16-003-SPH

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

Boone Kondylas, LLC,	*	
Appellant	*	No. 0758, September Term 2020
v.	*	CSA-REG-0758-2020
	*	Circuit Court No. C-03-CV-19-003515
People's Counsel For Baltimore County,	*	
Appellee	*	
	*	
	*	

* * * * * * * * * * * * *

MANDATE

On the 18th day of May, 2021, it was ordered and adjudged by the Court of Special Appeals:

Notice of Dismissal filed by appellant counsel. Appeal Dismissed.

STATE OF MARYLAND, Sct.:
I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this 19th day of May, 2021.

Gregory Hilton

Gregory Hilton, Clerk
Court of Special Appeals

CIRCUIT COURT FOR BALTIMORE COUNTY, MARYLAND
401 Bosley Avenue, P.O. Box 6754
Towson, MD 21285-6754
Main: 410-887-2601 Fax: 410-887-3062

Case Number: **C-03-CV-19-003515**
Other Reference Numbers:

IN THE MATTER OF BOONE KONDYLAS, LLC

ORDER AFFIRMING BOARD OF APPEALS

For the reasons stated in the court's Opinion in this case, issued contemporaneously with this Order, it is this **19th day of August 2020**

ORDERED that the decision of the Board of Appeals of Baltimore County dated August 22, 2019 in County Board of Appeals Case No. 16-003-SPH is AFFIRMED.

Judge Keith R. Truffer

True Copy Test
JULIE L. ENSOR, Clerk
Per
Assistant Clerk

RECEIVED
AUG 24 2020
BALTIMORE COUNTY
BOARD OF APPEALS

Entered: Clerk, Circuit Court for Baltimore County, MD
August 20, 2020

RECEIVED
AUG 24 2020
BALTIMORE COUNTY
BOARD OF APPEALS

PETITION OF:	*	IN THE
BOONE KONDYLAS, LLC	*	CIRCUIT COURT
	*	FOR BALTIMORE COUNTY
FOR JUDICIAL REVIEW OF THE	*	Civil Action No.C-03-CV-19-003515
OPINION OF THE BOARD OF	*	
APPEALS OF BALTIMORE COUNTY	*	
	*	
IN THE MATTER OF:	*	
BOONE KONDYLAS, LLC-Petitioner	*	
RE: Petition for Special Hearing to amend previous Restrictions imposed in Cases 07-144-SPH, CBA-06-044, and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music County Board of Appeals Case No.16-003-SPH	*	

OPINION

This matter is an appeal pursuant to MD. RULE 7-201, *et seq.* from a decision of the Baltimore County Board of Appeals dated August 22, 2019. The lengthy procedural history of this application for zoning approval will not be repeated in full but will be recounted below to the extent necessary to address the issues raised in this appeal.

The petitioner in this matter is Boone Kondylas, LLC (hereinafter the "Petitioner"). The Petitioner owns and operates a restaurant located at 9025 Cuckold Point Road in Baltimore County under the name of Dock of the Bay (hereinafter the "Property"). The Property is zoned BL (Business-Local) which precludes a "nightclub" use. People's Counsel and the Protestants have maintained that the Petitioner's proposed use, including the playing of music, qualifies as an impermissible "nightclub" use.

In 2014, the Petitioner filed a Petition for Special Hearing to permit use of the Property as a restaurant with limited accessory music. A public *de novo* hearing was held before the Board of Appeals of Baltimore County (hereinafter the "Board") on February 17 and April 28, 2016. In an Opinion and Order dated September 15, 2016 (hereinafter the "2016 Opinion") the

Board denied the request to amend the restrictions previously applied to the Property so as to permit its use as a restaurant with limited accessory music.

The 2016 Order was appealed to the Circuit Court for Baltimore County. By order filed on June 7, 2017, the proceedings were remanded to the Board for a clarification and amplification of the 2016 Opinion.[1] on June 20, 2019, the Board held a public deliberation at which no new testimony was requested or admitted. On August 22, 2019, following remand, the Board issued its Opinion and Order (hereinafter the "2019 Opinion") which is now before the court. In the 2019 Opinion, the Board amplified its factual findings and again denied the Petitioner's request.

The court begins its analysis with the June 7, 2017 Circuit Court remand order (J.Stringer). That order directed the Board to make

> ...a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC's v. Ciarpella*, No. 810, September Term, 2009 which includes consideration of the criteria in the International Building Code (IBC).

Judge Stringer, in his oral opinion, concluded that the Board's 2016 Opinion lacked such an analysis which precluded review by the Circuit Court.

In deciding the issues raised in this appeal, the court will review the Board's 2016 Opinion and 2019 Opinion as a single decision, including the evidence presented to the Board at the 2016 hearings.

Necessity of Additional Evidentiary Hearing

The Petitioner raises the predicate issue of whether, on remand, the Board was required to conduct a *de novo* public evidentiary hearing before issuing its 2019 Opinion. The Petitioner argues that two of the three members of the Board issuing the 2019 Opinion were not members of the panel which heard the Petitioner's evidence in 2016. The Petitioner points to assessments of credibility made in the 2016 and 2019 Opinions as reasons why a new hearing

[1] The Circuit Court's decision was appealed to the Court of Special Appeals which, by unreported opinion dated November 9, 2018, dismissed the appeal as premature.

was required.[2] While that concern is understandable, the court finds that the Board was not required to conduct further evidentiary proceedings on remand.

This precise issue was addressed in detail in *People's Counsel for Baltimore County v. Country Ridge Shopping Center Inc. et al.*, 144 Md. App. 580 (2002). Reviewing a similar set of procedural facts, *Country Ridge* held that it was not necessary, in deciding a remanded issue, for a missing member or members of the Board of Appeals of Baltimore County to have personally observed the testimony before the Board "so long as the member had read the transcript and heard the argument." *Id.* at 610 (citing *Younkin v. Boltz*, 241 Md. 339, 345 (1966)). Here, all of the transcripts of the 2016 evidentiary hearings and all briefing containing the parties' arguments were available to the two panel members who were not present at the 2016 hearings. Absent any indication to the contrary, the court will assume that this information was reviewed by the new Board members as part of their consideration of the 2019 Opinion. The court concludes that the Board was not required to conduct an additional *de novo* hearing prior to issuing the 2019 Opinion.[3]

Standard of Review

It is well established that a court's role in reviewing an administrative agency's decision is narrow and "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Maryland Aviation Administration v. Noland,* 386 Md. 556, 571 (2005) (quoting *Board of Physician Quality Assurance v. Banks,* 354 Md. 59, 67–69, (1999)). Generally, agency decisions receive no special deference on questions of law, which we review *de novo*. *Employees' Ret. Sys. of Baltimore Cty. v. Bradford*, 227 Md. App. 75, 82 (2016) (citing *Talbot County v. Miles Point Property, LLC,* 415 Md. 372, 384 (2010)). However, the consistent interpretation and application of a regulation by the agency responsible for administering it is entitled to considerable weight by reviewing courts. *Lussier v. Maryland Racing Com'n*, 343 Md. 681, 697 (1996) (citing *Consumer Protection Div. Office of Atty. Gen. v. Consumer Pub. Co., Inc.*, 304 Md. 731, 759 (1985)).

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[2] It must also be noted that the opportunity to observe "the witness' behavior on the stand and way of testifying" is only one of the criteria which may be applied by the factfinder in assessing a witness' credibility. (See MPJI-Cv 1:3.)
[3] People's Counsel and the Protestants raise the additional objection that the Petitioner did not request an evidentiary hearing in 2019 and, in the absence of that request, waived the right to argue this issue on appeal. While it appears clear that the Petitioner did not request a hearing nor raise an objection to the Board, the court makes no determination of waiver in light of its ruling on the merits of the issue.

An agency decision based on regulatory and statutory interpretation is a conclusion of law. *Carven v. State Ret. & Pension Sys. of Maryland*, 416 Md. 389, 406 (2010). Keeping in mind the deference owed to administrative decisions, the Court shall conduct an independent review of the regulations and statutory provisions upon which the Board rests its decision to determine whether the Board's decision is "plainly erroneous or inconsistent with the regulation." *Id.* (citing *Crofton Convalescent Ctr. v. Dep't of Health & Mental Hygiene*, 413 Md. 201, 215 (2010)).

A decision of an administrative agency must be upheld on judicial review if it is not based upon an erroneous determination of law and if the agency's conclusions reasonably may be based upon the facts proven. *Montgomery County v. Buckman*, 333 Md. 516 (1994). A reviewing court may, and should, examine facts found by the agency, to see if there was substantial evidence to support each fact found. *Commissioner, Baltimore City Police Dep't v. Cason*, 34 Md. App. 487, cert. denied, 280 Md. 728 (1977).

An agency's application of *res judicata* is a question of law which is reviewed by the Circuit Court *de novo*. *Seminary Galleria LLC v. Dulaney Valley Improvement Association, Inc.*, 192 Md. App. 719, 734 (2010).

Issues

In their submitted briefs, the parties have raised and framed the issues in a variety of ways. The court distills and restates the issues as follows:[4]

1. Did the Board err as a matter of law in determining that the doctrine of *res judicata* applied?
2. In determining that that the proposed use of the property qualified as a "nightclub" within the definition of the BCZR 101.1 and the IBC, did the Board err as a matter of law and was there sufficient evidence to support that determination?

Res Judicata

The Protestants and People's Counsel urge the court to affirm the Board's decision that any consideration of the Petition is barred by the principle of *res judicata*, relying on *Seminary Galleria LLC v. Dulaney Valley Improvement Association, Inc.*, 192 Md. App. 719, 734-39 (2010) (petitioner's self-classification of shopping center so as to permit additional parking was

[4] The Board's analysis and conclusions combined these two issues. Because different standards of review apply to each, the court will examine them separately.

insufficient to show substantial change) and *Whittle v. Bd. of Zoning Appeals of Baltimore County*, 211 Md. 36, 42, 125 A.2d 41, 44 (1956) (increased population and change in community opposition was insufficient to show substantial change). They maintain that the use of Dock of the Bay as an impermissible nightclub was conclusively determined as part of earlier proceedings initiated by a prior owner.

Prior Proceedings

In 2006, a prior owner of the Property, Fifth Street LLC, filed a petition for a special hearing to determine whether the restaurant which provides music during the day qualifies as an "nightclub" as defined in the BZCR. Following a *de novo* evidentiary hearing on January 15, 2008, the Board concluded that the Dock of the Bay operated as a nightclub. In an opinion issued on June 4, 2008, the Board ordered that the playing of music be discontinued. The Circuit Court affirmed the Board's decision. The proceedings culminated in an appeal to the Court of Special Appeals in *Fifth Street LLC v. Ciarpella,* No. 810, September Term 2009 which, in an unreported opinion, also affirmed the Board's decision.

Application of Res Judicata

A prior judicial decision between the same parties, or their privies, on the same cause of action may preclude subsequent relitigation of that cause of action. *Alvey v. Alvey* 225 Md. 386, 390 (1961).

In order to determine whether a prior agency decision is entitled to preclusive effect, it must be shown that:

A. The agency was acting in a judicial capacity;
B. The issue subject to review was actually litigated before the agency; and
C. The resolution of that issue was necessary to the agency's decision.

Batson v. Shiflett, 325 Md. 684, 701 (1992).

Here, the Board was acting in a judicial capacity in the 2008 proceedings when it heard evidence and applied law. The issue subject to review - whether the playing of music at the restaurant qualified the use as a "nightclub" was precisely the issue resolved by the Board in 2008. That issue was the sole issue before the Board in the 2008 proceedings, the resolution of which was necessary to the agency's decision

A previously denied zoning decision may nevertheless be reconsidered if there is a showing of "substantial changes in fact and circumstances" occurring since the previous denial. *Seminary Galleria*, 192 Md. App. at 737 (citing *Woodlawn Area Citizen's Association v. Bd. Of County Commissioners for Prince George's County*, 241 Md. 187, 197 (1965)).

In both the 2016 and 2019 Opinions, the Board reviewed the evidence introduced during the 2016 hearings. It determined that "there has been no substantial change in the facts as proposed [in the 2014 Petition] than was previously litigated... before this Board after a *de novo* hearing." 2016 Opinion, p. 12 (bracketed material added). Specifically, it noted at p. 12 of its 2016 Opinion that:

> The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties.

To the extent that the Board applied the doctrine of *res judicata* in reaching its decision, the court finds that the Board did not err as a matter of law in doing so.

Determination of Use as Nightclub

Notwithstanding the Board's application of *res judicata*, the court will review the Board's factual and legal determination that, based on the evidence presented in the 2016 hearing, the proposed use qualified as an impermissible "nightclub" in a BL zone.

As a matter of law, the Board properly applied the eight IBC[5] criteria identified in the Court of Special Appeals *Fifth Street LLC* Opinion and as directed on remand by the Circuit Court. On pages 6 through 13 of its 2019 Opinion, the Board cited the evidence introduced as to each criterion. A review of the 2016 hearing transcripts supports these evidentiary conclusions. The Board found that the Petitioner's proposed use met seven of the eight identified factors to qualify as a "nightclub" and that the playing of music causes the proposed use to be classified as an impermissible "nightclub" as defined in BCZR §101.1.

[5] International Building Code.

The court finds that there was substantial evidence before the Board to support its conclusion that the Petitioner's proposed use qualified as an impermissible "nightclub" in a BL zone and that the Board did not err as a matter of law in doing so.

Conclusion

For the reasons stated, the court will affirm the Board's denial of the Petition for Special Hearing to "to permit future use of the property as a restaurant with limited accessory music." An order to this effect will be issued contemporaneously with this Opinion.

August 19, 2020

Date

Judge Keith R. Truffer

True Copy Test
JULIE L. ENSOR, Clerk
Per
Assistant Clerk

Entered: Clerk, Circuit Court for Baltimore County, MD
August 20, 2020

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE BOARD OF APPEALS OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION AND ORDER ON REMAND
FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY

This case comes to the Board on remand from the Circuit Court for Baltimore County from an appeal of an Order of this Board denying a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music (the "Remand Order").

The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire and Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation on the Remand Order was held on June 20, 2019.

Factual and Procedural Background

The subject property is located on the water front in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" ("DOB"). The Property is also improved with boat slips for patrons to dock their boats and access

DOB via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, DOB came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation (aka the "Thanner Era"), music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement complaints beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing before this Board to request a determination that DOB - with its associated live music - did not constitute a "nightclub." In our June 4, 2008 Opinion (the "2008 Opinion"), we held that Mr. Thanner's operation of DOB, along with music played, met the definition of "nightclub" in §101.1 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a "nightclub" was not permitted in a BL zone (even by special exception), this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (2008 Opinion, p. 14).

Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record before this Board supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. (CSA Opinion, 7/9/2010).

In or about 2014, the Petitioner purchased the Property and reopened DOB. Petitioner filed the instant Petition for Special Hearing to request that the restriction on live music be removed. A public hearing *de novo* was held before this Board on February 17, 2016 and April 28, 2016.

In our Opinion and Order dated September 15, 2016 (the "2016 Opinion"), from which this Remand Order originated, we concluded that the Petitioner's proposal here, would constitute a "nightclub" under BCZR §101, just as it did when Fifth Street, LLC owned and operated DOB. (See 2016 Opinion, p. 13). Succinctly, we stated that: "there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner…or before this Board after a *de novo* hearing." (*Id.*).

In weighing the evidence presented at that time and in issuing our 2016 Opinion, we incorporated - *in its entirety* - our 2008 Opinion. (2016 Opinion, p. 9). In doing so, our 2016 Opinion adopted our 2008 analysis of the facts under the definition of "nightclub" in BCZR, §101.1, as well as the eight (8) characteristics listed in the International Building Code ("IBC") for facilities within the "A-2 classification." According, in our 2016 Opinion, when we decided that the Petitioner's proposed use was the same as the 2008 operation by Thanner, we adopted all factual determinations we previously made.

Additionally, our 2016 Opinion referred to: "the facts and holdings as set forth in the Court of Special Appeals decision dated July 9, 2010" which affirmed our 2008 Opinion. (See 2016 Opinion, p. 9). This is the same appellate decision now referred to by the Circuit Court in the Remand Order as: "*Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009" from which the Circuit Court now requires further analysis.

Issues on Remand

The Remand Order instructs this Board to do the following:

> ….for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC's v. Ciarpella*, No. 810, September

> Term, 2009 which includes consideration of the criteria in the International Building Code (IBC).

Notwithstanding the language of our 2016 Opinion, and in order to comply with the Remand Order, we analyze the facts presented under the BCZR definition of "nightclub" and the criteria in the IBC. As stated by the Court of Special Appeals in *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, a "nightclub" is comprised of three elements under BCZR, §100.1: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor," and 3) "categorized as a nightclub by the Building Code of Baltimore County." (See CSA Opinion, 7/9/2010, p. 16).

The Court of Special Appeals in *Ciarpella*, noted that, in 2005, Baltimore County adopted the IBC as the Building Code of Baltimore County. (See CSA Opinion, 7/9/2010, p. 3). The Appellate Court further stated that IBC, §303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." (*Id.*).

Within Assembly Group A, Subgroup A-2 includes:

Assembly uses intended for food and/or drink consumption including, but not limited to:

> Banquet halls
> Night clubs
> Restaurants
> Taverns and bars

(IBC at 24).

Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g.,

restaurants.) The uniqueness of these occupancies is characterized by some or all of the following:

1) Low lighting levels;
2) Entertainment by a live band or recorded music generating above-normal sound levels;
3) No theatrical stage accessories;
4) Later-than-average operating hours;
5) Tables and seating arranged or positioned so as to create ill-defined aisles;
6) A specific area designated for dancing;
7) Service facilities for alcoholic beverages and food; and
8) High occupant load density.

(IBC at 3-17; 3-18).

The Court of Special Appeals in *Fifth Street* emphasized that the IBC Commentary explained that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. (See CSA Opinion, 7/9/2010, p. 4). The Court further noted that the 8 characteristics listed above "are advisory in determining whether Group A-2 is the appropriate classification." (*Id.*). The Court also stated that these eight (8) characteristics are "non-exclusive." (*Id.* at p. 11).

It is important to highlight that the Appellate Court in *Fifth Street* rejected Thanner's argument that DOB must either be a "standard restaurant" or a "nightclub". Mr. Thanner argued that if the DOB is primarily engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant, and not a "nightclub." (CSA Opinion, 7/9/2010, p. 19). The Appellate Court disagreed and held that the terms "standard restaurant" and "nightclub" are not mutually exclusive. The Court interpreted the phrase "standard restaurant" as being distinguishable from other types of restaurants such as "carry-outs", "fast-food," or "drive-through only." (*Id.*).

The Court added that permissible uses in a BL zone actually included dual uses (*i.e.* combinations of permissible uses). BCZR, §230.1.A.10. As a result, a property located in a BL zone could be operating as a dual use, such that one use is permissible and one use is not. (CSA Opinion, 7/9/2010, p. 20).

Here, in the Petitioner's case on the merits, Mr. Boone was the sole witness who testified about his proposed plan. His testimony only addressed some of the IBC characteristics. The other witnesses who testified on behalf of DOB were character witnesses for Mr. Boone. Each of those character witnesses either worked at Dock of Bay, or were related to someone who worked there. They were collectively of the opinion that live music should be permitted by this Board because Mr. Boone is a good person.

On this point, we repeat what we said in our 2016 Opinion that our decision now and then, does not reflect on Mr. Boone personally:

> We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that [he would] be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

(2016 Opinion, p. 13).

In regard to the eight (8) IBC characteristics, we find as follows:

1) **Low lighting levels**.

Petitioner failed to testify about, or provide any evidence regarding, his proposed plan for lighting levels.

2) **Entertainment by a live band or recorded music generating above-normal sound levels**.

DOB is open 7 days a week. (T. p. 55). Mr. Boone testified that he wants live music to be played every day. (T. pp. 104, 114). He wants live music played both inside and outside DOB at varying times. (T. p. 98). He wants to compete with eight (8) other bars/restaurants which are located on the peninsula and offer live music, even on weekdays. (T. p. 62-63). Mr. Boone testified that those competing businesses offer Sunday afternoon music from 1:00 pm to 5:00 or 6:00 pm. (T. 113-114). According to Mr. Boone, those establishments also have music on Wednesdays, Thursdays and Fridays. (T. p. 103). However, Mr. Boone also acknowledged that his competitors are located in a "business, major (BM) zone," which zone permits live music.

As for "live bands," the Court of Special Appeals reiterated that, during the Thanner era, live entertainment was offered on the following days and times, both inside and outside the restaurant:

> Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.
>
> On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

(CSA Opinion, p. 6).

In April of 2015, Mr. Boone hired Mark Allen as a soloist act to play on a Saturday night. (T. p. 57). While it is more expensive, Mr. Boone indicated that he has the option to hire Mr. Allen along with his band. (T. p. 58). In addition to Mr. Allen, Mr. Boone hired a Frank Sinatra singer and an Oomph band to play for Octoberfest. (T, p. 58). Mr. Boone hired a disc jockey on New Year's Eve. (T. p. 51).

As we stated in our 2016 Opinion, Mr. Boone would not agree to any limitation on the type of live music. (T. p. 104-105). Indeed, when asked in direct examination whether he would agree to a restriction on type of music, Mr. Boone would only agree to time restrictions:

> MR. SCHMIDT: Okay and if the Board proposed limitations on the type of music or the volume of music, you would, you would be amenable to those and follow those limitations?
>
> MR. BOONE: I'd be very happy to live within sound restrictions on outside music, time restrictions on both indoor and outdoor music and I do not want to cater to the young crowd and I'd be happy to live with time restrictions, both inside and outside.

(T. pp. 59-60).

Mr. Boone's concession that he would be amenable to a sound level restriction was not persuasive. Mr. Boone had the burden to prove to the Board what constitutes "above-normal sound levels" and how the proposed live music (whether soloist or band) would stay below those levels.

When asked on cross examination how Mr. Boone would implement his plan, he sarcastically responded that: "I'll have an army of people with sound meters." (T. p. 112). Although appearing to the Board as an after-thought during his direct testimony, Mr. Boone's proposal is to use a decibel monitoring device each time live music is played outside DOB. He testified that there should be an "agreeable" sound level for outside music and that bands would play within that sound level. (T. p. 107). Yet, Mr. Boone could not provide the Board with maximum sound level that he was proposing. (T. p. 111). When pressed for his maximum sound level, Mr. Boone responded that it would "be determined at a later time." (T. p. 113).

Mr. Boone testified on cross examination that he did not know what kind of noise levels would meet decibel levels of 55-65. (T. p. 80). He admitted that he would not personally be at the DOB full time to measure sound levels. (T. p. 97). Indeed, he conceded that he has never

personally operated a decibel monitoring device. (T. p. 120). Mr. Boone is not an expert in music or sound. (T. p. 111). DOB does not employ a sound engineer. (*Id.*).

In addition, Mr. Boone did not dispute that there would be amplification of music as he stated that: "Most of the sound will be controlled by the level of amplification." (T. p. 113). Russell McClelland was a witness who testified that during the Thanner Era, reggae music was played at amplified levels, after dark until 11:00 pm or 12:00 am, all days of the week. (T. p. 134). Mr. Boone candidly revealed that he has no previous experience operating a business where live music is played. (T. p. 116).

The Board finds that Mr. Boone's proposal was not credible. His testimony left unanswered critical aspects as to how he would implement his plan. It is beyond the expertise of this Board to determine what is "above-normal sound levels" or to determine how such sound should be measured. The Board is left to speculate as to what might happen if live music is permitted inside and/or outside DOB. Thus, the proposed plan is both impractical and unenforceable.

As for sound emanating from live music inside the DOB, Mr. Boone did not acknowledge the known problem which occurred during the Thanner era with sound escaping beyond the four (4) walls of the building. We consider this issue in light of Mr. Boone's testimony that, other than the footprint of the kitchen area (which he expanded by pouring a concrete pad), he has not made any changes to the DOB since the Thanner Era. As Mr. Boone said: "...the four walls are still the four walls." (T. pp. 40-41). Thus, there is no additional sound proofing of the building which may alleviate sound levels inside.

Mr. Boone interjected that currently (without live music), his typical customer is between 40-70 years old; average age is 50 years old. (T. 55). While he indicated that he does not intend

to cater to a younger crowd, if the type of live music draws a younger crowd, he would not be able to exclude those customers. (T. pp. 99-100). During boating season, DOB draws customers from all over Baltimore County. (T. p. 68).

Accordingly, while Mr. Boone initially suggested hiring a solo guitarist or a Frank Sinatra singer, Mr. Boone would not agree to a restriction on the type of music which DOB could offer. (T. pp. 104-105). In fact, he testified that he believed the restriction on music at DOB would be lifted when the liquor license was transferred from Thanner to the Petitioner. (T. p. 79).

As for "recorded music," Mr. Boone already offers recorded music by way of radios and televisions inside the DOB. (T. p. 52). The Court of Special Appeals noted that Thanner had: "ten television sets inside the restaurant, and another two at the outside bar. A house music system, connected to speakers inside and outside, played satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered." (CSA Opinion, 7/9/2010, p. 6). According, we find that the use and availability of recorded music has not changed.

Consequently, as to whether proposed live band or recorded music will generate above-normal sound levels, the Board finds that live band or live music will generate above-normal sounds levels and Mr. Boone's testimony did not persuade us otherwise.

3) **No theatrical stage accessories.**

Mr. Boone testified that he has no plans to build a stage from which a live band could perform. (T. p. 63). However, this Board is mindful, that a stage or at least a stage-like area (both inside and outside) would have to be created if live bands were to perform.

4) **Later-than-average operating hours.**

Mr. Boone verified that DOB is open seven (7) days a week. (T. p.55). He testified that during fall, spring, and winter seasons, DOB is opened Monday through Saturday from 11:00 am

until 10:00 pm; on Sundays, DOB closes around 9:00 pm. (T. p.55; p. 63). In the summer, on the weekends, he said DOB opens at 9:00 am for breakfast. (*Id.*). The outside space at DOB is open from April through October. (T. p. 48).

On cross examination, Mr. Boone's direct testimony as to current operating hours was contradicted with the introduction of a copy of the DOB website which confirms that DOB is actually open Monday through Thursday from 11:00 am to 11:00 pm; and Friday and Saturday 11:00 am until 1:00 am. (PC Ex. 1). (T. p. 96). Mr. Boone admitted that he arranged and approved the website, but had forgotten about the hours of operation listed there. (*Id.*).

He initially testified on direct that his plan was to have music on Friday and Saturday nights from 6:00 pm to 10:00 pm with last call for alcohol at midnight; he hopes DOB will then be cleared out by 12:30. (T. p. 60). He then stated that he would like music outside on Sundays: "probably 5:00 til 8:30 outside.....I don't expect to have music outside after dark." (T. p. 61).

Then, on cross examination, he denied that his proposal was to have all music stop on Friday and Saturday nights at 10:00 pm. (T. p. 103). Notwithstanding his direct testimony at the Board hearing, he added hours for both inside and outside music which would apply to all weekdays and weekends:

> What I said is that music inside would stop at 11:00 pm on Fridays and Saturdays, stop at 7:00 pm on Sundays, music outside would stop at dusk.

(T. p. 103). Mr. Boone agreed that, in summer months, "dusk" could be as late as 9:00 pm. (T. p. 104). Even Mr. Thanner's outside music ended at 8:00 pm. (CSA Opinion, 7/9/2010, p. 6).

We find that Mr. Boone's testimony on this factor was not credible. The DOB website, which Mr. Boone arranged and approved, reveals later than average operating hours for a restaurant. Accordingly, DOB hours are akin to those of a nightclub.

5) **Tables and seating arranged or positioned so as to create ill-defined aisles**.

Photographs of the tables and chairs both inside and outside the DOB reveal that neither are fixed or in any way anchored to the floor. (Pet. Ex. 8E, 8F, 8G, 8H, 8K, 8M and 8N). Additionally, Mr. Boone did not testify that the tables and chairs were attached to the floor. Accordingly, while both seating areas have aisles to permit serving food and beverages, nothing prevents such tables and chairs from being moved into ill-defined aisles, to allow for a band or for people to dance as in the Thanner Era. Indeed, this Board can reasonably expect that customers will rearrange tables and chairs so as to permit dancing when live music performs. This factor closely resembles a nightclub, rather than a restaurant.

6) **A specific area designated for dancing**.

Mr. Boone testified that the restaurant does not have a dance floor and that he has no plans to build a dance floor. (T. p. 63). In our 2008 Opinion, we likewise found that there was no specific dance area during the Thanner era. (BOA 2008 Opinion, p. 12; CSA Opinion, 7/9/2010, p. 6). Although the Appellate Court reaffirmed that there was no dance floor, it noted that: "....during live performances patrons often dance in between the tables." (CSA Opinion, 7/9/2010, p. 6).

Ironically, the existence of a dance floor under this IBC factor is a characteristic of a nightclub. Yet, the definition of "nightclub" in BCZR §101.1 is a facility "with or without a dance floor." Given that this is a proposed use, we must consider what is more likely to occur than not if live music is permitted. Based on Mr. Boone's testimony, the seating arrangement and layout of tables and chairs both inside and outside the restaurant is substantially similar to that of the Thanner Era, we find that there is nothing to prohibit patrons from dancing between the tables. It certainly would be reasonable to expect patrons to want to dance if live music is permitted.

Further, if there is no designated dance floor, nothing prevents patrons from moving tables and chairs to create a dance area.

7) **Service facilities for alcoholic beverages and food.**

There is no dispute that DOB serves both alcohol and food. Mr. Boone testified that, without live music, the food/alcohol ratio is consistently 80% food, 20% alcohol. (T. p. 56). During the Thanner Era, approximately 70% of sales was on food, 28% was on alcohol and 2% was on t-shirts and cookbooks. (CSA Opinion, p. 6). As a result, we find that the food/alcohol ratio is substantially similar to those during the Thanner Era. We can also reasonably expect that the sale of alcohol will increase if live music is permitted.

8) **High occupant load density**.

At full capacity, Mr. Boone testified that DOB has the capacity to *seat* over 223 people (98 people at inside seating, plus 25 more people at the inside bar; and an additional 100 people can sit outside). (T. p. 53). The Court of Special Appeals noted that, based on Mr. Thanner's testimony before this Board in 2008, the DOB had the capacity to serve 150-160 people and that, with those numbers, there was a high occupant load density. (CSA Opinion, p.5).

As set forth above, the description in Subgroup A-2 includes "occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants.)." Based on Mr. Boone's testimony of 223 people who can be seated at DOB, and giving consideration to even more people who would be standing and/or dancing, we find that DOB has a high occupant load density.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. The Board finds that DOB meets 7 of the 8 criteria set forth in Group A-2. This would be criteria 2, 3, 4, 5, 6, 7, and 8 (with no evidence presented as to criteria #1). Simply put, as we stated in our 2016 Opinion and based on the IBC characteristics above, we find that music, under the Petitioner's proposal, whether played inside or outside, is a factor in finding that the DOB is classified as a "nightclub" under the definition set forth in BCZR, §101.1.

DOB proposed operations are substantially the same as in 2008. Both Mr. Thanner and Mr. Boone expressed the desire for live music to boost revenue and compete with the neighboring restaurants located in BM zones. Moreover, there has been no change to the physical layout of the building, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of inside live music on the neighboring properties.

The County Council has determined that "nightclubs" can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in that zone. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101.1. The facts presented by the Petitioner here have not changed that determination.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 22nd day of August, 2019, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Deborah C. Dopkin

Jason S. Garber

Board of Appeals of Baltimore County

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August 22, 2019

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RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

Dear Counsel:

Enclosed please find a copy of the Opinion and Order on Remand from the Circuit Court for Baltimore County issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Multiple Original Cover Letters

c: Kenneth Boone/Boone Kondylas, LLC
Lawrence M. Stahl, Managing Administrative Law Judge
C. Pete Gutwald, Director/Department of Planning
Michael D. Mallinoff, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

Circuit Court for Baltimore City
Case No.: 03-C-16-010551

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 638

September Term, 2017

IN THE MATTER OF BOONE KONDYLAS, LLC

Meredith,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 9, 2018

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Boone Kondylas, LLC ("Boone"), appellee, filed a zoning petition for special hearing in the Baltimore County Office of Administrative Hearings ("OAH"), seeking an amendment to, or rescission of, restrictions previously placed on Boone's waterfront property ("the property"), to permit the use of the property as a restaurant with limited accessory music and entertainment. Following the special hearing, an OAH administrative law judge ("ALJ") denied Boone's zoning petition on the ground that it was barred by *res judicata,* as a result of this Court's 2010 unreported opinion in *Fifth Street, LLC, et al. v. Matthew Ciarpella, et al.*, No. 810, September Term, 2009 (filed July 9, 2010) ("*DOB I*"), wherein we held that the operation by the previous owner comprised a use as both a restaurant and a nightclub, and that use as a nightclub was prohibited by the applicable zoning regulations.

Boone appealed the ALJ's decision to the Board of Appeals of Baltimore County ("Board"), which also denied Boone's petition as barred by *res judicata*. Boone petitioned for judicial review, and the Circuit Court for Baltimore County remanded the matter to the Board for a determination of whether the subject property, under Boone's ownership, currently meets the definition of a nightclub, in light of the factors cited in our opinion in *DOB I.*

Appellants, Charles Wolinski, *et al.* ("Wolinski")—residential neighbors of the property—and People's Counsel of Baltimore County ("People's Counsel"), appealed the decision of the circuit court.

The questions presented, as set forth in Wolinski's brief, are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition?

2. As a matter of law, should the Opinion of the County Board of Appeals in this matter dated September 15, 2016 have been affirmed by the Circuit Court for Baltimore County?

3. Does an administrative agency or on appeal a reviewing Court have the authority to amend the zoning restriction previously granted by the Court of Special Appeals?

The questions as presented by People's Counsel are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition, which alleges essentially a cosmetic change in management style or operation?

2. Is the County Board of Appeals' opinion correct and at least legally sufficient based on the deferential, contextual and interpretive scope of judicial review?

3. Does the Circuit Court remand misapply *res judicata*; exceed the prudential scope of judicial review, fail to exercise judicial self-restraint, and both disrespect and undermine the administrative function[?]

For the reasons that follow, we shall dismiss appellants' appeal as premature.

FACTS AND LEGAL PROCEEDINGS

The waterfront property at the center of the controversy in this matter is located on Cuckold Point Road on Miller's Island in Baltimore County. The 1.27 acre property is improved by a restaurant/bar called Dock of the Bay ("DOB").[1]

In October 2003, shortly after it suffered extensive damage from Hurricane Isabel, Fifth Street, LLC ("FSLLC"), purchased DOB.[2] After a lengthy rebuilding period, FSLLC

[1] A restaurant, under various names and owners, has operated on the property since the 1950s.

[2] For the background of DOB before Boone purchased it, we rely primarily on the factual recitation set forth in *DOB I*.

reopened DOB in March 2004. It was licensed as a restaurant with a capacity of approximately 150-160 patrons and held a Class D liquor license. On an outdoor patio, there was more seating and a bar, along with a children's play area. DOB had an in-house music system to play satellite radio inside and outside, and it offered live entertainment by disc jockeys, bands and karaoke performers.

In 2006, residential neighbors of DOB complained to the Baltimore County Department of Permits and Development Management that the live music was too loud and disruptive and that DOB was operating as a nightclub, which was not permitted in the applicable business zone.[3] DOB was cited three times for: operating a nightclub in a B.L.

[3] DOB is located in a B.L. (Business Local) business zone. Baltimore County Zoning Regulation ("BCZR") §230.1, permits the operation of a "standard restaurant" and a "tavern" in a B.L. zone but does not permit a "nightclub," even by special exception. BCZR §230.3.

BCZR §101.1 defines "standard restaurant" as:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

The same code section defines a "tavern" as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." Finally, "nightclub" is defined by the Code section as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County."

(continued . . .)

zone; erecting a tent without a permit and; failing to cease nightclub operations and to remove the tent.

In August 2006, FSLLC filed a petition for special hearing, seeking a determination of whether DOB was a nightclub in violation of BCZR.[4] The zoning commissioner determined that DOB was a nightclub under BCZR and the International Building Code and ordered DOB to discontinue the playing of music by way of speaker system. On appeal, a majority of the members of the Board affirmed that determination.[5] Upon judicial review, the Circuit Court for Baltimore County also affirmed the determination. In an unreported opinion by a panel of this Court in *DOB I*, we affirmed the circuit court's judgment, concluding that the transcript and record provided substantial evidence to support the Board's finding that DOB was operating as a nightclub. In reaching that

(. . . continued)

The International Building Code, which was adopted as the Building Code of Baltimore County, sets forth advisory characteristics in determining whether an establishment may be characterized as, *e.g.,* a nightclub, dance hall, banquet hall, or cabaret, to include some or all of the following: low lighting levels; entertainment by a live band or recorded music generating above-normal sound levels; no theatrical stage accessories; later than average operating hours; tables and seating arranged or positioned so as to create ill-defined aisles; a specific area designed for dancing; services facilities for alcoholic beverages and food; and high occupant load density.

[4] A "request for special hearing is, in legal effect, a request for a declaratory judgment." *Antwerpen v. Baltimore County*, 163 Md. App. 194, 209 (2005).

[5] One board member dissented, finding that DOB was a restaurant offering some musical entertainment on the side.

conclusion, we analyzed DOB's operation, using the criteria (for determining whether premises are being used as a nightclub) set forth in the International Building Code.

In 2010, Baltimore County filed a petition for contempt alleging that FSLLC continued to operate DOB in violation of the Board's order. At a hearing on the matter, FSLLC argued that DOB was no longer operating as a nightclub because it was not playing music outside the restaurant.

The circuit court, citing the Board's ruling that "the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR," found FSLLC in violation of the Board's order for "continuing to play live and/or recorded entertainment on the premises." The court found FSLLC to be in contempt of court and ordered that FSLLC permanently dismantle any outdoor speaker system at DOB and refrain from allowing "any live band, Disc Jockey, karaoke or any other form of live or recorded entertainment to perform at the Site" for a period of one year beginning November 10, 2010.

DOB closed in 2012. In 2014, Boone purchased the property from FSLLC and reopened DOB. In 2015, Boone filed a petition for special hearing to "amend previous restrictions imposed . . . so as to permit future use of the property as a restaurant with limited accessory music." Before the ALJ, Boone argued that, unlike FSLLC's use of DOB as a nightclub, its business was first and foremost a restaurant, with music to be offered only as a complement to the dining experience.

In his October 22, 2015 written opinion and order, the ALJ concluded that FSLLC's zoning violation and special hearing case had been appealed to the Board, the circuit court, and this Court, all of which had affirmed the agency's finding that DOB was a nightclub, subject to the conditions and restrictions contained in the agency's order. Therefore, the ALJ concluded, "*res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard." In the absence of any evidence of such significant changes by Boone, the ALJ continued, the ruling that DOB was both a restaurant and a nightclub must stand. Boone's petition was therefore denied.

Boone appealed the ALJ's decision to the Board on November 13, 2015. The Board heard argument on the matter on February 17 and April 28, 2016.

At the start of the hearing, People's Counsel argued that the doctrine of *res judicata* permitted the Board to dispose of the matter on a motion to dismiss. Counsel for DOB's residential neighbors agreed and added that amending the zoning restrictions would require a reversal of this Court's 2010 unreported decision, which the Board was not permitted to do. Boone claimed that there had been some significant changes since 2010 that should cause this Board to come to a different conclusion.

Boone's attorney, although acknowledging that FSLLC had operated a nightclub with loud rock music, which was not permitted in the pertinent B.L. zone, argued that Boone was not operating a nightclub, but a restaurant with the occasional "single acoustic guitar player" providing music. With regard to the *res judicata* argument, counsel averred

that *res judicata* did not apply because there had been a significant change in the facts of the case since *DOB I* was decided.

The Board reserved ruling on the *res judicata* issue and heard testimony.

Kenneth Boone ("Mr. Boone") the sole managing member of Boone Kondylas, LLC,[6] testified that DOB is licensed to operate as a restaurant and maintains a Class D liquor license, which Boone purchased from FSLLC. The restaurant averages 80% food / 20% alcohol sales.

Since Mr. Boone's purchase of DOB, his corporation has expanded the restaurant's kitchen to permit the outdoor steaming of crabs and removed the outdoor stage and tent that FSLLC had erected. Indoors, he said, DOB has seating for approximately 125 patrons at dining room tables and the bar, and there is outdoor seating for approximately 100 additional patrons. DOB has no dance floor or stage, and Mr. Boone has no plans to create either one.

DOB is presently open seven days a week, with posted hours of 11:00 a.m. to midnight, but the restaurant generally closes between 9:00 and 10:00 p.m. during winter months when business is slow. The average patron is between 40 and 70 years of age.

Other than a DJ on New Year's Eve 2014, Mr. Boone testified that he had hesitated to book live performers, as he was initially unfamiliar with what the applicable zoning code permitted. His hesitation appears to have been well founded because in 2015, when Mr.

[6] Mike and Donna Kondylas, the "Kondylas" of "Boone Kondylas, LLC" were no longer in partnership with Mr. Boone by the time of the hearing.

Boone scheduled an acoustic guitarist to play on a Saturday night, the neighbors complained about the potential for noise and disruption, and a zoning official threatened to pull DOB's liquor license if the musician played. Mr. Boone cancelled the guitarist, as well as scheduled performances by a Frank Sinatra cover singer and an "oompah" band for Oktoberfest, and he had not scheduled any live music since then.

Boone's petition centered on his desire to "cater to the demographic" and book soloists to play at DOB. Mr. Boone said he was willing to "live within sound restrictions on outside music [and] time restrictions of both indoor and outdoor music" in anticipation of offering live music outdoors on Friday and Saturday nights from 6:00 until 10:00 p.m. (with last call for alcohol at midnight) and on Sunday afternoons from 5:00 until 8:30 p.m.

Several neighborhood residents testified on Boone's behalf, stating that when FSLLC owned DOB, it hired "[v]ery loud, heavy metal" full-sized bands, which played until midnight or 1:00 a.m. on weekends. In contrast, DOB under Boone's ownership has a family atmosphere with an older demographic. The supporters advocated giving Boone a chance to have live music at DOB.

Charles Wolinski, whose house is approximately 200 feet from DOB, testified that he had fought with FSLLC for seven years over the loud music and the disorderly patrons in the parking lot. In his opinion, everything at DOB now that Boone owns it is "exactly the same" as when FSLLC owned it (other than the playing of live music), and the addition of live music would return the establishment to the level of disruption it had created during FSLLC's ownership.

In the opinion of Matthew Ciarpella, who was also a neighborhood protestant in the FSLLC litigation, the playing of any outdoor music at DOB would re-introduce the same noise problems that had been previously litigated. Other neighbors who had heard the loud music played when FSLLC owned DOB also protested the reinstatement of live music outside the restaurant.

The Board issued its written opinion on September 15, 2016. Therein, the Board noted that as the parties, or their privy, and the property had been involved in the previous litigation regarding the same zoning issue of whether live music should be permitted at the DOB, which led to the Board's 2008 opinion, the only manner in which the Board could act upon the new application for special permit previously denied would be if there had been a substantial change in the facts from those previously litigated. The Board found that the restaurant operations and layout and Boone's proposal for live music were substantially the same as when FSLLC owned the premises and litigated the matter. In the Board's view, a change in the restaurant's ownership or management style did not amount to a substantial change. Having previously determined that DOB comprised a nightclub not permitted in a B.L. zone, and having currently determined that no substantial change to the property existed that would support re-litigation of the issue, the Board denied Boone's petition to amend the previous restrictions imposed upon DOB.

Boone filed a petition for judicial review in the circuit court on October 17, 2016. The court heard argument on the petition on June 1, 2017.

Boone initially argued that the Board, in denying his petition on *res judicata* grounds, never decided the merits of the matter, that is, whether DOB can play live music and, if so, under what circumstances. Counsel for Boone said "whether the zoning is the same, the building is the same, the neighbors are the same, that doesn't matter. The Board of Appeals focused on the wrong inquiry" and "got this wrong" in failing to make a determination of the "ultimate issue." Counsel for Boone requested that the court reverse on the *res judicata* issue and remand to the Board for a determination of whether music should be allowed at DOB as an accessory use to the restaurant service and under what circumstances.[7] In the alternative, Boone argued that the court should find that the operative facts had changed since the time of FSLLC's ownership such that *res judicata* should not apply as a bar to the present litigation.

The circuit court observed that the Board had determined that the prior owner played music that was "loud and [performed by] rock bands and the neighbors didn't like it, therefore nobody can do anything different, because it might [move us] back into what the Dock of the Bay was under" the prior owner. The judge went on to say that the panel of this Court, in its *DOB I* decision was "very factually oriented" when it upheld the Board's determination that DOB was a nightclub while owned by FSLLC. In the circuit court's

[7] As the court pointed out, the applicable zoning regulations prohibit a nightclub from operating in a B.L. zone but does not prohibit music from being played. The Board appeared to use "live music" and "nightclub" interchangeably in its ruling.

view, for *res judicata* to apply, "the same analysis has to be done to see and determine whether the proposed use with the current owner would constitute a nightclub." In the court's words, "[i]f the facts were the same, then maybe *res judicata* would apply at this time . . ., but the analysis just was not done in this case."

Although the Board had found no substantial change in the facts as previously litigated, the circuit court observed that the Board did not perform an adequate analysis of the relevant criteria to determine whether DOB is currently a nightclub. Determining that that analysis should be done, the circuit court remanded the matter to the Board for a determination under the facts of this case as to "whether the proposed use would constitute a nightclub under the analysis used by the Court of Special Appeals in that prior case."

The circuit court issued its written order on June 2, 2017. The order remanded the matter to the Board "for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a 'nightclub' as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC)."[8]

[8] *See* footnote 3, *supra*, for the International Business Code criteria.

DISCUSSION

Although not raised by any party, before we may consider appellants' arguments, we must ensure that the appeal has been taken either from a final judgment or from an appealable interlocutory ruling. We shall hold that this appeal is premature.

Pursuant to Maryland Code (2013 Repl. Vol., 2017 Supp.) §12-301 of the Courts and Judicial Proceedings Article ("CJP"), a party may appeal from a final judgment in a civil case. The Court of Appeals has consistently stated that "a judgment or order of a court is final when it determines or concludes the rights of parties or when it denies the parties means of further prosecuting or defending their rights and interests in the subject matter of the proceeding." *Schultz v. Pritts*, 291 Md. 1, 5–6 (1981). We will dismiss an appeal if it is not taken from a final judgment entered in a civil case by a circuit court, or if a non-final judgment does not fit within the statutory exceptions or the collateral order doctrine. *Foy v. Baltimore City Det. Ctr.*, 235 Md. App. 37, 47 (2017), *cert. granted*, 457 Md. 660 (2018).

In general, where, as here, a circuit court orders a remand of the proceeding to an administrative agency, that is an appealable final order because when "a court remands a proceeding to an administrative agency, the matter reverts to the processes of the agency, and there is nothing further for the court to do. Such an order is an appealable final order because it terminates the judicial proceeding and denies the parties means of further prosecuting or defending their rights in the judicial proceeding." *Schultz*, 291 Md. at. 6 (citing *Fred W. Allnutt, Inc. v. Commissioner of Labor and Industry*, 289 Md. 35, 40

(1980)). Nevertheless, a circuit court's remand order in a judicial review action is not always an appealable final judgment. Although a remand after the circuit court has conducted a judicial review of the sole question raised in the administrative action, thereby precluding the parties from further contesting the validity of the agency's decision on the merits of the case, is an appealable final judgment, "a remand that precedes any judicial review is not a final judgment[.]" *Metro Maint. Sys. South, Inc. v. Milburn*, 442 Md. 289, 305, 310 (2015). As we suggested in *Foy*, *supra*, the "lack [of] any discernable conclusions of law or findings of fact" and the circuit court's apparent inability to assess the merits of the Board's decision may render the remand order a non-final judgment. 235 Md. App. at 52-53.

The sole issue before the circuit court in this matter was whether the Board was correct in denying Boone's petition on the ground of *res judicata*, based on the Board's determination that DOB was a nightclub when owned by FSLLC. The circuit court declared itself unable to make a finding on that sole claim because the Board had not determined whether DOB is currently a nightclub, pursuant to the International Business Code factors that were discussed in detail in *DOB I.*

The circuit court did not find any error of law on the part of the Board, nor did it affirm or reverse the Board's decision or decide or conclude the matter in dispute. In other words, the circuit court did not conduct judicial review. As in *Milburn*, the remand was to precede the circuit court's determination of whether there was substantial evidence in the record to support the Board's ruling and whether or not to affirm. 442 Md. at 308. In other

words, although the court did not specifically so state in its order, it deferred its ruling pending the remand, and the matter "contemplates that judicial review awaits the return of the case following the remand." *Id.* at 309. Specifically, once the Board has an opportunity to apply the International Business Code factors to the facts of this case, the circuit court will then determine whether *res judicata* would apply to support the denial of DOB's petition on that basis.

As noted in *Milburn*, 442 Md. at 309, although the parties "have, in a sense, been 'put out of court'. . . there is a strong potential, bordering on certainty, that the issue at hand—the viability of . . . an administrative decision—will be back for determination by the circuit court." The remand order in the subject case does not prevent the parties from continuing to defend or challenge the Board's decision following the remand; once the Board reconsiders its decision, the parties may continue to challenge or defend the Board's decision. All this was made clear in *Milburn*, where the Court said:

> It is true that, on remand, the Board of Appeals retains discretion to reconsider its decision. Finality, however, is not determined by considering what additional proceedings may occur before the agency, but what further proceedings, if any, will occur in the circuit court. *See Brewster* [*v. Woodhaven Bldg. & Dev., Inc.*, 360 Md. 602 (2000)] (proceedings before another forum are irrelevant to finality). Thus, the breadth of the additional proceedings at the agency level do not convert the remand order here into a final, appealable judgment.
>
> After the remand, the parties will have the opportunity to litigate their positions in the circuit court and pursue appellate review of those issues, including any contention that the remand was unlawful or an abuse of discretion. It may be, of course, that the lawfulness of the remand will no longer be at issue and that other issues concerning the validity of the Board's decisions will have become moot as a result of any modifications that the Board makes. In that respect, our holding that a remand that precedes any

> judicial review is not a final judgment is consistent with the purpose of the final judgment rule—to promote judicial efficiency by limiting piecemeal appeals.

Id. at 310-11 (footnotes omitted).

APPEAL DISMISSED; COSTS TO BE PAID BY APPELLANTS.

16-003-SPH

IN THE MATTER OF BOONE KONDYLAS, LLC Petitioner	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-16-010551

* *

ORDER

This matter came before the Court for a hearing on the *Petition for Judicial Review* of the opinion of the Board of Appeals for Baltimore County dated September 15, 206, filed by Petitioner, Boone Kondylas. Upon consideration of the Petitioner's *Memorandum in Support of Petition for Judicial Review*, the *Memorandum of People's Counsel for Baltimore County*, the *Memorandum in Opposition to Petition for Judicial Review* filed by the Protestants, and arguments of counsel, for the reasons stated on the record in open court, it is this 2nd day of June, 2017, by the Circuit Court for Baltimore County, hereby

ORDERED, that this matter is Remanded to the Board of Appeals for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Clarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC).

RECEIVED
JUN 08 2017
BALTIMORE COUNTY
BOARD OF APPEALS

H. Patrick Stringer, Judge

12/15/16
TO WP

RECEIVED
DEC 14 2016
DEPARTMENT OF PERMITS
APPROVALS AND INSPECTIONS

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

December 14, 2016

VIA HAND-DELIVERY
Civil Clerk
Circuit Court for Baltimore County
401 Bosley Avenue
Towson, Maryland 21204

RE: In the matter of: Boone Kondylas, LLC
Civil Action No.: 03-C-16-010551
Board of Appeals Case No.: 16-003-SPH

Dear Clerk:

Enclosed for filing please find the Proceedings before the Administrative Law Judge and the Board of Appeals for Baltimore County. Additionally, please allow this letter to reflect the filing of one accordion folder containing the entire Board of Appeals case file, exhibits, and transcript pursuant to Maryland Rule 7-206.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Enclosures

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

Board of Appeals of Baltimore County

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September 15, 2016

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Multiple Original Cover Letters

c: Kenneth Boone/Boone Kondylas, LLC
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE
	*	BOARD OF APPEALS
	*	OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge (the "ALJ") in which the ALJ denied a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music.

A public hearing was held *de novo* on February 17, 2016 and April 28, 2016. The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire of Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation was held on June 14, 2016.

Factual Background

The subject property is water front property located in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" (the "Restaurant"). The Restaurant is open seven (7) days a week and has a total seating capacity of approximately 225 persons (125 persons inside and 100 persons outside). The Property is also

improved with boat slips for patrons to dock their boats and access the Restaurant via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, the Restaurant came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation, music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement actions beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing to request a determination that the Restaurant with its associated live music did not constitute a 'nightclub.' In our June 4, 2008 Opinion, this Board held that Mr. Thanner's operation of the Restaurant along with music played met the definition of "nightclub" in §101 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a 'nightclub' was not permitted in a BL zone, this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (Board Opinion 6/4/08, p. 14). Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. Thereafter, the Restaurant closed.

In or about August of 2014, the Petitioner purchased the Property. In or about October of 2014, the Petitioner reopened the Restaurant under the previous name – Dock of the Bay. At the hearing, Kenneth Boone, owner of Boone Kondylas, LLC, the Petitioner, testified before this Board that his ownership and operation of the Restaurant is one of three businesses he owns. The Restaurant has both a business license and a liquor license. The food menu varies from seafood to sandwiches, hamburgers and pasta.

The Petitioner described the minimal improvements that have been made to the Restaurant since August of 2014. These have included pouring a concrete pad where the customers can eat steamed crabs, expanding the kitchen, and removing the outside stage installed by Mr. Thanner where the musicians formerly played.

In April of 2015, the Petitioner hired Mark Allen, a guitar player, to perform at the Restaurant. Mr. Allen was also a regular performer at the Restaurant during the period that Mr. Thanner owned it. When signs advertising Mr. Allen's performance were put up at the Restaurant, a Baltimore County inspector instructed the Petitioner that the Restaurant would be closed down if music was permitted to play.

Mr. Boone mentioned that 'Row Boat Willie's', a restaurant located next to the Property is permitted to have live music. Row Boat Willie's is located in a BM (Business-major) zone which permits 'nightclubs' to operate. The Petitioner is competing with 8 other restaurants, including the 'The New White Swan' located at 8821 Millers Island Blvd. and 'The Islander' located at 9008 Cuckold Point Rd., on or near the waterfront and all of them have some type of live music. Mr. Boone was certain that the Restaurant would not be able to survive financially without live music.

While not excluding any specific age of customers, the plan is to hire musical performers who cater to a 50 year-old audience, who want to hear music while enjoying lunch or dinner. The Petitioner does not want to cater to a younger crowd as he anticipated the potential problems that might arise with a younger audience. In the summer months, boaters from all over Baltimore County patronize the Restaurant. The types of musical acts envisioned by the Petitioner would range from solo acoustic or electric guitar players to Frank Sinatra and Oompa bands.

The proposed hours for the musical groups would be Friday and Saturday nights from 6:00 p.m. to 10:00 p.m., with the last call at midnight, in hopes that the customers might leave by 12:30

a.m. On Sundays, in the summer, music would be played outdoors from 5:00 p.m. to 8:30 p.m. Also, there would not be a dance floor or stage area.

The Petitioner is amenable to a decibel level restriction for the sound stemming from the music. However, Mr. Boone has not personally operated any type of device to monitor decibel levels at the Restaurant.

On cross examination, the Petitioner conceded that the Restaurant hours of operation are in fact stated on the website. The hours of operation stated in the website are Monday to Thursday 11:00 a.m. to 11:00 p.m.; Friday and Saturday 11:00 a.m. to 1:00 a.m.; and Sunday from 9:00 a.m. to 8:00 p.m. Mr. Boone then changed his testimony on the time period during which musical acts would perform and indicated that the music would end at Friday and Saturday nights at 11:00 p.m., on Sundays at 7:00 p.m.; and, at dusk for outdoor performances in the summer months which would end as late as 9:00 p.m.

The Petitioner acknowledged that it did not want to be restricted to certain types of music but would entertain other types of music such as jazz quartet bands or Reggae bands. The Petitioner was uncertain about normal sound levels or how the proposed music might be regulated.

In support of the Petitioner's proposed business, several Miller's Island residents testified. Cheryl Gowers of 2812 Bay Drive has lived at that address since 1993. At the previous hearing, Ms. Gowers testified against Mr. Thanner's operation. She was familiar with the problems that resulted from Mr. Thanner's operation of the business which, she said permitted very loud music including heavy metal music and played until midnight or 1:00 a.m. on most weekends. Presently, Ms. Gowers works as a waitress in the Restaurant for the Petitioner. Having worked at both The New White Swan and The Islander, she corroborated that live music is played at those establishments.

Russell McClelland, 9011 Miller's Island Blvd. testified that he lives 400 yds. from the Property. Mr. McClelland was familiar with the complaints from neighbors and the level of sound

coming from Mr. Thanner's restaurant. He described music at Mr. Thanner's restaurant as being played from speakers mounted to a stage outside the Restaurant. The music was amplified over the water and would occur all days of the week until midnight. He recalled that Reggae music was played.

Mr. McClelland is in support of the Petitioner's request here because he believes, like Ms. Gowers, that Mr. Boone will not permit the type of problems associated with Mr. Thanner's operation. Mr. McClelland works for the Petitioner by cutting the grass and policing both the parking lots and boat slips. If this request is granted, he is willing to monitor the sound level.

Charles Boland and Jerri Boland, his wife, 2414 Eugene Avenue, Edgemere, MD live 1 ½ miles from the Restaurant. Mr. Boland is a retired Baltimore County police officer whose son is employed by the Petitioner. Mr. Boland frequents the Restaurant 4-5 times per week and testified that the Petitioner's operation is family-oriented. The Bolands have no objection to live music at the Restaurant.

Dorothy Reilly, 2809 3rd Street, Miller's Island, is located 2 blocks from the Restaurant. Ms. Reilly has observed loud music coming from The White Swann and The Islander. She reiterated that the Petitioner's restaurant is family oriented. She does not like loud music but would like to hear softer music while there.

In the Protestants' case in chief, Charles Wolinski, 9019 Cockhold Point Rd. testified that his home is adjacent to the Restaurant. Mr. Wolinski is a high school biology teacher at Sparrow's Point High School. He can see the Restaurant from his house. He has 4 children, ranging in age from 13 yrs. to 3 yrs. Mr. Wolinski described his family's life through the Thanner years as living through a "nightmare." He specifically described the problems with the loud music both indoor and outdoor which occurred every weekend. Disorderly patrons were loud while the music was playing and, after the music ended, the clapping and screaming was just as bad as the music itself.

These patrons would then spillover into the parking lot and would continue with loud, disruptive behavior.

Because of the loud noises made by patrons and the loud music, he can never open the windows in his home in the summer or winter. All the noise from the music and the patrons could still be heard inside the home; even in the shower with the fan running. This situation disrupted his family's sleep and the enjoyment of their home. Due to the configuration of the Restaurant's door leading to the outside, even the music played indoors by a live band can be heard in his home and it is disruptive. He explained that each time the outside door would open, the music and noise from inside the Restaurant would project outdoors. He further stated that the parking would overflow into the neighborhood streets. He described one incident where a Restaurant patron, who was blocked in by another car on the parking lot, drove across Mr. Wolinski's lawn in order to exit the parking lot. That incident forced Mr. Wolinski to incur the cost of erecting a fence. Mr. Wolinski was clear that Mr. Thanner never controlled the crowds that came with playing music at the Restaurant.

Mr. Wolinski is also familiar with Mr. Boone's operation of the Restaurant and explained that the physical layout of the Restaurant has not changed. He is very concerned that the same problems will reoccur whether the music is played inside or outdoors. Mark Allen is the same performer hired by Mr. Thanner. Mr. Allen's guitar is connected to an amplifier which Mr. Wolinski described as so loud that Mr. Allen was no longer permitted to play at Rowboat Willie's. Mr. Wolinski recalled that Mr. Thanner also hired steel drum bands. In his experience and from personal observation, the music from Rowboat Willie's does not impact him or his family. He indicated that The Islander only has karaoke music inside.

Mr. Wolinski stated that the litigation against Mr. Thanner's operation lasted seven (7) years through the various appeals in the Court system and that he and the other Protestants paid

substantial attorney's fees. Toward that end, he was surprised that the new owner could make the identical request for music when that request was previously denied in the various appeals.

Also testifying for the Protestants was Matthew Ciarpella, 2116 6th Street, Miller's Island where he has resided for 11 years. Mr. Ciarpella experienced first-hand Mr. Thanner's operation of the Restaurant and also endured seven (7) years of litigation. He opposes outdoor music at the Restaurant due the proximity of the Restaurant to his house. As such, even if the proposed music ends at 7:00 p.m., rather than 9:00 p.m., it would still be intrusive. His house, similar to others in the neighborhood is built on elevated foundations such that the sound travels upward. When wind blows from the north over the water, the sound travels. He could hear the music and loud patrons while inside his house with the windows closed. Each time the outside door opened, bursts of sound would travel. This problem occurred even with a 6' privacy fence and a wall of Leland Cypress trees.

Mr. Ciarella is convinced that the type of music will not be limited to acoustic or Reggae. He insists that the Petitioner will not repeatedly hire the same musical acts because, economically, the Restaurant will profit from hiring a variety of bands. Moreover, the more popular the band, the more revenue will be generated. Karaoke would not be a better option because a microphone will still be used. He is familiar with Mark Allen's guitar which is connected to an electric amplifier and/or microphone whether he is playing classic rock, 'oldies music' or Reggae.

Mr. Ciarpella added that when the popular rendition of a song was played, he would hear cheering, clapping and hooting for the music to continue. In contrast, this additional noise from cheering and clapping does not occur when a song is being played on a radio. At The Islander, he said that there is a DJ inside and that he cannot hear that from his house.

Mr. Ciarpella was familiar with the layout of Row Boat Willie's as he was involved with constructing the sound proofing of the pavilion where the live music plays. The pavilion consists

of a 32x30 square shape and is opened on north side. The pavilion also has table seating and an elevated deck.

In his view, the proposal presented here is the same one that was previously rejected by this Board and by the courts. He testified that there will be no regulation of decibel levels. During the Thanner years, the neighbors regulated the music levels by filing complaints with Code Enforcement. What he learned through the Thanner litigation is that there is no regulation of noise levels by Baltimore County; rather any nuisance is complaint driven. This puts a burden on the Protestants to seek enforcement against the Restaurant.

He further testified that along with bands comes the followers which he described as a 'different type of crowd' than would normally be expected with music that accompanies dinner. He also stated that the amount of traffic not only increased with the live music but the followers of those bands did not drive civilly.

Mr. Ciarpella anticipates that, if the Petitioner's request is granted, he and his neighbors will endure more litigation monitoring the Petitioner and again when the Restaurant is subsequently sold. Any live music played at this restaurant will negatively affect his property values.

Brad Metheny, 2704 6th Street, Miller's Island, testified that he too lived through the Thanner era. He recalled that the bands would play on Friday and Saturday nights until 1:30 a.m. He also heard all the music and noise while inside his house with the doors and windows closed, with the air conditioning running and the TV playing. He approximated that his home is located 180' from the Restaurant.

Mr. Metheny described the instant hearing as being the same that he heard when Mr. Thanner and his employees previously testified. Granting this request would open the door to the same problems he endured for the last 7 years. Since outside the Restaurant can accommodate 150 people, if outdoor music is combined with alcohol consumption by patrons and boaters who

dock outside the Restaurant, the situation becomes problematic. He does not want to suffer through the same 'constant battle and disruption.' Indeed, Mr. Metheny's son and his family were living at 2712 6th Street which Mr. Metheny also owns. Due to the noise problems, his son was forced to move with his 4 year old granddaughter to Bel Air.

Mr. Metheny's mother-in-law previously owned The Fisherman's Inn in the 1940s and 1950s. Mr. Metheny recalled that when the Restaurant was The Fisherman's Inn there were outdoor dining tables without any problems.

Following Mr. Metheny's testimony was his wife, Bonnie Metheny as well as a neighbor Wayne Waldmann of 9014 Cuckhold Point Road. Both of those neighbors also opposed any type of music at the Restaurant.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. In short, the Petitioner asks this Board to believe that the same problems will not result if live music is now permitted.

In our decision of June 4, 2008, which decision was affirmed by both the Circuit Court and the Court of Special Appeals, we made many findings of fact. We incorporate that Opinion in its entirety herein. We also refer to the facts and holding as set forth in the Court of Special Appeals Opinion dated July 9, 2010.

Specifically, we previously found that the Restaurant could seat 150-160 patrons inside. Outside of the Restaurant was a patio, two television sets, along with an outside bar, and tables for patrons to use. There were also outside speakers connected to a radio which played music both inside and outside. The Restaurant had 14 boat slips for "transient" boat customers.

The Restaurant opened every day from 11:00 a.m. and closed at 2:00 a.m. In the winter, the Restaurant closed early as customers left. The kitchen closed at 11:00 p.m. but the bar stayed

open until 2:00 a.m. as permitted by the liquor license. The food menu was seafood, steaks and sandwiches. We also found that 70% of sales were from food and 30% were in beverages.

On Friday and Saturday nights, we found that live bands played from 9:00 p.m. to 1:00 a.m. We also found that on Saturday and Sunday afternoons, live music played from 4:00 p.m. to 8:00 p.m. (with the caveat that the music stopped after 8:00 because of the code violation complaints).

The type of music were "mostly duos" or "steel bands." There was no charge for live entertainment and the Restaurant stayed open until 2:00 a.m. when live music was played. We also heard testimony that the Restaurant would close without live music being available. In that case, we also heard the testimony against the live music from Matthew Ciarpella, Charles Wolinski, Brad and Bonnie Metheny and Patricia Waldmann.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not even hear the facts before determining whether the doctrine of *res judicata* applies. *Id* at 995 A.2d 1070. The Court also stated that *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett*, 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

This Board's Opinion of June 4, 2008 meets this test. (1) The Board was acting in a judicial capacity by conducting a hearing on the Petition for Special Hearing, where evidence was presented, and rulings were made on disputed factual and legal issues; (2) The issue of whether music should be permitted at this location was actually litigated; and (3) the Board's Opinion of June 4, 2008 was necessary for a resolution of the issue.

Under *Deleon v. Slear*, 328 Md. 569 (1992), the Court of Appeals made clear that in determining whether claims are the same for the purposes of *res judicata*, the Court has in the past applied "same evidence test." However, the *Deleon* Court acknowledged that the concept of "claim" is broad and that "claim" is defined as a "group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from the narrow concept of a 'cause of action.'" *Id.* at 589. The *Deleon* Court, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), emphasized that the most recent test for determining when two claims or causes of action are the same for purposes of *res judicata* is the "transaction" test as set forth in §24 of the Restatement (Second) of Judgments.

The Court of Appeals in *Bilbrough*, recited the transaction test as follows:

> The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 497-498; *Deleon* at 589.

Specifically, with respect to whether the claims are the same, the *Deleon* Court reviewed the facts to see whether they "are related in time, space, origin or motivation." *Id.* at 591. As applied to the instant case, the same parties, or their privy, are involved here as were involved in the Thanner litigation which led to our June 4, 2008 Opinion. We further find that, the same piece

of property has been involved as well as the same zoning issue with respect to whether a music should be permitted on the Property.

With regard to amending previous restrictions or conditions where an earlier application has been denied by a zoning board, the Court of Appeals in *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1936) appropriately explained that:

> The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions..... This rule seems to rest not strictly on the doctrine of res judicata, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.
>
> * * * *
>
> The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County (3) decreased opposition of neighbors and some support by them; and (4) additional conditions attached to the granting of the permit.

Applying the reasoning of *Whittle* here, we find that there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner on the Petition for Special Hearing or before this Board after a *de novo* hearing. The same neighbors who incurred attorney fees and endured the Thanner era of ownership are still protesting both indoor and outdoor music.

The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that, in order to be successful on this request, the changes needed

under *Whittle* must be more than a change in the Restaurant's ownership or management style of the new owner.

We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that it be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

The County Council has determined that 'nightclubs' can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in the BM zone. In contrast, this restaurant is located in a BL zone which is not permitted to have live music. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101. The facts presented by the Petitioner here have not changed that determination.

We also cite our previous holding in *The Belvedere Baptist Church of Baltimore*, Case No. 15-004-SPH, wherein we declined to approve a request to amend a restriction in a previous ALJ Order. In that case, we applied the doctrine of *res judicata* and found that there was no substantial change in circumstances or facts between the first case and the second case to warrant the requested relief. Specifically, we found that: "there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decision." (Board Opinion, p.8).

In the Board's desire to be consistent in its holdings, we find that the facts of this case fit squarely within the relief requested in the *Belevedere Baptist* case. Here, there has been no change in the Property, the Restaurant, the neighborhood, the neighbors or the zoning that might lead to a different result.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Benfred B. Alston

Jane M. Hanley was on the panel and agreed with the majority opinion. She was not reappointed to the Board and her last day with the Board of Appeals was June 30, 2016.

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY	*	
PETITION OF: BOONE KONDYLAS, LLC	*	
FOR JUDICIAL REVIEW OF THE OPINION OF THE BOARD OF APPEALS OF BALTIMORE COUNTY JEFFERSON BUILDING – ROOM 203 105 W. CHESAPEAKE AVENUE TOWSON, MARYLAND 21204	*	CIVIL ACTION NO. : 03-C-16-010551
IN THE MATTER OF: BOONE KONDYLAS, LLC FOR PROPERTY LOCATED AT 9025 CUCKOLD POINT ROAD	*	
15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	
BOARD OF APPEALS CASE NO.: 16-003-SPH		

* * * * * * * * * * * *

PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes the Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the original papers on file in the Department of Permits, Approvals and Inspections and the Board of Appeals of Baltimore County:

ENTRIES FROM THE DOCKET OF THE BOARD OF APPEALS AND DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS OF BALTIMORE COUNTY

July 6, 2015	Petition for Special Hearing filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC under Section 500.7 of the Baltimore County Zoning Regulations to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

February 17, 2016 Board convened for a Hearing, Day 1.

Exhibits submitted at Motion Hearing before the Board of Appeals:

Protestants' Exhibit No.

1 – Opinion and Order of OAH (Case No. 2016-0003-SPH) dated October 22, 2015

2 – Unreported Opinion of Court of Special Appeals No. 810, Sept. Term 2009, filed July 9, 2010

People's Counsel Exhibit No.

1 – Compilation of BCZR, Opinion of OAH (Case No. 2016-0003-SPH), Trial Memorandum from Appellant (Case No. 2016-0003-SPH), definition of anticipate, Unreported Court of Special Appeals of Maryland (No. 810 Sept. Term 2009, filed July 9, 2010), Majority Opinion of Baltimore County Board of Appeals (Case Nos. CBA-06-044 and CBA-07-134)

2 – Zoning Checklist/PAI

February 19, 2016 E-mails between Board and counsel regarding scheduling and witnesses.

March 8, 2016 Notice of Reassignment issued by the Board.

April 28, 2016 Board convened for a Hearing, Day 2.

Exhibits submitted at Hearings before the Board of Appeals:

Petitioner's Exhibit No.

1 – Site Plan

2A – Majority Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2B – Dissenting Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2C – Ruling on Motion for Reconsideration and Clarification (Case Nos. 07-144-SPH, CBA-06-044, and CBA-07-134)

3 – Circuit Court Opinion, Final Order, Case No. 03-C-08-009996

4 – Unreported Opinion, Court of Special Appeals, No. 810, Sept. Term, 2009, Filed July 9, 2010

5 – Memorandum Opinion (Exhibit) Contempt-Circuit Court for Baltimore County, Case No. 03-C-08-009996

6 – My Neighborhood Map/aerial photograph of "Dock of the Bay"

10 – Letter dated June 9, 2008, letter measured decibel levels emanating from the Dock of the Bay
11 – Letter dated October 3, 2007 measuring the decibel levels from Dock of the Bay
12 – Photograph of Row Boat Willie's building
13 – Large map of aerial view of Dock of the Bay and area, 2016 Google Imaging
14 – My Neighborhood Map printed 4/27/2016, aerial view of Dock of the Bay and area
15 – 2015 Alcoholic Beverage License for Dock of the Bay
16 – Baltimore County Police Records, Sgt. Parrish
17 – Summary of Calls from Exhibit 16
18 – Facebook posts for Dock of the Bay 2/17/16 Boone Letter
19 – Facebook posts for Dock of the Bay 2/21/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
20 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
21 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
22 – Facebook post from Dock of the Bay 2/22/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
23 – Facebook posts from Dock of the Bay (ID ONLY/NOT ADMITTED/NOT IN FILE)

People's Counsel Exhibit No.

1 – Website photo showing hours of operation
2A – SDAT record showing 9025 Cuckold Point Road, Lot 504
2B – SDAT record showing Cuckold Point Road, Lot 500
2C – SDAT record showing Cuckold Point Road, Lot 502
2D – SDAT record showing Cuckold Point Road, Lot 501
3 – Deed to 9025 Cuckold Point Road dated September 30, 2014
4 – Deed to 9025 Cuckold Point Road dated March 10, 1999
5 – People's Counsel Sign-In Sheet, 2/17/16
6 – People's Counsel Sign-In Sheet, 4/28/16
7 – Map – Property ID and Zoning, 2014 image
8A – Map
8B – Map (color)
8C – Map
9 – Comprehensive Zoning Map
10 – Website page for Mark Alan date 4/26/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
11A – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.

Tammy A. McDiarmid

Tammy A. McDiarmid, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

Case-in chief

Board of Appeals

Case No: 16-003-SPH Case Name: Boone/Condy LLC, LLC

Exhibit List

Party: People's Counsel Date: 2-17-16

Exhibit No:	Description:
✓ 1	Website photo showing the hours of operation
✓ 2A	SDAT Record showing 9025 Cuckold point Rd Lot 504
✓ 2B	SDAT Record showing Cockhold Rd Lot 500
✓ 2C	SDAT Record showing Cockhold Road 502
✓ 2D	SDAT Record showing Cockhold Road 501
✓ 3	Deed to 9025 Cockhold Point Rd. dated 9/30/14
✓ 4	Deed to 9025 Cockhold Point Rd. Dated 3/10/1999
✓ 5	P.C. Sign in sheet
	VERIFIED BY KC DATE: 2/19/16

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondy Lots, LLC

Exhibit List

Party: People's Counsel Date: 4-28-16

Exhibit No:	Description:
✓ 6	People's Counsel Sign in sheet
✓ 7	MAP - Property Id + Zoning 2014 Image
✓ 8a	MAP
✓ 8b	MAP (color)
✓ 8c	MAP
✓ 9	Comprehensive Zoning Map.
Not Admitted 10	Website page for Mark Allan date 4-26-2016 Marked for Id only - Not admitted
Not Admitted 11a	Baltimore County Website showing of the Liquor License for Dor of the Bay Tavern 4-27-2016
Not Admitted 11b	Baltimore County Website showing of Liquor License for Dor of the Bay Tavern 4-27-2016
✓ 12	Letter dated april 25, 2016 from Denise Hass,
	VERIFIED BY KC DATE: 4/28/16

not admitted

not admitted

People's Counsel Ex. 1
case-in-chief

DOCK of the BAY

Contact Info: 9025 Cuckold Point Road, Sparrows Point, MD
(410) 477-8100
Hours: Monday - Thursday: 11am - 11pm and Friday - Saturday: 11am - 1am
Sunday: 9am breakfast buffet. Close at 8pm.

Directions

Our Menu

Gallery

2A

Real Property Data Search (w2) **Guide to searching the database**

Search Result for BALTIMORE COUNTY

View Map | View GroundRent Redemption | View GroundRent Registration

Account Identifier: **District - 15 Account Number - 1508790109**

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	9025 CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	9025 CUCKOLD POINT RD SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			504	2015	Plat Ref:	0009/ 0004

Special Tax Areas:		**Town:**	NONE
		Ad Valorem:	
		Tax Class:	

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
1993	6530		7,500 SF	30

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation
		SERVICE GARAGE				

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	225,000	225,000		
Improvements	379,100	379,200		
Total:	604,100	604,200	604,133	604,167
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	Date: 10/21/2014	Price: $600,000
Type: ARMS LENGTH MULTIPLE	Deed1: /35488/ 00133	Deed2:
Seller: HRANICKA EDWARD F	Date: 04/08/1999	Price: $300,000
Type: ARMS LENGTH MULTIPLE	Deed1: /13658/ 00354	Deed2:
Seller:	Date:	Price:
Type:	Deed1:	Deed2:

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:		**Special Tax Recapture:**	
Exempt Class:		NONE	

Homestead Application Information

Homestead Application Status: No Application

People's Counsel Exhibit 2A
cast-in-chief

2B

Real Property Data Search (w2) | Guide to searching the database

Search Result for BALTIMORE COUNTY

View Map | View GroundRent Redemption | View GroundRent Registration

Account Identifier: **District - 15 Account Number -** 1508790105

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			500	2015	Plat Ref:	0009/ 0004

Special Tax Areas:		**Town:**	NONE
		Ad Valorem:	
		Tax Class:	

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
			7,500 SF	31

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	28,100	28,100		
Improvements	0	0		
Total:	28,100	28,100	28,100	28,100
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	Date: 10/21/2014	Price: $600,000
Type: ARMS LENGTH MULTIPLE	Deed1: /35488/ 00133	Deed2:
Seller: HRANICKA EDWARD F	Date: 04/08/1999	Price: $300,000
Type: NON-ARMS LENGTH OTHER	Deed1: /13658/ 00354	Deed2:
Seller:	Date:	Price:
Type:	Deed1:	Deed2:

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:	Special Tax Recapture:
Exempt Class:	NONE

Homestead Application Information

Homestead Application Status: No Application

People's Counsel Exhibit 2B
Case-in-chief

2C

Real Property Data Search (w2) Guide to searching the database

Search Result for BALTIMORE COUNTY

View Map View GroundRent Redemption View GroundRent Registration

Account Identifier: **District - 15 Account Number - 1508790107**

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	SW COR 5TH ST SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			502	2015	Plat Ref:	0009/ 0004

Special Tax Areas:		**Town:**	NONE
		Ad Valorem:	
		Tax Class:	

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
			7,500 SF	31

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	28,100	28,100		
Improvements	0	0		
Total:	28,100	28,100	28,100	28,100
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	Date: 10/21/2014	Price: $600,000
Type: ARMS LENGTH MULTIPLE	Deed1: /35488/ 00133	Deed2:
Seller: HRANICKA EDWARD F	Date: 04/08/1999	Price: $300,000
Type: ARMS LENGTH MULTIPLE	Deed1: /13658/ 00354	Deed2:
Seller:	Date:	Price:
Type:	Deed1:	Deed2:

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:	Special Tax Recapture:
Exempt Class:	NONE

Homestead Application Information

Homestead Application Status: No Application

People's Counsel exhibit 2C
case-in-chief

2D

Real Property Data Search (w2) **Guide to searching the database**

Search Result for BALTIMORE COUNTY

View Map | View GroundRent Redemption | View GroundRent Registration

Account Identifier: **District - 15 Account Number - 1508790106**

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			501	2015	Plat Ref:	0009/ 0004

Special Tax Areas:		**Town:**	NONE
		Ad Valorem:	
		Tax Class:	

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
			7,500 SF	31

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	28,100	28,100		
Improvements	0	0		
Total:	28,100	28,100	28,100	28,100
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	Date: 10/21/2014	Price: $600,000
Type: ARMS LENGTH MULTIPLE	Deed1: /35488/ 00133	Deed2:
Seller: HRANICKA EDWARD F	Date: 04/08/1999	Price: $300,000
Type: ARMS LENGTH MULTIPLE	Deed1: /13658/ 00354	Deed2:
Seller:	Date:	Price:
Type:	Deed1:	Deed2:

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:	Special Tax Recapture:
Exempt Class:	NONE

Homestead Application Information

Homestead Application Status: No Application

people's Counsel Exhibit 2D
Case-in-Chief

BALTIMORE COUNTY CIRCUIT COURT (Land Records) JLE 35488, p. 0133, MSA_CE62_35344. Date available 10/27/2014. Printed 02/17/2016.

This Deed, MADE THIS 30th day of September in the year Two Thousand Fourteen by and between Fifth Street, LLC, a Maryland limited liability company, party of the first part, and Boone Kondylas, LLC, a Maryland limited liability company, party of the second part.

Witnesseth, That in consideration of the sum of Six Hundred Thousand Dollars and NO Cents ($600,000.00), the receipt of which is hereby acknowledged, the said party of the first part does grant and convey to the said party of the second part, in fee simple, that parcel of ground situated in Baltimore County, Maryland and described as follows, that is to say:

BEGINNING for the same and being known and designated as Lots Nos. 500, 501, 502, 503, 504 and 505, as laid out on the revised Plat of Swan Point, which Plat is recorded among the Land Records of Baltimore County in Plat Book L.McL.M. No. 9, folios 4 and 5.

Tax ID Nos. 15-1508790150
15-1508790106
15-1508790107
15-1508790108
15-1508790109
15-1508790110

The improvements thereon being known and designated as 9025 Cuckold Point Road, Baltimore, MD 21219

BEING the same parcel of ground which by deed dated March 10, 1999 and recorded among the Land Records of Baltimore County, Maryland in Liber 13658, folio 354 which was granted and conveyed by Josephine M. Hranicka unto Fifth Street, LLC, the Grantor herein.

This is to certify the within instrument was prepared under the supervision of an Attorney duly admitted to practice before the Court of Appeals of the State of Maryland.

F. Michael Grace

F. Michael Grace, Esquire

TOGETHER with the buildings thereupon, and the rights, alleys, ways, waters, privileges, appurtenances and advantages thereto belonging, or in anywise appertaining.

TO HAVE AND TO HOLD the said described lot of ground and premises to the said party of the second part as sole owner, its successors and/or assigns, in fee simple.

BUYERS INITIAL HERE MK _____

People's Counsel Exhibit 3
Case-in-chief

BALTIMORE COUNTY CIRCUIT COURT (Land Records) JLE 35488, p. 0134, MSA_CE62_35344. Date available 10/27/2014. Printed 02/17/2016.

And the said party of the first part hereby covenants that it has not done or suffered to be done any act, matter or thing whatsoever, to encumber the property hereby conveyed; that it will warrant specially the property hereby granted; and that it will execute such further assurances of the same as may be requisite.

WITNESS the name and seal of said Limited Liability Company and the signature of the sole member thereof and the hand(s) and seal(s) of said Grantee(s).

Attest:

Fifth Street, LLC

By: _____ (SEAL)
Lawrence J. Thanner, Jr., Sole Member

_____ _____ (SEAL)

State of Maryland, County of Baltimore, to wit:

I Hereby Certify, That on this 30th day of September in the year Two Thousand Fourteen, before me, the subscriber, a Notary Public of the State of Maryland, County of Baltimore personally appeared Lawrence J. Thanner, Jr., who acknowledged himself to be the Sole Member of Fifth Street, LLC, a Maryland Limited Liability Company, and that he as such Sole Member being authorized so to do, executed the aforegoing instrument for the purposes therein contained, by signing in my presence, the name of the LLC by himself as such Sole Member.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

_____
Patricia L. Hinkel

My Commission Expires: January 14, 2017

PATRICIA L. HINKEL
Notary Public, State of Maryland
Baltimore County
Commission Expires Jan. 14, 2017

AFTER RECORDING, RETURN TO:
RGS TITLE, LLC
10025 GOVERNOR WARFIELD PARKWAY
SUITE 302
COLUMBIA, MD 21044
FILE NO. 195189MA

0035488 13

2014 MARYLAND FORM

Certification of Exemption from Withholding Upon Disposition of Maryland Real Estate
Affidavit of Residence or Principal Residence

Based on the certification below, Transferor claims exemption from the tax withholding requirements of §10-912 of the Tax-General Article, Annotated Code of Maryland. Section 10-912 provides that certain tax payments must be withheld and paid when a deed or other instrument that effects a change in ownership of real property is presented for recordation. The requirements of §10-912 do not apply when a transferor provides a certification of Maryland residence or certification that the transferred property is the transferor's principal residence.

1. Transferor Information

Name of Transferor

Fifth Street, LLC

2. Reasons for Exemption

Resident Status

☐ I, Transferor, am a resident of the State of Maryland.

☑ Transferor is a resident entity as defined in Code of Maryland Regulations (COMAR) 03.04.12.02B(11), I am an agent of Transferor, and I have authority to sign this document on Transferor's behalf.

Principal Residence

☐ Although I am no longer a resident of the State of Maryland, the Property is my principal residence as defined in IRC 121 and is recorded as such with the State Department of Assessments and Taxation.

Under penalty of perjury, I certify that I have examined this declaration and that, to the best of my knowledge, it is true, correct, and complete.

3a. Individual Transferors

Witness

Name

Signature

3b. Entity Transferors

Witness/Attest

Fifth Street, LLC

Name of Entity

By

Lawrence J. Thanner, Jr.

Name

Sole Member

Title

14-49

BALTIMORE COUNTY CIRCUIT COURT (Land Records) JLE 35488, p. 0135, MSA_CE62_35344. Date available 10/27/2014. Printed 02/17/2016.

0035488 136

State of Maryland Land Instrument Intake Sheet

☐ Baltimore City ☒ County: Baltimore County

Information provided is for the use of the Clerk's Office, State Department of Assessments and Taxation, and County Finance Office only.

(Type or Print in Black Ink Only - All Copies Must Be Legible)

1 Type(s) of Instruments	( ] Check Box if Addendum Intake Form is Attached.)						
	1 Deed	☐ Mortgage	☐ Other _____	☐ Other _____
	2 Deed of Trust	☐ Lease		
2 Conveyance Type Check Box	X Improved Sale Arm-Length[1]	☐ Unimproved Sale Arms-Length[2]	☐ Multiple Account Arms-Length[3]	☐ Not an Arms-Length Sale[9]
3 Tax Exemptions (if applicable) Cite or Explain Authority	Recordation			
	State Transfer			
	County Transfer			

TMP FD SURE 40.00
RECORDING FEE 20.00
TR TAX STATE 3,000.00
TOTAL 3,060.00
Rest BA01 Rcpt # 7393
JLE TD Blk # 1599
Oct 21, 2014 03:55 PM

4 Consideration and Tax Calculations	Consideration Amount		Finance Office Use Only	
	Purchase Price/Consideration	$ 600,000.00	Transfer and Recordation Tax Consideration	
	Any New Mortgage	$ 415,000.00	Transfer Tax Consideration	$
	Balance of Existing Mortgage	$	X( )% =	$
	Other:	$	Less Exemption Amount -	$
			Total Transfer Tax =	$ 9000.00
	Other:	$	Recordation Tax Consideration	$ 3000.00
			X( ) per $500 =	$
	Full Cash Value	$	TOTAL DUE	$

5 Fees	Amount of Fees	Doc. 1	Doc. 2
	Recording Charge	$ 20.00	$ 75.00
	Surcharge	$ 40.00	$ 40.00
	State Recording Tax	$ 3000.00	$
	State Transfer Tax	$ 3000.00	$
	County Transfer Tax	$ 9000.00	$
	Other	$	$
	Other	$	$

Agent: BP
Tax Bill: FY pd
C.B. Credit: _____
A.G. Tax/Other: N

6 Description of Property	District	Property Tax ID No.(1)	Grantor Liber/Folio	Map	Parcel No.	Var. LOG [ ] (5)
SDAT Requires Submission of all applicable information. A maximum of 40 characters will be indexed in accordance with the priority cited in Real Property Article Section 3-10(g)(3)(i).	15	1508790150* 05	13658/0354			

Subdivision Name	Lot (3a)	Block(3b)	Sect/AR(3c)	Plat Ref.	SqFt/Acreage(4)
Plat of Swan Point					

Location/Address of Property Being Conveyed (2): 9025 Cuckold Point Road, Baltimore, MD 21219

Other Property Identifiers (if applicable): *1508790106, 1508790107, 1508790108, 1508790109, & 10

Water Meter Account No.:

Residential [ ] or Non-Residential ☒ | Fee Simple [ ] or Ground Rent [ ] Amount: $

Partial Conveyance? [ ] Yes [X] No | Description/Amt. of SqFt/Acreage Transferred:

If Partial Conveyance, List Improvements Conveyed:

7 Transferred From	Doc. 1 - Grantor(s) Name(s)	Doc. 2 - Grantor(s) Name(s)
	Fifth Street, LLC	Boone Kondylas, LLC
	Doc. 1 - Owner(s) of Record, if Different form Grantor(s)	Doc. 2 - Owner(s) of Record, if Different form Grantor(s)

8 Transferred To	Doc. 1 - Grantee(s) Name(s)	Doc. 2 - Grantee(s) Name(s)
	Boone Kondylas, LLC	Brian Kinnear & Mike Wallace
	New Owner's (Grantee) Mailing Address	
	same as above	

9 Other Names To Be Indexed	Doc. 1 - Additional Name(s) to be Indexed (Optional)	Doc. 2 - Additional Name(s) to be Indexed (Optional)
		M & T Bank

10 Contact/Mail Information	Instrument Submitted By or Contact Person	
	Name: Michelle Baldwin	FILE: 195189MA
	Firm: RGS Title, LLC	
	Address: 10025 Governor Warfield Parkway	
	Suite 302, Columbia, MD 21044 (410) 715-5830	

X Return to Contact Person
☐ Hold for Pickup
☐ Return Address Provided

11 IMPORTANT: BOTH THE ORIGINAL DEED AND A PHOTOCOPY MUST ACCOMPANY EACH TRANSFER

Assessment Information

☐ Yes X No Will the property being conveyed be the grantee's principal residence?
☐ Yes X No Does transfer include personal property? If yes, identity:
☐ Yes X No Was property surveyed? If yes, attach copy of survey (if recorded, no copy required)

Assessment Use Only - Do Not Write Below This Line

[ ] Terminal Verification [ ] Agricultural Verification [ ] Whole [ ] Part [ ] Tran. Process Verification

Transfer Number: Date Received: Deed Reference: Assigned Property No:

Year			Geo	Map	Sub	Block
Recaptured			Zoning	Grid	Plat	Lot
Buildings			Use	Parcel	Section	Occ. Cd.
Total			Town Cd.	Ex.St.Ct./RCATION	EXEMPT REQUIRED	

REMARKS: Dept

Director of Budget and Finance
BALTIMORE COUNTY, MARYLAND
T.P. ART.12-108

Distribution: White - Clerk's Office; Canary - SSDAT; Pink - Office of Finance; Goldenrod - Preparer

AOC-CC-300 (6/95)

DOC # 2 3 4 5 6

Initial: BP

Date 10/21/14

BALTIMORE COUNTY CIRCUIT COURT (Land Records) JLE 35488, p. 0136, MSA_CE62_35344. Date available 10/27/2014. Printed 02/17/2016.

DUPLICATE PAID RECEIPT
ACTUAL TIME DRW
5 10/21/2014 15:04:40 JLE
ESD:MSDS LMK
REC#:17 787985 10/21/2014 OFLN
RECORDATION TAXES
ASSMNT ID 1508790105
$12,000.00
CK $.00 CA
County, Maryland

0013658 354

FILE NO. 11925T

Property Address:
9025 Cuckold Point Road
Baltimore, Maryland 21219
Tax I.D. 15-08-790109/15-08-790110/15-08-790108

THIS DEED, made this 10th day of March, 1999, by and between Josephine M. Hranicka, party of the first part, and Fifth Street, LLC, party of the second part.

WITNESSETH, that in consideration of the sum of $300,000.00, the said party of the first part does grant and convey to the said Fifth Street, LLC his/her heirs, personal representatives/successors and assigns, in fee simple, all that piece or parcel of land situate, in BALTIMORE COUNTY, Maryland, and described as follows, to wit;

BEGINNING for the same and being known and designated as Lots Nos. 500, 501, 502, 503, 504 and 505, as laid out on the revised Plat of Swan Point, which Plat is recorded among the Land Records of Baltimore County in Plat Book L.McL.M. No. 9, folios 4 and 5. The improvements thereon being known as No. 9025 Cuckold Point Road.

BEING six of the lots of ground described in a Deed dated November 6, 1968 and recorded among the Land Records of Baltimore County in Liber OTG 4938 folio 60 was granted and conveyed by Property Transfer Co., Inc. unto Edward F. Hranicka and Josephine M. Hranicka, his wife.

BEING also the same six lots of ground as described in a Merger Deed dated November 6, 1968 and recorded among the Land Records of Baltimore County in Liber OTG 4938 folio 62 was granted and conveyed by John H. Herold and Jean L. Herold, his wife unto Edward F. Hranicka and Josephine M. Hranicka, his wife.

The said Edward F. Hranicka having departed this life on or about January 23, 1980.

TOGETHER WITH the buildings thereupon, and the rights, alleys, ways, waters, privileges, appurtenances and advantages thereto belonging or in anywise appertaining.

TO HAVE AND TO HOLD the property hereby conveyed unto the party of the second part, Fifth Street, LLC his/her personal representatives, heirs and assigns, in fee simple, forever.

AND the party of the first part hereby covenants that he/she has not done or suffered to be done any act, matter or thing whatsoever, to encumber the property hereby conveyed; that he/she will warrant specially the property hereby granted; and that he/she will execute such further assurances of the same as may be requisite.

WITNESS the hand and seal the day and year first hereinbefore written.

Witness:

_____ _____(SEAL)
Josephine M. Hranicka

STATE OF MARYLAND
County of Baltimore, TO WIT;

I Hereby Certify, That on this 10th day of March, 1999, before me, the subscriber, a Notary Public of the state and county aforesaid, personally appeared Josephine M. Hranicka, known to me (or satisfactorily proven) to be the person whose name is/are subscribed to the within instrument and acknowledged that he/she executed the same for the purposes therein contained, and signed the same in my presence.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

MELLIE N. OLIVER NOTARY PUBLIC BALTIMORE COUNTY, MD.

My Commission Expires: 3/1/2002

_____
NOTARY PUBLIC - Mellie N. Oliver

People's Counsel Exhibit 4
Case-in-Chief

BALTIMORE COUNTY CIRCUIT COURT (Land Records) SM 13658, p. 0354, MSA_CE62_13513. Date available 03/08/2005. Printed 02/17/2016.

0013658 355

This is to certify that the within instrument has been prepared (i) by or under the supervision of the undersigned Maryland attorney, or (ii) by a party to this instrument.

ARNOLD L. MAZOR, Attorney

MAIL TO: TRUST TITLE COMPANY, INC.
7222 HOLABIRD AVENUE
BALTIMORE, MD 21222

BALTIMORE COUNTY CIRCUIT COURT (Land Records) SM 13658, p. 0355, MSA_CE62_13513. Date available 03/08/2005. Printed 02/17/2016.

016799 APR-88 0013658 056

State of Maryland Land Instrument Intake Sheet

☐ Baltimore City ☒ County: Baltimore

Information provided is for the use of the Clerk's Office, State Department of Assessments and Taxation, and County Finance Office only.

(Type or Print in Black Ink Only—All Copies Must Be Legible)

IMP FD SURE $ 5.00
RECORDING FEE 20.00
RECORDATION T 1,500.00
TR TAX STATE 1,500.00
TOTAL 3,025.00
Rcpt # 6482 Rct # 47581
SM BC Bk # 1627
Apr 08, 1999 11:56 am

1 Type(s) of Instruments (☐ Check Box if Addendum Intake Form is Attached.)

X Deed	X Mortgage	☐ Other	☐ Other
☐ Deed of Trust	☐ Lease		

2 Conveyance Type Check Box

X Improved Sale Arms-Length [1]	☐ Unimproved Sale Arms-Length [2]	☐ Multiple Accounts Arms-Length [3]	☐ Not an Arms-Length Sale [9]

3 Tax Exemptions (If Applicable) Cite or Explain Authority

Recordation
State Transfer
County Transfer

4 Consideration and Tax Calculations

Consideration Amount		Finance Office Use Only — Transfer and Recordation Tax Consideration	
Purchase Price/Consideration	$ 300,000.00	Transfer Tax Consideration	$ 300,000.
Any New Mortgage	$ 300,000.00	X ( ) % =	$ 4500.00
Balance of Existing Mortgage	$	Less Exemption Amount −	$
Other:	$	Total Transfer Tax =	$ 4500.00
Other:	$	Recordation Tax Consideration	$
		X ( ) per $500 =	$
Full Cash Value	$ 300,000.00	TOTAL DUE	$

5 Fees

Amount of Fees	Doc. 1	Doc. 2
Recording Charge	$ 20.00	$ 20.00
Surcharge	$ 5.00	$ 5.00
State Recordation Tax	$	$
State Transfer Tax	$ 1,000.00	$
County Transfer Tax	$ 3,000.00	$
Other Stamps	$ 1,000.00	$
Other	$	$

$ 20 1500 1500

Agent: [illegible]
Tax Bill: no V4
C.B. Credit:
Ag. Tax/Other:

6 Description of Property — SDAT requires submission of all applicable information. A maximum of 40 characters will be indexed in accordance with the priority cited in Real Property Article Section 3-104(g)(3)(i).

District	Property Tax ID No. (1)	Grantor Liber/Folio	Map	Parcel No.	Var. LOG ☐ (5)
15	15-08-790105				

Subdivision Name | Lot (3a) | Block (3b) | Sect/Ar (3c) | Plat Ref. | Sq Ft/Acreage (4)

Location/Address of Property Being Conveyed (2)
9025 Cuckold Point Road, Baltimore, Maryland, 21219

Other Property Identifiers (If applicable) continue.....
15-08-790106 / 15-08-790107 / 15-08-790108 / 15-08-790109 / 15-08-790110

Residential ☐ or Non-Residential ☐ | Fee Simple ☒ or Ground Rent ☐ | Amount:

Partial Conveyance? ☐ Yes ☒ No | Description/Amt. of SqFt/Acreage Transferred:

If Partial Conveyance, List Improvements Conveyed:

7 Transferred From

Doc. 1 - Grantor(s) Name(s)	Doc. 2 - Grantor(s) Name(s)
Josephine M. Hranicka	Fifth Stret, LLC
Doc. 1 - Owner(s) of Record, If Different from Grantor(s)	Doc. 2 - Owner(s) of Record, If Different from Grantor(s)

8 Transferred To

Doc. 1 - Grantee(s) Name(s)	Doc. 2 - Grantee(s) Name(s)
Fifth Street, LLC	Edward Hranicka
	Josephine Hranicka

New Owner's (Grantee) Mailing Address
1824 Elk Road, Baltimore, Md., 21221

9 Other Names to Be Indexed

Doc. 1 - Additional Names to be Indexed (Optional)	Doc. 2 - Additional Names to be Indexed (Optional)

10 Contact/Mail Information

Instrument Submitted By or Contact Person
Name: Krissy L. Hall
Firm: Trust Title Company, Inc.
Address: 7222 Holabird Avenue, Baltimore, Md., 21222
Phone: (410) 285-7330

☐ Return to Contact Person
☒ Hold for Pickup
☐ Return Address Provided

11 IMPORTANT: *BOTH* THE ORIGINAL DEED *AND* A PHOTOCOPY MUST ACCOMPANY EACH TRANSFER

Assessment Information

☐ Yes ☒ No Will the property being conveyed be the grantee's principal residence?
☐ Yes ☒ No Does transfer include personal property? If yes, identify:
☐ Yes ☒ No Was property surveyed? If yes, attach copy of survey (if recorded, no copy required).

Assessment Use Only - Do Not Write Below This Line

☐ Criminal Verification ☐ Agricultural Verification ☐ Water ☐ Part ☐ Trans. Process Verification

Official Number: Date Received: Deed Reference: Assessed Property No.:

Year	19	19	Geo.	Map	Sub	Block
Land			Zoning	Grid	Plat	Lot
Improvements			Use	Parcel	Section	Occ. Cd.
Total # Units			Town Cd.	Ex. St.	Ex. Cd.	

Distribution: White - Clerk's Office
Canary - SDAT
Pink - Office of Finance
Goldenrod - Preparer
AOC-CC-900 (6/98)

BALTIMORE COUNTY CIRCUIT COURT (Land Records) SM 13658, p. 0356, MSA_CE62_13513. Date available 03/08/2005. Printed 02/17/2016.

RECEIPT DATA
DATE 4/08/1999 TIME 11:24:00
ACTUAL
RECEIPT
CLERK 7 TIME
RECEIPT TOT 4,500.00
ACCOUNT 08790105
CK .00 CA
BALTIMORE COUNTY, MARYLAND

People's Counsel Sign-In Sheet

Case Name: BOONE-KONDRIAS, LLC, PETITIONER
Case No.: 2016-003-SPH
Date: 2/17/16

The Office of People's Counsel was created by the County Charter to participate in zoning matters on behalf of the public interest. While it does not actually represent community groups or protestants, it will assist in the presentation of their concerns, whether they have their own attorney or not. If you wish to be assisted by People's Counsel, please sign below.

Check to testify	Name	Address	Phone #	Email	Group you represent	Basis of your concerns
✓	MATT CIARAMELLA	2716 6TH ST 21219	443 677 1130			
	DENISE HAAS	2709 BAY DR. 21219	410 477-2410			
	BONNIE MATHENY	2704 6TH STREET 21219	410-477-4675			
	BRAD MATHENY	2704 6TH STREET 21219	410-477-4675			
	CHARLES WOLINSKI	9019 CUCKOLD POINT RD. 21219	410-477-0053			

People Counsel's Exhibit 5
Case-in-chief

Exhibit 1

People Counsel exhibit 6

People's Counsel Sign-In Sheet

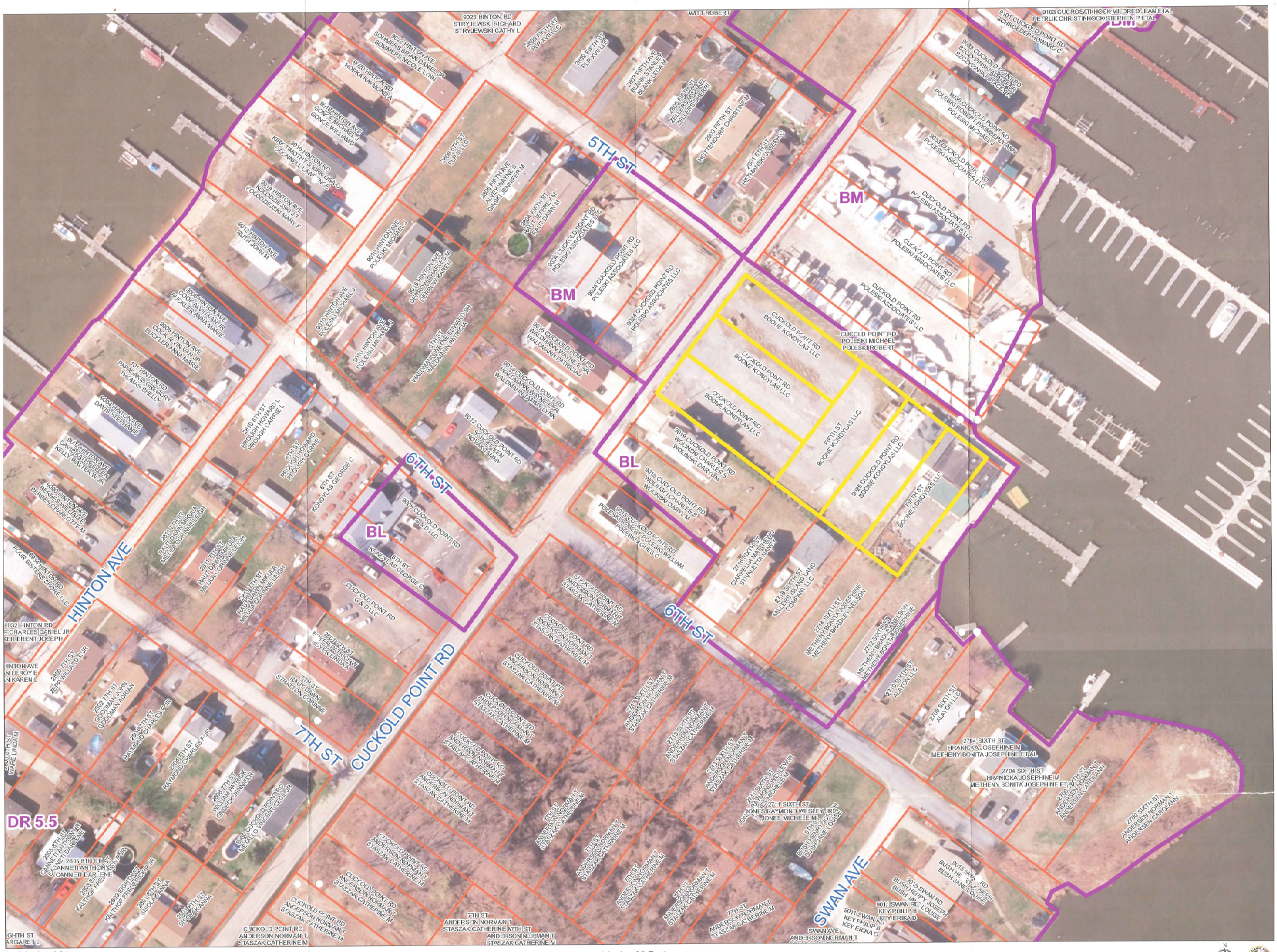
Case Name: Boone - Kondylas, LLC

Case No.: 16-003-SPH Day 2

Date: April 28, 2016

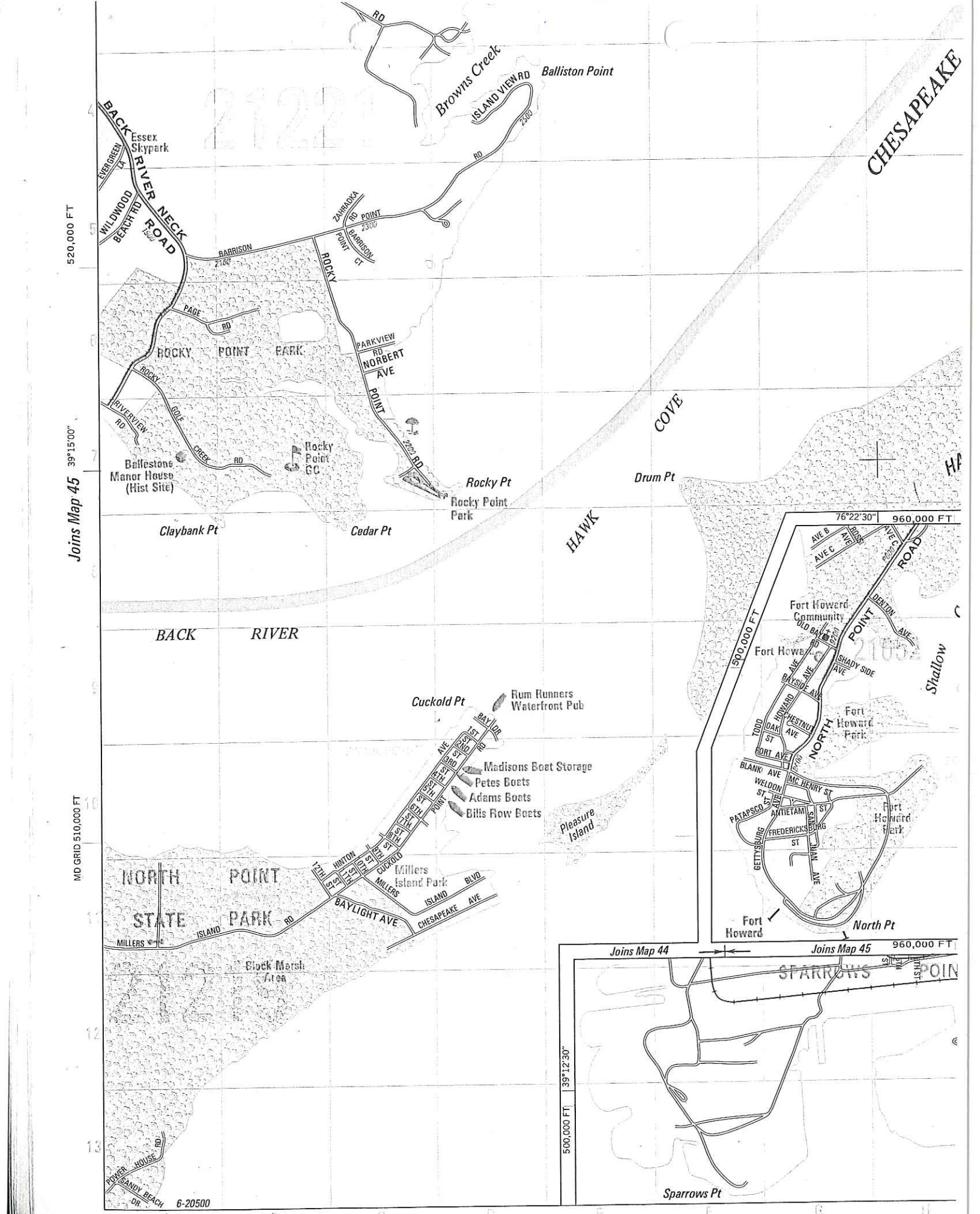
The Office of People's Counsel was created by the County Charter to participate in zoning matters on behalf of the public interest. While it does not actually represent community groups or protestants, it will assist in the presentation of their concerns, whether they have their own attorney or not. If you wish to be assisted by People's Counsel, please sign below.

Check to testify	Name	Address	Phone #	Email	Group you represent	Basis of your concerns
✓	Matt Ciarpella	2716 6th Street	4436771130		Protestants	
	Charles Wolinski	9019 Cuckold Pt Rd	443-850-9431		Protestants	
✓	BRAD Metheny	2704 6TH ST.	410-477-4675		PROTESTANT	
✓	WAYNE WALDMANN	9014 CUCKOLD PT. RD	443 797 9121		PROTESTANT	
	Bonnie Metheny	2704 6th Street	410-477-4675		PROTESTANT	
	Mike Kondylas	8908 Millers Island Rd	410 477 4865		PDC	
	Tami Waldmann	9014 Cuckold Pt Rd	443-	2840	Protestant	



P.C. Exh. 7

2016-053-SPH



© ALEXANDRIA DRAFTING CO.

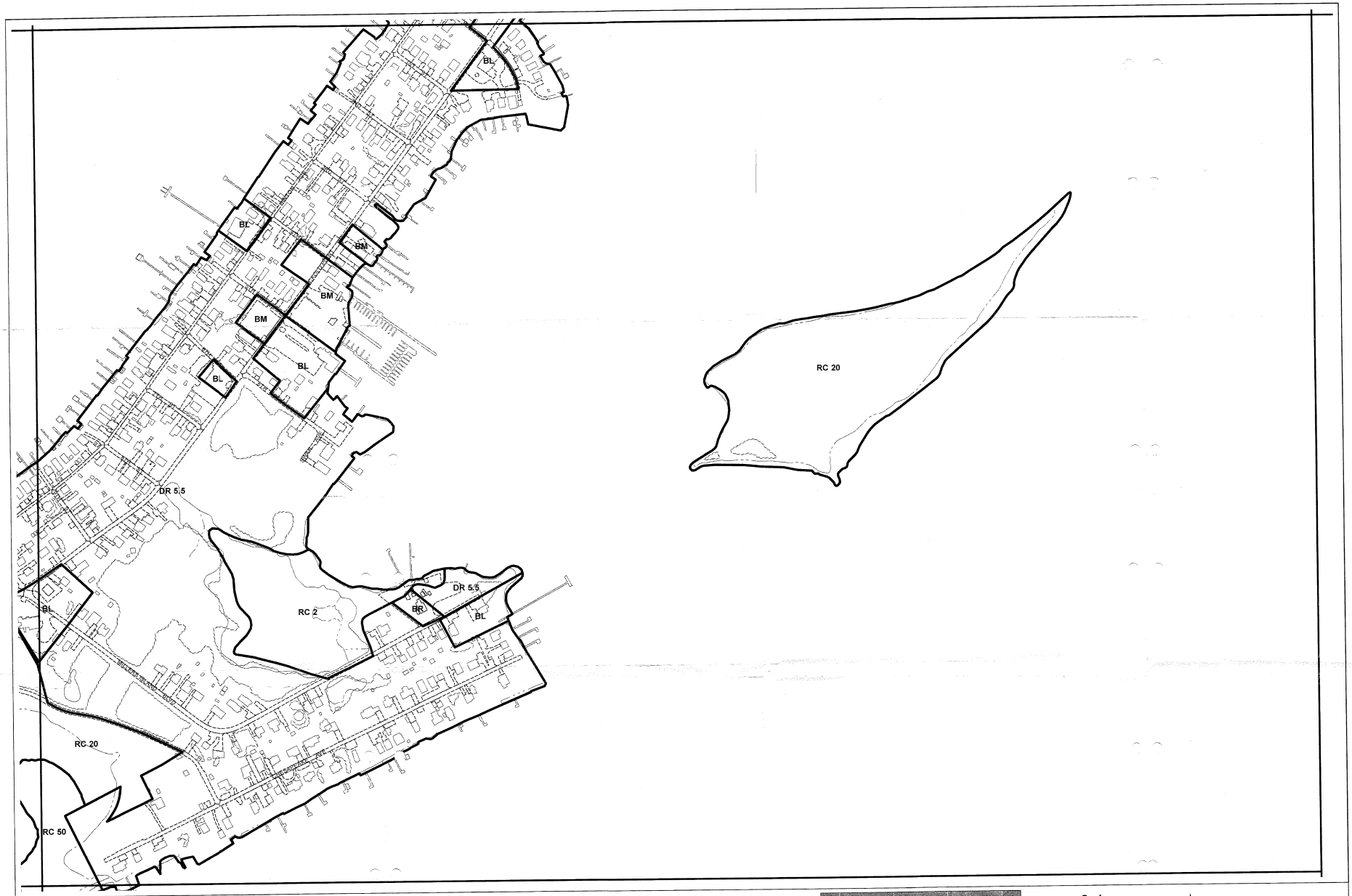
Peoples Counsel 8a Exhibit



People's Counsel 8b Exhibit



People's Counsel / BC Exhibit



Plan Sheet: *112B2*

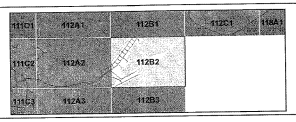
Note:
The zoning depicted in this map incorporates the actions associated with 2012 Comprehensive Zoning Map Process and Baltimore County Board of Appeals actions through December 31, 2012.

2016-003-SPH

Legend

Zoning — Streams — Rail Lines
Buildings — Roads — Vegetation

Baltimore County
Department of Planning
Official Zoning Map



Scale

1" = 200'

0 100 200 400 Feet

Data Sources:
Planimetric Data - Baltimore County
OIT/GIS Services Unit
1:2400, from 2008 photography
Zoning - Baltimore County Office of Planning
1:2400, 2012

P.C. Exh. 9

People's Counsel Exhibit 9

April 25, 2016

Denise Haas, President,
Millers Island Community Association
2703 Bay Drive, Millers Island, MD 21219

Baltimore County Board Of Appeals

Re: Dock of the Bay

Board of Appeal Members,

I had been asked to testify at the hearing on April 28, 2016, however, I will be out of town. I wanted to provide the following information on the Millers Island Community Association's position on the hearing to allow Dock of the Bay to play music. The Millers Island Community Association has, and will continue to remain neutral. Our position is "We want our residents to be happy and our businesses successful but neither at the expense of the other". That being said there are a couple of things that the Board of Appeals may need to be aware of.

Mr. Boone called me in February 2015 and ask if I would set up a meeting between him and the residents who had opposed music at Dock of the Bay under the previous owner. He suggested that he would be agreeable to changing his hours if the residents would agree to allow musical entertainment at Dock of the Bay. I contacted three of the residents who said that they would contact him directly and meet with him. I was told that a meeting did take place and I had no further phone contact with Mr. Boone. At the February 17, 2016 Mr. Boone stated that he was not aware of the music restriction prior to being contacted by the Liquor Board after he advertised live music in April of 2015, however this was not what he spoke of in our February 2015 conversation, he was aware of the restriction.

I attended the February 17, 2016 hearing to see what the final outcome was. The only other Dock of the Bay hearing I had attended was the last hearing under Lawrence Thanner's ownership. Several days after the February 17th hearing Mr. Boone proceeded to post on his Dock of the Bay Face Book page the details of the February 17th hearing. Some of the postings he allowed included the names, addresses and phone numbers of the residents living near Dock of the Bay and myself, it was posted that they were the contact information of those who opposed DOB music restrictions. I also received a harassing message from one of Mr. Boone's employees (copy attached).

My self and the residents of Millers Island would love to see a quality waterfront restaurant in our community, good food, good service and reasonable prices, the kind of place our families can enjoy. Past issues with DOB music had divided our community and created tension among neighbors and friends. Our hope is that this hearing puts this issue to rest so that we can all enjoy the beautiful community we live in.

Regards,

Denise Haas

Denise Haas, President, Millers Island Community Association

People's Counsel exhibit 12

~~Motion Hearing~~
CASE-IN-Chief

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondylas, LLC

Exhibit List

Party: Petitioners/~~Motion Response~~ Date: 2-17-16

Exhibit No:	Description:
✓ 1	Site Plan -
✓ 2A	Majority Opinion ~~Court of Special Appeals~~ Board of appeals (Case No. 07144-SPH) CBA-06-044 CBA-07-134
✓ 2B	Dissenting Opinion Board of appeals 07144-SPH CBA-06-044 CBA-07-134
✓ 2C	Ruling on Motion for reconsideration and clarification Case Nos. 07-144 SPH, CBA-06044, CBA-07-134
✓ 3	Circuit Court Opinion, Final Order, Case No. 03-C-080996
✓ 4	Unreported Opinion Court of Special Appeals No. 810, September Term 2009, File July 9, 2010
✓ 5	Memorandum (Exhibit) Contempt - Circuit Court For Baltimore County Case No. 03-C-08-009996
✓ 6	My Neighborhood Map Photo - Areal Photograph of THE "Dock of the Bay"
✓ 7	Thumb Tack - showing Dock of the Bay photo - Areal Photograph of Millers Island > my neighborhood
✓ 8A	photo Entrance to Dock of the Bay / Boat yard
✓ 8B	photo of Zoning Noted / Dock of Bay
✓ 8C	Photo Boat yard
✓ 8D	Photo - Dock of Bay
✓ 8E	Photo - Dock of the Bay Pier
	VERIFIED BY KC DATE: 2/19/16

Case-in-chief

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondylas

Exhibit List

Party: Petitioner - Date: 2-17-16

Exhibit No:	Description:
✓ 8F	Photo out door Seating for Dock of Bay
✓ 8G	Seating at Dock of Bay photo
✓ 8H	Seating + chairs Dock - photo
✓ 8I	Pier of Dock of the Bay Photo
✓ 8J	(Row Boat Willie) Photo
✓ 8K	Photo Dock of Bay
✓ 8L	Photo of Dock of Bay - Play area for children
✓ 8M	Photo of Seating inside Dock of the Bay
✓ 8N	Photo of Seating at Dock of the Bay
✓ 8O	Photo of Bar w/ Patron at Dock of the Bay
✓ 9	Business license issued by MD + operated Rosland
✓ 10	Photo of Sign viewed as you leave the Dock of the Bay, Neighbor Respect Sign
✓ 11A	Petition of Residents of Miller's Island - Support
✓ 11B	Petition of Non-Residents of Miller's Island Support
	VERIFIED BY KC DATE: 2/19/16

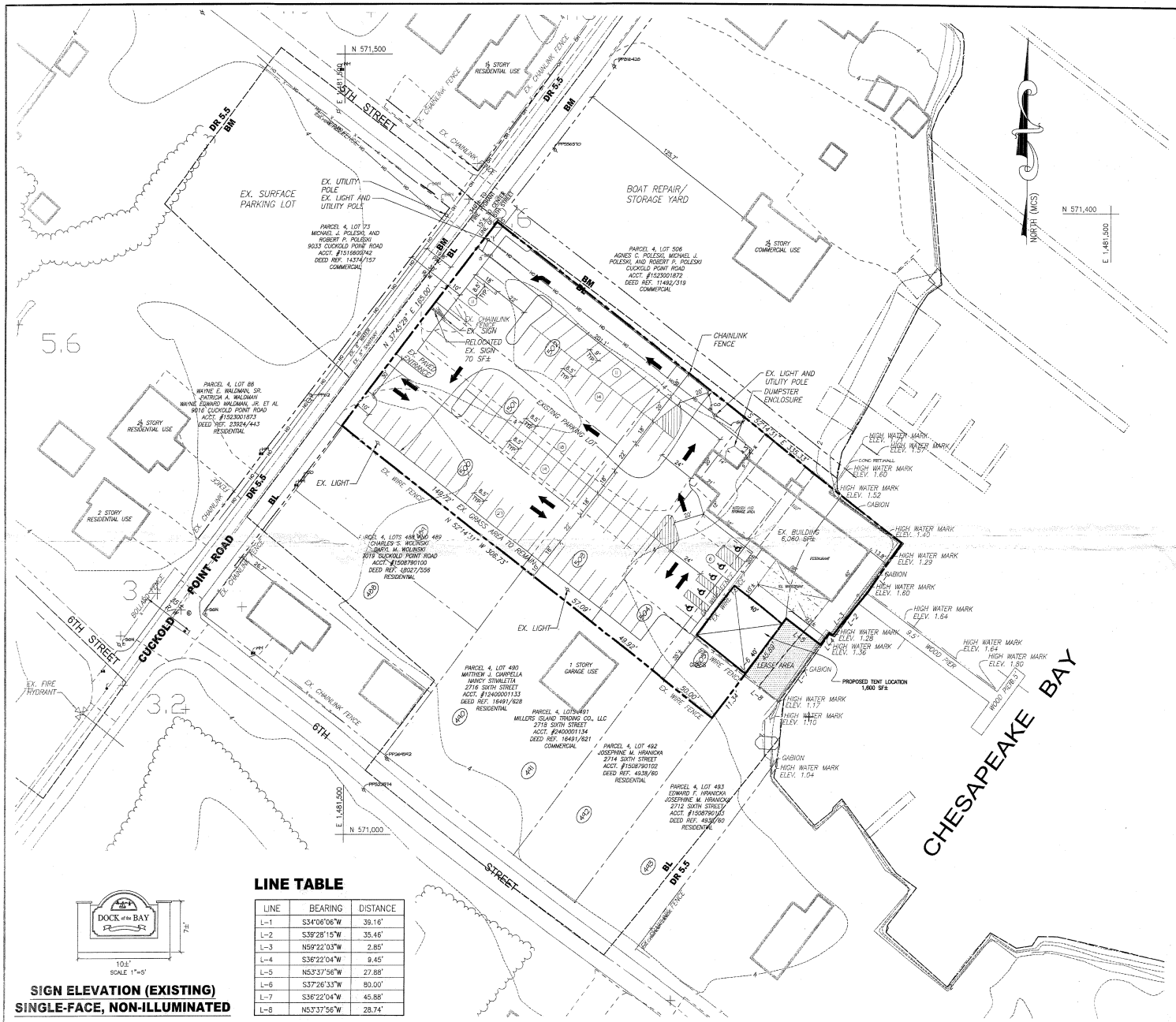
Board of Appeals

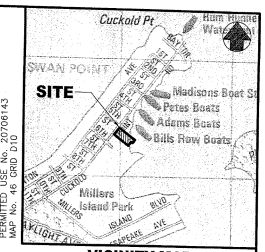
Case No: 16-003-SPH Case Name: Boone - Kond

Exhibit List

Party: Petitioner Date: 4-28-16

Exhibit No:	Description:
✓ 12a	Petition from Customers of Doz of the Bay
✓ 12b	Petition from Customers of Doz of the Bay
✓ 13	Letter from Mark Allan to the Zoning Commission
	VERIFIED BY KC DATE: 4/28/16





VICINITY MAP
SCALE: 1"=1000'

Ref No 1

PROPERTY OWNERSHIP

OWNER: FIFTH STREET, LLC
9025 CUCKOLD POINT ROAD
BALTIMORE, MARYLAND 21219-1635

GENERAL NOTES:

1. ZONING: BL
2. LOT AREA:
   GROSS ACREAGE 1.276 AC± (55,594 SQ. FT.)
   NET ACREAGE 1.219 AC± (53,119 SQ. FT.)
3. ZONING MAP: 112B2
4. PLAT REFERENCE: 9/4
5. CENSUS TRACT: 4519.00
6. WATERSHED: 13
7. SUBSEWERSHED: 43
8. SEWAGE PLAN DESIGNATION: S1
9. WATER SUPPLY PLAN DESIGNATION: W1
10. REGIONAL PLANNING DISTRICT: 331
11. ELECTION DISTRICT: 15TH
    COUNCILMANIC DISTRICT: 7TH
12. EXISTING USE: RESTAURANT
13. PROPOSED USE(S): RESTAURANT AND SEASONAL TENT TO COVER EXISTING OUTDOOR SEATING AREA.
14. BUILDING AREA:
    EXISTING BUILDING:
    1ST FLOOR:
    EXISTING RESTAURANT =2,230 SF±
    KITCHEN/ STORAGE =2,410 SF±
    2ND FLOOR:
    STORAGE/ OFFICE =1,420 SF±
    TOTAL: =6,060 SF±
    PROPOSED:
    SEASONAL TENT TO COVER EXISTING OUTDOOR SEATING =1,600 SF±
    TOTAL BUILDING AREA =7,660 SF±
15. FLOOR AREA RATIO (F.A.R.):
    F.A.R. (7,660 SF±/50,407 SF±) =0.15
    F.A.R.- I PERMITTED =3.0
16. THIS SITE IS SERVICED BY PUBLIC WATER AND SEWER AS SHOWN.
17. THIS SITE IS WITHIN THE 100-YEAR FLOODPLAIN PER FIRM MAP 240010 0445 C.
18. BUILDING CONSTRUCTION SHALL COMPLY WITH BUILDING AND FIRE CODE REQUIREMENTS.
19. SIGNAGE: AS SHOWN
20. PARKING:
    EXISTING BUILDING:
    1ST FLOOR:
    EXISTING RESTAURANT: 2,230 SF±
    KITCHEN/ STORAGE: 2,410 SF±
    TOTAL: 4,640 SF± @ 16 P.S./1,000 =75 P.S.
    2ND FLOOR:
    STORAGE/ OFFICE 1,420 SF± @ 3.3 P.S./1,000 SF =5 P.S
    PROPOSED SEASONAL TENT TO COVER EXISTING SEATING 1,600 SF± @ 16 P.S./ 1,000 SF =26 P.S
    TOTAL REQUIRED PARKING: =106 P.S.
    PROPOSED PARKING: =106 P.S
21. THERE SHALL BE NO BOAT SLIP RENTALS, ONLY TRANSIENT DOCKING IS PERMITTED.
22. LANDSCAPING SHALL COMPLY WITH THE BALTIMORE COUNTY LANDSCAPE MANUAL.
23. EXISTING LIGHTING SHALL REMAIN AS SHOWN ON PLAN.
24. PRIOR ZONING HEARINGS:
    PETITION FOR SPECIAL HEARING 5/30/07 CASE NO. 07-144-SPH
    PETITIONER REQUESTED DETERMINATION AS TO WHETHER THE USE OF THE B.L. ZONED PROPERTY AT 9025 CUCKOLD POINT ROAD IS IN VIOLATION OF THE ZONING REGULATIONS. AND SPECIFICALLY, IS THE RESTAURANT, WHICH PROVIDES MUSIC DURING THE DAY, A "NIGHTCLUB" AS DEFINED IN SECTIONS 101,102.1 AND 230. THE ZONING COMMISSIONER ORDERED THAT THE PLAYING OF OUTDOOR MUSIC EITHER BY WAY OF AN OUTSIDE SPEAKER, LIVE/OR RECORDED ENTERTAINMENT BE DISCONTINUED. DENIED 5/30/07. DECISION APPEALED TO MARYLAND STATE COURT OF SPECIAL APPEALS. AWAITING HEARING.
25. EXISTING CURB STOPS TO REMAIN.
26. EXISTING COMPACTED GRAVEL AND MACADAM TO REMAIN.
27. NO COMMERCIAL PERMITS WERE FOUND.

LINE TABLE

LINE	BEARING	DISTANCE
L-1	S34°06'06"W	39.16'
L-2	S39°28'15"W	35.46'
L-3	N59°22'03"W	2.85'
L-4	S36°22'04"W	9.45'
L-5	N53°37'56"W	27.88'
L-6	S37°26'33"W	80.00'
L-7	S36°22'04"W	45.88'
L-8	N53°37'56"W	28.74'

SCALE 1"=5'

SIGN ELEVATION (EXISTING)
SINGLE-FACE, NON-ILLUMINATED

MORRIS & RITCHIE ASSOCIATES, INC.
ENGINEERS, PLANNERS, SURVEYORS AND LANDSCAPE ARCHITECTS
1220-C EAST JOPPA ROAD, SUITE 505
TOWSON, MARYLAND 21286
(410) 821-1690
FAX: (410) 821-1748
MRAGTA.COM

PLAN TO ACCOMPANY BUILDING PERMIT APPLICATION

9025 CUCKOLD POINT ROAD

'DOCK OF THE BAY'

BALTIMORE COUNTY, MARYLAND

ELECTION DISTRICT 15 COUNCILMANIC DISTRICT 7

DATE	REVISIONS
5/18/2010	SEASONAL TENT WITH REVISIONS TO NOTES

JOB NO.: 15477
SCALE: 1"=30'
DATE: 08/31/07
DRAWN BY: TH
DESIGN BY: WM
REVIEW BY: WM
SHEET: 1 OF 1

J:\Projects\2007\15477-BUILDING-PERMIT-TENT 2010 05 19.dwg, 5/19/2010 5:54:55 PM, Melissa
1:1, Copyright 2009 Morris & Ritchie Associates, Inc.

IN RE: **PETITION FOR SPECIAL HEARING** **(9025 Cuckold Point Road)** 15th Election District 7th Council District	*	BEFORE THE
	*	OFFICE OF
	*	ADMINISTRATIVE HEARINGS
Boone Kondylas, LLC *Legal Owner* Petitioner	*	FOR BALTIMORE COUNTY
	*	**Case No. 2016-0003-SPH**

* * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Boone Kondylas, LLC, legal owner. The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

Ken Boone appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioner. Several neighbors, represented by Francis Borgerding, Esq., attended and opposed the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Bureau of Development Plans Review (DPR). Neither agency opposed the request, but suggested certain conditions be imposed if relief is granted.

The subject property is 1.27 acres and zoned B.L. The property is improved with a restaurant known as "Dock of the Bay." The restaurant has new ownership, which proposes to offer limited music and live entertainment as an "accessory" use to the food and beverage service. This property and business have been the subject of protracted litigation concerning loud music and unruly patrons which disturbed the neighborhood. The operation was found by the court of

ORDER RECEIVED FOR FILING
Date 10/22/15
By Den

special appeals to constitute a "nightclub," a use prohibited in the B.L. zone. Protestants contend the petition is barred by *res judicata,* while Petitioner argues that unlike the former operation the current business is first and foremost a restaurant, with music offered to compliment the dining experience.

Under Maryland law, an agency determination affirmed on appeal is entitled to preclusive effect. Esslinger v. Balto. City, 95 Md. App. 607, 621 (1993). This is the case, and *res judicata* will apply, unless there is a significant change in circumstances between the earlier and subsequent action. *See, e.g.*, Alvey v. Hedin, 243 Md. 334, 340 (1966). In light of this authority I believe the doctrine of *res judicata* mandates that the petition in this case be dismissed.

As an initial matter, I do not believe the OAH has the authority to "amend" restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the board of appeals, circuit court and then the court of special appeals. In an unreported opinion (No. 810, September Term, 2009) the appellate court affirmed the agency findings, which necessarily included the conditions and restrictions found in those orders. To amend those restrictions at this juncture would be akin to reversing the appellate court, which an administrative agency cannot do.

I believe the Petition must also be denied based on *res judicata.* As discussed above, *res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard. For example, if the owner of the subject property was now proposing to operate a barbershop or beauty salon at the site, that would constitute a significant change and *res judicata* would not apply. But here, I do not believe there

ORDER RECEIVED FOR FILING
Date 10/22/15
By

have been significant changes; Petitioner is still proposing to operate a restaurant that would offer live and/or recorded music.

The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010).

THEREFORE, IT IS ORDERED this 22nd day of October, 2015 by this Administrative Law Judge, that the Petition for Special Hearing pursuant to B.C.Z.R. § 500.7 to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music, be and is hereby DENIED.

Any appeal of this decision must be filed within thirty (30) days of the date of this Order.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln

ORDER RECEIVED FOR FILING
Date 10/22/15
By sln

CASE NO. 2016-0003-SPH

CHECKLIST

Comment Received	Department	Support/Oppose/ Conditions/ Comments/ No Comment
7/17/15	DEVELOPMENT PLANS REVIEW (if not received, date e-mail sent _____)	C
_____	DEPS (if not received, date e-mail sent _____)	_____
_____	FIRE DEPARTMENT	_____
8/4/15	PLANNING (if not received, date e-mail sent _____)	C
7/14/15	STATE HIGHWAY ADMINISTRATION	no Obj
_____	TRAFFIC ENGINEERING	_____
_____	COMMUNITY ASSOCIATION	_____
_____	ADJACENT PROPERTY OWNERS	_____

ZONING VIOLATION (Case No. _____)

PRIOR ZONING (Case No. 2007-0144-SPH)

NEWSPAPER ADVERTISEMENT Date: 9/8/15

SIGN POSTING Date: 9/6/15 by O'Keefe

PEOPLE'S COUNSEL APPEARANCE Yes ☑ No ☐

PEOPLE'S COUNSEL COMMENT LETTER Yes ☐ No ☐

Comments, if any: _____

Real Property Data Search (w4) Guide to searching the database

Search Result for BALTIMORE COUNTY

View Map View GroundRent Redemption View GroundRent Registration

Account Identifier: District - 15 Account Number - 1508790109

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	9025 CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	9025 CUCKOLD POINT RD SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			504	2015	Plat Ref:	0009/ 0004

Special Tax Areas: **Town:** NONE
Ad Valorem:
Tax Class:

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
1993	6530		7,500 SF	30

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation
		SERVICE GARAGE				

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	225,000	225,000		
Improvements	379,100	379,200		
Total:	604,100	604,200	604,133	604,167
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	**Date:** 10/21/2014	**Price:** $600,000
Type: ARMS LENGTH MULTIPLE	**Deed1:** /35488/ 00133	**Deed2:**
Seller: HRANICKA EDWARD F	**Date:** 04/08/1999	**Price:** $300,000
Type: ARMS LENGTH MULTIPLE	**Deed1:** /13658/ 00354	**Deed2:**
Seller:	**Date:**	**Price:**
Type:	**Deed1:**	**Deed2:**

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:
Exempt Class:
Special Tax Recapture: NONE

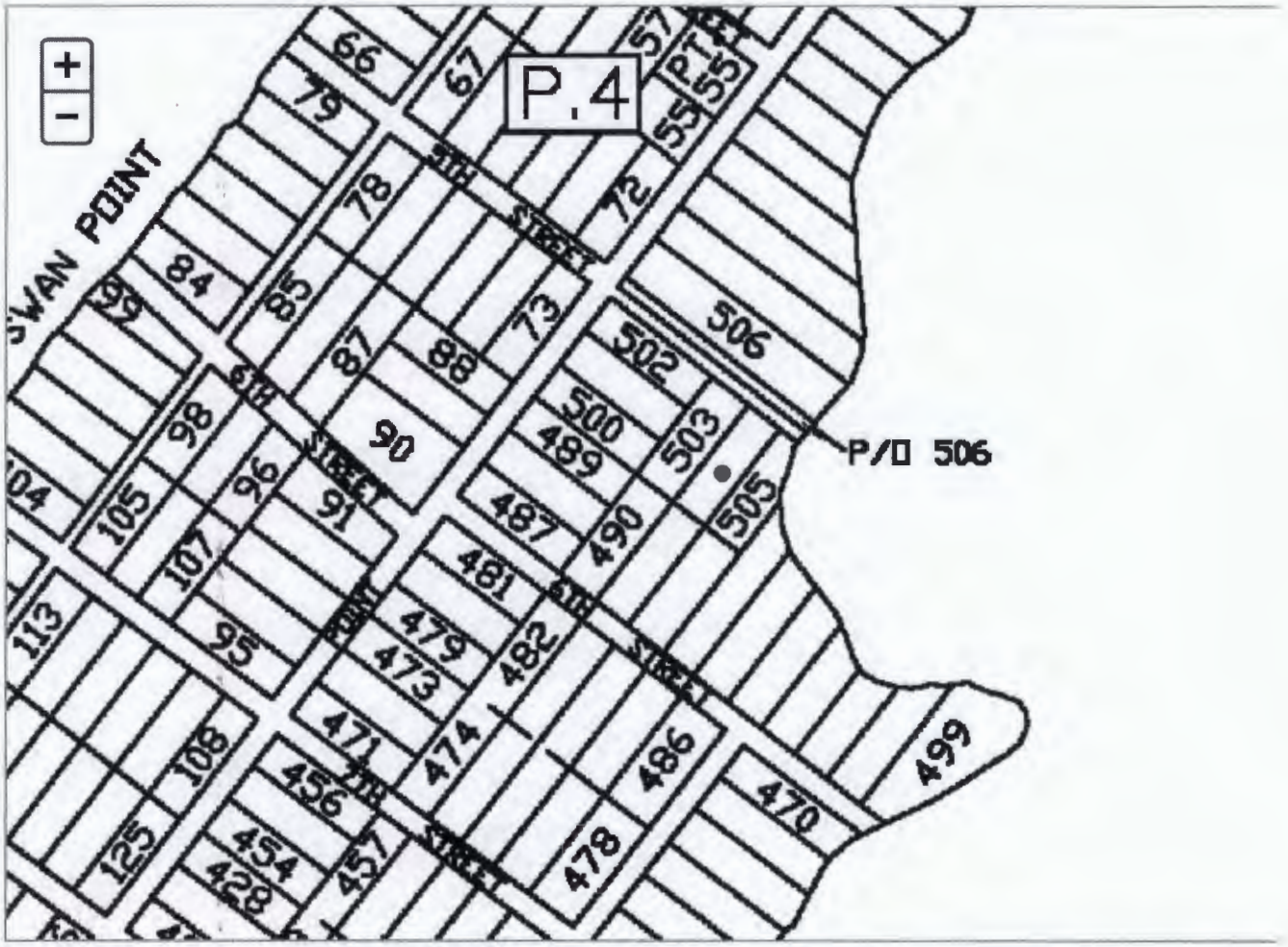
Homestead Application Information

Homestead Application Status: No Application

Baltimore County

New Search (http://sdat.dat.maryland.gov/RealProperty)

District: 15 Account Number: 1508790109



The information shown on this map has been compiled from deed descriptions and plats and is not a property survey. The map should not be used for legal descriptions. Users noting errors are urged to notify the Maryland Department of Planning Mapping, 301 W. Preston Street, Baltimore MD 21201.

If a plat for a property is needed, contact the local Land Records office where the property is located. Plats are also available online through the Maryland State Archives at www.plats.net (http://www.plats.net).

Property maps provided courtesy of the Maryland Department of Planning ©2011.

For more information on electronic mapping applications, visit the Maryland Department of Planning web site at www.mdp.state.md.us/OurProducts/OurProducts.shtml (http://www.mdp.state.md.us/OurProducts/OurProducts.shtml).



(http://imsweb05.mdp.state.md.us/website/mosp/)

Loading... Please Wait. Loading... Please Wait. -->

Larry Hogan, *Governor*
Boyd Rutherford, *Lt. Governor*

SHA State Highway Administration
Maryland Department of Transportation

Pete K. Rahn, *Secretary*
Douglas H. Simmons, *Acting Administrator*

Date: 7/14/15

Ms. Kristen Lewis
Baltimore County Office of
Permits and Development Management
County Office Building, Room 109
Towson, Maryland 21204

RE: Baltimore County
Item No 2016-0003-SPH
Special Hearing
BooneKondylas LLC, Ken Boone.
9025 Cuckold Point Road.

Dear Ms. Lewis:

Thank you for the opportunity to review your referral request on the subject of the above captioned. We have determined that the subject property does not access a State roadway and is not affected by any State Highway Administration projects. Therefore, based upon available information this office has no objection to Baltimore County Zoning Advisory Committee approval of Item No. 2016-0003-SPH

Should you have any questions regarding this matter, please contact Mr. Richard Zeller at 410-229-2332 or 1-866-998-0367 (in Maryland only) extension 2332, or by email at (rzeller@sha.state.md.us).

Sincerely,

David W. Peake
Metropolitan District Engineer
Baltimore & Harford Counties

DWP/RAZ

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon
Deputy Administrative Officer and
Director of Permits, Approvals and Inspections

DATE: August 4, 2015

FROM: Andrea Van Arsdale
Director, Department of Planning

SUBJECT: 9025 Cuckold Point Road

INFORMATION:

Item Number: 16-003

Petitioner: Ken Boone

Zoning: BL

Requested Action: Special Hearing

SUMMARY OF RECOMMENDATIONS:

The Department of Planning has reviewed the Petition for a Special Hearing to determine whether the Administrative Law Judge should approve amendments to previous restrictions imposed in Zoning Cases 07-144-SPH, CBA-06-044, CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music and other and further relief as may be required.

Testimony in the aforementioned cases established the fact of the prior use of the property as a "nightclub" which is not listed as an allowed use in the zone. Upon a site visit and discussions with the petitioner's counsel, the Department understands the future use of the property will be as a permitted restaurant that will have music, both live and reproduced, as an accessory component.

The Department has no objection to the granting of the petitioned zoning relief conditioned upon the following:

There shall be no dance floor, nor shall the restaurant become a "nightclub" as defined in the BCZR Section 101.1 and the Building Code of Baltimore County.

All accessory music shall be limited to reasonable sound levels so as not to disturb adjacent properties.

All accessory music shall be limited to the following hours or as may be otherwise established by the Administrative Law Judge:

a. No outdoor music after 10:00 p.m. Monday thru Saturday.

b. No indoor music after 12:00 a.m. (midnight) Monday thru Saturday.

c. No music after 8:00 p.m. on Sundays.

For further information concerning the matters stated herein, please contact Bill Skibinski at 410-887-3480.

Division Chief: Kathy Schlabach

AVA/KS

C: Bill Skibinski

TO: PATUXENT PUBLISHING COMPANY
Tuesday, September 8, 2015 Issue - Jeffersonian

Please forward billing to:
Lawrence Schmidt 410-821-0070
Smith, Gildea & Schmidt
600 Washington Avenue, Ste. 200
Towson, MD 21204

NOTICE OF ZONING HEARING

The Administrative Law Judge of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 2016-0003-SPH
9025 Cuckold Point Road
SE/s of Cuckold Point Road, 15 ft. SW of the centerline of 5th Avenue
15th Election District – 7th Councilmanic District
Legal Owners: Boone Kondylas, LLC, Ken Boone

Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music; and for such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Hearing: Monday, September 28, 2015 at 10:00 a.m. in Room 205, Jefferson Building, 105 West Chesapeake Avenue, Towson 21204

Arnold Jablon
Director of Permits, Approvals and Inspections for Baltimore County

NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ADMINISTRATIVE HEARINGS OFFICE AT 410-887-3868.
(2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

CBCA

F100D

PETITION FOR ZONING HEARING(S)

To be filed with the Department of Permits, Approvals and Inspections

To the Office of Administrative Law of Baltimore County for the property located at:

address 9025 Cuckold Point Road **which is presently zoned** BL

Deed Reference 35488/00133 10 Digit Tax Account # 1 5 0 8 7 9 0 1 1 0

Property Owner(s) Printed Name(s) Boone Kondylas, LLC

CASE NUMBER 2016-0003-SPH **Filing Date** 7/6/15 **Estimated Posting Date** __/__/_____ **Reviewer** BD

(SELECT THE HEARING(S) BY MARKING X AT THE APPROPRIATE SELECTION AND PRINT OR TYPE THE PETITION REQUEST)

The undersigned legal owner(s) of the property situate in Baltimore County and which is described in the description and plan attached hereto and made a part hereof, hereby petition for:

1. ✓ **a Special Hearing** under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

Please see attached.

2. ____ **a Special Exception** under the Zoning Regulations of Baltimore County to use the herein described property for

3. ____ **a Variance** from Section(s)

of the zoning regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons: **(Indicate below your hardship or practical difficulty or indicate below "To Be Presented At Hearing". If you need additional space, you may add an attachment to this petition)**

TO BE PRESENTED AT HEARING

Property is to be posted and advertised as prescribed by the zoning regulations.
I, or we, agree to pay expenses of above petition(s), advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.
Legal Owner(s) Affirmation: I / we do so solemnly declare and affirm, under the penalties of perjury, that I / We are the legal owner(s) of the property which is the subject of this / these Petition(s).

ORDER RECEIVED FOR FILING
Date 10/22/15
By BD

Contract Purchaser/Lessee:

Name- Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

Legal Owners:

Boone Kondylas, LLC
Ken Boone

Name #1 – Type or Print Name #2 – Type or Print

Signature #1 Signature # 2

9025 Cuckold Point Road, Sparrows Point, MD

Mailing Address City State

21219 kboone@tidalwaterdirect.com

Zip Code Telephone # Email Address

Attorney for Petitioner:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name- Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

Representative to be contacted:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name – Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

REV. 2/23/11

ATTACHMENT TO PETITION FOR ZONING HEARING

9025 Cuckold Point Road
15th Election District
7th Councilmanic District

Special Hearing:

1. To amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music; and

2. For such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Item #0003

CENTURY ENGINEERING

10710 Gilroy Road
Hunt Valley, MD 21031

Zoning Description for
9025 Cuckold Point Road*

Beginning at a point on the southeast side of Cuckold Point Road which is 30 feet wide, at the distance of fifteen feet southwest of the centerline of Fifth Street which is 30 feet wide. Being Lots 500 through 505 in the subdivision of Swan Point as recorded in Plat Book L.McL.M. # 9, Folio #5. Containing 1.031 acres of land, more or less. Also known as 9025 Cuckold Point Road and located in the 15th Election District and the 7th Councilmanic District.

STATE OF MARYLAND
BRYAN JASON HAYNIE
No. 21139
PROFESSIONAL LAND SURVEYOR

W:\file\login2\ld\ld06\descriptions\9025 Cuckold Point Road-08-17-06
* Legal Description from Case No. 07-144-SPH

IN 144

Item # 0003

DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT
ZONING REVIEW

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

The Baltimore County Zoning Regulations (BCZR) require that notice be given to the general public/neighboring property owners relative to property which is the subject of an upcoming zoning hearing. For those petitions which require a public hearing, this notice is accomplished by posting a sign on the property (responsibility of the petitioner) and placement of a notice in a newspaper of general circulation in the County, both at least fifteen (15) days before the hearing.

Zoning Review will ensure that the legal requirements for advertising are satisfied. However, the petitioner is responsible for the costs associated with these requirements. The newspaper will bill the person listed below for the advertising. This advertising is due upon receipt and should be remitted directly to the newspaper.

OPINIONS MAY NOT BE ISSUED UNTIL ALL ADVERTISING COSTS ARE PAID.

For Newspaper Advertising:

Item Number or Case Number: 2016-0003-SPH

Petitioner: Boone Kondylas, LLC

Address or Location: 9025 Cuckold Point Road

PLEASE FORWARD ADVERTISING BILL TO:

Name: Lawrence E. Schmidt, Esquire

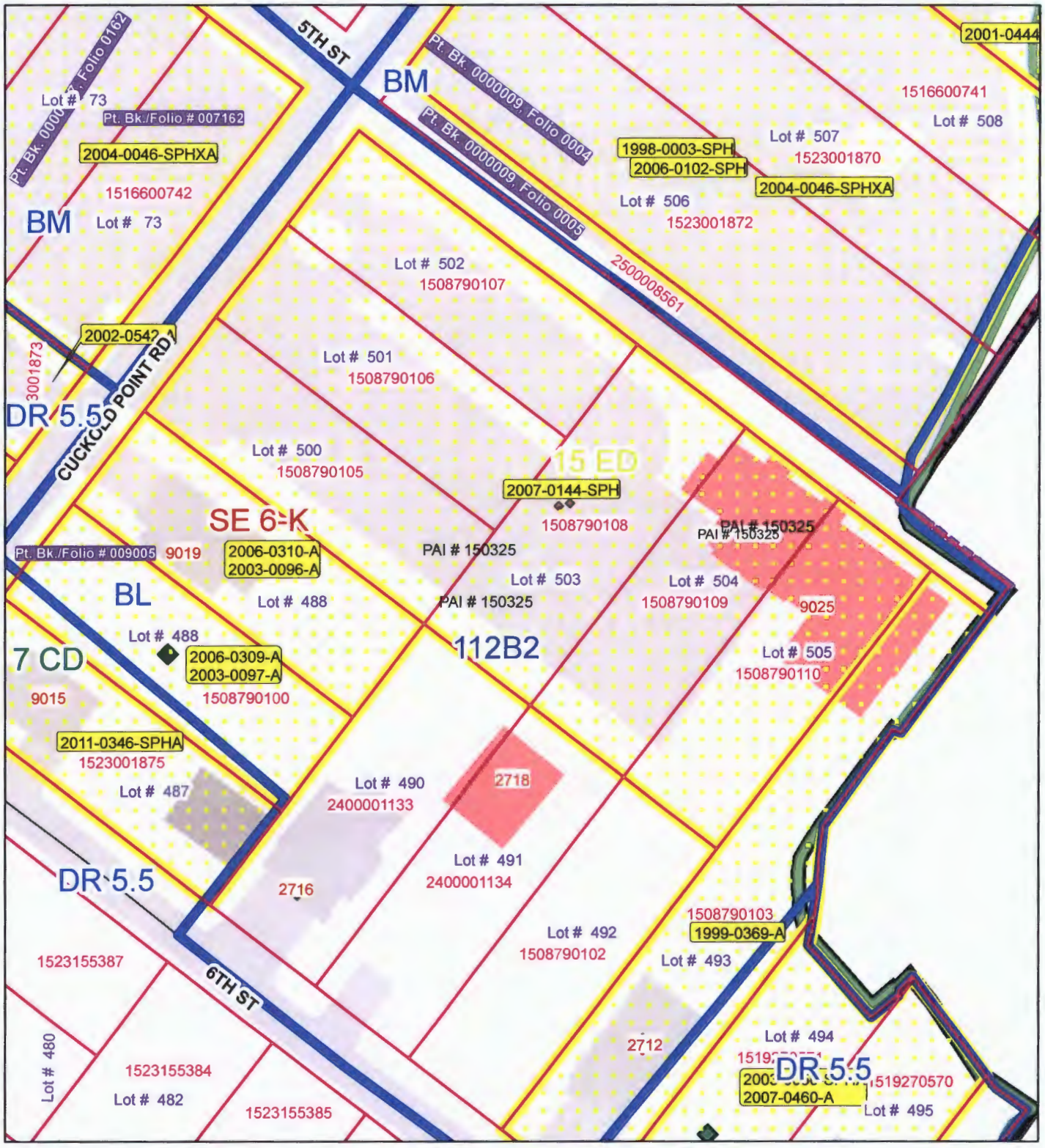
Address: Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Telephone Number: 410-821-0070

Revised 2/20/98 - SCJ


BM
BM
BL
DR 5.5
290'
170'
160'
115'
130'
58'
80'
58'
225'
9019
9025
9015
2718
2716
2712
2708
2704
2711
CUCKOLD POINT RD
61ST ST
SWAN AVE
103 Feet

9025 Cuckold Point Road



Publication Date: 7/2/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

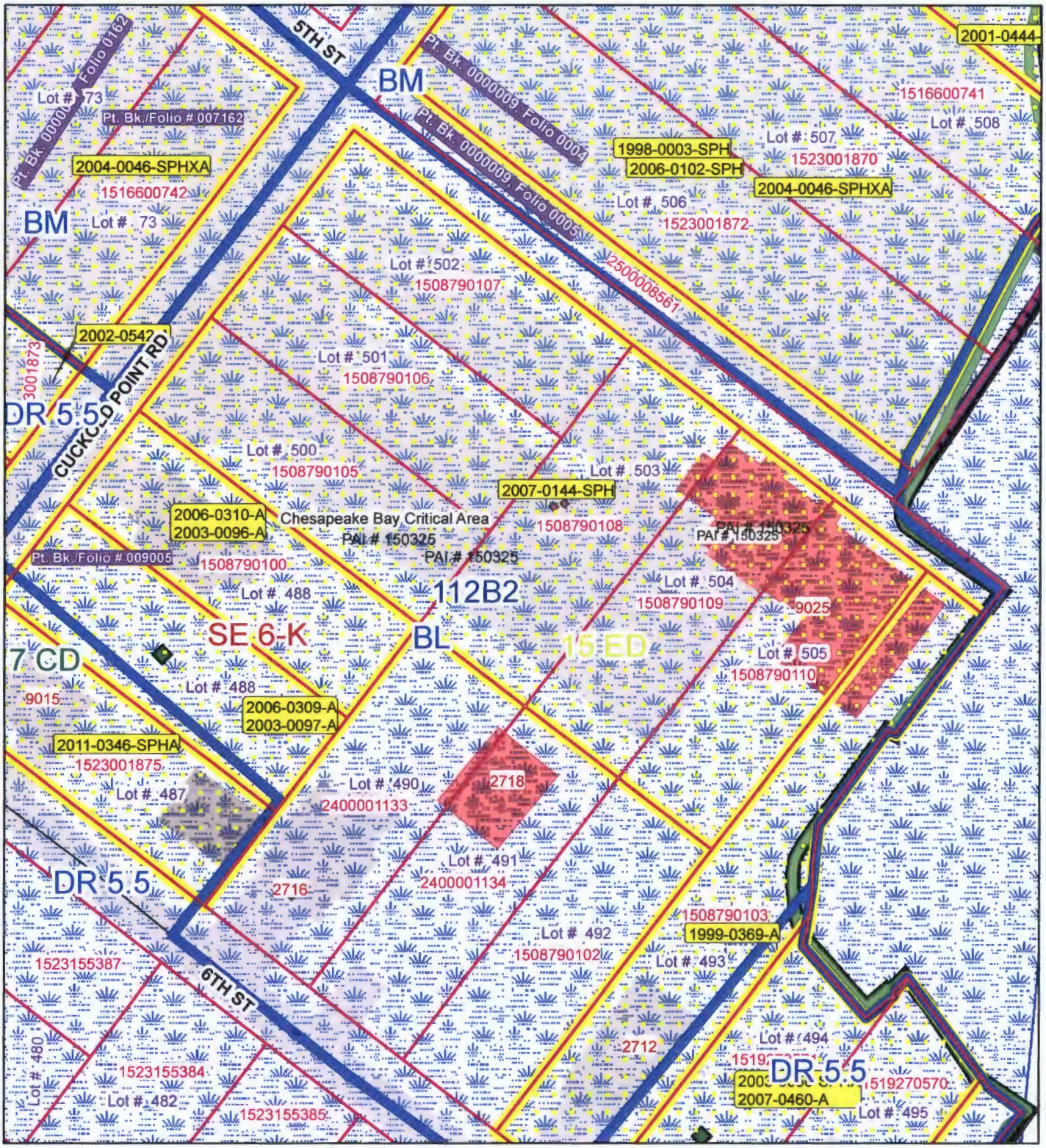
N
W E
S

0 15 30 60 90 120 Feet

1 inch = 60 feet

Item #0003

Chesapeake Bay Critical Area



Publication Date: 7/6/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

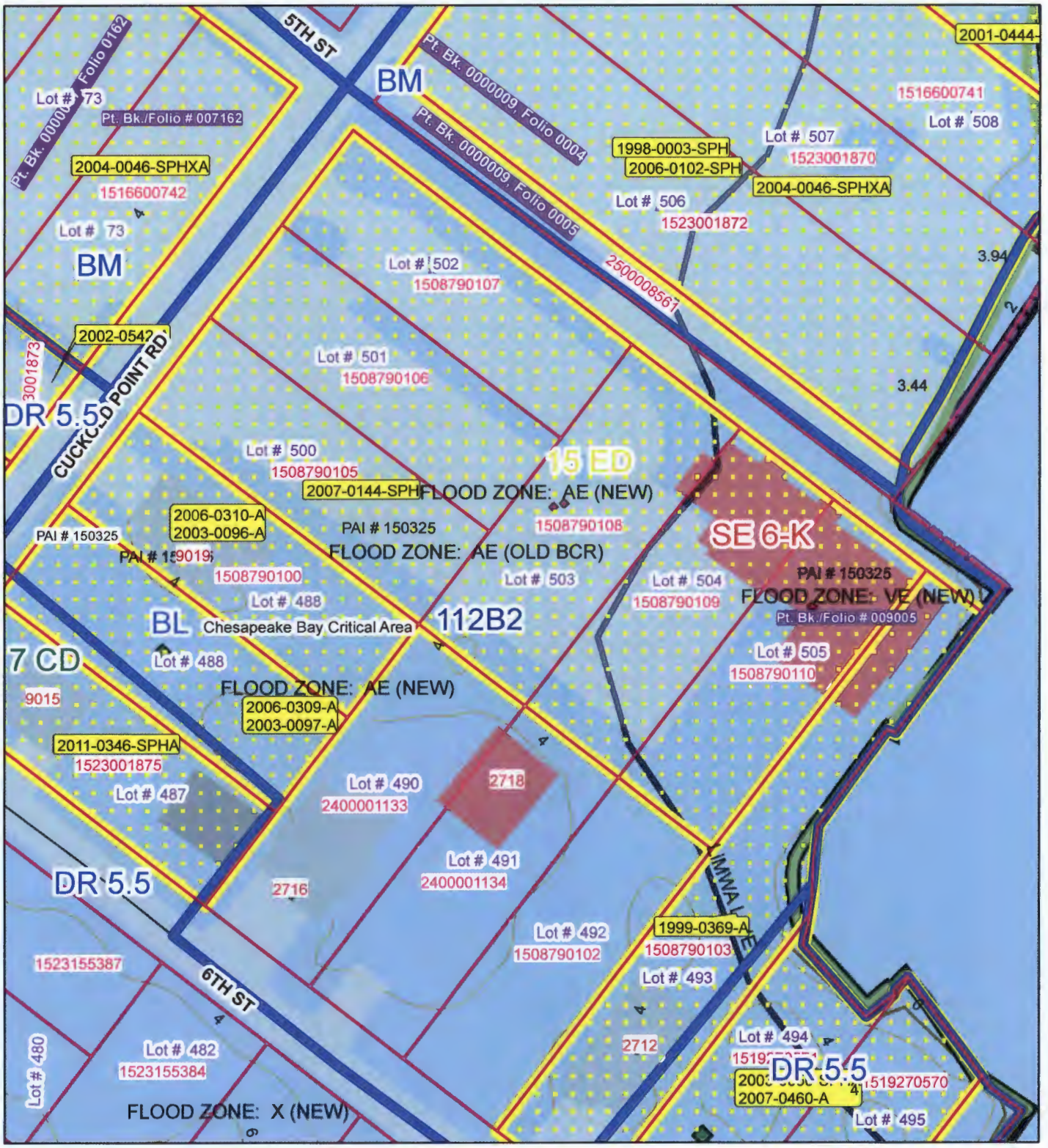
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0 15 30 60 90 120 Feet

1 inch = 60 feet

Item #0003

Elevations and Flood Hazards



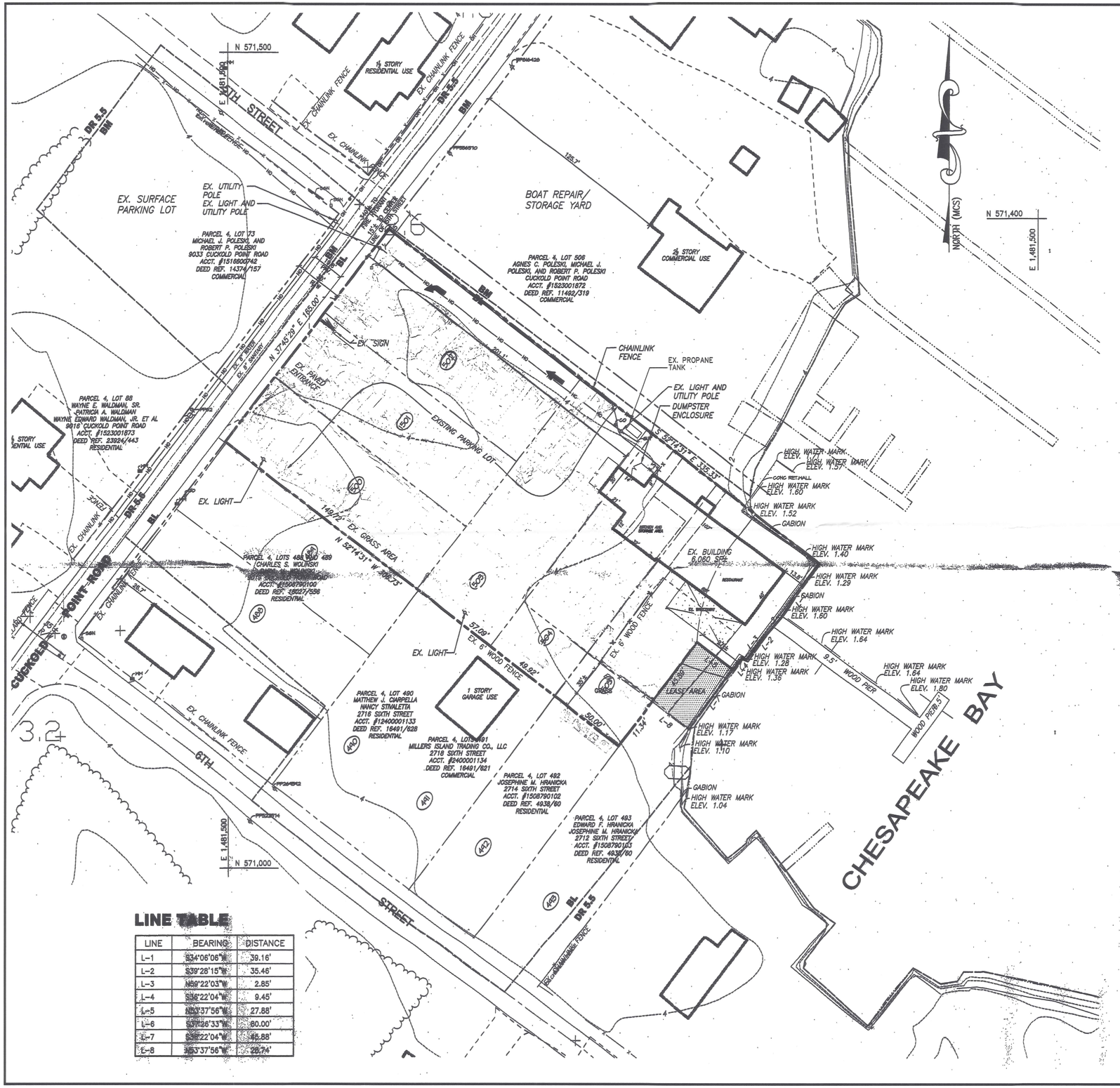
Publication Date: 7/6/2015

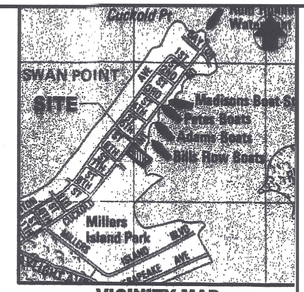
Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

0 15 30 60 90 120 Feet

1 inch = 60 feet

Item #0003





VICINITY MAP
SCALE: 1"=1000'

PROPERTY OWNERSHIP

OWNER: BOONE KONDYLAS LLC
9025 CUCKOLD POINT ROAD
SPERROWS POINT, MARYLAND 21219-1635

GENERAL NOTES:

1.	ZONING:	BL
2.	LOT AREA:	
	GROSS ACREAGE	1.276 AC± (55,594 SQ. FT.)
	NET ACREAGE	1.219 AC± (53,119 SQ. FT.)
3.	ZONING MAP:	112B2
4.	PLAT REFERENCE:	9/4
5.	CENSUS TRACT:	4519.00
6.	WATERSHED:	13
7.	SUBSEWERSHED:	43
8.	SEWAGE PLAN DESIGNATION:	S1
9.	WATER SUPPLY PLAN DESIGNATION:	W1
10.	REGIONAL PLANNING DISTRICT:	331
11.	ELECTION DISTRICT:	15TH
	COUNCILMANIC DISTRICT:	7TH
12.	EXISTING USE:	RESTAURANT
13.	PROPOSED USE(S):	RESTAURANT

14. BUILDING AREA:

EXISTING BUILDING:	
1ST FLOOR:	
EXISTING RESTAURANT	=2,230 SF±
KITCHEN/ STORAGE	=2,410 SF±
2ND FLOOR:	
STORAGE/ OFFICE	=1,420 SF±
OUTDOOR SEATING:	=1,600 SF±
TOTAL:	=7,660 SF±

15. PRIOR ZONING HEARINGS:
PETITION FOR SPECIAL HEARING 5/30/07 CASE NO. 07-144-SPH
PETITIONER REQUESTED DETERMINATION AS TO WHETHER THE USE OF THE B.L. ZONED PROPERTY AT 9025 CUCKOLD POINT ROAD IS IN VIOLATION OF THE ZONING REGULATIONS. AND SPECIFICALLY, IS THE RESTAURANT, WHICH PROVIDES MUSIC DURING THE DAY, A "NIGHTCLUB" AS DEFINED IN SECTIONS 101,102.1 AND 230. THE ZONING COMMISSIONER ORDERED THAT THE PLAYING OF OUTDOOR MUSIC EITHER BY WAY OF AN OUTSIDE SPEAKER, LIVE/OR RECORDED ENTERTAINMENT BE DISCONTINUED. DENIED 5/30/07. DECISION APPEALED TO MARYLAND STATE COURT OF SPECIAL APPEALS.

15. EXISTING CURB STOPS TO REMAIN.
16. EXISTING COMPACTED GRAVEL AND MACADAM TO REMAIN.
17. NO COMMERCIAL PERMITS WERE FOUND.
18. THIS PLAN WAS PREPARED FROM A 2010 MORRIS & RITCHIE ASSOCIATES, INC. SURVEY AND FIELD MEASUREMENTS PERFORMED ON 6/29/2015.

LINE TABLE

LINE	BEARING	DISTANCE
L-1	S34°06'06"W	39.16'
L-2	S39°28'15"W	35.46'
L-3	N69°22'03"W	2.85'
L-4	S16°22'04"W	9.45'
L-5	N53°37'56"W	27.88'
L-6	S37°26'33"W	60.00'
L-7	S16°22'04"W	45.88'
L-8	N53°37'56"W	28.74'

Professional Certification
I hereby certify that these documents were prepared or approved by me, and that I am a duly licensed professional engineer under the laws of the State of Maryland.
Licence No.: 22538
Expiration Date.: 11-24-15

GRAPHIC SCALE
0 30 60 90
1 inch = 30 ft.

CMS Associates LLC
4925 Ellis Lane
Ellicott City, Maryland 21043
Tel. (410) 988-2436
Contact: Geoffrey L. Ciniero, PE
www.cms-engineering.net
PLANNING
ENGINEERING
SITE ANALYSIS
PROJECT MANAGEMENT

REV. NO.	DATE	REVISIONS PRIOR TO APPROVAL

9025 CUCKOLD POINT ROAD
"DOCK OF THE BAY"
PLAN TO ACCOMPANY ZONING APPLICATION
COUNCILMANIC DISTRICT 7
ELECTION DISTRICT 15
BALTIMORE COUNTY MARYLAND

PLAN NO.:
SCALE: 1"=30'
DATE: 6/30/15
SHEET 1 OF 1
FILE NO: 16-009

#2016-0003-SPH

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET AND FINANCE
MISCELLANEOUS CASH RECEIPT

No. 127362

Date: 7/6/15

Fund	Dept	Unit	Sub Unit	Rev Source/ Obj	Sub Rev/ Sub Obj	Dept Obj	BS Acct	Amount
001	806	0000		6150				500 00

Total: 500 00

Rec From:

For: Zoning hearing - case # 2016-0003-SPH

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER GOLD - ACCOUNTING
PLEASE PRESS HARD!!!!

PAID RECEIPT
BUSINESS ACTUAL TIME DRN
7/06/2015 7/06/2015 11:19:28 5
REG WS05 WALKIN RB05 LR0
>>RECEIPT # 802508 7/06/2015 OFLN
Dept 5 520 ZONING VERIFICATION
CR NO. 127362
Recpt Tot $500.00
$500.00 CK $.00 CA
Baltimore County, Maryland

CASHIER'S VALIDATION

Pet Ex A

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-07-134

* * * * * * *

MAJORITY OPINION

These cases come to the Board on appeal from two decisions of the Code Enforcement Hearing Officer and a decision of the Zoning Commissioner. The two decisions of the Code Enforcement Hearing Officer found the Petitioner, Fifth Street, LLC, guilty of violations of the County Code and levied fines of $5,000.00 and $1,000.00. The appeal from the decision of the Zoning Commissioner found that the Dock of the Bay, operated by Fifth Street, LLC, was classified as a nightclub under the Baltimore County Zoning Regulations (BCZR) and was in violation of the BCZR for operating a nightclub within a Business Limited (B.L.) zone.

Since the cases basically involved an interpretation of the County zoning regulations and the same sets of circumstances, the Board consolidated the cases for hearing. A hearing on the merits was held on January 15, 2008. Testimony was taken in Case No. 07-144-SPH, and oral

Petitioner: ~~Petitioner~~ Case-in-chief Exhibit 2A

argument was conducted in Cases No. CBA-06-044 and No. CBA-07-134. Petitioner, Fifth Street, LLC, and Lawrence Thanner, Legal Owner, was represented by J. Carroll Holzer, Esquire. Protestants, Matthew J. and Nancy Jean Ciarpella, Phil and Kay Sessa, Charlie and Darrell Wolinski, Michael and Robert Poleski, David and Vena Sheck, Ken Schoyl and Tammy Novak, Doug W. Waldmann, et al, Louis Petrovia, Robert Haas, David Znamirowski, David McWilliams, and Terri Poleski, were represented by Francis X. Borgerding, Jr., Esquire. Baltimore County was represented by Nancy C. West, Assistant County Attorney. The parties were given the opportunity to file briefs on February 19, 2008. A public deliberation was held on March 13, 2008.

Background

Fifth Street, LLC, and Lawrence J. Thanner, its Resident Agent, operates the Dock of the Bay restaurant offering dining facilities and services at its location at 9025 Cuckold Point Road, Millers Island, in Baltimore County, Maryland. On August 8, 2006, the Dock of the Bay was cited for a Code violation, with a proposed penalty of $5,000.00, for operating a nightclub in a B.L. zone. In addition, Fifth Street, LLC, was cited for erecting a tent on the premises without obtaining the required permit from the County. A hearing was held before the Code Enforcement Hearing Officer on August 23, 2006, and a decision was rendered on August 25, 2006, ordering the Respondent to remove the tent and finding that the property "is being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use and continued unabated despite receiving notice of violation on May 12, 2006. A restaurant with dancing and/or live or recorded entertainment is not a permitted use in a B.L. zone."

After that hearing, Fifth Street, LLC, filed a Petition for Special Hearing in Case No. 07-144-SPH. This Petition requested the Zoning Commissioner to interpret the zoning regulations for Baltimore County with respect to the operation of a nightclub.

The decision of the Zoning Commissioner finding that Fifth Street, LLC, and the Dock of the Bay was a restaurant providing music during the day and was a "nightclub" as defined in BCZR § 101, 102.1, and 230, was dated May 30, 2007. Subsequent to that date, Fifth Street, LLC, was again cited for violation of the *Baltimore County Code* (BCC) for failure to obtain a permit for a tent and also for violation of BCZR § 101, 102.1, 230, and 500.6 for failure to cease operation of a nightclub in a B.L. zone. A second hearing was held before the Code Enforcement Hearing Officer and, by decision dated August 16, 2007, the Code Enforcement Hearing Officer again found Dock of the Bay in violation of BCZR for operating a nightclub in a B.L. zone and erecting a tent without obtaining the required permit. The Hearing Officer imposed a $1,000.00 fine in that case.

Testimony and Evidence

Petitioner presented Lawrence J. Thanner, Managing Member of Fifth Street, LLC, as their principal witness. Mr. Thanner stated that the Dock of the Bay has been a restaurant since 1955 and, to his knowledge, always had music and on many occasions, providing live bands. Mr. Thanner opened the new Dock of the Bay restaurant in March of 2004 after refurbishing the building from the effects of Hurricane Isabel. Everything was completely refurbished and new equipment was installed in the restaurant.

Thanner stated that the restaurant has a 2,400 square foot rectangular bar at one end and has tables and chairs on the main floor to accommodate diners. He stated that the restaurant could seat about 150 to 160 patrons inside. In the summertime, he has an outside patio with an outside bar and tables with umbrellas and chairs for patrons to utilize. The restaurant has 14 boat

slips for transient boat customers. The restaurant also has a playground for children, with a wooden pirate ship to allow children to play on the playground. The restaurant opens every day at 11:00 a.m. and closes at 2:00 a.m. In the winter, the restaurant will close early when customers are gone. Thanner testified that the restaurant kitchen closes at 11:00 p.m., but that the bar will stay open until 2:00 a.m. He stated that the restaurant has a full commercial kitchen and provides a full menu of seafood, steaks, sandwiches, etc. He has licenses from the Baltimore County Health Department, which states that he is a restaurant, and a basic license from the State of Maryland, which also states that it is a restaurant.

The restaurant has ten television sets inside and two out on the patio. There is a house music system that plays radio and satellite radio inside and outside. There are outside speakers. The television sets are on all the time except when they have live entertainment.

Mr. Thanner stated that he does have live entertainment at the restaurant with a D.J. playing for karaoke participants and live bands on Friday and Saturday nights. On those occasions, the entertainment goes from 9:00 p.m. to 1:00 a.m. During the previous summer, he stated that he had live music on Saturday afternoon and Sunday afternoon from 4:00 p.m. to 8:00 p.m.

Mr. Thanner stated that he had stopped the music after 8:00 p.m. after the Liquor Board had told him to cease the music. He stated that he had full-scale bands in 2004 with no complaints, but in 2005, a Liquor Board inspector told him to "pipe down" and he still had the bands, but mostly duos or steel bands. He received complaints in May of 2006 from the outside music and wrote a letter to the County asking for clarification on May 14, 2006. This letter was sent to C. Raynor, inspector in the Baltimore County Department of Code Inspections and Enforcement. The letter listed a number of activities, which Mr. Thanner proposed to conduct at the Dock of the Bay and requested clarification as to how these items qualified as a nightclub

under the citation that he had received. This letter was presented as Petitioner's Exhibit #2 to the Board. Thanner stated that he received no response to his letter.

After he sent the letter, he contacted Attorney Carroll Holzer to file for a special hearing. Mr. Thanner stated that 70 percent of the sales at his restaurant were in food and 30 percent are beverages. He indicated that he does not charge for the live entertainment and is open until 2:00 a.m. when the live music is played. Mr. Thanner also stated that, when he has live entertainment, he does lower the lighting level in the restaurant. He stated that the live bands play quite loudly but that he has never been cited for having a noise level about 65 decibels at the property line. He also stated that he does not have any stage accessories for the bands except in the summertime when there is a small stage erected outside on the patio. His operating hours are 11:00 a.m. to 2:00 a.m., which he considered to be normal, but under State law, you cannot sell alcohol past 2:00 a.m. With respect to defined aisles for the tables and chairs, he stated that tables and chairs are set in certain ways to form aisles. He did admit that some time when the bands are playing inside people would move the tables and chairs and dance between the tables. He does have facilities for serving alcoholic beverages and, as previously stated, the restaurant will accommodate 150 to 160 patrons.

Mr. Thanner argued that his operation should not be considered a nightclub based upon the criteria set forth in the International Building Code which has been adopted by the County. It was Mr. Thanner's position that he could not survive in the wintertime without the live music because the restaurant would not pay for itself based solely on food and drinks served during normal times without the music being available.

Mr. James H. Thompson, Supervisor of Code Enforcement, was called by Protestants as a witness and testified that he has worked in Zoning for 31 years, 13 of which as Supervisor of Code Enforcement, and that his office cited Mr. Thanner for being a nightclub operating in a

B.L. zone. Mr. Thompson stated that his office operates on a complaint basis only. He stated that they had had no complaints about the restaurant property before Mr. Thanner took over the property. It was his testimony that his office only reviews a situation based upon a complaint and, if the operation being considered provides live entertainment in a B.L. zone, it would be considered a nightclub and would not be allowed to operate. This would include karaoke, a person playing a piano, and strolling minstrels.

The Protestants presented Matthew Ciarpella, who has resided on Sixth Street adjacent to the Dock of the Bay for 3 years. Mr. Ciarpella complained of hearing the music even though the band was inside and it was wintertime. He stated that Monday through Thursday there were no problems since no music was played, and that when the music was played, it was loud enough for him to hear in his house even though it was not played outside.

Kay Sessa also testified stating that she lived at Sixth Street, which is about 650 feet from the Dock of the Bay. She stated that she heard the karaoke being played and that, although the previous restaurant had live bands, they stopped playing in 1970. She stated that she has been bothered by the live bands of the Dock of the Bay since 2004.

Patricia Waldmann, Charles Wolinski, and Brad Metheny and Bonnie Metheny all testified that they were neighbors living approximately 100 to 250 feet from the Dock of the Bay and that the music played on Friday and Saturday nights was so loud that they could not enjoy a peaceful night's sleep. Wolinski testified that he had gone into the Dock of the Bay and had witnessed that the tables were moved when the bands were playing and that there were not always aisles for the tables.

Finally, George Abendschoen, the Administrator of the Baltimore County Liquor Board, testified that there had been a file opened by his office on the Dock of the Bay. Based upon complaints that were received by the Liquor Board concerning the music that was played, an

inspector, Dan Crockett, had gone to the Dock of the Bay to investigate the matter. There was no determination by the Liquor Board. The report by the inspector, Dan Crockett, was received for identification only but was not admitted as part of the evidence in this matter.

Cases No. CBA-06-044 and No. CBA-07-134

Subsequent to the evidence presented in the special hearing case, the parties argued with respect to the civil citations and the decisions of the Hearing Officer in the above matters. Mr. Holzer contended that, under § 500.6 and 7 of the BCZR, the Hearing Officer had no authority or jurisdiction to interpret the *Baltimore County Zoning Regulations* with respect to whether or not the Dock of the Bay fell under the definition of nightclub. He stated that that was restricted solely to the authority of the Zoning Commissioner. These cases should be determined on the basis of the decision that this Board makes with respect to finding as to whether or not the Dock of the Bay is a nightclub under the BCZR. Mr. Holzer argued that Mr. Thanner had, in good faith, sought clarification in the Baltimore County Department of Code Inspection and Enforcement and received no clarification from that office. He also stated that § 3103 of the *International Building Code*, which has been adopted by the County, applies to structures erected for less than 180 days. He stated that Counsel for the Protestants in his letter claims that, in addition to live music, the tent was up for over 8 months. If that is the case, he felt that his client was cited under the wrong citation. He stated that it was not clear what the fine of $5,000.00 covered and requested a reduction in the fine if the Board finds that the operation is a nightclub. There was no indication as to whether or not there was any evidence presented to the Code Enforcement Hearing Officer with respect to how long the tent was erected at the Dock of the Bay operation.

With respect to the second citation, Mr. Holzer indicated that the second charge should have been given the same file number, even though the first charge was on appeal to the Board.

He stated that the Code Enforcement Hearing Officer in Case No. CBA-07-134 found that the Zoning Commissioner had determined that the playing of outdoor music must be discontinued but did not address the playing of indoor music. The Code Enforcement Hearing Officer found the Dock of the Bay to be a nightclub and therefore in violation of the BCZR. Mr. Holzer wanted further clarification of the fine levied in the second hearing.

In addition, Mr. Holzer indicated that the Zoning Commissioner had received an inquiry from the Liquor Board with respect to his decision. Evidently, the Zoning Commissioner replied to the inquiry, stating that he had determined that the music being played inside and outside the building was prohibited. Mr. Holzer felt that he had to appeal this letter because it was his position that the Zoning Commissioner had not taken any position with respect to the inside music.

Counsel for the Protestants argued to affirm the decision of the Code Enforcement Hearing Officer. He argued that both decisions were affirmed by the decision of the Zoning Commissioner in which he found that the operation was a nightclub. There was no prejudice or reversible error committed and that the Hearing Officer should be affirmed on his findings with respect to the nightclub definition. With respect to the tent, he argued that the tent had been put up on two separate occasions and that the Hearing Officer was correct in finding a violation on both occasions.

Ms. West argued solely with respect to the jurisdictional aspect and it was her position that, under the Code, Article 3, § 6-101, the Hearing Officer had the authority to hear the two cases for finding and was correct in finding the violations.

Decision

There is no question that the Dock of the Bay restaurant is located in a B.L. zone. The B.L. zone uses permitted, as of right, include under § 230.4 a standard restaurant, tea room,

convenience store, and dairy barn. Section 101 of the BCZR defines a standard restaurant as "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment."

The definition of "nightclub" is found in BCZR § 101, List of Definitions, and states:

> A tavern or other establishment which permits live or recorded entertainment with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County.

Section 101 also defines a tavern as:

> An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of a nightclub, as defined in these regulations, shall be considered a nightclub.

A tavern and standard restaurant are allowed in a B.L. zone; a nightclub is not allowed.

The International Building Code, adopted in Bill No. 1-05 by the County Council, includes, in § 303.1:

> 303.1 Assembly Group A:
>
> Assembly Group A occupancy includes, among others, the use of a building or structure or a portion thereof, for the gathering together of persons for purposes such as civic, social, or religious functions, recreation, food or drink consumption, or awaiting transportation....

Following the major assembly group are the five sub-assembly groups. A-2 is the primary group with which we are concerned in this matter.

> A-2. Assembly uses intended for food and/or drink consumption, including but not limited to:
>
> banquet halls
> nightclubs
> restaurants
> taverns and bars

In a discussion of the various groups, the Code states:

> ...In the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high....Darkened spaces in theaters, nightclubs, and the like serve to increase hazards. In emergencies, the congestion caused by large numbers of people rushing to exits can cause panic conditions.

The characteristics for sub-assembly group A2 state:

Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:

- low light levels;
- entertainment by a live band or recorded music generating above-normal sound levels;
- no theatrical stage accessories;
- later than average operating hours;
- tables and seating arranged or positioned so as to create ill-defined aisles;
- a specific area designated for dancing;
- service facilities for alcoholic beverages and food; and
- high occupant load density.

There follows an example which states:

Example: The Downtown Club, a popular local nightclub /dance hall, features a different band every weekend [See figure 303.1(5)]. It is equipped with a bar and basic kitchen facilities so that beverages and appetizers can be served. There is a platform for a band to perform on, a dance floor in front of the platform, and numerous cocktail tables and chairs. The tables and chairs are not fixed, resulting in a haphazard arrangement such that there are no distinct aisles. When the band performs, the houselights are dimmed and spotlights are keyed in on the performers. The club is equipped with a sound system that is used at loud levels. The club is open until 3:00 a.m. – the latest time the local jurisdiction will allow.

From this descript of The Downtown Club, one can readily see that the appropriate classification is Group A-2. Sometimes, however, it is not this easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building.

The Board recognizes that this decision could have far-reaching effects in the County. The definition of "nightclub" in the BCZR is certainly far from being crystal clear. As testified to by the Building Inspector, the inspection department operates solely on a complaint basis. Their criteria for finding a nightclub would be any restaurant, tavern or bar which provides live

entertainment. This could be anything from a piano player playing background music, a strolling minstrel, or a 12-piece orchestra.

In reviewing the characteristics for the group of facilities classified as A-2 in the Building Code, the Board finds as follows:

1. Low light levels.

Mr. Thanner testified that normally the restaurant is lit at what one would consider a normal level. However, when the band is playing, he did admit that the lights were turned down.

2. Entertainment by a live band or recorded music generating above-normal sound levels.

Mr. Thanner indicated that on Fridays, Saturdays, and Sundays, he has live entertainment, be it karaoke, a D.J., or a small band. In fact, this is a major part of his business and he feels that, without the music, the Dock of the Bay cannot survive during the winter months. The question of whether or not the band and the music is played above normal sound levels is one that would probably be determined by the persons listening to it. Certainly, the neighbors surrounding the Dock of the Bay feel that the sound level of the music is above normal, even during the winter months when music is played inside. There has been no indication that the restaurant has been declared to be in violation of noise levels under the Maryland Occupational Safety and Health Act. However, there is no question that the bands do play at sound levels which extend beyond the four walls of the restaurant.

3. No theatrical stage accessories.

Mr. Thanner testified that there are no theatrical stage accessories, particularly during the winter months. He did state that on weekends during the summer time there is a small stage for the bands that play outside until 8:00 p.m.

4. Later than average operating hours.

Mr. Thanner testified that normal operating hours of the restaurant are 11:00 a.m. to 2:00 p.m. He stated that during the winter the restaurant would close early if there were no patrons. He also indicated that his kitchen closes at 11:00 p.m.; however, the facility will stay open until 2:00 a.m., which is the normal closing hour required by the County for facilities serving liquor.

5. Tables and seating arranged or positioned so as to create ill-defined aisles.

Mr. Thanner again testified that the tables and chairs in the restaurant are generally fixed according to aisles for serving. However, he did state that when a band plays it is normal for individuals to move chairs and tables to allow for the band and also to allow people to dance in between the tables.

6. Specific area designated for dancing.

Mr. Thanner testified that there is no specific dance area. However, once again he did indicate that when the bands are playing people would move the tables and dance in the aisles among the tables.

7. Service facilities for alcoholic beverages and food.

There is no question that the Dock of the Bay serves alcohol and food. Mr. Thanner was quite emphatic that 70 percent of his business comes from the food operation and probably 28 to 30 percent from the alcoholic beverages.

8. High occupant load density.

There is no definition of what a high occupant load density is. Mr. Thanner testified that the restaurant would seat 150 to 160 individuals. On nights when there are bands playing, there appears to be a large crowd coming into the restaurant and one would probably find that it is filled to capacity.

The Board finds that the Dock of the Bay meets at least six of the criteria set forth in Group A-2. This would be criteria 1, 2, 3, 4, 7 and 8.

While our dissenting Member would find that there is no violation when the music is played inside the facility, he would find that it is a nightclub when music is played outside. The Majority finds that the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR. The second criterion does not differentiate between inside and outside noise. The fact that the Dock of the Bay does not provide music Monday through Thursday is not controlling in the opinion of this Board. Playing loud music on Friday through Sunday that can be heard by the neighbors makes the operation a nightclub under the present definition of the BCZR.

The Board is not unmindful that the definition of a nightclub, under the BCZR, can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.M. zones, might be considered "nightclubs" under the present criteria of the BCZR. It is not for the Board to change the definition but for the County Council to consider.

Cases No. CBA-06-044 and No. CBA-07-134

The Board has considered the arguments and evidence presented to the Board and the Code Enforcement Hearing Officer in the above matters.

The Board finds that the Code Enforcement Hearing Officer is authorized to interpret the definition of a nightclub under his duties to hold hearings and issue final orders under § 3-6-206 of the BCZR. In any event, the Zoning Commissioner had found the Dock of the Bay to be a nightclub prior to the holding of the second Code Enforcement hearing. Therefore, the Code Enforcement Hearing Officer could rely on that decision to uphold his findings.

The Board will affirm the decision of the Hearing Officer in both matters but will reduce the penalty to a $1,000.00 fine for operating as a nightclub in a B.L. zone and a $1,000.00 for failure to obtain a permit to erect a tent on a temporary basis at the Dock of the Bay restaurant.

ORDER

IT IS THEREFORE this 4th day of June, 2008, by the Board of Appeals for Baltimore County,

ORDERED that the Petition for Special Hearing pursuant to § 500.6 and 500.7 of the Baltimore County Zoning Regulations requesting a determination as to whether the use of the B.L. zoned property at 9025 Cuckold Point Road is in violation of the zoning regulations, and, specifically, as to whether the facility which provides music at this location is a "nightclub" as defined in the BCZR §§ 101, 102.1 and 230 is hereby answered in the affirmative and the playing of music by way of speaker system, live or recorded entertainment must be discontinued; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-06-044 be and is hereby **AFFIRMED;** and further that the fine is reduced to $1,000.00 for operating a nightclub in a B.L. zone; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-07-134 for operating a nightclub in a B.L. zone and for erecting a temporary tent without a permit be and is hereby **AFFIRMED**; and further that the fine of $1,000.00 for the erection of the tent is **AFFIRMED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules.*

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Wendell H. Grier

Pet 23

IN THE MATTER OF THE APPLICATION OF	*	BEFORE THE
FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL	*	COUNTY BOARD OF APPEALS
HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH	*	OF
STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT	*	BALTIMORE COUNTY
7TH COUNCILMANIC DISTRICT	*	Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT	*	Case No. CBA-06-044
9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT	*	
7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF	*	
CODE ENF. HEARING OFFICER	*	
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT	*	Case No. CBA-07-134
9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT	*	
7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF	*	
CODE ENF. HEARING OFFICER	*	

* * * * * * *

DISSENTING OPINION

I respectfully disagree with the opinion of the Majority.

In support thereof, I draw attention to the very arguments and content of the Majority Opinion. Based upon the testimony presented and summarized in the Majority Opinion, we are faced with a commercial enterprise described as follows:

- 150 to 160 seated patrons at tables and chairs with defined aisles
- a playground for children on the premises, including a wooden pirate ship
- operating hours of a commercial kitchen of 11 a.m. to 11 p.m. with a full menu of steaks, seafood, sandwiches, etc.

Case-in-chief
Petitioner: ~~Motion~~ exhibit 23

- Health Department and State of Maryland licenses as a restaurant
- 70% of total receipts related to food service, while only 30% is related to alcohol
- no cover charge or other entrance fee
- no stage accessories inside the premises

On its face, absent further imposed factors, the above would appear to be a common sense discussion of a restaurant.

In this particular care there is no question that there is live and musical entertainment provided on a limited basis at the location. There are TV sets in the premises, and there is karaoke and DJ music on two nights of the week. The definition of a restaurant in § 101 of the Baltimore County Zoning Regulations (BCZR) is a clear statement that "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment." However, the definition of "nightclub" is exceedingly unclear and circuitous. It is quoted on page nine of the Majority Opinion and is based upon the essential definition of a "tavern" which permits music and is further "characterized" as a nightclub by the Building Code.

Unfortunately, this is a situation of law in which Baltimore County has seen fit to adopt a "one size fits all" International Building Code (IBC) as opposed to creating or evolving a Building Code that reflects the particular realities and common sense observations of this jurisdiction. Once again, the Majority has appropriately quoted the salient portions of the adopted International Building Code in an effort to determine whether the subject site is indeed a nightclub. Group A2 is the subgroup of the IBC which is applicable to this discussion. Group A2, while providing a general description of "uses intended for food and/or drink consumption,"

includes such disparate uses as banquet halls, nightclubs, restaurants, taverns, and bars. Common sense cannot but reach the inalterable observation that there are significant differences (or should, in reality, be) between these different uses, notwithstanding the fact that the authors of the "one size fits all" IBC determined to lump them together. In a discussion of the characteristics for the sub-assembly Group A2, the Majority, on page ten of its Opinion, quotes the Code as follows:

> ...Group A2 includes occupancies in which people congregate in high densities for social entertainment such as drinking and dancing (e.g., nightclubs, dancehalls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). **[Emphasis added.]**

Clearly, even the generalists who produced the IBC recognized that facilities utilized for purely social gathering were different than those used primarily for food and drink.

There follows a list of characteristics in which "some or all" would be relevant to a determination of the actual identity of a particular site use. This writer disagrees with the evaluation of the Majority as to these characteristics and would note those disagreements:

1. Low light levels – There is no question that the vast majority of the time the subject site lighting is at a normal level for a restaurant. That the lighting is sometimes reduced as part of its ambience should not negate the general lighting scheme on most occasions.
2. Entertainment by a live band or recorded music generating above-normal sound levels – There is no question that there is live or recorded music both inside and outside the subject business on occasion. There is absolutely no testimony that the owners have ever been cited for allowing music or live entertainment to generate above-normal sound levels either inside or outside the premises of the restaurant. The Majority properly notes that there is no

indication "that the restaurant has been found to be in violation of noise levels under the Maryland Occupation Safety and Health Act." There is anecdotal testimony of neighbors, many of whom came into the area after the activities at this location had continued for many years, that there were levels of music and other sound that adversely affected their enjoyment of their property. None testified to filing complaints with the police, nor was there any information developed that the restaurant had been cited for violation of noise statutes. With all due respect to the neighbors, their determination is subjective to the extreme; nor does the record reflect any action taken regarding the restaurant by governmental enforcement agencies akin to that which has occurred over many years to limit and modulate above-normal generated sound levels at house parties, college fraternity events, and other occasions when the police were summoned for above-normal noise levels. On such occasions, there are recognized decibel levels that are acceptable, the violation of which will result in governmental action immediately. No such evidence of governmental action regarding this restaurant exists here.

3. There are no theatrical stage accessories in the subject premises.
4. Later than average operating hours – There is no testimony of any sort that there are any but normal restaurant and bar hours for this location. The restaurant's commercial kitchen is open 12 hours a day. As noted, the restaurant provides 70 percent of the income at the location. Clearly these activities are the primary purposes of the establishment.

5. Tables and seating arranged or positioned so as to create ill-defined aisles – There is no testimony that there is a special setup of tables or chairs (other then that appropriate to a restaurant) for the purpose of providing entertainment. In fact, it is simply a habit of some patrons to move their chairs and seating arrangements to fit the moment. One might also be able to say that there would probably be any number of occasions when music is played and no one determines to move chairs or tables. There is simply no on-going structural plan by the owner of the establishment to do so.
6. Specific area designated for dancing – There is no specific area designated by the owner for dancing. That occasionally action by customers to do so unofficially does not officially create such an area. Therefore, the absence of that clearly defined plan should indicate just the opposite conclusion.
7. Service facility for alcoholic beverages and food – As noted above, the vast majority of the income derived at the location is as the result of food service to patrons, including families.
8. High-occupant load density – Once again, the "one size fits all" Code gives us no indication as to what "high" means. There is undisputed testimony that the restaurant seats 150 to 160 individuals and that on occasion that maximum is reached. The seating limitation is for restaurant use and is another indicator of Baltimore County's "real life" views of the nature of the business.

It is the opinion of this writer that the criteria applied in the IBC does not clearly indicate that this location in any significant way meets the definition and requirements under the law to be termed a "nightclub." In fact, as is characteristic of most generalized and non-specific

criteria, the IBC itself (as quoted by the Majority on page ten of the Opinion) states that "sometimes however it is not easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building." It essentially tells us that the criteria is so broad and determinedly subjective discussion and conclusion that it should not be utilized in a vacuum. The actual facts of the use and description of the site being addressed must be utilized in order to reach any viable conclusion as to the sites' status under the law. These additional factors and inquiries do not appear to have been utilized by the enforcement authorities or the Zoning Commissioner in their respective determined by in this case.

Baltimore County (as well as most jurisdictions in Maryland) has a history of primarily restaurant and other food related establishments utilizing various music and entertainment accoutrements to enhance both the ambience and experience of the patrons. Whether those accoutrements are physical (such as a playground for children at this location) or television sets or music or piano player, a strolling minstrel, a singing waiter, or a roving "in character" presentation by staff, these activities do not render such an establishment a nightclub but rather a restaurant with some additional entertainment provided. The position of the majority however, would result in a finding of "Nightclub" for any restaurant establishment utilizing these activities. Such a result turns a blind eye to common sense.

This writer believes that the result reached by the Majority, with its admitted, far-reaching effects, is the classic "untended consequences" situation. I believe that the Code Enforcement authorities should at the least have utilized the instruction in the IBC language that other factors, such as those existing here, should have been utilized and therefore the decision by

the Majority, that this is a nightclub as opposed to a restaurant, is incorrect; and, moreover, does not reflect the actual reality of the situation.

As a final note, Mr. Thompson, of the Enforcement agency for the County, testified that their actions in this matter and as to other establishments under this section and scenario would be generated on a "complaint only" basis. While I will not dwell on the point, such selective enforcement appears to me to be contrary to the spirit and intent of any well-written regulation, is arbitrary and capricious, and possibly an "Equal Protection under the laws" violation. I believe that the appellate court should revisit this particular situation in order to confirm that the subject site in this case is indeed a restaurant and not a nightclub; and further, that the criteria for such determinations must include factors in addition to the bare generalities of the IBC. Additionally, I believe that the County Council should, as quickly as possible, revisit the issue and adjust the County Code sections as they relate to the use of entertainment in restaurants and negate now and avoid in the future a result such as this, which is not in the best interests of the citizens or economy of Baltimore County.

For all of the above, I dissent in the Opinion of the Majority.

Lawrence M. Stahl, Board Member

DATE: 6-04-2008

Ref 2C

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-07-134

* * * * * * *

RULING ON MOTION
FOR RECONSIDERATION AND CLARIFICATION

On June 4, 2008, the Board issued its decision in the above cases, finding that the Respondent was in violation of the Baltimore County Code (BCC) and levying a fine of $1,000.00 in lieu of the $3,500.00 that was levied by the Hearing Officer. A timely Motion for Reconsideration was filed by Counsel for the Respondent. The Motion raises five questions or issues.

Question 1 – How many of the criteria set forth in the Building Code can an establishment have before it is considered to be operating a nightclub?

Question 2 – Will the Board amend its Order to state that the Dock of the Bay Restaurant must discontinue its nightclub operations?

Petitioners Motion Exhibit 2C

Question 3 – Should the Petitioners be held liable for not adhering to a law which no one except the Board of Appeals in a split decision could define?

Question 4 – How can the Petitioner be fined for erecting a tent without a permit when the Petitioner was never charged with that violation?

Question 5 – Was the testimony given by neighbors of Dock of the Bay proper testimony?

Decision

The Board held a public deliberation on the Motion on August 12, 2008. The Board finds that the issues raised in questions 1 and 2 request an advisory opinion, which the Board does not render.

With respect to question #3 concerning the $1,000.00 fine, the Board finds that the fine was appropriate and it will stand. The question of whether or not there was a split decision makes no difference with respect to the assessment of the $1,000.00 fine.

As to question #4, the Board finds that the Respondent was charged with failure to obtain a permit for the tent that it erected on the property. The Code Enforcement notice of May 20, 2006, states that the Respondent should obtain a tent permit or remove the structure. The notice of June 7, 2006, states a failure to obtain a permit for the tent. The notice of August 14, 2006, has an amendment, "Remove the tent or obtain permit." The Board finds that the Respondent had adequate notice that it was being charged with respect to failure to obtain a permit for the tent.

In regard to question #5, the Board considers that the testimony which it received from the neighbors was appropriate testimony and it will not grant any review with respect to that testimony. Should the Respondent feel that the testimony is improper, it may contest that in the Circuit Court for Baltimore County.

Therefore, the Board, having considered all of the questions raised by the Respondent, will deny the Motion for Reconsideration. The Board's Opinion and Order issued on June 4, 2008, remains this Board's final decision in this matter.

IT IS THEREFORE ORDERED THIS 12th day of September 2008 that the Motion for Reconsideration filed in this matter is **DENIED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Wendell H. Grier

Lawrence M. Stahl

Ref 3

IN THE PETITION OF **FIFTH STREET, LLC** FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY	*	IN THE
	*	CIRCUIT COURT
IN THE CASE OF **FIFTH STREET, LLC** LEGAL OWNERS/PETITIONERS FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE S/E corner of Cuckold Point Road & Fifth Street (9025 Cuckold Point Road) 15th Election District, 7th Councilmanic District	*	FOR
	*	BALTIMORE COUNTY
Case Nos. 07-144-SPH, CBA-06-044, CBA-07-134 Before the County Board of Appeals	*	Case No.: 03-C-08-09996

* * * * * * * * * * * * * *

FINAL ORDER

Upon judicial review of the record, of memoranda filed by the parties, and of oral argument by counsel in open hearing on May 6, 2009, and for reasons stated at the conclusion of the hearing, it is, this 14th day of May, 2009, **ORDERED by the Circuit Court for Baltimore County, that the Order of the Majority Opinion of the County Board of Appeals of Baltimore County dated June 4, 2008**, as finalized by the September 12, 2008 denial of petitioner Fifth Street, LLC's Motion for Reconsideration, **be and hereby is, AFFIRMED** in its entirety, as to the County Board of Appeals' *de novo* determination upon Fifth Street, LLC's petition for special hearing in Case 07-144-SPH and as to the County Board of Appeals' Orders affirming Code Enforcement Hearing Officer decisions in Case Nos. CBA-06-144 and CBA- 07-134.

True Copy Test
SUZANNE MENSH, Clerk
Per _____
Assistant Clerk

LAWRENCE R. DANIELS, JUDGE
Circuit Court for Baltimore County

APPROVED AS TO FORM:

Francis X. Borgerding, Jr, Esquire, Attorney for Respondents

J. Carroll Holzer, Esquire, Atty for Petitioner

Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County

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FILED JUN 3 2009

Petitioner: Motion Exhibit 3

Ret'd

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 810

September Term, 2009

FIFTH STREET, LLC., ET AL.

v.

MATTHEW CIARPELLA, ET AL.

Eyler, Deborah S.,
Woodward,
Kehoe,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 9, 2010

Petitioners (Exhibit) Motion / Exhibit 4

Fifth Street, LLC, and its managing member, Lawrence J. Thanner, Jr. (collectively "FSLLC"), the appellants, own the Dock of the Bay, a restaurant and bar located at 9025 Cuckold Point Road in Baltimore County.[1] They appeal from the judgment of the Circuit Court for Baltimore County affirming a decision of the Baltimore County Board of Appeals ("Board"), finding them in violation of the Baltimore County Zoning Code ("Zoning Code") for operating a nightclub in a B.L. (Business Local) zone. The appellees are People's Counsel for Baltimore County ("the County") and Matthew Ciarpella, who resides near the restaurant. The FSLLC presents four questions for our review, which we have consolidated and rephrased as follows:

I. Did the Board err in concluding that the Dock of the Bay operates as a nightclub, as defined in the Zoning Code?

II. Is the definition of a "night club" in the Zoning Code so arbitrary and confusing as to deprive the appellants of their due process rights?

III. Did the Code Enforcement Division hearing officer err in concluding that the appellants violated the Zoning Code by erecting a tent without a permit?[2]

---

[1]We will refer to the Dock of the Bay as a restaurant, as all parties seem to agree that it performs this function, but we do not intend this description to be in any way determinative of the central issue in this case.

[2]As framed by FSLLC, the question presented are:

1. In Special Hearing Case No.: CBA-07-144-SPH, the County Board of Appeals erred as a matter of law in determining that the Dock of the Bay restaurant was a night club under the Baltimore County Zoning Regulations definition.

2. In Zoning Violation Case No.: 06-044, the finding of violation was in error as a matter of law.

(continued...)

For the reasons that follow, we shall affirm the judgment of the circuit court.

ZONING REGULATIONS

The Zoning Code establishes three types of business zones: B.L. (Business Local), B.R. (Business Roadside), and B.M. (Business Major). Zoning Code § 100.1.A.2. As noted above, the Dock of the Bay is located in the B.L. zone. The B.L. zone is the most restrictive of the three business zones.

Zoning Code section 230.1.A sets forth the permitted uses in the B.L. zone, which include the operation of a "standard restaurant" and a "tavern." Combinations of permitted uses also are allowed. Zoning Code § 230.1.A.10. A "nightclub" is not among the permitted uses in the B.L. zone, nor is it permitted by special exception. Zoning Code § 230.3.[3]

A "standard restaurant" is defined in the Zoning Code as follows:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term

---

[2](...continued)

3. If the Dock of the Bay is a restaurant, Civil Citation in Case No.: 07-134 and Case No.: 06-044 must be reversed.

4. County's arbitrary and confusing definition of night club violates Appellants' due process rights, violates standards for discretionary enforcement; leaves enforcement to the arbitrary discretion of County officials and constitutes undue favoritism by the County as established in the testimony before the Board of Appeals. Further, that the County's classification of night club must be reasonable and the evidence before the Board and the Board's conclusions established that the use of I.B.C. Group A-2 to define night club is unusable, arbitrary and capricious.

[3]A nightclub is a permitted use in the B.M. zone. Zoning Code § 233.1.

> includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

Id. at § 100.1. A "tavern" is defined as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." *Id.* Lastly, a "nightclub" is defined as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County." *Id.*

In 2005, the Baltimore County Council passed Bill No. 1-05, adopting the ICC International Building Code, 2003 Edition ("IBC"),[4] with some modifications, as the Building Code of Baltimore County. Chapter 3 of the IBC governs "Use and Occupancy Classification." IBC at 23. IBC section 303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." *Id.* at 24. Subgroup A-2 includes:

> Assembly uses intended for food and/or drink consumption including, but not limited to:
>
> Banquet halls
> Night clubs

[4]International Code Council, *International Building Code* (2003).

Restaurants
Taverns and bars

Id.

The commentary to the IBC explains, "[b]ecause of the arrangement and density of the occupant load associated with occupancies classified in the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high." ICC, *IBC Commentary - Vol. 1,* at 3-16 (2003) ("IBC Commentary"). It then provides a description of each subgroup classification. Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - Low lighting levels;
> - Entertainment by a live band or recorded music generating above-normal sound levels;
> - No theatrical stage accessories;
> - Later-than-average operating hours;
> - Tables and seating arranged or positioned so as to create ill-defined aisles;
> - A specific area designated for dancing;
> - Service facilities for alcoholic beverages and food; and
> - High occupant load density.

Id. at 3-17 - 3-18. The IBC Commentary explains that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. *Id.* at 3-18. Finally, it notes that the characteristics listed above "are only advisory in determining whether Group A-2 is the appropriate classification." *Id.*

FACTS AND PROCEEDINGS

The underlying facts are largely undisputed. The Dock of the Bay has been in operation since approximately 1955. It is situated on the Miller's Island peninsula between the Back River, to the west, and the Chesapeake Bay, to the east. To the south are residences that, like the Dock of the Bay, are zoned B.L. To the north and west of the property is a marina with attendant parking facilities. These properties are zoned B.M.

In September 2003, the Dock of the Bay was destroyed by Hurricane Isabel. One month later, FSLLC purchased the restaurant. Thanner then spent five months rebuilding the restaurant before reopening it in March 2004.

The interior of the restaurant is about 2,400 square feet. The first floor consists of a rectangular bar at one end and tables and chairs in most of the remaining open space. The second floor is used only for storage and office space. The business is licenced as a restaurant and is authorized to serve approximately 150-160 people. It also holds a Class-D liquor license.

Outside the restaurant is a patio area with more tables and chairs and an outside bar. Adjacent to the patio is a children's play area with a wooden pirate ship. The patio overlooks the Chesapeake Bay. FSLLC also owns a dock with 14 "transient" boatslips for customer use.

The restaurant is open daily from 11:00 a.m. until 2:00 a.m., although it frequently closes earlier on week nights, especially in the wintertime. It serves a full lunch and dinner

menu, with an emphasis on seafood. It also serves alcohol. Food service ends at 11:00 p.m. Approximately 70% of its sales are food, 28% beverages, including alcohol, and 2% T-shirts and cookbooks.

There are ten television sets inside the restaurant and another two at the outside bar. A house music system, connected to speakers inside and outside, plays satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered.

Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.

On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

Although there is no dance floor, during live performances patrons often dance in between the tables.

On April 21, 2006, a little over two years after the Dock of the Bay reopened under FSLLC's management, the Code Enforcement Division ("CED") of the Baltimore County Department of Permits and Development Management ("DPDM") received a letter of

complaint from Matthew Ciarpella, through counsel, regarding live music at the restaurant.[5] The letter alleged that the Dock of the Bay was operating as a nightclub, which is not a permitted use in the B.L. Zone.

In May, June, and August of 2006, the Dock of the Bay was cited for operating a nightclub in a B.L. zone, erecting a tent without a permit, and failing to cease nightclub operations and to remove the tent.[6]

On August 18, 2006, FSLLC filed a "Petition for Special Hearing," presenting two questions:

> 1. Whether the use of the property at 9025 Cuckold Point Rd., Millers Island 21219 is in violation of the [Zoning Code ?]
> 2. Is the use by Fifth Street, LLC, a restaurant, at 9025 Cuckold Point Rd., which provides music during the day, . . . a "night club" as defined in the [Zoning Code]?

On August 23, 2006, before the petition for special hearing was ruled upon, the case came before a CED Hearing Officer at the DPDM. The hearing officer heard testimony from Thanner, Ciarpella, and another nearby resident, Wayne Walkman, Jr. Evidence consisting of advertisements highlighting the music offered at the Dock of the Bay also were introduced. The hearing officer issued "Findings of Fact and Conclusion[s] of Law." He found that the Dock of the Bay offered live and recorded music, both inside and outside. He

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[5]This was not the first complaint about the property. In the summer of 2005, Ciarpella and other nearby residents made numerous noise complaints.

[6]After the first of the citations, Thanner wrote to the inspector to request clarification as to the nature of his violation. He received no response to his letter.

then referenced the IBC and the IBC Commentary, concluding that the property "exhibits some of the listed characteristics" in the IBC Commentary for Subgroup A-2. He ruled that the Dock of the Bay was "being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use." He imposed a civil penalty of $5,000 and ordered FSLLC to "dismantle the outside speaker system and cease live and/or recorded entertainment immediately." He further concluded that the tent was erected without a permit in violation of IBC sections 3102.1, 3103.1 and 3103.1.1 and ordered it removed.

A two-day, public special hearing was held before the Zoning Commissioner ("Commissioner") to determine if the Dock of the Bay, "which provides music [] during the day, [is] a 'nightclub' as defined in [the Zoning Code]." Thanner testified at the hearing. Three past and present residents of Millers Island testified in support of FSLLC. Twenty-two nearby residents testified as protestants about the loud music, parking overflow, and noisy patrons leaving the property late at night. Finally, the CED officer who had cited the property and James H. Thompson, CED Supervisor, testified.

On May 30, 2007, the Commissioner issued his opinion. After reciting the "relatively simple" facts, the Commissioner addressed the question whether the Dock of the Bay is a "nightclub or simply a restaurant where ancillary entertainment is provided." He looked to the definition of "nightclub" in the Zoning Code and to the IBC and IBC Commentary. He concluded that, under the plain language of the Zoning Code definition, any establishment

that "provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub" under the IBC is an impermissible use in a B.L. zone. He further concluded that the use of the term "categorized" means only that the establishment necessarily falls under the IBC "Use and Occupancy Classification" category that includes "nightclubs." The Commissioner ruled that the Dock of the Bay is a "nightclub" under the Zoning Code and ordered "that the playing of outdoor music either by way of an outside speaker system, live/or recorded entertainment, must be discontinued."

After the special hearing, FSLLC was cited for continuing nightclub and tent violations. A second hearing before a hearing officer was held and the Dock of the Bay again was found in violation.

FSLLC appealed to the Board from the decision of the Commissioner, as well as from the decisions of the hearing officers. The cases were consolidated before the Board.

On January 15, 2008, a three-member panel of the Board took testimony and heard argument.[7] FSLLC called Thanner and also called Thompson, as an adverse witness. In addition to the facts already adduced concerning the nature of his business, Thanner testified that live entertainment was a significant draw for the Dock of the Bay, especially during the

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[7]Pursuant to Zoning Code section 501.6, appeals from the Zoning Commissioner are heard "*de novo*." Accordingly, the Board took testimony on the issues presented at the special hearing. The appeal of the code enforcement rulings, however, were reviewed on the record before the hearing officer pursuant to section 3-6-303 of the Baltimore County Code (2003).

slower winter months, and that he would likely have to close down if forced to discontinue it.

Thompson testified that the CED operates on a "complaint basis only," meaning that it investigates alleged code violations only after receiving a complaint about a property or business. It does not undertake investigations of potential violations on its own initiative. He also testified that, in his opinion, based on his experience enforcing the Zoning Code, a property could operate as a "dual use," meaning that it could fit into multiple categories of use simultaneously. He explained that it was the practice of the CED to treat live music, but not recorded entertainment, as a code violation in the B.L. zone.

Numerous residents also testified. For the most part, their testimony was not relevant to the issues on appeal.[8] There was testimony that music played at the dock of the Bay was loud enough to be heard inside residents' houses.

At the conclusion of testimony and arguments, the Board allowed the parties to submit briefs. On June 4, 2008, a two-member majority of the Board issued an opinion concluding that the Dock of the Bay was operating as a nightclub and affirming the hearing officer's

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[8]FSLLC filed a motion to limit testimony with respect to expected resident testimony concerning noise at the restaurant and related complaints about the establishment. The Board granted the motion, opining that this type of testimony generally was not relevant to the legal issue whether the business was a nightclub under the Zoning Code, the only issue under *de novo* review. Despite that ruling, many residents testified. Their testimony was cut short by relevance objections, however.

An employee of the Liquor Board also testified and counsel for Ciarpella attempted to introduce into evidence records related to prior noise complaints from 2005. The Board granted FSLLC's hearsay objections to this testimony and evidence, however.

rulings. The Board reduced the $5,000 fine imposed for operating as a nightclub to $1,000 and upheld a $1,000 fine imposed by the hearing officer for the tent violation. FSLLC was ordered to discontinue the "playing of music by way of speaker system" and "live or recorded entertainment."

In its opinion, after reciting the facts, the Board majority looked to the definition of "nightclub" in the Zoning Code. Having noted already that the Dock of the Bay offered "live or recorded entertainment," it turned to the IBC and the IBC Commentary to determine if the business was "categorized as a nightclub." Like the Commissioner, it considered whether the eight non-exclusive characteristics of Subgroup A-2 applied to the Dock of the Bay. It found that six of the eight factors were met: low light levels, entertainment by a live band or recorded music generating above normal sound levels, no theatrical stage accessories, later than average operating hours, service facilities for alcoholic beverages and food, and high occupant load density. It found that two factors – tables and seating arranged or positioned so as to create ill-defined aisles and a specific area for dancing – did not apply.

Based on its finding that the Dock of the Bay exhibited six of the eight characteristics of Subgroup A-2, the Board majority concluded that the restaurant was operating as a nightclub. Its decision closed as follows:

> The Board is not unmindful that the definition of a nightclub, under the [Zoning Code], can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.[L.] zones, might be considered "nightclubs" under the present criteria of the [Zoning Code]. It is not for the Board to change the definition but for the County Council to consider.

One of the three Board panel members issued a dissenting opinion. He emphasized the undisputed facts that characterized the Dock of the Bay as a family restaurant, such as the full-service menu, table seating for 150-160 persons, a pirate ship play area, no cover charge, and the vast majority of sales being food related. He described the "nightclub" definition in the Zoning Code as "exceedingly unclear and circuitous" and characterized the IBC as a "'one size fits all'" building code that fails to reflect the "particular realities and common sense observations of this jurisdiction." In particular, the dissenter took issue with the IBC's practice of grouping restaurants together with such "disparate uses" as banquet halls and nightclubs. He noted that the IBC Commentary even distinguishes between buildings in which people congregate for "*drinking and dancing* (e.g., nightclubs, dancehalls, banquet halls, cabarets, etc.)" and buildings in which people congregate for "food and drink consumption (e.g., restaurants)." (Emphasized in dissenting opinion.)

Finally, the dissenter stated that, even if it were appropriate to apply the Subgroup A-2 criteria, the evidence did not support the Board majority's findings with respect to several of the criteria. Specifically, he found from the testimony that the lighting only was dimmed occasionally, for ambiance; that the business never had been cited for allowing the music to generate above-normal sound levels; that there was no evidence that the business hours from 11:00 p.m. to 2:00 a.m. were "later than average operating hours"; and that "high-occupant load density" is too ambiguous a characteristic to be applied.

The dissenter closed by observing that the Board majority was turning "a blind eye to common sense," when, as here, the facts were clear that the Dock of the Bay was a restaurant offering some musical entertainment on the side. He also noted that "selective enforcement" of the Zoning Code, as testified to by Thompson, seem "contrary to the spirit and intent of any well-written regulation, [] arbitrary and capricious, and possibly an 'Equal Protection under the laws' violation."

FSLLC moved for reconsideration of the Board decision, asking the Board to clarify how many of the IBC Commentary criteria must be satisfied before a business is considered a nightclub; to amend its order to direct the Dock of the Bay to "discontinue its nightclub operation" as opposed to discontinuing all music and live or recorded entertainment;[9] to reconsider the imposition of any fine for the nightclub violation, given the difficulty the Board itself had in determining whether a violation had occurred; and to reconsider the finding of a tent violation. FSLLC also argued that testimony of a number of nearby residents should not have been allowed. The motion was denied in its entirety.

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[9]FSLLC suggested certain changes it could make, short of discontinuing all live and recorded music, to reduce the number of Subgroup A-2 characteristics applicable to it. It stated that it would keep lighting levels at medium, use theatrical accessories, not remain open later than average, keep defined aisles, not have a dance area, close the kitchen during live entertainment so that there would not be "service facilities for food and drink," and not exceed the occupant load limit as set forth by the fire department.

FSLLC petitioned the circuit court for judicial review. Oral argument was heard,[10] and the circuit court issued a ruling on the record affirming the Board's decision. FSLLC timely appealed the judgment of the circuit court.

We shall include additional facts in our discussion of the issues.

STANDARD OF REVIEW

The Court of Appeals has described our circumscribed role in reviewing an agency decision as follows:

> A court's role in reviewing an administrative agency adjudicatory decision is narrow, *United Parcel v. People's Counsel*, 336 Md. 569, 576, 650 A.2d 226, 230 (1994); it "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel*, 336 Md. at 577, 650 A.2d at 230. *See also* [Md.] Code (1984, 1995 Repl. Vol.), § 10-222(h) of the State Government Article; *District Council v. Brandywine*, 350 Md. 339, 349, 711 A.2d 1346, 1350-1351 (1998); *Catonsville Nursing v. Loveman*, 349 Md. 560, 568-569, 709 A.2d 749, 753 (1998).
>
> In applying the substantial evidence test, a reviewing court decides """whether a reasoning mind reasonably could have reached the factual conclusion the agency reached."""" *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978). *See Anderson v. Dep't of Public Safety*, 330 Md. 187, 213, 623 A.2d 198, 210 (1993). A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. *CBS v. Comptroller*, 319 Md. 687, 698, 575 A.2d 324, 329 (1990). A reviewing court "'must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence' and to draw inferences from that evidence." *CBS v. Comptroller, supra*, 319 Md.

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[10]The judge indicated to the parties that his main concern was "with the 14th Amendment to the United States Constitution that guarantees every citizen the right of due process."

at 698, 575 A.2d at 329, quoting *Ramsay, Scarlett & Co. v. Comptroller*, 302 Md. 825, 834-835, 490 A.2d 1296, 1301 (1985). *See Catonsville Nursing v. Loveman, supra*, 349 Md. at 569, 709 A.2d at 753 (final agency decisions "are *prima facie* correct and carry with them the presumption of validity").

Despite some unfortunate language that has crept into a few of our opinions, a "court's task on review is *not* to ""'substitute its judgment for the expertise of those persons who constitute the administrative agency,'""" *United Parcel v. People's Counsel, supra*, 336 Md. at 576-577, 650 A.2d at 230, quoting *Bulluck v. Pelham Wood Apts., supra*, 283 Md. at 513, 390 A.2d at 1124. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. *Lussier v. Md. Racing Commission*, 343 Md. 681, 696-697, 684 A.2d 804, 811-812 (1996), and cases there cited; *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881, 886 (1989) ("The interpretation of a statute by those officials charged with administering the statute is . . . entitled to weight"). Furthermore, the expertise of the agency in its own field should be respected. *Fogle v. H & G Restaurant*, 337 Md. 441, 455, 654 A.2d 449, 456 (1995); *Christ v. Department of Natural Resources*, 335 Md. 427, 445, 644 A.2d 34, 42 (1994) (legislative delegations of authority to administrative agencies will often include the authority to make "significant discretionary policy determinations"); *Bd. of Ed. For Dorchester Co. v. Hubbard*, 305 Md. 774, 792, 506 A.2d 625, 634 (1986) ("application of the State Board of Education's expertise would clearly be desirable before a court attempts to resolve the" legal issues).

Bd. of Physician Quality Assurance v. Banks, 354 Md. 59, 67-69 (1999) (footnotes omitted).

In *Marzullo v. Kahl*, 366 Md. 158 (2001), the Court reaffirmed the principle that agencies are owed due deference in their interpretation of the zoning regulations they are tasked with enforcing. In that case, like the instant case, the agency was the Board and the regulations at issue were part of the Baltimore County Zoning Code. The Court opined that the Board's "expertise should be taken into consideration and its decision should be afforded

appropriate deference in our analysis of whether it was 'premised upon an erroneous conclusion of law.'" *Id.* at 173 (quoting *Banks, supra*, 354 Md. at 68) (footnote omitted).

DISCUSSION

I.

FSLLC challenges the legal foundation for the Board's decision and the factual findings supporting it. We begin with the legal contentions. The Zoning Code's definition of "nightclub" is comprised of three elements: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor" and 3) "categorized as a nightclub by the Building Code of Baltimore County." It is undisputed that the Dock of the Bay is a "tavern or other commercial establishment" that offers both live and recorded entertainment in the form of bands, karaoke, DJs, satellite radio, and television. Thus, the central focus of FSLLC's legal argument is that the Board erred in concluding that the Dock of the Bay is "categorized as a nightclub by the Building Code of Baltimore County."

FSLLC points out that the IBC does not define "nightclub." Rather, it groups certain structures, including nightclubs and restaurants, as fitting in Assembly Subgroup A-2. Therefore, according to FSLLC, a finding that the Dock of the Bay meets characteristics of Subgroup A-2 is of no moment because it does not answer the ultimate question: is the Dock of the Bay a nightclub?

Before we address this contention, some history is helpful. Since at least 1956, the Baltimore County Building Code ("BCBC") has adopted the standards of a model building code. *See Metius v. Julio*, 27 Md. App. 491, 497 n.3 (1975). Baltimore County is not unique in this practice. Since the early part of the 20th century, at both the municipal and state levels, building codes around the country have been based on model codes. Three regional model code groups promulgated the codes – the International Conference of Building Officials ("ICBO"), the Building Officials Code Administrators International ("BOCA") and the Southern Building Code Conference International ("SBCCI"). *See* www.iccsafe.org/ABOUTICC/Pages/default.aspx. BOCA, a code designed for the east coast and the midwest, previously had been adopted by the Baltimore County Council. *See Swinson v. Lords Landing Village Condo.*, 360 Md. 462, 479 (2000) (noting that, since at least 1981, most counties in Maryland have had building codes patterned on the BOCA model code); *Metius, supra*, 27 Md. App. at 497 n.3 (noting that Baltimore County adopted the BOCA standards beginning in 1956).

In 1994, these three regional groups consolidated to form the ICC. The first version of the IBC was published in 2000.[11] The IBC does not differ substantially from the BOCA code that it replaced. As relevant to the instant case, however, the category in which a "restaurant" was placed changed. Under the BOCA code, a restaurant was categorized in

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[11]Pursuant to Md. Code (2003, 2009 Supp.), section 12-503 of the Public Safety Article, the Maryland Department of Housing and Community Development is required to adopt the IBC as its model building code, subject to some permitted modifications.

Assembly Subgroup A-3.[12] *See* Building Officials Code Administrators, *The BOCA National Building Code/1999* 18 (14th ed. 1999). As discussed, *supra*, under the IBC, restaurants are categorized in Subgroup A-2. Under both BOCA and IBC, nightclubs are categorized in Subgroup A-2. The IBC Commentary, discussed *supra*, setting forth the eight non-exclusive characteristics of Subgroup A-2, appears to have been lifted verbatim from the BOCA Commentary that preceded it. *See In the Matter of the Application of Rampart Partnership (Club 101)*, Case No. 96-60-XA at 18-19 (Aug. 28, 1998) ("*Club 101*") (quoting from the Commentary to the BOCA Code with respect to Subgroup A-2).

Returning to FSLLC's argument, we agree that the IBC does not define a nightclub. The Zoning Code definition of "nightclub" merely requires that the IBC "categorize" an establishment as a "nightclub." The IBC (and the BOCA Code before it) do exactly that. They categorize structures for purposes of numerous safety regulations. That a restaurant and a nightclub fall into the same sub-category under the IBC "Use and Occupancy Classifications" does not affect the analysis under the Zoning Code, however. The Board correctly looked to the IBC and the characteristics of structures that fall within Subgroup A-2 to determine if the Dock of the Bay property is categorized in that grouping. If it is, then it met the Zoning Code definition of "nightclub."

Moreover, as mentioned above, we accord the Board "a degree of deference . . . in its application of the law." *Banks*, *supra*, 354 Md. at 69. In the instant case, the Board's

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[12]Interestingly, that subgroup included "restaurants other than nightclubs."

decision was informed by its experience applying these characteristics, as evidenced by its *Club 101* decision.[13] In *Club 101*, the Board considered whether, under the Zoning Code, a club was operating as a nightclub or an after-hours club. It applied the eight non-exclusive criteria in the commentary to the then applicable BOCA code in analyzing the issue and determined that the club was operating as an after-hours club, in violation of the Zoning Code.[14] The decision reveals, as discussed *supra*, that the eight criteria applied in the instant case were developed at a time when restaurants were not included in Subgroup A-2, thus adding further support to the Board's conclusion that these factors are relevant to the determination whether a structure is "categorized as a nightclub" under the IBC.

FSLLC also maintains that the Dock of the Bay must be *either* a "nightclub" or a "standard restaurant" as those terms are defined under the Zoning Code. FSLLC focuses on the use of the word "primarily" in the definition of "standard restaurant," arguing that, if the Dock of the Bay is "primarily" engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant. We disagree. Several types of restaurants are defined in the Zoning Code, including "carry-out," "fast-food," and "fast-food, drive-through only." *See* Zoning Code § 101. We read the

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[13]The *Club 101* decision was cited by FSLLC both on appeal and before the Board in support of its argument that the Dock of the Bay must be either a "nightclub" or a "restaurant." We will discuss this argument further, *infra*.

[14]In that case, the property owner actively advocated for a finding that the property met the eight characteristics because a "night club" was a permitted use in the zone in question.

phrase "primarily for serving meals and beverages to persons seated at tables on the premises of the establishment" as being intended to distinguish a "standard restaurant" from the other types of restaurants defined in the Zoning Code. This conclusion is buttressed further by the fact that the definition specifically permits a standard restaurant to "offer a carry-out service, provided that such service is accessory to the principal restaurant operations." *Id.*

We also find support in the Zoning Code for the proposition that a property can operate as a "dual use." Section 230.1.A of the Zoning Code sets forth the permissible uses in a B.L. zone. Section 230.1.A.10 lists as a permissible use "combinations of the above uses." It is implicit in this section that properties may operate with dual permissible uses. It follows that a property also could be operating as a dual use with one use being permissible and one use being impermissible. Thompson also testified to this effect before the Board based on his experience in the CED.

Moreover, the only legal authority FSLLC cites for the proposition that a property cannot operate as a dual use actually supports the opposite position. In *Club 101*, the Board explicitly stated that the club could not be both a "night club" and an "after hours club." The then existing definition of an "after hours club" provided, however, that "[a]n after hours club is not a nightclub as defined in the zoning regulations or the building code of Baltimore

County." No such limitation appears in the definition of a "standard restaurant" in the Zoning Code.[15]

FSLLC also challenges the Board's factual finding that six of the eight characteristics of Subgroup A-2 were met. As discussed, *supra*, we review these findings under the deferential substantial evidence standard. We have reviewed the transcript and the record and are satisfied that there was substantial evidence in the record to support these findings.[16]

Finally, FSLLC echoes the concerns expressed by both the majority and dissenting members of the Board that the definition of a nightclub under the Zoning Code is extremely broad. We agree with the Board majority that this is a matter for the Baltimore County Council to address if it is deemed necessary. "The 'wisdom or expediency' of the [zoning ordinance] in its current form is not a matter for judicial intervention." *Lonaconing Trap*

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[15]Moreover, the Board found that, while Club 101 exhibited most of the eight characteristics in the BOCA Commentary, it nonetheless was an after hours club because of other characteristics that distinguished its operation. This is similar to the finding in this case that, while the Dock of the Bay may have met the definition of a restaurant, it nonetheless was operating as a nightclub because of distinguishing characteristics. We perceive no error in this conclusion.

[16]For example, the FSLLC challenges the finding of "low level lights." Thanner himself testified, however, that the lights were dimmed "every evening" for live entertainment; that they were turned down "for dinners as well"; and that they also were turned down "[o]n nights when we are open and do not have live entertainment."

Similarly, FSLLC challenges the finding of "above-normal sound levels" on the basis that there was no evidence in the agency record of prior noise violations. There was evidence, however, that the music that was being played at the Dock of the Bay was loud enough to be heard inside the homes of nearby residents. That evidence plainly supported a finding of "above-normal sound levels."

Club, Inc. v. Md. Dep't of the Env't, 410 Md. 326, 349 (2009) (quoting *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 48 (1973)).

II.

FSLLC contends the definition of "nightclub" under the Zoning Code is "arbitrary, unreasonable and confusing" and therefore the application of that definition is a violation of its due process rights. It also maintains that the County's practice of "discretionary enforcement" of the Zoning Code is unconstitutional.

FSLLC raises these arguments for the first time on appeal. Accordingly, they are not preserved for review.[17] *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *see also Heft v. Maryland Racing Comm'n,* 323 Md. 257, 273-74 (1991) (party may not obtain judicial review of an issue not raised before administrative agency); *Gonzales v. Ghinger*, 218 Md. 132, 135 (1958) (attack on validity of a section of the Baltimore City Code raised for the first time on appeal would not be

[17]As discussed, *supra*, the dissenting member of the Board suggested the possibility of a due process violation in his opinion. The circuit court judge presiding over this case on judicial review also commented on this issue during oral argument, but ultimately affirmed the Board's decision. FSLLC did not raise this issue in its appeal to the Board in its motion for reconsideration or in its petition for judicial review, however.

heard). Moreover, FSLLC cites to no Maryland authority for its propositions.[18] We decline to consider these arguments on appeal.

III.

Finally, FSLLC contends it was error for the CED to charge it with a violation of IBC section 3103 for erecting a tent without a permit. It follows that it was error for the hearing officer to find the violation and for the Board to affirm the finding. This contention is based on the letter of complaint to the CED from Ciarpella's counsel stating that FSLLC had "constructed a 40 X 60 foot reception tent . . . which has been on the property for approximately eight months." According to FSLLC, section 3103 of the IBC is inapplicable to structures in place for more than 180 days.

FSLLC received two citations related to the tent. On August 14, 2006, it was charged with violating section 3103 and ordered to "remove tent or obtain permit." A hearing before a hearing officer was held nine days later and a violation was found. On July 5, 2007, it was again charged with violating section 3103 for having a "tent erected without permit," in addition to continuing nightclub violations. A little over a month later, a hearing was held and a violation was found. In the first case, FSLLC was fined $5,000 both for the nightclub violation and the tent violation. As discussed, *supra*, the Board reduced this fine to $1,000.

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[18]FSLLC instead relies upon section 18:11 of *The Law of Municipal Corporations* pertaining to the standards for discretionary enforcement. Eugene McQuillin, *The Law of Municipal Corporations* (3d ed. 2004). Our research reveals that this section has never been cited in a reported opinion of this Court or the Court of Appeals.

In the second case, a fine of $1,000 was imposed, again without distinction between the tent and nightclub violations.

FSLLC does not point us to any place in the record where it made the argument raised on appeal before the hearing officer.[19] It was raised before the Board, but the Board only reviewed the issue on the record before the hearing officer and found that the hearing officer's decision was supported by substantial evidence and was not premised on an erroneous conclusion of law.

Even if preserved, we find no error in this decision. IBC section 3103 governs "Temporary Structures." Section 3103.1 explains the applicability of this section as follows:

> The provisions of this section shall apply to structures erected for a period of less than 180 days. Tents and other membrane structures erected for a period of less than 180 days shall comply with the *International Fire Code*. Those erected for a longer period of time shall comply with applicable sections of this code.
>
> > **Exception**: Provisions of the *International Fire Code* shall apply to tents and membrane structures erected for a period of less than 180 days.
> >
> > **3103.1.1 Permit Required.** Temporary structures that cover an area in excess of 120 square feet (11.16 m^2), including connecting areas or spaces with a common means of egress or entrance which are used or intended to be used for the gathering together of 10 or more persons, shall not be erected, operated or maintained for any purpose without obtaining a permit from the building official.

(Underlined emphasis added.)

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[19]No transcript of those proceedings is provided in the record extract.

This provision states that tents erected for less than 180 days must comply with the *International Fire Code*, whereas tents erected for "longer periods of time" must comply with the "applicable sections of this code." In other words, contrary to FSLLC's argument, an exception is carved out of section 3103 for tents erected for less than 180 days, but a tent erected for longer must comply with the permit requirement found either in that section or in section 105.1. Accordingly, we find no merit in FSLLC's contention that it was charged under the wrong section of the IBC.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.

Pet No 5

THANNER ENTERPRISES, LLC

Noted + filed per Board 11/15/10

BALTIMORE COUNTY, MARYLAND	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
FIFTH STREET, LLC	*	BALTIMORE COUNTY
Defendant	*	CASE NO.: 03-C-08-009996

* * * * * * * * * * * * *

MEMORANDUM OPINION

This case arises from allegations by Baltimore County that Defendant, Fifth Street LLC, and Lawrence J. Thanner, its Resident Agent, are operating the Dock of the Bay restaurant in violation of the Baltimore County Code and this Court's Order of May 14, 2009 by continuing to play live or recorded entertainment or music on the premises.

BACKGROUND

This matter came before a Code Enforcement Hearing Officer for the Department of Permits and Development Management on August 23, 2006 for a hearing on a citation for violations of the Baltimore County Zoning Regulations (BCZR) and the International Building Code (IBC) for failure to cease operation of a nightclub in a BL zone, failure to obtain a permit for a tent, and failure to remove a tent on property zoned BL. The Code Enforcement Hearing Officer found that the Dock of the Bay restaurant was improperly being operated as a night club in a BL zone, that the Dock of the Bay is a restaurant with dancing and/or live or recorded entertainment, and that a restaurant with dancing and/or live or recorded entertainment is not a permitted use in a BL zone. The Code Enforcement Hearing Officer also found that a tent had been erected on the property without a permit. As a result, a five thousand dollar ($5,000.00) civil penalty was

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Petitioner Exhibit 5
Case-in-chief

imposed, and Defendant was ordered to remove the tent and dismantle the outside speaker system and cease live and/or recorded entertainment immediately.

This matter then came before the Zoning Commissioner for Baltimore County for a Petitioner for Special Hearing filed by Defendant to determine whether the use of the BL zoned property known as the Dock of the Bay was in violation of the zoning regulations, and specifically, whether the operations conducted at the Dock of the Bay restaurant fell within the definition of a nightclub as defined in the BCZR. On May 30, 2007 the Zoning Commissioner issued an opinion answering that question in the affirmative and ordering that any playing of outdoor music, either by way of an outside speaker system, live/or recorded entertainment, must be discontinued.

On August 14, 2007 this matter came before a Code Enforcement Hearing Officer for a hearing on a second citation for violations under the BCZR and the Baltimore County Code for failure to cease operation of a nightclub in a BL zone, failure to comply with the Zoning Commissioner's Order, and for failure to obtain a permit for a tent or for electrical work on the property. The Code Enforcement Hearing Officer found that the Defendant was in violation of the Zoning Commissioner's Order for continuing to operate the Dock of the Bay restaurant with live outdoor music and for erecting a tent without the required permit or zoning approval. Defendant was ordered to pay a one thousand dollar ($1,000.00) fine and to obtain a building or use permit prior to the erection of any tent or other structure at the Dock of the Bay restaurant.

Defendant appealed both Orders of the Code Enforcement Hearing Officer and the Zoning Commissioner's Order to the Board of Appeals for Baltimore County. The three cases were consolidated. On June 4, 2008 the Board of Appeals issued a Majority

Opinion affirming the prior decisions of the Code Enforcement Hearing Officer and the Zoning Commissioner and ordering that the playing of music by way of speaker system, live or recorded entertainment, must be discontinued. Defendant filed a timely Motion for Reconsideration which the Board denied on September 12, 2008.

Defendant filed a Petition for Judicial Review of the Board's denial of the Motion for Reconsideration. Following a hearing, on May 14, 2009, Judge Daniels executed an Order affirming the Majority Opinion of the County Board of Appeals. Defendant then appealed to the Court of Special Appeals which affirmed the judgment of the Circuit Court upholding the Board of Appeals' findings.

The matter now comes before this Court on Baltimore County's Petition for Contempt alleging that Defendant continues to operate the Dock of the Bay restaurant in violation of the Court's May 14, 2009 Order. A hearing was held before this Court on the Petition for Contempt on October 12, 2010.

ANALYSIS

Defendant contends that the Dock of the Bay restaurant is no longer operating in violation of the Baltimore County Code because music is not being played outside of the restaurant. However, the Majority Opinion of the County Board of Appeals states that "[t]he Majority finds that the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR" and that "[t]he second criterion does not differentiate between inside and outside noise." *See* Majority Opinion of County Board of Appeals of Baltimore County, p. 13. Furthermore, the Board of Appeals ordered that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." *See* Majority Opinion of County Board

of Appeals of Baltimore County, p. 14. Thus, the Board of Appeals made no distinction between outdoor and indoor music when it ruled that the Dock of the Bay was operating as a nightclub in violation of the Baltimore County Code and ordered that the playing of music be discontinued.

At the hearing before this Court, Defendant argued that a recent decision by the Court of Appeals of Maryland involving the Dock of the Bay restaurant controls the instant case. In *Thanner Enterprises v. Baltimore County, Maryland* 414 Md. 265 (2010), the Court of Appeals held that the Board of Liquor License Commissioners for Baltimore County acted outside the scope of its authority when it imposed a sanction on Thanner Enterprises that prohibited it from playing any outdoor music at the Dock of the Bay. However, the instant case arises from Orders of a Code Enforcement Hearing Officer for the Department of Permits and Development Management and the Zoning Commissioner, who are governed by different authority than the Board of Liquor License Commissioners. As such, a sanction imposed by the Liquor Board that is outside the scope of its authority is not necessarily outside the scope of the authority of an Officer of the Department of Permits and Development Management or the Zoning Commissioner.

For these reasons, the Court finds that Defendant Fifth Street, LLC is in violation of the Court's May 14, 2009 Order for continuing to play live and/or recorded entertainment on the premises. However, absent any citation of appropriate authority by Baltimore County, the Court does not believe that it is appropriate for any sanction to be imposed against Mr. Thanner individually as he is not a party to the lawsuit. Service of the Petition for Contempt on Mr. Thanner was in his capacity as a Resident Agent of

Fifth Street, LLC not as a party to the proceeding. As such, he is not the "alleged contemnor" pursuant to the Petition.

> "A civil contempt proceeding is intended to preserve and enforce the rights of private parties to a suit and to compel obedience to orders and decrees primarily made to benefit such parties. These proceedings are generally remedial in nature and are intended to coerce future compliance. Thus, a penalty in a civil contempt must provide for purging." *State v. Roll*, 267 Md. 714, 728 (1973).

Counsel should contact the Court to schedule a hearing for the purpose of determining appropriate sanctions as well as purge provisions against Defendant Fifth Street, LLC.

10/25/10
DATE

JUDGE ROBERT N. DUGAN

cc: Adam Rosenblatt, Esquire
John Nowicki, Esquire
(410) 477-8400

True Copy Test
RICHARD D. ARNOLD, JR., Clerk
By: Assistant Clerk

BALTIMORE COUNTY, MARYLAND	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
FIFTH STREET, LLC	*	BALTIMORE COUNTY
Defendant	*	CASE NO.: 03-C-08-009996

* * * * * * * * * * * * *

ORDER

It is hereby ORDERED this 27th day of October, 2010, by the Circuit Court for Baltimore County, that the Court finds Defendant Fifth Street, LLC to be in violation of the Court's May 14, 2009 Order and that counsel should contact the Court to schedule an additional hearing.

IT IS FURTHER ORDERED that no sanction be imposed against Mr. Thanner individually.

JUDGE ROBERT N. DUGAN

NOV 10 2010

True Copy Test
RICHARD D. ARNOLD JR. Clerk
Per _____ Assistant Clerk

cc: Adam Rosenblatt, Esquire
John Nowicki, Esquire

FILED OCT 27 2010

NOV 10 2010

BALTIMORE COUNTY, MARYLAND Plaintiff v. FIFTH STREET, LLC Defendant	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY Case No. 03-C-08-009996

CONTEMPT ORDER

No pending is the Petition for Constructive Civil Contempt filed by Plaintiff, Baltimore County, Maryland, against the Defendant, Fifth Street, LLC. The Court read and considered said Petition together with the Exhibits attached thereto and heard and considered the arguments advanced in open court by the parties thereto.

On October 25, 2010, the Court issued a Memorandum Opinion finding Defendant in violation of the Court's May 14, 2009 Order for continuing to play live and/or recorded entertainment on the premises.

NOW, THEREFORE, in consideration of the above, the Court finds Defendant in Constructive Civil Contempt of Court. It is therefore:

ORDERED, that within ten (10) days of the issuance of this Order, Defendant Fifth Street, LLC shall be allowed to purge this Contempt as follows:

1. Defendant shall permanently dismantle any outdoor speaker system at the Dock of the Bay restaurant located at 9025 Cuckhold Point Road, Baltimore, MD 21219 ("the Site").

2. Defendant shall permanently refrain from allowing any live band, Disc Jockey, karaoke or any other form of live or recorded entertainment to perform at the Site. This

requirement applies to entertainment both inside and outside of the restaurant, and permanently prohibits Defendant from having any such entertainment performed anywhere on the Site.

IT IS FURTHER ORDERED, that if Defendant fails to comply with any of the aforementioned directives, Defendant shall be immediately subject to the following penalties:

1. Defendant will be fined Ten Thousand Dollars ($10,000.00) for ~~each instance~~ Defendant either plays music via an outdoor speaker system or allows any live or recorded entertainment to take place at the Site. ~~For the purposes of this paragraph, each day such a violation occurs shall constitute a separate incident for which the $10,000 fine will be levied.~~

2. The Dock of the Bay restaurant will not be permitted to operate in any capacity for seven (7) days following each instance where Defendant either plays music via an outdoor speaker system or allows any live or recorded entertainment to take place at the Site. The restaurant must remain closed to the public for the entire seven (7) days and must not reopen until the Defendant fully complies with the terms of this Order.

IT IS FURTHER ORDERED, that failure to comply with any of the aforesaid conditions and directives will constitute a further CONSTRUCTIVE CIVIL CONTEMPT of Court, and Defendant will be brought before the Court, which may impose additional fines, penalties, and other measures against Defendant and its officers to coerce compliance with this Contempt Order.

This Order is hereby issued this 18th day of November, 2010.

JUDGE ROBERT N. DUGAN

Pet No 6



My Neighborhood Map

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Tech No 7



My Neighborhood Map

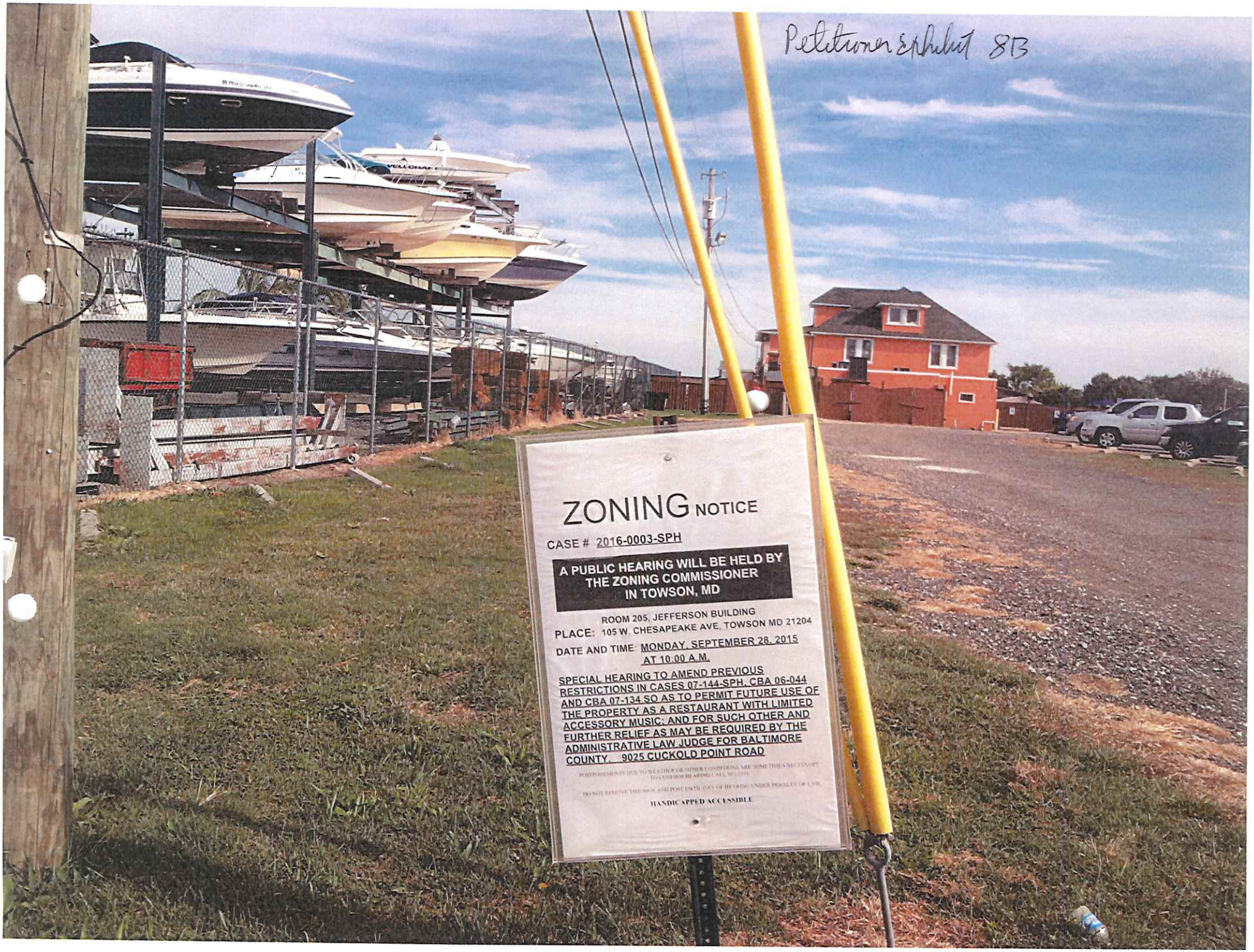
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My Neighborhood

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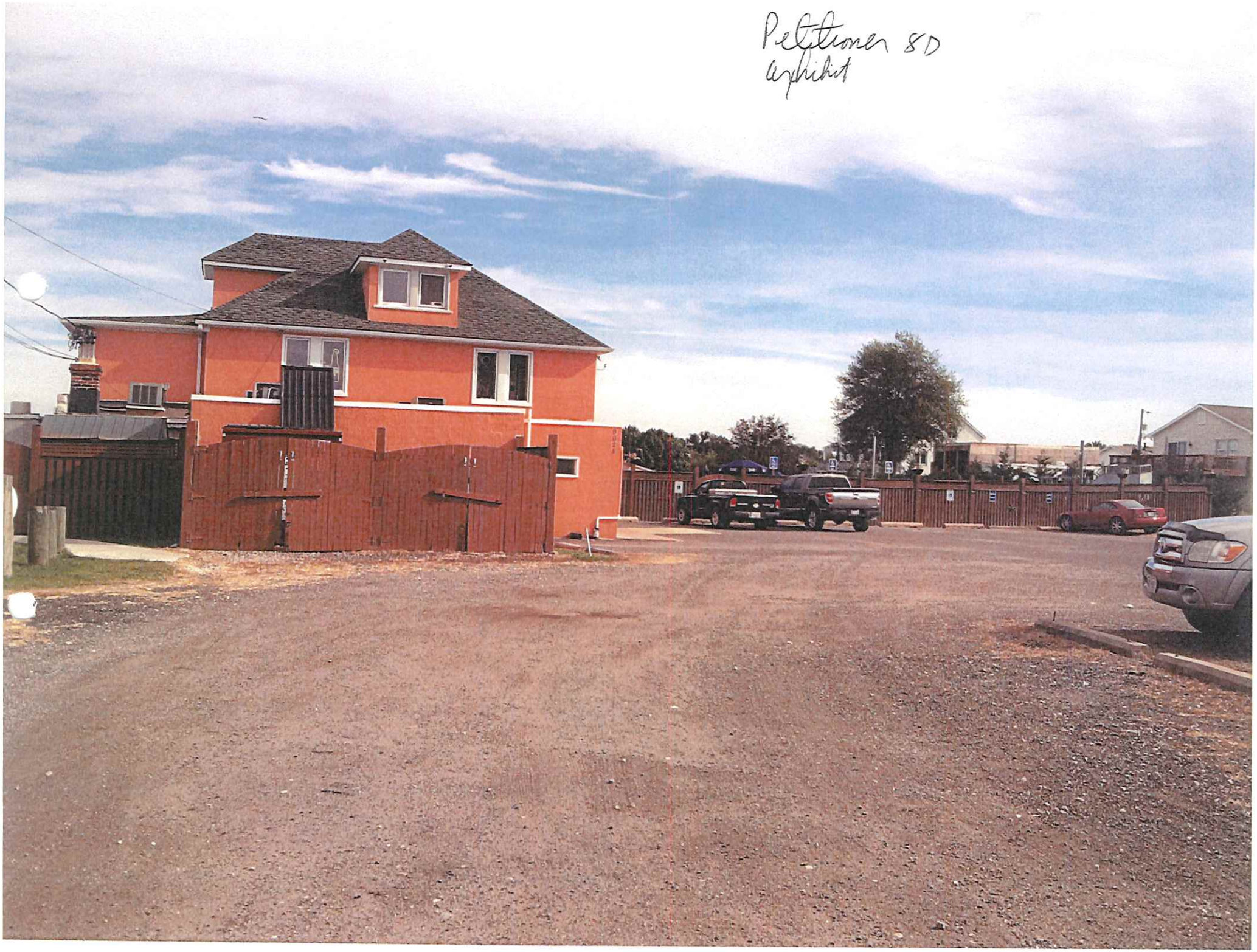
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Petitioner exhibit 8 & 4

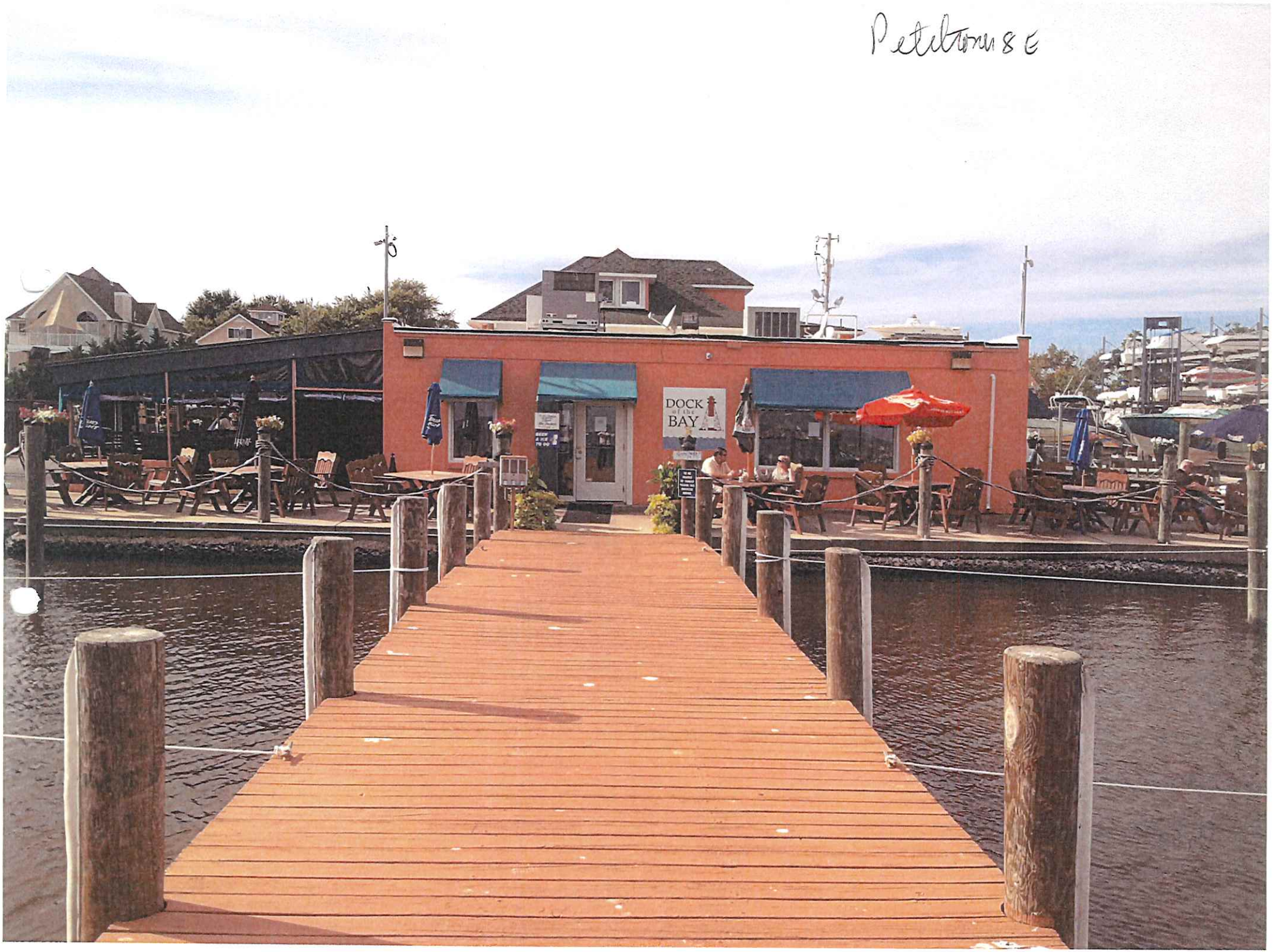



Petitioner's Exhibit 8B
ZONING NOTICE
CASE # 2016-0003-SPH
A PUBLIC HEARING WILL BE HELD BY THE ZONING COMMISSIONER IN TOWSON, MD
ROOM 205, JEFFERSON BUILDING
PLACE: 105 W. CHESAPEAKE AVE, TOWSON MD 21204
DATE AND TIME: MONDAY, SEPTEMBER 28, 2015 AT 10:00 A.M.
SPECIAL HEARING TO AMEND PREVIOUS RESTRICTIONS IN CASES 07-144-SPH, CBA 06-044 AND CBA 07-134 SO AS TO PERMIT FUTURE USE OF THE PROPERTY AS A RESTAURANT WITH LIMITED ACCESSORY MUSIC; AND FOR SUCH OTHER AND FURTHER RELIEF AS MAY BE REQUIRED BY THE ADMINISTRATIVE LAW JUDGE FOR BALTIMORE COUNTY. 9025 CUCKOLD POINT ROAD
HANDICAPPED ACCESSIBLE


Petitioner 8C
KEY WEST

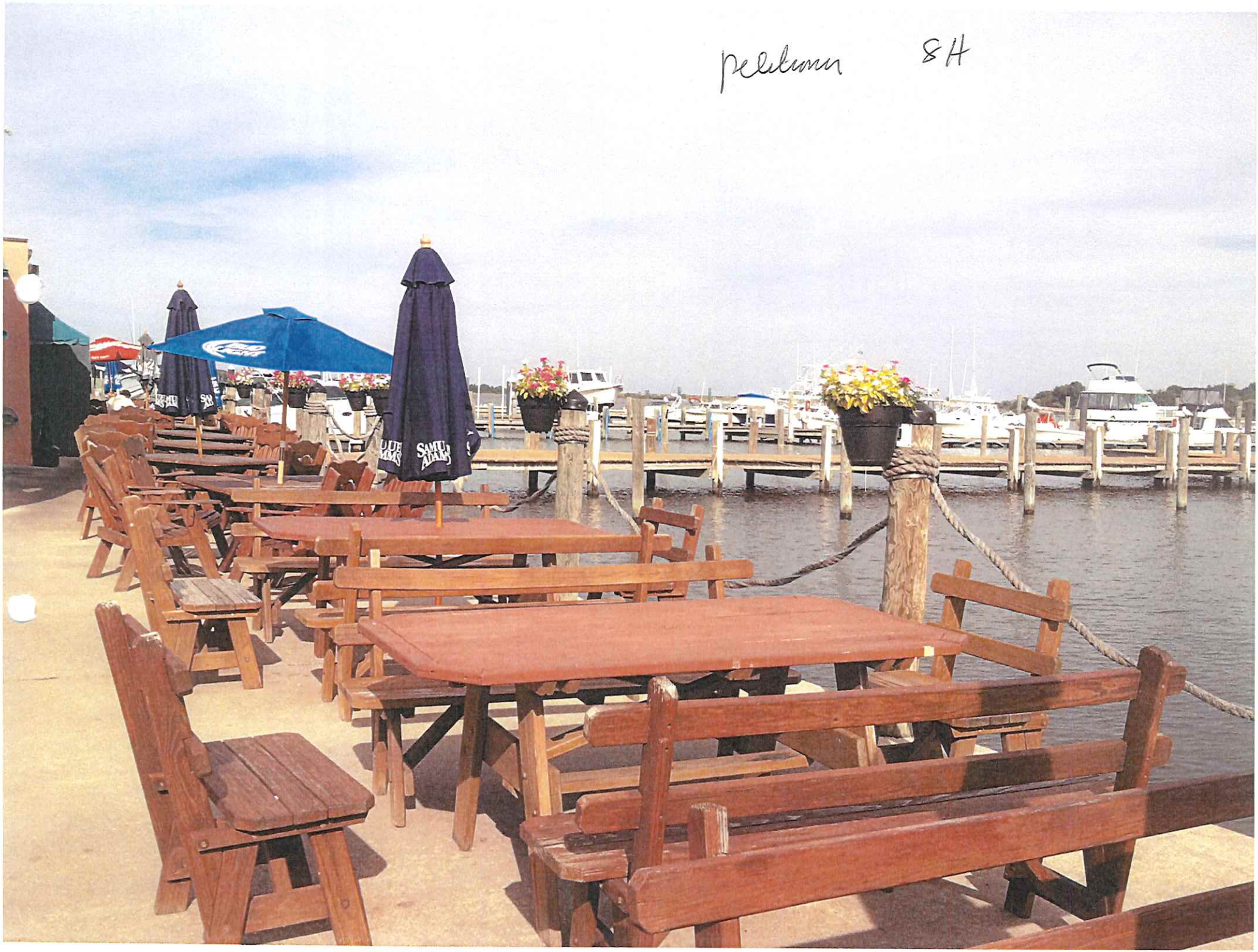

Petitioner 8D
exhibit

Petitioner



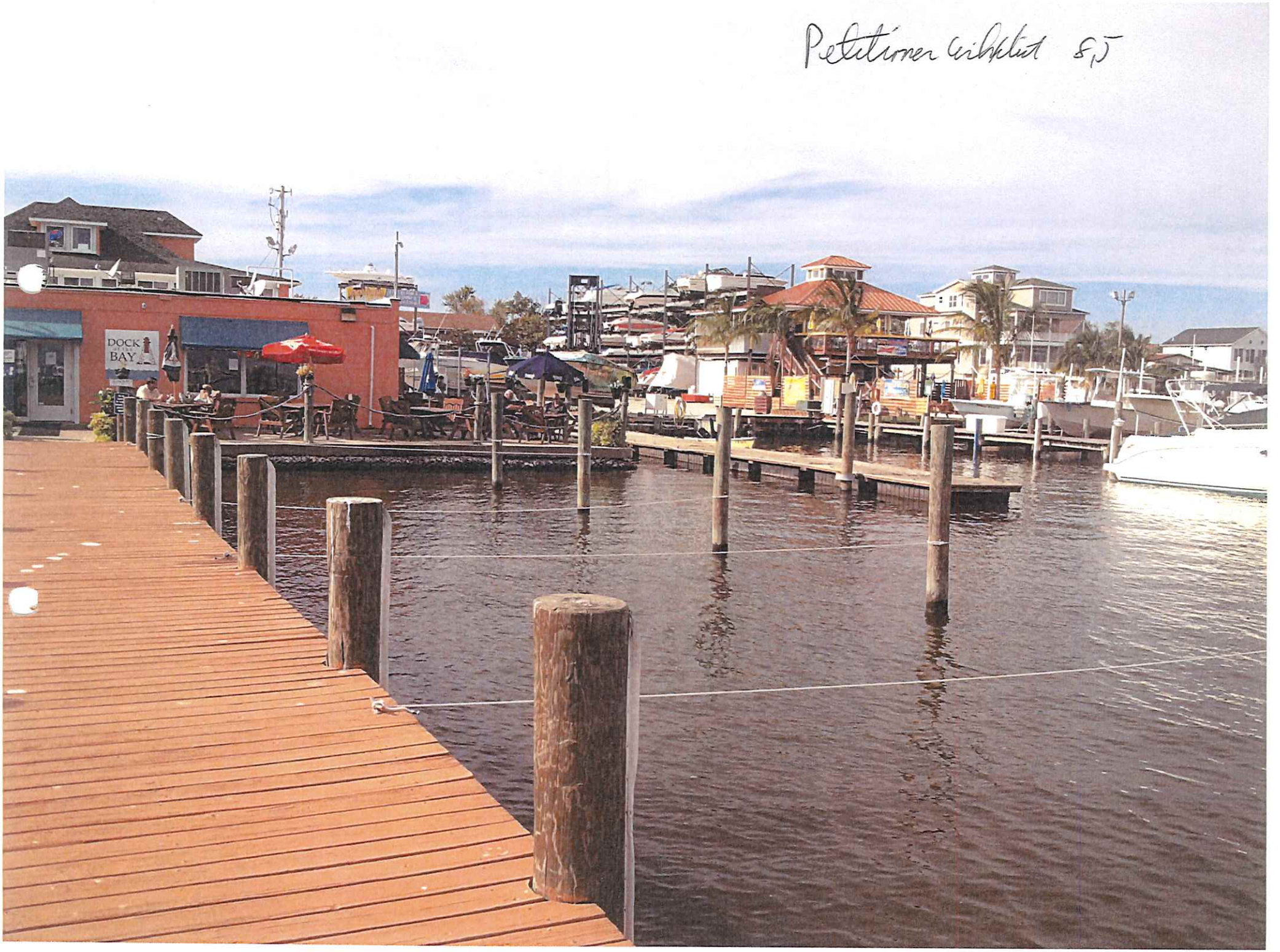

Petitioner 8F
SAMUEL ADAMS
SAMUEL ADAMS


peliteria 86
SAMUEL ADAMS
SAMUEL ADAMS


pelican
S&H


petitioner exhibit 81

Petitioner exhibit 8,5



Petitioner 8K
exhibit



Petitioner Exhibit 8L




Petitioner exhibit 8M


Petitioners exhibit 8N


Peliteres exhibit 80

90 County

State of Maryland
License

03943288
03943288
15716697

15

DOCK OF THE BAY LLC
9025 CUCKOLD POINT ROAD
BALTIMORE MD 21219

DOCK OF THE BAY LLC
9025 CUCKOLD POINT ROAD
BALTIMORE MD 21219

CODE	UNIT	TYPE OF LICENSE	NO OF LIC	COST
87	802	RESTAURANT	1	50.00
71	080	TRADER'S LICENSE	1	80.00
		ISSUING FEES		4.00
		TOTAL		134.00

DATE OF ISSUE
MO DAY YR
06/05/2015

MONTHS PAID
11

AMOUNT PAID
134.00

THIS LICENSE MUST BE PUBLICLY DISPLAYED
AND EXPIRES ON **APRIL 30, 2016**

ISSUED BY
JULIE L. ENSOR, CLERK OF CIRCUIT COURT
401 BOSLEY AVENUE
TOWSON, MARYLAND 21204-6754 (410)887-2607

JMK

The information below is for the Clerk's Office use only, customers can disregard.
These barcodes are for use with the new Cashiering System. When your site is upgraded, you will be given instructions for their use.

These barcodes must be scanned in order for RCS:
Scan this one first

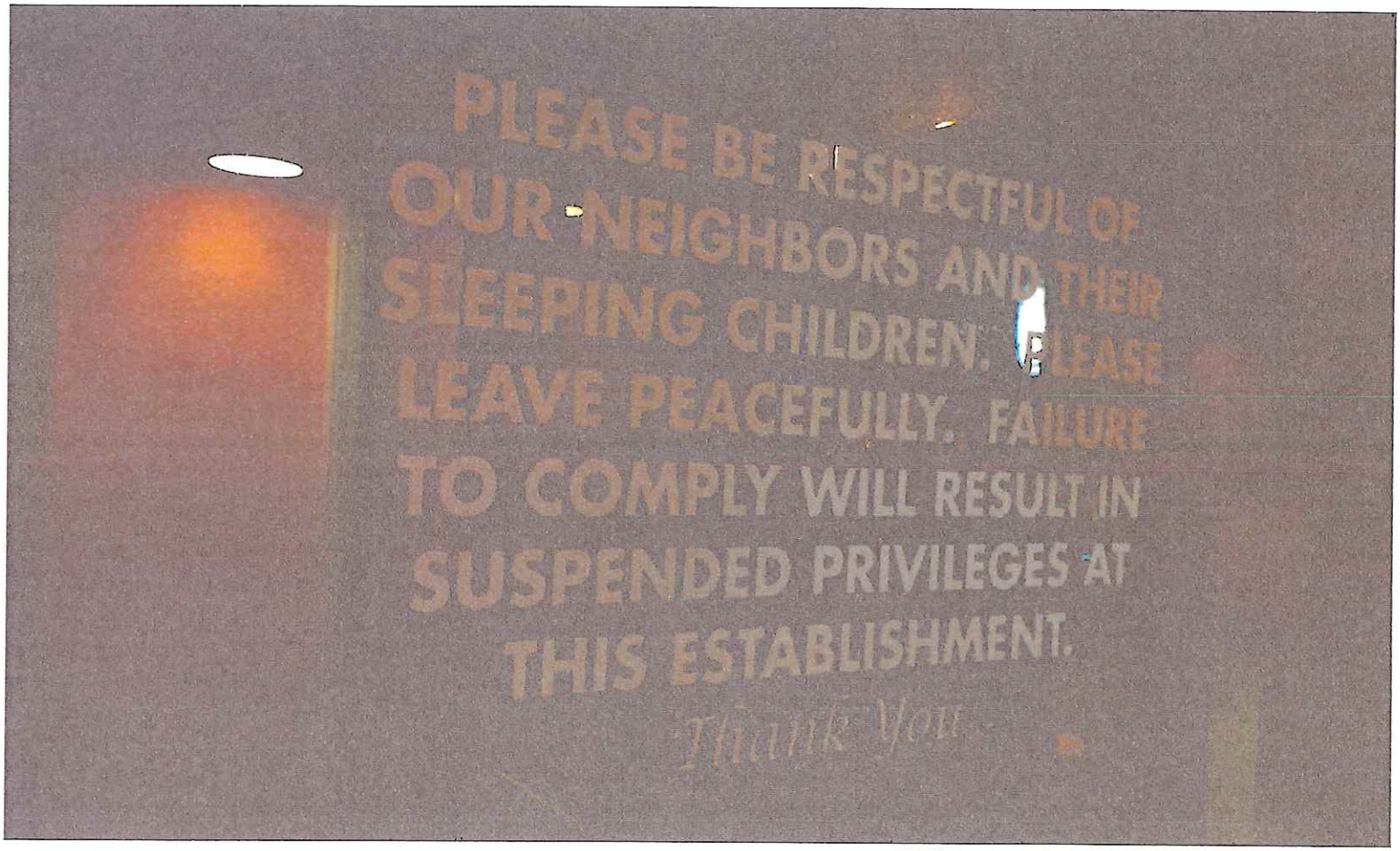
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Pet No 9

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Petitioners Exhibit 9



Pet No 10

Petitioner exhibit No. 10

Bill A

I am a resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	Meagan Hively	9011 Chesapeake Ave	21219	Meagan Hively
2	Taylor Yeiter	9131 Cuckold Pt Rd	21219	Taylor Yeiter
3	Heather Reilly	2809 3rd ST.	21219	Heather M Reilly
4	Tammi Reeder	9110 Chesapeake Ave	21219	
5	Raymond Jones	2711 6TH ST	21219	Raymond Jones
6	Michele Jones	2711 6th St	21219	Michele Jones
7	WILL ZEPP	2800 7TH ST	21219	
8	Cheryl Gowers	2812 BAY DR	21219	C Gowers
9	Robert Gowers	2812 BAY DR	21219	Robert Gowers
10	Brian Sommers	9022 Hinton Ave	21219	
11	Nicole Sommers	9022 Hinton Ave	21219	
12	Dave Phelps	9211 Cuckold Point Dr	21219	
13	Nicole Kates	9211 Cuckold Point Rd	21219	Nicole Kates
14	Rebecca Reitmeyer	9107 Cuckold Pt	21219	
15	Dave Reitmeyer	9107 Cuckold Pt	21219	
16	Jeannie Rawling	9107 Cuckold Pt	21219	
17	Sheila Yeatman	9004 Millers Island Blvd	21219	
18	Joe Love	1121 Chester RD	21220	
19	Hunter Giangrasso	2828 wells ave	21219	
20				
21	Chrissy Landefeld	3106 River Dr Rd	21219	
22	Anne Dumps	2905 Wells Ave	21219	
23	Matthew Dumps	2905 Wells Ave Stevensville Pt.	21219	
24	Karen Miller	2805 1ST Street	21219	Karen A. Miller
25	Karl Miller	2805 1st Street	21219	Karl Miller

I am a resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay

	Name	address	Zip code	Signature
1	Chrissy Sandefeld	3100 River Drive Rd	21219	Chrissy Sandefeld
2	MICHAEL MILLER	2801 12th STREET	21219	
3	Lanny Williams	8800 Miller Island Rd	21219	
4	Elaine Williams	8800 Millers Island Rd	21219	Elaine L Williams
5	CHRIS HOKNECK	9125 CUCKOLD PT RD	21219	
6	LISA DELFINO	9028 HINTON AVE	21219	
7	Tom Bothe	9028 HINTON AVE	21219	
8	Matt Gowers	2812 Bay drive	21219	Matt Gowers
9	Jane Hottendorf	2803 5th Street	21219	Jane Hottendorf
10	Teresa Hoffman	14370 Beaton Ave	21093	
11	~~Shawn Hoff~~	93		
12	Derrell Prevost	2810 3rd St	21219	
13	Jessica Thomas	2810 3rd St Millers Is.	21219	
14	Ryan Hauck	9032 Millers Island Blvd	21219	
15	Randy Arnold	9111 W Seneca Ave	21219	
16	Carrie Brown	2810 Lorn Street	21219	
17	Howard Brown	2810 Lorn Street	21219	
18	Jeanie Brown	2810 Lorn Street	21219	
19	Donald Brown	2810 Lorn Street	21219	
20	Donald J. Hazen	9125 Hinton	21219	
21	Christine Hollander	2803 5th Street	21219	
22	Ara Daugherty	2803 5th Street	21219	
23	Robert Gowers	2812 Bay Dr	21219	
24	Robert Gowers Jr	9208 Hinton Ave	21219	
25				

I am a resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	Delsa Burke	2505 3rd St	21219	Delsa Burke
2	George Burke	" " "	21219	George Burke
3	[illegible]	2809 Bay Drive	21219	[illegible]
4	Karl A Chalmers	9036 Hinton Ave.	21219	[illegible]
5	Charlene KOTRLA	2822 Bay Drive	21219	C Kotrla
6	Buddy KOTRLA	2822 Bay Drive	21219	B Kotrla
7	Amanda Adair	915 Millers Island Blvd	21219	Amanda Adair
8	Brandon Adair	915 Millers Island Blvd	21219	[illegible]
9	Russ McClellan	9011 Millers Island Blvd	21219	[illegible]
10	RON YEATMAN	9004 MILLERS IS. BLVD.	21219	[illegible]
11	Joseph Krug	2811 7th St	21219	[illegible]
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Pet 113

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	[illegible]	11839 Man O'War Ave	21811	[illegible]
2	[illegible]	2414 Eugene Ave	21219	[illegible]
3	[illegible]	7322 Wildman Av	21219	[illegible]
4	Jodi Meekins	9207 North Point Rd	21052	[illegible]
5	Derek Meekins	9207 North Point Rd	21052	[illegible]
6	[illegible]	2520 Hollingsworth Rd	21136	[illegible]
7	[illegible]	2414 Eugene Ave	21219	[illegible]
8	Joe Lowe	1121 Chestnut Rd	21220	[illegible]
9	[illegible]	3508 Galloway	"	[illegible]
10	Anyce Dumps	2905 Wells Ave	21219	[illegible]
11	Matthew Dumps	2905 Wells Ave	21219	[illegible]
12	DEBRA CAPLAN	6350 Red Cedar Place	21209	[illegible]
13	JERRY STADD	6350 Red Cedar Place	21209	[illegible]
14	Marcie C Law	2702 Moorgate Rd	21222	[illegible]
15	BILL RASMUSSEN	614 KLEES Mill Rd	21157	[illegible]
16	Linda Rasmussen	"	"	[illegible]
17	Verna Patti	3226 Grace Rd	21219	[illegible]
18	[illegible]	7014 River Dr. Rd	21219	[illegible]
19	[illegible]	7718 Dorp Rd	21219	[illegible]
20	Diana Johnson	8141 Bullneck Rd	21222	Diana Johnson
21	SCOTT TAYLOR	7014 RIVER DR RD	21219	[illegible]
22	JOE PIPER	8604 ESQUIRE RD.	21219	[illegible]
23	Allison Ches	7007 Alice Ave	21219	[illegible]
24	BILL SHKOL	8515 Esquire Rd	21219	[illegible]
25	JENNY JONES	1946 HOLBORN RD	21222	[illegible]
26	Matt Myers	2410 oak Manor Rd	21219	[illegible]
27	Stephen Hughes	9305 Todd AVE	21052	[illegible]

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	Bryan Hughes	224 St Helena Ave	21222	
2	Gordon Clifton Jr	8021 Wallace Rd.	21222	
3	Gordon Clifton	2113 Lodge Forest Dr	21219	
4	Hector Vivyra	1646 Manor, Baltimore MD	21222	
5	Karen McCumber	7519 School Avenue	21222	
6	Bill Zuromski Jr.	7519 School Avenue	21222	
7	Brian Herring	4518 Stud wood Rd	21219	
8	David Reitmyer	Visitor		
9	Crissy Reitmyer	Visitor		
10		Moorgate Rd	21222	
11		2113 Lodge Forest Drive	21219	
12	James Bieler	2113 Lodge Forest Dr	21219	
13	Rob Martin	Edgemere	21219	
14	Kevin Cummings SR	1249 Damsel Rd Essex	21221	
15	Amanda Williams	507 Eckhart Drive Joppa	21085	
16	Dou Chaney	7617 Chestnut Ave	21052	
17	Irena Hoffman	14378 Burton Ave	21093	
18	Ray Pfeifer	8122 Stratman Rd	21222	
19	Eric Marvin	7323 Geisc Ave	21219	
20	Kim Marvin	2622 Manor	21219	
21	Shane Wolf	9390 Northpoint	21052	
22	Dawn Miller	7417 Chesapeake Ave	21219	
23	Donna Schaefer	7137 E. Baltimore St	21224	
24	Gordon Smith	8 cw chesta rd	21220	
25	Lynn Buraczynski	964 Aubel Rd	17314	
26	ALICE GRANDT	4111 WEAVER CT	21219	
27	Natalie Boone	250 S. President St	21202	

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	NANCY HONEYCUTT	8311 SAGAMORE RD	21237	Nancy Honeycutt
2	ED WIERZBICKI	1201 NEIGHBORS AVE	21237	Ed Wierzbicki
3	JOHN ICEMRODE	1023 SUMTER AVE	21237	John Icemrode
4	SCOTT WALLACE	1300 ROSEWICK	21237	Scott Wallace
5	Katie Martin	1419 Spring Ave.	21237	Katie Martin
6	Tammy Kesner	Parkville Md	21234	Tammy Kesner
7	WHEELER LOANZER	3 LOWERFIELD CT	21087	Wheeler Loanzer
8	Darlene Gebhart	33 Parkhill Rd	21236	Darlene Gebhart
9	Russell KNESS	4061 FEDERAL HILL RD JARRETTSVILLE MD	21084	Russell Kness
10	Michael LoBiecki	1227 Hillsboro Rd	21222	Michael LoBiecki
11	Janet Bowery	28 Deadeon Ct.	21234	Janet Bowery
12	Derek F. Cox	1214 Berkwood Road	21237	Derek F. Cox
13	Linda Dickerson	4 Yewood	4224	Linda Dickerson
14	David V. Pugh	1604 Cape May Rd	21221	David V. Pugh
15	Gary Westfall	6215 Golden Ring Rd	21237	Gary Westfall
16	Jim Ford	1020 Chesaco Ave	21237	Jim Ford
17	Bernadette Landgraf	8107 Sumter Ave.	21237	Bernadette Landgraf
18	Doris Baker	Balto, MD	21206	Doris Baker
19		Baltimore MD	21206	
20	Kathy Seibert	8604 McDaniel Ave	21237	K. Seibert
21	Theresa McCaf	315 Gooverhorn	21200	T. McCaf
22	Thomas Seibert	8604 McDaniel	21237	Thomas Seibert
23	Dennis Standby	8302 Charles Ave	21237	Dennis Standby
24	TOMMY MARTIN	110 CHOPTANK	21237	TOMMY MARTIN
25	WARREN SMITH	8030 EDGEWATER AVE	21237	Warren Smith
26	HANK PATTILLO	6007 SHADYSPRING	21237	Hank Pattillo
27	MIKE BOTTOM	1026 SUMTER AVE	21237	Mike Bottom

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	Vereneyenco Mgncsym	250 President	21202	
2	Charles Powell	1882 Middletown	21120	C. Powell
3	Janice Dymowski	1965 Sunbury Dr.	21222	J. Dymowski
4	Pam Buermans	3800 Fait Ave	21284	
5	BILL BLANKENSHIP	11907 TARRAGON ROAD	21136	
6	Alison Cummings	1249 Damsel Rd Essex	21221	
7	Stephen Blum	6520 Loch Hill Ct	21239	
8	Thomas Palarcky	1705 Mystic Cir	21221	
9	Terry Ketler	1219 Sharon Acres	21050	Terry Ketler
10	Kevin Ketler	1219 Sharon Acres	21050	
11	Sandy Bentzen	2908 Alden Road	21234	Sandra Bentzen
12	DAN BENTZEN	2908 ALDEN RD	21234	
13	Paul LINDT	2900 Salisbury Rd	21215	
14	Joseph Vrablic	2616 MATTHAY	21219	
15	John Dixon	7047 Solleys Pt. Rd.	21222	
16	Stacey McIntire	6750 Woodley Rd	21222	
17	Vicki Baird	104 Kentway	21222	Vicki Baird
18	Mark Kent Gesic	586 Hopkins Lodge	21220	
19	Lori Kurdziel	586 Hopkins Lodge	21221	
20	Vicki COULSON	1620 Lydich Rd	21222	
21	Ann Borsa	787 Seabrook Rd	21222	
22	Valerie Taylor	9308 Point Rd Sea 21219	21219	
23	Zack Taylor			
24	Lyndsie Taylor			
25	Zachary Taylor			
26	TIMOTHY WOLSKI	7927 34TH ST	21237	
27			21222	

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay

	Name	address	Zip code	Signature
1	Tabatha McNew	POBox 263	21052	
2	Donna McNew	2903 S Sparrows Pt Rd	21219	
3	Nicole Pennington	2711 Lake Forest Dr.	21219	
4	Gabrielle Ignatavich	7726 N Cove	21219	
5	Kate Foulke	2912 Ritchie Ave	21219	
6	Sam Verni	7216 Dony Lane	21219	
7	Michele Dobbs	9110 Ave. C	21219	
8	Tori Marvin	Geise Ave	21219	
9	Kurt Hoffman	1437A Burton Ave	21093	
10	Nicole Mayer	319 Chesapeake Ave	21220	
11	Cierra Nunnery	878 Jeannette Ave	21222	
12	Brian Sommers	15841 York Rd	21152	
13	Nicole Sommers	15841 York Rd	21152	
14	Robert Ritter	280 Artnus Ct.	2013	
15	Jaquan Burks	878 Jeannett Ave	21222	
16	ANDY HAASE	106 W OVERLEA AVE	21206	Andrew Haase
17	Ed Evers	216 Long Cove	21221	
18	Nichole Thomps	910 Runnymede St	21221	
19	Mathew Boland	2414 Eugene Ave	21219	
20				
21	Dave McClelland	9108 Avenue A	21219	
22	Karen McClelland	9108 Avenue A	21219	
23	John O.		21219	
24	Nancy O.		21219	
25	Debbie Jones		21219	
26		7106 Ruth Dr.	21219	
27	Woodrow NASH	1931 Merritt Blvd	21222	

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	Anthony Malzres	709 Oakleigh Beach Rd	21221	
2	Al Murphy	1923 Kathryn	21221	
3	Daniella Parson	906 Grove Ave.	21222	
4	Sarah Pennington	8230 N. Bankory Rd	21222	
5	Shawn Casalla	7316 Geese Ave	21219	
6	Angelina Yeagy	55 highfield rd. Aiyville PA	17302	
7	Bethany Hovard	4533 Sandwood Rd	21219	
8	Michael Sturgill	1914 Maxwell Ave	21222	
9	Charlie Cooke	211 Bayside Dr	21222	
10	Lori Sitko	8001 Shore Rd	21222	
11	Jim Sitko	8001 Shore	2122	
12	Mary Mandley	100 Bayside	21222	
13	J. Wolf	1300 Nobles Rd	21052	
14	Steve Zink	5042 Springhouse Ct	21237	
15	Justin Kraemer	878 Jeanette Ave	21222	
16	Kenneth Collins	14 Pinecliff Rd Newton NJ 07860	07860	
17	Erin Shroll	14 Pinecliff Rd Newton, NJ	07860	
18	Carmela Copen	1 Bayside Dr	21222	
19	Bryan Hovard's	6814 Bragin	21222	
20	Chris Mayski	3708 N Pt Rd	21222	
21	Amy Repko	3708 N Pt Rd	21222	
22	Dave Matranga	5220 Kingsville Rosedale	21237	
23	Joe Matranga	" "	"	
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I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay

	Name	address	Zip code	Signature
1	DEBRA MALLONEE	1206 HILLDALE RD	21237	Debra Mallonee
2	Tim MALLonee	1206 Hilldale Rd	21237	Timothy Mallonee
3	Steve Frazier	3108 Moreland Ave	21234	Steve Frazier
4	Kathryn McDade	4417 Kenwood Ave	21206	Kathryn E McDade
5	Harriet Spence	27 MORNING Court	21237	Harriet Spence
6	SHARON RAPPOLD	27 MORNING CT	21237	Sharon Rappold
7	PAMELA WESTAPIL	6215 GOLDEN RING RD	21237	Pamela Westapil
8	Trudy Seubert	1133 Rosedale Ave	21237	Trudy Seubert
9	Christy Sebastianelli	1122 Rosedale Ave	21237	Christy Sebastianelli
10	Marty Braun	5903 Trumps Mill Rd 21206		Marty Braun
11	E-B Taylor	623 Tampa rd	21221	
12	MARY A. TAYLOR	623 TAMPA ROAD	21221	Mary A. Taylor
13	VALERIE WHITE	223 W. Commerce	19977	
14	Gary Forbes	2806 Gray Manor Terrace	21222	
15	MICHAEL T. CANAVAN	20 SYLVANDALE WAY	21236	
16	Rachel Godwin	2424 Wythe Ave	21219	Rachel Godwin
17	Ray Godwin	2424 Wythe Ave	21219	Ray Godwin
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I am a resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay

	Name	address	Zip code	Signature
1	Mattie Wynne	2807 3rd St	21219	Mattie Wynne
2	Jonathan Wynne	2807 3rd St	21219	
3	Leah Wolfe	2811 3rd St.	21219	
4	Tim Wolfe	2811 3rd St.	21219	
5	Matt Gowen	2814 Bay Drive	21219	
6	Ryan Hauck	9032 Millers Island Blvd	21219	
7	Karyn L Wolf	8918 Hinton Ave	21219	Karen L Wolf
8	Jeff Cole	9105 Cuckold Pt Rd	21219	FRANK ROSATI
9	Erin Williams	9105 Cuckold Pt Rd	21219	
10	Andrew Alley	8802 Hinton Ave	21219	
11	Carli Zellers	2805 5th Street	21219	
12	Michelle	410-807-0434		
13	Stefanie Ferguson			
14	Virginia Stewart	410 388-2736	21219	Virginia Stewart
15	Michael Stewart	410 388 2736	21219	
16	Bailey Pratt	8908 Cuckold Pt.	21219	
17	Ben Pratt	8908 Cuckold Pt	21219	
18	JOHN TOYAVE	8921 MILLERS	21219	
19	JAKE HAUCK	2216 MAPLE RD	21219	
20	Melanie Hauck	2216 Maple Rd	21219	
21	Nicholas Shreve	3020 Delmar Ave	21219	
22	Joseph Genovese	8821 Millers Is Rd	21219	
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009

Petitioner Exhibit 12A

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay

	Name	address	Zip code	Signature
1	David F. Riesett	8626 Schroeder Ave	21236	David F Riesett
2	Kathleen M. Riesett	8626 Schroeder Ave	21236	Kathleen M Riesett
3	Tim Heiny	307 WYE RD	21221	Tim Heiny Jr.
4	Denise Anderson	1119 Angora Rd	21219	D Anderson
5	Joyce Fellers	251 Hackamore Rd	21009	Joyce Fellers
6	Ruth Harrison	3148 Main Ave	21219	Ruth Harrison
7	Edward Streib	3148 Main Ave	21219	Edward Streib
8	Lisa Wells	218 E Chatsworth Ave	21136	LM
9	Michael Curtis	218A Chatsworth Ave	21136	
10	Angie Smith	2780 Blighthouse Pt	2624	
11	Steven Smith	2780 Blighthouse Pt	21224	
12	Bill Callahan	Blandinsville IL	61420	W Callahan
13	Joy Judge Callahan	Blandinsville, IL	61420	Joy Callahan
14	Shane Schapiro	1929 Stanhope Rd	21222	
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Petitioner exhibit 12B

Pet 12B

Zoning commission,

Baltimore County

111 Chesapeake Av

Towson MD 21204

Dear Commissioners,

I attended the February 17th hearing but delays at that haring caused me not to be able to testify. Unfortunately I will not be able to attend the April 28th hearing but wanted to supply this testimony.

I was told that at the September hearing a neighbor categorized my fan base as loud and rowdy. My fans are generally mature and polite. Through all the years and venues of performing, not once did the police have to be called to break up a fight or deal with underage drinking. In fact two of my biggest fans are the parents of one of the neighbors.

Regarding Dock of the Bay, I was first contacted by Donna Kondylas to perform on New Year's Eve in 2014. We had an agreement for me to perform which was later cancelled. I was later contacted by Ken Boone to perform in April 2015. Ken canceled that agreement also.

I live in Baltimore County. I perform 3-4 times a week, mostly in Baltimore county and mostly at Dock Bars.

Sincerely

Mark Alan

Jodi Lynn Stolba

Petitioner exhibit 13

Case-in-chief

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondylas, LLC

Exhibit List

Party: Protestant Date: 2-17-16

Exhibit No:	Description:
✓ 1	Letter dated 9-24-14 - Borgerding Jr. to Mike Kondylas
~~NOT IN FILE~~ ✓ 2 Not Admitted	Letter dated 9-12-2014 (For Id only) Not admitted Francis Borgerding to Adam Rosenblatt, County Attorney
~~NOT IN FILE~~ ✓ 3	MDE - State Noise pollution - Noise level arrays dated 5/19/2014
NOT IN FILE 4	—
✓ 5	Photo and view of dock of the Bay and other residents closely "My neighborhood
✓ 6	Photo of Dock of the Bay from Balcony
✓ 7	Photo of Dock of the Bay
✓ 8	Photo of seating at Dock of the Bay
✓ 9	Thanner's ownership of Dock of the Bay re: sound and decible levels Letter dated May 13, 2008
✓ 10	Letter dated June 9, 2008, Letter measured Decible levels emanating from the Dock of the Bay
✓ 11	Bass Letter dated 10-3-2008, Letter measuring the decible levels from Dock of the Bay
	VERIFIED BY KC DATE: 2/19/16

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondylas, LLC

Exhibit List

Party: Protestant Date: 4-28-16

Exhibit No:	Description:
✓ 12	photograph of Row boat Willie's building
Large Ex. ✓ 13	large map ariel view of the Dock of the Bay and the area - 2016 Google Imagery
✓ 14	small map My Neighborhood Map 4/27/16 ariel view of Doc of the Bay and area
✓ 15	2015 alcoholic Beverage license for Doc of the Bay
✓ 16	Baltimore County Police Records; Parrish
✓ 17	Summary of Calls from exhibit 16
✓ 18	Facebook posts for Dock of the Bay 2-17-16 Boone Letter
Not Admitted 19 Id only	Facebook posts for Dock of the Bay 2-21-16
✓ 20	Facebook post for Dock of the Bay 4-27-2016 4:57 pm Boone Letter
✓ 21	Facebook posts for Dock of the Bay 4-27-2016 5:24 PM Boone Letter
Not Admitted 22 Id only	Facebook post from Dock of the Bay 2-22-2016 8:06 AM
Not Admitted 23 Id only	Facebook posts from Dock of the Bay
	VERIFIED BY KC DATE: 4/28/16

FRANCIS X. BORGERDING, JR.
ATTORNEY AT LAW

409 WASHINGTON AVENUE, SUITE 600
TOWSON, MARYLAND 21204
(410) 296-6820
FAX: (410) 296-6884

September 24, 2014

Mr. Mike Kondylas
Ms. Donna Kondylas
8909 Miller Island Boulevard
Baltimore, Maryland 21219-1642

RE: Dock of the Bay Restaurant

Dear Mike and Donna Kondylas:

I represent neighbors of the Dock of the Bay who were in long running court battles over the previous use of the Dock of the Bay. It has come to our attention that you may be interested in purchasing the Dock of the Bay. Enclosed please find correspondence from Baltimore County indicating that all previous zoning decisions still apply to the property. This is being sent for your information.

If you have any questions, please contact me. Thank you.

Very truly yours,

FRANCIS X. BORGERDING, JR.

FXBJr:bjk
Enclosure
cc: Mr. Charles Wolinski

Protestant Exhibit 1
case-in chief

Prot. Ex 3

e'mde

MARYLAND Department of the Environment

Martin O'Malley Governor | Anthony G. Brown Lt. Governor | Robert M. Summers Secretary

Volume V, Number 2 May 2012

A sound approach to noise that annoys

By Matthew Rowe, Science Services Administration

To eMDE Cover

A revised framework for enforcing noise standards is designed to lead to swift responses to complaints.

Under House Bill 190, which was signed into law by Governor O'Malley, enforcement authority for state noise pollution standards will rest with local governments starting Oct. 1. This approach mirrors the delegation agreements MDE has had with some local governments – and is designed to allow citizen noise complaints to be addressed more efficiently and cost-effectively.

A 1974 Maryland law set statewide environmental noise standards and established MDE's predecessor, the Office of Environmental Programs in the Department of Health and Mental Hygiene, as the lead for implementing and enforcing noise standards. It also allowed for local jurisdictions to adopt noise control ordinances, rules or regulations and established committees to review noise controls and consider revisions.

Historically, MDE had an inspector on staff to respond to and investigate noise complaints. In 2004, legislative action defunded MDE's noise control program, limiting the Department's enforcement capability. MDE then provided local governments with limited technical support and training to enforce the state noise standards. MDE also entered into delegation agreements with Anne Arundel and Harford counties, providing those jurisdictions with full enforcement authority.

Local governments can respond to noise complaints more rapidly than a state agency. Police or other local government agencies can enforce standards. And local jurisdictions, through planning and zoning provisions, can help prevent noise conflicts from arising. As a result, MDE worked with the General Assembly this year to legally transfer noise enforcement authority to local governments statewide.

The 2012 noise legislation retains Maryland's noise standards. Those standards set limits based on land use and time of day. For instance, the daytime limit for residential areas is 65 decibels.

Maximum Allowable Noise Levels (dBA) for Receiving Land Use Categories

Day/Night	Industrial	Commercial	Residential
Day	75	67	65
Night	75	62	55

The regulation exempts such activities as lawn care, snow removal and the normal use of household tools during the day.

The new law also retains MDE's authority for updating these standards using current scientific and public health data. Local governments no longer need a formal delegation agreement from MDE and may adopt noise standards at least as stringent as existing standards. The law abolishes the state-level noise council and committee that had outlived their purpose.

The changes to Maryland statute are designed to allow citizen noise complaints to be more efficiently and cost-effectively addressed. MDE plans to conduct statewide outreach this summer and continue to provide local jurisdictions with limited technical support and training. Sound measurements and documentation are critical for resolving noise complaints. Citizens can assist during this transition by contacting their local leaders regarding the public health benefit of noise standard enforcement.



Protestant exhibit no. 5
case-in-chief

My Neighborhood Map

Created By
Baltimore County
My Neighborhood

This data is only for general information purposes only. This data may be inaccurate or contain errors or omissions. Baltimore County, Maryland does not warrant the accuracy or reliability of the data and disclaims all warranties with regard to the data, including but not limited to, all warranties, express or implied, of merchantability and fitness for any particular purpose. Baltimore County, Maryland disclaims all obligation and liability for damages, including but not limited to, actual, special, indirect, and consequential damages, attorneys' and experts' fees, and court costs incurred as a result of, arising from or in connection with the use of or reliance upon this data.

Printed 5/18/2015



Protestant Exhibit No. 6
Case-in chief



proletarian exhibit
NO. 8



Protestant exhibit NO. 8

May 13, 2008

To: Jerry Kilduf
Chief Inspector
Baltimore County Liquor Board

From: Donald Crocket
Inspector
Baltimore County Liquor Board

Re: Dock of the Bay

On Saturday May 10, 2008 I received a call from Mrs. Wolinski stating that there was loud music coming from Dock of the Bay. She also informed me that there was no visible security in the parking lot. At 10:10pm I calibrated my sound meter and then proceeded to drive to Dock of the Bay. Upon my arrival, I drove through the parking lot where there was no security present and I witnessed two men urinating in the parking lot. I then visited the Wolinski home where I met with Charlie Wolinski. We stood on his deck for 20 minutes during which time there was no security presence in the parking lot of Dock of the Bay.

I then went to the home of Matt Ciarpella to get some sound readings from his yard. While the band was playing the sound levels varied from 49 decibels to 52 decibels. However, when the side door of the establishment was opened, the sound level rose to 69 decibels. During my 25 minute stay at Mr. Ciarpella's home, the side door of Dock of the Bay was opened and closed approximately 20 times.

After gathering sound readings from Mr. Ciarpella's yard, I then walked over to the Dock of the Bay parking lot. I was approached by a gentleman who identified himself as security. He had recognized me from my previous visits and I told him that I was there to make sure that security was present in the parking lot. After this encounter I left the establishment, the time was approximately 11:30pm.

Sincerely,

Donald Crocket

Donald Crockett

MAY 13 2008
RECEIVED

Protestant Exhibit No. 9
Case-in-chief

June 9, 2008

To: Chief Inspector Jerry Kilduf

Re: Dock of the Bay

Mr. Kilduf,

On Friday June 6, 2008 I received a call from Bonnie Metheny regarding loud patrons and music coming from Dock of the Bay. I calibrated my sound meter and took readings from Ms. Metheny's backyard. Initially, I gathered sound level readings from 63 to 69 decibels. The majority of noise was coming from the patrons that were at the outside bar and tables. When the side doors of the Bar were opened the sound level readings would spike to 73 decibels in response to the band that was playing inside. I took sound level readings from Ms. Metheny's backyard for thirty minutes and the meter readings ranged from 63 to 73 decibels. I then went to the home of Charlie Wolinski and took sound level readings from his back deck for thirty minutes. The meter readings ranged from 61 to 63 decibels. While on Mr. Wolinski's deck I saw security come outside two times for approximately ten seconds at a time. They would not walk further then two feet from the door and there was nobody patrolling the parking lot. Also, I saw a large tent outside of the Bar that was not there the last time I visited. I left at 12:05am.

Sincerely,

Don Crockett
Inspector

HIGHYARD
JUN - 9 2008
RECEIVED

Protestant exhibit No. 10
Case-in-chief

October 3, 2007

To: Chief Inspector Jerry Kilduf

From: Inspector Donald Crockett

Re: Dock of the Bay

Mr. Kilduf,

On Friday September 28, 2007 I received a call from Bonnie Metheny stating that the music and patrons at Dock of the Bay were very loud. I calibrated the sound meter to 114 and drove to Dock of the Bay where I met with Bonnie Metheny, Kay Sessa, and Tammy Waldman. We went to the backyards of Bonnie and Kay which face Dock of the bay and at 10:10 pm I began taking noise level readings from their backyards. Patrons from Dock of the Bay were sitting at the outside bar and the noise level reading was 63 decibels. When the band began to play the noise level reading varied from 45 to 49 decibels. When the back and side door were opened the decibel level spiked to 70.

I witnessed three patrons from Dock of the Bay walking out of the back door and onto the pier in order to access their boat. They were screaming and yelling; the noise level rose to 73 decibels. When they started their boat the noise level spiked to 95 decibels. This went on for 15 minutes until they left in their boat. I also heard loud noises coming from the parking lot and the noise level registered 69 decibels on the sound meter. This lasted for approximately 5 minutes. Lastly, I drove through the parking lot of Dock of the Bay. There were two security people sitting outside, I then left at 11:30pm.

Sincerely,

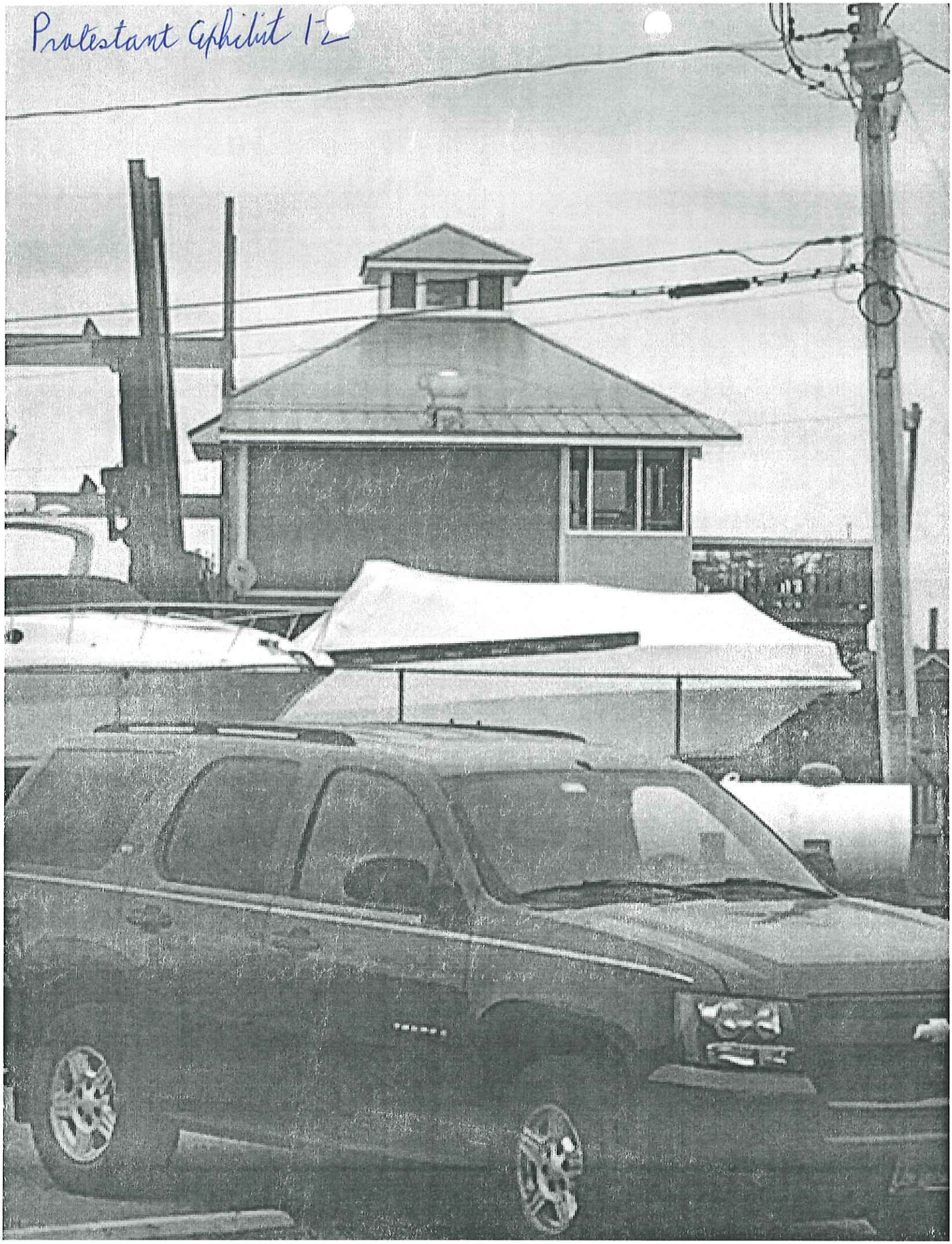
Donald Crockett

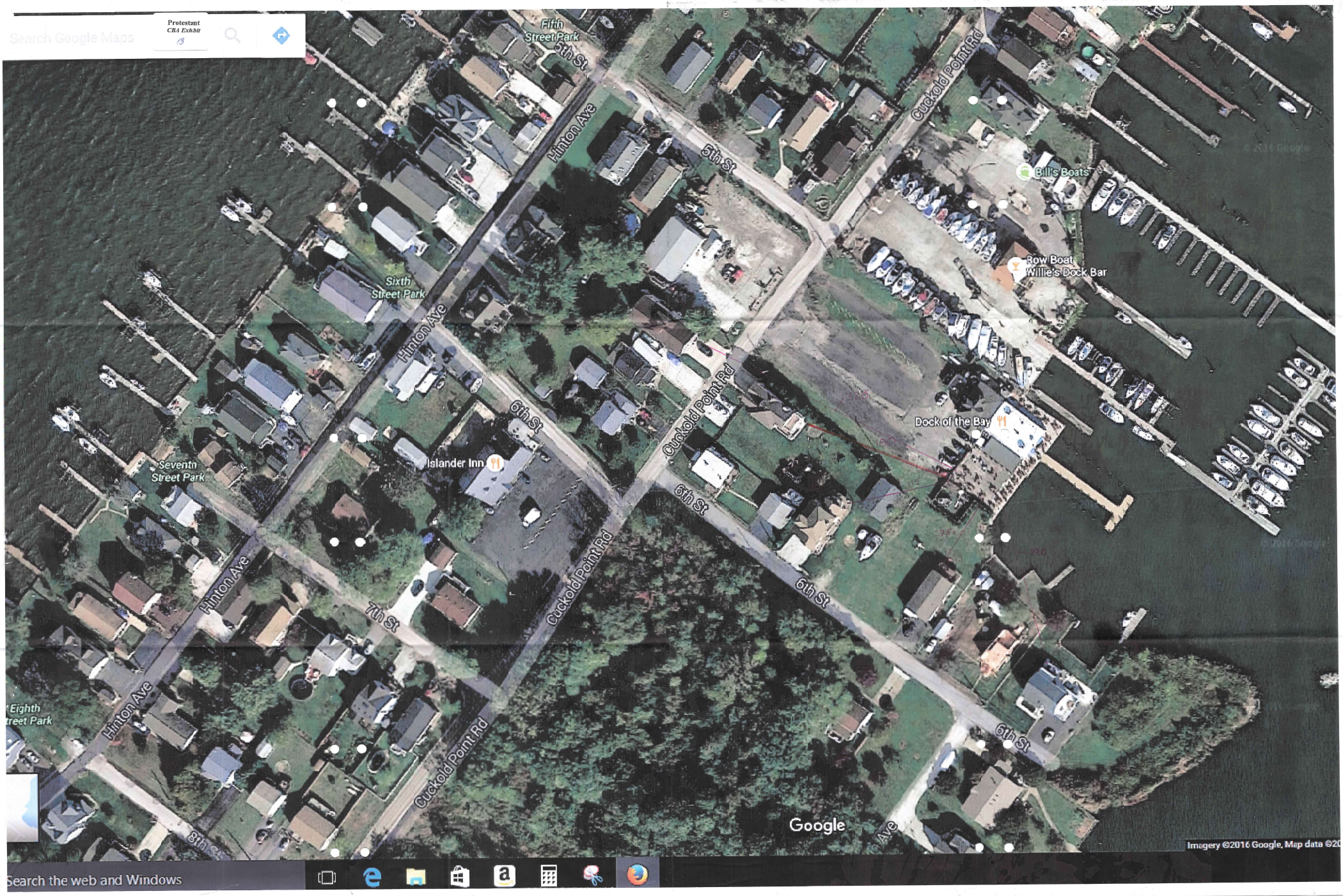
Donald Crockett
Inspector

OCT - 4 2007

Protestants Exhibit No. 11
Case-in-Chief

Protestant Exhibit 12




Protestant
CBA Exhibit
B
Search Google Maps
Fifth Street Park
5th St
Hinton Ave
Cuckold Point Rd
Bill's Boats
Row Boat
Willie's Dock Bar
Sixth Street Park
Hinton Ave
5th St
Cuckold Point Rd
6th St
Dock of the Bay
Islander Inn
Seventh Street Park
6th St
Hinton Ave
7th St
Cuckold Point Rd
6th St
Eighth Street Park
Hinton Ave
Cuckold Point Rd
6th St
8th St
Google
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Search the web and Windows



My Neighborhood Map

Created By
Baltimore County
My Neighborhood

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Printed 4/27/2016

Protestant Exhibit 14

7/2/2015

2015

ALCOHOLIC BEVERAGE

LICENSES

BOARD OF LIQUOR LICENSE COMMISSIONERS
FOR
BALTIMORE COUNTY

Chairman
Charles E. Klein

Member
Leslie M. Pittler

Member
Alexander Page, Jr.

Chief Admin.
Michael Mohler

Protestant exhibit 15

Class D(BWL)

DAMICO PROPERTIES, INC.
J.B.'S BAR & GRILL
6916 NORTH POINT ROAD
BALTIMORE, MD 21219

License: **0**
Class: **D(BWL)**
Phone: **(410) 477-3082**
Election Dist: **15**
Police Precinct: **12**
Council District: **07**
Legislation Dist: **06**

Licensees:
Bethanne Damico
Joseph A. Damico

DEPAOLA'S PUB, LLC
DEPAOLA'S PUB & GRILL
1401 SULPHUR SPRING ROAD
BALTIMORE, MD 21227

License: **20150655**
Class: **D(BWL)**
Phone: **(410) 247-0283**
Election Dist: **13**
Police Precinct: **01**
Council District: **01**
Legislation Dist: **12**

Licensees:
Andrew J. DePaola

DINING OUT ENTERPRISES, INC.
MICHAEL'S 2119
2119 YORK ROAD
TIMONIUM, MD 21093

License: **20150656**
Class: **D(BWL)**
Phone: **(410) 252-2022**
Election Dist: **08**
Police Precinct: **07**
Council District: **03**
Legislation Dist: **42**

Licensees:
Michael S. Dellis
Steven Dellis

Outside patio approved for Dining 6/5/00

DOCK OF THE BAY, LLC
DOCK OF THE BAY
9025 CUCKOLD POINT ROAD
BALTIMORE, MD 21219

License: **20150657**
Class: **D(BWL)**
Phone: **(410) 477-8100**
Election Dist: **15**
Police Precinct: **12**
Council District: **07**
Legislation Dist: **06**

Licensees:
Dorothea M. Reilly
Russell McClelland

Applicant(s):	**Russell McClelland, Dorothea Reilly**
Results:	Approved
Business Name:	Dock of the Bay, LLC
Trading As:	Dock of the Bay
Location:	9025 Cuckold Point Road, Baltimore, Maryland 21219
Election District, Inspector:	(15), Brooks
License Class, Time:	D(BWL), 2:10 p.m.
Hearing Type:	Change of Corporate Officers
Attorney:	David F. Mister, Esquire
Remarks:	Application for change of Corporate Officers of Class D (on sale) Beer, Wine, Liquor License from Donna Kondylas, Michelle Kondylas of Dock of the Bay, LLC trading Dock of the Bay.

CERTIFICATION OF RECORDS CUSTODIAN REGARDING RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY

I, Sergeant Gwendolyn Parrish, custodian of the records of the Baltimore County Police Department, hereby certify that the records attached here to are duplicate copies of the records of regularly-conducted business activity of the Baltimore County Police Department and that the attached records were (A) made at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (B) are made and kept in the course of the regularly-conducted business activity, and (C) were made and kept by the regularly-conducted business activity as a regular practice.

I SOLEMNLY AFFIRM under the penalties of perjury that the above statement is true to the best of my knowledge, information, and belief.

Sgt. Gwendolyn Parrish
Custodian of Records
Baltimore County Police Department

Protestant Exhibit #16

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETAD	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	051700813	6/19/05 1:50 PM	1	Lost or Stolen Property	AMY LUCAS	CELL PHONE..NO SUSP INFO..1017 @ 2301 SPARROWS POINT RD RA120930 CS NORTHPOINT BLVD*MASSETH AV. 1225 DIRECT AND HOLDING DRU 1245 1242 1243 1214 1244
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	051701236	6/19/05 7:20 PM	8	Disturbance	MATTHEW CIARPERLLA	MUSIC,ONGOING PROBLEM
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	051830151	7/2/05 1:49 AM	1	2nd Degree Assault (Not Domestic Abuse)	PC12	??? JUST RECVD HANGUP CALL FRM LOC, VOICE MAIL ON CB. MR THANNER / EMPLY 410 477 8100 ADV FIGHT IN PKING LOT.. ABT 20 INTOX M INV. UNKN WEAPS... 1242 BROWSE: STEVEN BARTON WM
9025 CUCKOLD POINT RD	051860285	7/5/05 4:57 AM	1	Burglary, 2nd Degree	MR.THANNER	JUST DISCOVERED .DOCK OF BAY RESTAURANT .COML WILL WAIT OUT FRT FOR OFC . REQ C/L SEE CC#051860295 FOR C/L CALL
9025 CUCKOLD POINT RD	051970284	7/16/05 4:34 AM	8	Alarm Business - Faulty	UNLIMITED INS/819	DOCK OF THE BAY, AUD, 2ND FLOOR OFFICE MOTION, NOTIFY, NO PERMIT.
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052041395	7/23/05 7:33 PM	7	Disturbance	WAYNE WALDMANN	IN PARKING LOT, UNK WEAPS/INTOX/DRUGS, FIGHT HAS CEASED, SUBJS GOT IN VEHS & FLED UP ROAD, PER COMPL, PD CAN 1022
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052041402	7/23/05 7:37 PM	8	Parking Complaint	DAWN RAUT	VEHS PARKED ON BOTH SIDE OF THE ROAD NEXT TO THE RESTAURANT .IF THERE WERE AN EMERGENCY ,. EMER VEHS WOULD NOT BE ABLE TO GET THRU. NFI
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052111440	7/30/05 8:14 PM	1	Noise Complaint	MATHEW CIARPELLA	LOUD MUSIC COMING FR LOC(CALLER SAID HIS HOUSE BACKS UP TO LOC AND HE WILL SEE OFFICERS) 1242 DIR 76 PC TO FIX RADIO PROBLEM WILL THEN B 76 MS WOLINSKI, 410-477-0053, ADV SAME
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052120989	7/31/05 4:38 PM	1	Noise Complaint	MS SESSA	LIVE MUSIC OUTSIDE
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052180128	8/6/05 1:51 AM	8	Duplicate Call	THE DOCK OF THE BAY	INFO FROM ALI;CNTRX ...H/UP CALL,NO VOICE CONTACT...GOT ANSWER MACHINE ON C/B SEE CC# 129
9025 CUCKOLD POINT RD	052180129	8/6/05 1:51 AM	1	Destruction of Property	ANGELA	THE DOCK OF THE BAY, A FIGHT STARTED INSIDE LOC & NOW IS IN THE PAKING LOT, STARTED 2 SUBJ'S FIGHTING NOW ITS 5, NO WEAPS SEEN, WINDOW OF LOC WAS BUSTED OUT. SEE CC# 128

STREETADD	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052261303	8/14/05 7:14 PM	7	Noise Complaint	MS ANON	LOUD MUSIC
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052320290	8/20/05 4:44 AM	1	2nd Degree Assault (Not Domestic Abuse)	928	CC
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052320300	8/20/05 5:05 AM	8	Duplicate Call	MICHEAL STEIGERWALD	1017 7305 BETZ AV, C/S LINCOLN AV, RA 120940...APPROX 0100HRS, ROB CALANAN DRIVING A GRN ACURA HIT COMPL W/ HIS VEH, AMBO REFUSED
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052400174	8/28/05 2:01 AM	7	Disturbance	WOLINSKI CHARLIE	SUBJS INSIDE MORONE TRACTOR.W/OPEN BEER BOTTLES.ABT TO LEAVE ... CORRECTION NO..... 1017 MAROON SIDEKICK ..GRY CIVIC...LEAVING DOCK OF BAY.. VEH MORNE SIDE KICK & GRAY CIVIC.....SUBJS WERE WALKING TWDS 6TH ST.
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052531832	9/10/05 11:30 PM	7	Check on Location	MR ANON	INTOX SUBJS IN THE PARKIN GLOT, CAUSING A VERBAL DISTURB
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052540093	9/11/05 12:55 AM	5	Noise Complaint	DARYL WOLINSKI	BUD HUMMER IS IN THE PRKING LOT,PLAYING LOUD MUSIC AND GIVING BEER TO PEOPLE WHO ARE DRIVING AND DRINKING W/FREE BEER
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052540227	9/11/05 2:27 AM	5	Traffic Complaint - Other	CIARPERLLA, MATTHEW	M/C ON PRKING LOT BEING LOUD AND DRINKING
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052601494	9/17/05 6:36 PM	8	Noise Complaint	MS ANON	LOUD MUSIC
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052621634	9/19/05 8:42 PM	8	Traffic Complaint - Other	MR WOLINSKI CHARLIE	VEHS IN THE PKG LOT DOING DONUTS.,, WHI PU TRUCK. VW, MAROON VEH POSS UP BY BAYSHORE NOW.. UNK TAGS.. COMPL THINKS THEY ARE INTOX
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052621702	9/19/05 9:30 PM	8	Duplicate Call	CHARLIE WOLINSKI	REF #1634, COMPL STATES OFFICER NEVER SHOWED & WANTED A 1017,1017 9019 CUCKOLD POINT RD, CS 6TH ST, SAME RA, ALOT OF DWI ALWAYS COMING OUT OF LOC AND COMPL WANTS TO TALKE TO OFFICERS ABOUT IT, PC FOR DELAY
9025 CUCKOLD POINT RD	052661977	9/23/05 11:37 PM	7	Noise Complaint	MR WOLINSKI	DOCK OF THE BAY PARKING LOT .. LOUD MUSIC, ROWDY MUSIC, NFI 1242 CANCELLED 1241 FROM RESPONDING, HE WILL HANDLE THIS CALL LAST

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETAD...	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052740239	10/1/05 3:30 AM	8	Check on Subject	MR MATTHEW CIARPERLL	MALE SITTING IN A RED PU, LEANED OVER AND ENGINE IS REVVING
9025 CUCKOLD POINT RD	052800503	10/7/05 9:18 AM	8	Alarm Business - Accidental	UNLIMITED INSTALL 77	DOCK ON THE BAY, NOTIFY AUD NO PERMIT, 2ND FLOOR OFFICE MOTION
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052890033	10/16/05 12:15 AM	7	Check on Subject	MR WOLINSKI	GRP OF SUBJ ON PKG LOT DRINKING BEING LOUD
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	053021386	10/29/05 7:37 PM	8	Noise Complaint	MATTHEW CIAPERILLA	BANDS OUTSIDE,LOUD MUSIC,1017 2716 6TH ST RA120960 CS CUCKOLD POINT*SWAN
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	053082008	11/4/05 10:51 PM	7	Disturbance	KAY SESSA	LOUD MUSIC
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	053151854	11/11/05 10:44 PM	7	Noise Complaint	MR WOLINSKI CHARLIE	LOUD MUSIC IN PARK LOT OR DOORS OPENED THERE...
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	053311285	11/27/05 8:39 PM	7	Traffic Complaint - Other	MR WOLINSKI	BLU DODGE P/U MD REG# 84E980 DOT TWRDS NORTHPOINT RD,VEH BURNED RUBBER OUT OF LOT AND FISH TAILED THEN SPED DOWN THE RD P.1245
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	053450158	12/11/05 2:13 AM	1	Disturbance	MATT CIARPERLLA	12 SUBJS ON PARKING LOT
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	053641676	12/30/05 11:05 PM	5	Disturbance	MR WOLINSKI	3-5 SUBJS IN PKG LOT BEING VERY LOUD & DISORDERLY
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060202009	1/20/06 11:54 PM	7	Traffic Complaint - Other	MR WOLINSKI CHARLIE	COMPL ADV HAS SEEN AT LEAST 15 VEHS COMING OUT OF LOT SPEEDING AND SUBJS HAVE POSS BEEEN DRINKING... 1240 DIRECT ON HOLD
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060281551	1/28/06 9:56 PM	7	Traffic Complaint - D.W.I.	MR. WOLINSKI CHARLIE	MALE & FEM SUBJS WERE DRINKING AT LOC THEN GOT INTO A SMALL COMPACT CAR AND LEFT..DOT ON CUCKOLD POINT RD TWDS NORTH POINT RD
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060281635	1/28/06 10:55 PM	7	Noise Complaint	KAY SESSA	LOUD MUSIC

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD
MAY 9, 2004 - APRIL 3, 2008

STREETADD	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060281688	1/28/06 11:31 PM	5	Noise Complaint	MR CHARLIE WOLINSKI	6-8 SUBJS IN PKG LOT CARRYING ON & MAKING ALOT OF NOISE. COMPL ALSO ADV THE BAR ITSELF IS MAKING ALOT OF NOISE AND COMPL WANTS OFF TO ASK THEM TO TURN IT DOWN AND ASK THEM TO PAY BETTER ATTENTION TO THE PKG LOT C/L CC1708 23:46HRS...CMPLT C/B...REQ OFCR GO INSIDE & TELL THEM TO PATROL THEIR LOT WANTS OFCR TO STAY THERE TIL AFTER CLOSING
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060481935	2/17/06 11:01 PM	8	Traffic Complaint - Other	WOLINSKI,CHARLIE	WHI ,POSS BMW,UNK TAG ,LEFT LOT,TO MILLERS ISLAND RD,TWDS NORTHPOINT..SPEEDING
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060501847	2/19/06 11:07 PM	7	Narcotics, Citizen Initiated	MATT CIARPERLLA	CARLOAD OF SUBJS IN RED,HONDA CIVIC TYPE CAR,ROLLED,POSS MARIJUANA CIGARETTE & ARE SMOKING & DRINKING ON LOT MAY 1021 IF NEED
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060752050	3/16/06 10:18 PM	7	Disturbance	CHARLIE WOLINSKI	ADV PEOPLE ARE DRINKING IN THE PKG LOT FOR PAST 40 MINS.. ALSO ADV THAT EARLIER A SUBJ URINATED NEAR HIS TRUCK.. TRAFFIC ALSO SPEEDING OUT OF LOT..
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060770169	3/18/06 2:08 AM	7	Traffic Complaint - D.W.I.	DARRYL WOLINSKI	ABT 7-8 VEHS LEAVING THE LOC..SUBJS ARE INTOX..
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060830118	3/24/06 2:12 AM	4	Disturbance	MR ANON	LOUD MUSIC COMPLAINT IN PARKING LOT SEE CC#119
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060830119	3/24/06 2:12 AM	8	Duplicate Call	MR MATTHEW CIARPERLL	COMPL ADV DRINKING AND LOUD MUSIC COMNG FROM VEH ON PKG LOT AT LOC SEE CC#118
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060840149	3/25/06 2:07 AM	1	Disturbance	MS CHARLIE WOLINSKI	1017:9019 CUCKOLD POINT RD..SUBJS IN PKG LOT DRINKING AND MAKING A LOT OF NOISE 2:06HRS....WAYNE WALDMANN..REQ 1017 @ 9014 COCKOLD POINT RD ADVS; SUBJS WERE FIGHTING...NOW ARE RACING VEHS ON LOT

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETAD	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060890079	3/30/06 1:16 AM	1	Disturbance	MR WALDMANN	M & F IN PKING LOT.... 1017 9014 CUCKOLDPOINT RD AFTER GOING TO BAR MS SANDY 443 866 6328 ADV M IN GRN EXPLORER 189M422 WAS STARTING TRBL AT LOC, PULLED OFF.. CLR FOLLOWED & SUBJ BACKED HIS VEH UP & HIT HERS AT 12TH & MILLERSISLAND DOT TWD NORTHPOINT RD MR WALDMANN C/B ADV HE NEEDS THE OFF BACK TO LOC BECAUSE THERE IS A FE MALE ON THE ROOF SCREAMING THAT SHE CANT GET DOWN AND BELIEVES SHE MAY BE TRYING TO BREAK INTO THE BAR
9025 CUCKOLD POINT RD	060920134	4/2/06 1:28 AM	7	Disturbance	MR WOLINSKI CHARLIE	DOCK OF THE BAY, IN THE PARKING LOT, LOTS OF PEOPLE BEING ROWDY, THEY ARE DRINKING, NO WEAPONS SEEN, 1242 DIR TO HANDLE PKING LOT IS EMPTY..AUTH 1209
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060972099	4/7/06 9:42 PM	8	Disturbance	MR CIARPERLLA	COMPL ADV SUBJ THAT LOOK LIKE THEY ARE IN A BIKE GANG ARE DOING DONUTS IN STREET IFO LOC
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	061120134	4/22/06 2:03 AM	8	Noise Complaint	MS DARYL WOLINSKI	OUTSIDE ON THE PRKING LOT,PATRONS LEAVING BEING LOUD AND DRINKING 1242 DIRECT ON THE CALL AND WILL ADV FOR BACK-UP
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	061271051	5/7/06 4:05 PM	8	Boating Complaint	MR.BRAD METHENEY	BET LOC AND PLEASURE ISLAND IN THE BAY- SEVERAL BOATS AND SEADOOS FLYING BACK AND FORTH THRU AREA GOING VERY FAST..ONLY SUPPOSED TO BE 6MPH AT LOC...
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	061390202	5/19/06 3:31 AM	6	Assistance Request	MS APRIL	24 YOF, FRIEND IS ILL, FOAMING AT THE MOUTH, THINKS SHE WAS SPLIPPED SOMETHING IN HER DRINK- THE OWNER OF THE BAR IS THE POSS SUBJ RESPON SEE CC# 201 F IS THROWING UP , CAN HARDLY MOVE, SHE IS REALLY OUT OF IT SUBJS BROTHER JUST TOOK THE SICK F, SARAH DICKEY - LEFT LOC IN A SILVE R TOYT SCION TC, BRAND NEW, POSS MD TAG FRK327 MEDIC/1228 OUT W/SCION AT MILLERS ISLAND/NORTHPOINT MEDIC'S ATTENDING PATIENT COMPL - MS APRIL IS 1076 TO 1025 THE OFFICERS COMPL ADV SHE AND HER FRIEND WERE DRINKING THE EXACT SAME BEVERAGES & HER FRIEND IS DEATHLY ILL

TO: ALANE FOLTZ

FROM: K. MCCUBBIN

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETADL..	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	061391646	5/19/06 7:54 PM	1	Hit & Run Accident - Property Damage	OFF EMERICK/OFF DUTY	ADV HIS WHI LEXUS RX330... ADV WAS IN LOC FOR ABT 45 MINS..CAME OUT & VEH WAS HIT... NO SUSP INFO...
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	061500441	5/30/06 9:09 AM	1	Lost or Stolen Property	MS KALB	CELL PHONE 443-570-0583 IS MS. KALB'S CELL #, YOU CAN CALL HER ON THAT #
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	062171938	8/5/06 11:50 PM	1	Narcotics, Citizen Initiated	MR. SPRECHER	FEM CUSTOMER FOUND A BAG OF COCAINE IN MENS BATHROOM
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	062451355	9/2/06 7:25 PM	1	Found Property	MR RON	FOUND JET SKI IN WATER HAS IT TIED UP TO PIER MD TAG 881BM COMPL IS IN THE RESTAURANT VIN: KAW80894C101
9025 CUCKOLD POINT RD	062600336	9/17/06 5:52 AM	8	Assist Motorist	HARVEY LEE	THE DOCK OF THE BAY...COMPL IS CLEANING MAN. HAS LOCKED KEYS IN TRUNK,HAS NO MONEY AND NO ONE TO CALL. IS ALONE. ON FRT PRKING LOT INA KIA OPTIMA
9025 CUCKOLD POINT RD	062870035	10/14/06 12:25 AM	8	Check on Location	THE DOCK OF THE BAY	ALI INFORMATION, NO VOICE CONTACT ON CALL BACK MALE ANSWERED AND HUNGUP LINDSEY,EMPLOYEE CANCEL PD 1022, NO NEED. HONEST MISTAKE. 0026HRS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	062880031	10/15/06 12:24 AM	8	Traffic Complaint - D.W.I.	MR. MARK	A M IN A SILVER FORD RANGER, LEAVING LOC, IS VERY INTOX, COMP ADV NO DOT, BECAUSE HE DOESN'T KNOW WHERE HE IS, DID ADV THAT TH E M IN NOW NEAR THE BOAT STORE,NEXT TO LOC, NFI NFD
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	063631734	12/29/06 10:55 PM	8	Traffic Complaint - Other	MELISSA JOYAVE	WM DRIVING WHITE PONTIAC TAG#2BB063 AND WF DRIVING SILVER FORD TAG#1CHL33 SUBJS RACING AT HIGH SPEED PASSING HER TO GET TO THIS LOC.1017 2810 11TH ST CALLER SAYS SUBJS VERY RECKLESS AND SAYS SHE HAD HER BABY IN HER VEH WHEN SUBJS WENT RACING BY. MALE DRIVER WENT INTO DOCK OF THE BAY AND THE FEMALE LEFT PARKING LOT NO DOT. SENT 4 DELAY 1225 DIR HOLDING 1242 PREMPTED FOR FLAGDOWN
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	070110226	1/11/07 6:06 AM	7	Suspicious Condition	MR. DON	BILLS BOAT YARD, DK TRUCK W/O LIGHTS, FOLLOWED BY ANOTHER TRUCK PULLING A BOAT, BILLS IS CLOSED, THE DK TRUCK PULLED INTO DOCK OF BAY PARKING LOT

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETAD	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	070111338	1/11/07 5:39 PM	8	Traffic Complaint - Other	MR. MATT	SEVERAL M/C'S ARE DOING DONUTS AND BURNOUTS IN THE PARKING LOT OF LOC ADV THEY ARE MAKING ALOT OF NOISE
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	070251143	1/25/07 4:34 PM	1	Lost or Stolen Property	MR THANNER	LOST WALLET ON SUNDAY, CREDIT CARDS WERE BEING USED,
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	070550139	2/24/07 1:50 AM	1	Domestic - Spousal Assault	MS. ELIZABETH	OCC 20 MINS AGO, EXHUSBAND,JOHN MICHALSKI,45YO W/M IN A GRY 03 MUSTANG HIT COMPL'S VEH IN PKG LOT. COMPL HAS WITNESSES AT LOC. JENNINGS, KEVIN MARK 011260
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	071601962	6/9/07 11:00 PM	8	Noise Complaint	MR JOHN SESSA	SUBJ'S PLAYING LOUD MUSIC, ADV HE HAS CALLED THEM SEVERAL TIMES & THEY ARE REFUSING TO TURN IT DOWN SUBJ'S PLAYING LOUD MUSIC, ADV HE HAS CALLED THEM SEVERAL TIMES & THEY ARE REFUSING TO TURN IT DOWN
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	071610012	6/10/07 12:05 AM	8	Noise Complaint	MS SESSA	SUBJ ARE OUTSIDE OF LOC BEING LOUD ALSO LOUD MUSIC 2ND CALL SUBJ ARE OUTSIDE OF LOC BEING LOUD ALSO LOUD MUSIC 2ND CALL
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	071662115	6/15/07 11:03 PM	8	Noise Complaint	SESSA,KAY	LIVE BAND,WHICH IS ALSO A CODE VIOL. BAR DOESN'T HAVE ZONING FOR A LIVE BAND. PATRONS ON PRKING LOT BEING LOUD LIVE BAND,WHICH IS ALSO A CODE VIOL. BAR DOESN'T HAVE ZONING FOR A LIVE BAND. PATRONS ON PRKING LOT BEING LOUD 1225 DIR HOLDING
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	071872019	7/6/07 11:05 PM	5	Noise Complaint	MS. KAY SESSA	LOUD MUSIC, COMPL ADV SUBJS PLAYING MUSIC THERE NOT SUPPOSED TO PLAY LOUD MUSIC, COMPL ADV SUBJS PLAYING MUSIC THERE NOT SUPPOSED TO PLAY 1242 PREEMPTED
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	071940428	7/13/07 7:51 AM	1	Hit & Run Accident - Property Damage	MS MURPHY	TO VEH OCC'D LS PM NO SUSP INFO UNK TAG INFO TO VEH OCC'D LS PM NO SUSP INFO UNK TAG INFO
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	072012144	7/20/07 11:32 PM	8	Disturbance	SESSA, MS	& BOAT @ END OF PIER @ BILLS BOAT YARD. LOUD MUSIC & BOAT @ END OF PIER @ BILLS BOAT YARD. LOUD MUSIC & BOAT @ END OF PIER @ BILLS BOAT YARD. LOUD MUSIC MR. BRAD METHINE, C/B 4104774675, ADV LOUD MUSIC COMING FROM BOAT AT BILLS BOAT YARD NEXT TO LOC AND COMING FROM BOATS AT LOC.

TO: ALANE FOLTZ

FROM: K. MCCUBBIN

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETADDR	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	072030085	7/22/07 12:44 AM	7	Noise Complaint	MS. SESSA	SUBJS ON THE BOATS AT THE END OF THE PIER REVVING THE MOTORS THEN TURNING THEM OFF. ONGOING PBLM SUBJS ON THE BOATS AT THE END OF THE PIER REVVING THE MOTORS THEN TURNING THEM OFF. ONGOING PBLM SUBJS ON THE BOATS AT THE END OF THE PIER REVVING THE MOTORS THEN TURNING THEM OFF. ONGOING PBLM
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	072221655	8/10/07 7:43 PM	8	Duplicate Call	MR KEN LANE	TO A GRAY CHRYSLER LHS, VEH RESP STILL AT LOC, BLK DODGE CHARGER, MD/7CGX92 10-17 COMPL IN PARKING LOT, POSS WITNESS AT LOC TO A GRAY CHRYSLER LHS, VEH RESP STILL AT LOC, BLK DODGE CHARGER, MD/7CGX92 10-17 COMPL IN PARKING LOT, POSS WITNESS AT LOC 1240 DIRECT PC ADV DELAY MR KEN LANE C/B ADV THEY HAVE NOW EXCHANGED INFO & WANTS TO CANCEL OFC 19:48HRS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	072310069	8/19/07 12:36 AM	8	Disturbance	DENNIS SPRECHER/SEC	INTOX TALL 20YOWM,BALD..THREW BOTTLE IN BAR,BROKE GLASSES..ON LOT NOW COMPL C/B AND ADV SUBJ GOT INTO CAB AND LEFT TWDS NORTHPOINT RD. COMPL STILL WANTS OFF TO RESPOND.
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	072310172	8/19/07 1:51 AM	8	Disturbance	MR. SPRECHER	W/M WRG GRY TSHIRT, KAHKI SHORTS, IS CAUSING PBLMS AT LOC. SUBJ IS NOW ON THE BOAT YARK PKG LOT. COMPL CALLED PD ON SUBJ EARLIER
9025 CUCKOLD POINT RD	072440041	9/1/07 12:25 AM	5	Check on Location	THE DOCK OF THE B	911 OPENLINE CALL, HEARING VOICES IN BACKGROUND. NOONE TALKING TO 911. 911 OPENLINE CALL, HEARING VOICES IN BACKGROUND. NOONE TALKING TO 911. VOICEMAIL ON C/B
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	072581462	9/15/07 8:00 PM	6	Burning Complaints	MR. BRUCE	IRO LOC, TO RIGHT HAND SIDE, ADV PEOPLE ARE BURNING POSS WOOD, AND ASHES ARE BLOWING AROUND, ***1242 ADV THERE IS A PIT FIRE AT LOC*** IRO LOC, TO RIGHT HAND SIDE, ADV PEOPLE ARE BURNING POSS WOOD, AND ASHES ARE BLOWING AROUND, ***1242 ADV THERE IS A PIT FIRE AT LOC***
9025 CUCKOLD POINT RD	073351643	12/1/07 12:00 AM	1	1st Degree Assault (Not Domestic Abuse)	MR ANON	ABOUT 8 SUBJS FIGHTING, TALKING ABOUT KILLING PEOPLE, NO SEEN WEAPS, LOC :DOCK OF THE BAY IN BAR

TO: ALANE FOLTZ

FROM: K. MCCUBBIN

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETADDR	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	073351646	12/1/07 12:00 AM	8	Duplicate Call	KATHY	4-5 OUTSIDE FIST FIGHTING, NO WEAPONS DUP CC# 1643
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	073351665	12/1/07 12:00 AM	8	Duplicate Call	MS BOWIE	BOUT 6-7 MALE SUBJ FIGHTING, GROUP CAN SEE THEM THRU THE TREES, POSS INTOX, UNK WEAPS, UNK IF AMBO NEEDED. DUP CC# 1643
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	080130065	1/13/08 12:35 AM	8	Noise Complaint	MR BRAD	PLAYING EXTREMELY LOUD MUSIC SINCE 2130HRS, COMPL TRIED TO CALL & ONLY GETS RECORDING, CAN 1017 AT 2704 6TH ST IF NEEDED 1240DIRECT HOLDING
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	080281827	1/28/08 10:26 PM	8	Disturbance	MR. NO NAME	MALE CALLED AND SAID SEND OFFC TO DOCK OF THE BAY, THEN MALE IN BACKGROUND SAID NO, PHONE H/U
9025 CUCKOLD POINT RD	080281883	1/28/08 11:19 PM	1	2nd Degree Assault (Not Domestic Abuse)	MR RODREGIUS	DOCK OF BAY RESTAURANT...LOC HAS SUSP INFO..COMP WAS THERE FOR A POKER TOURNAMENT & THE RESTAURANT HAS SUSP INFO NAME ETC. REFUSED AMBO

TO: ALANE FOLTZ

FROM: K. MCCUBBIN

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

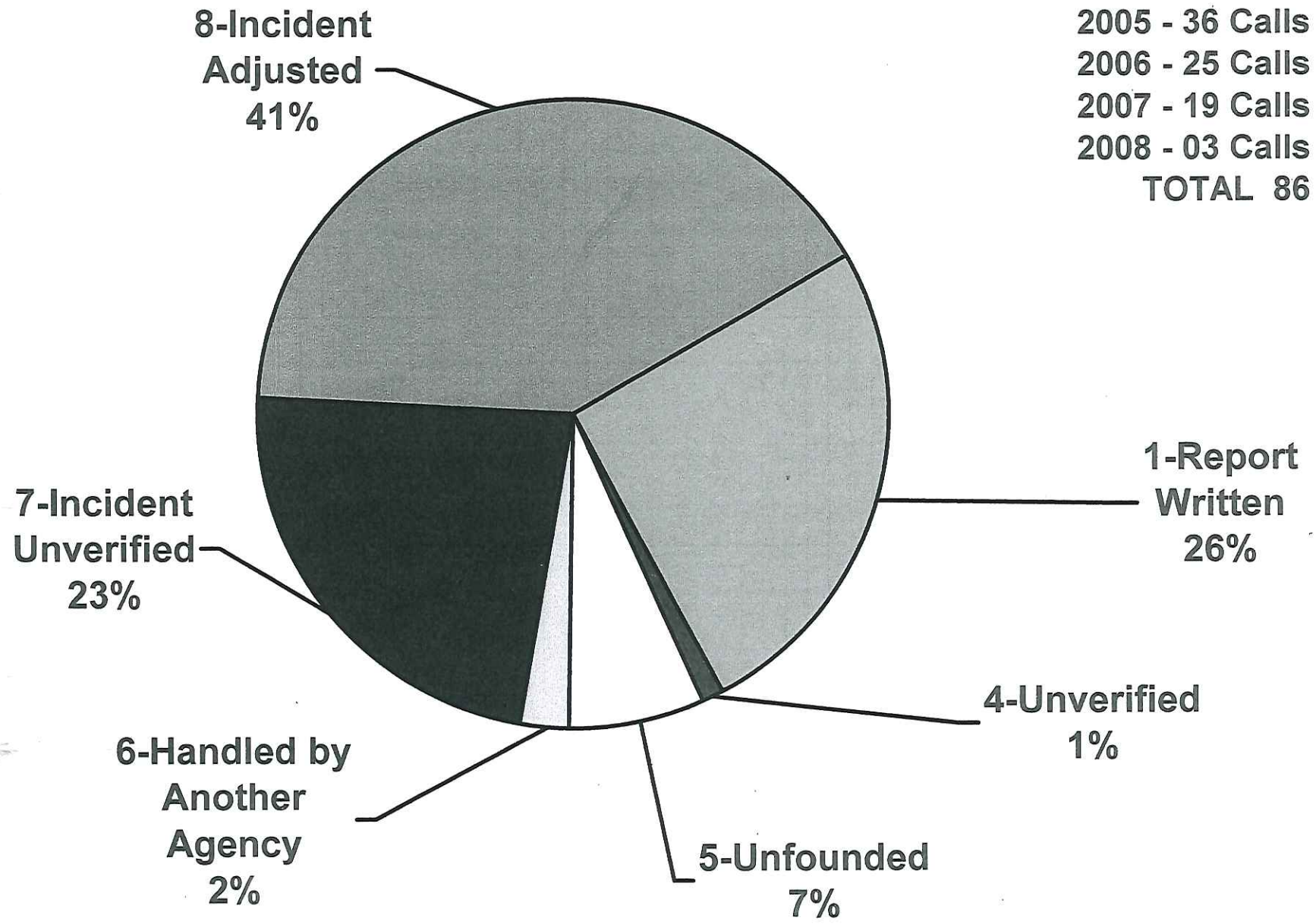
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Protestant exhibit 17

SUMMARY OF CALLS

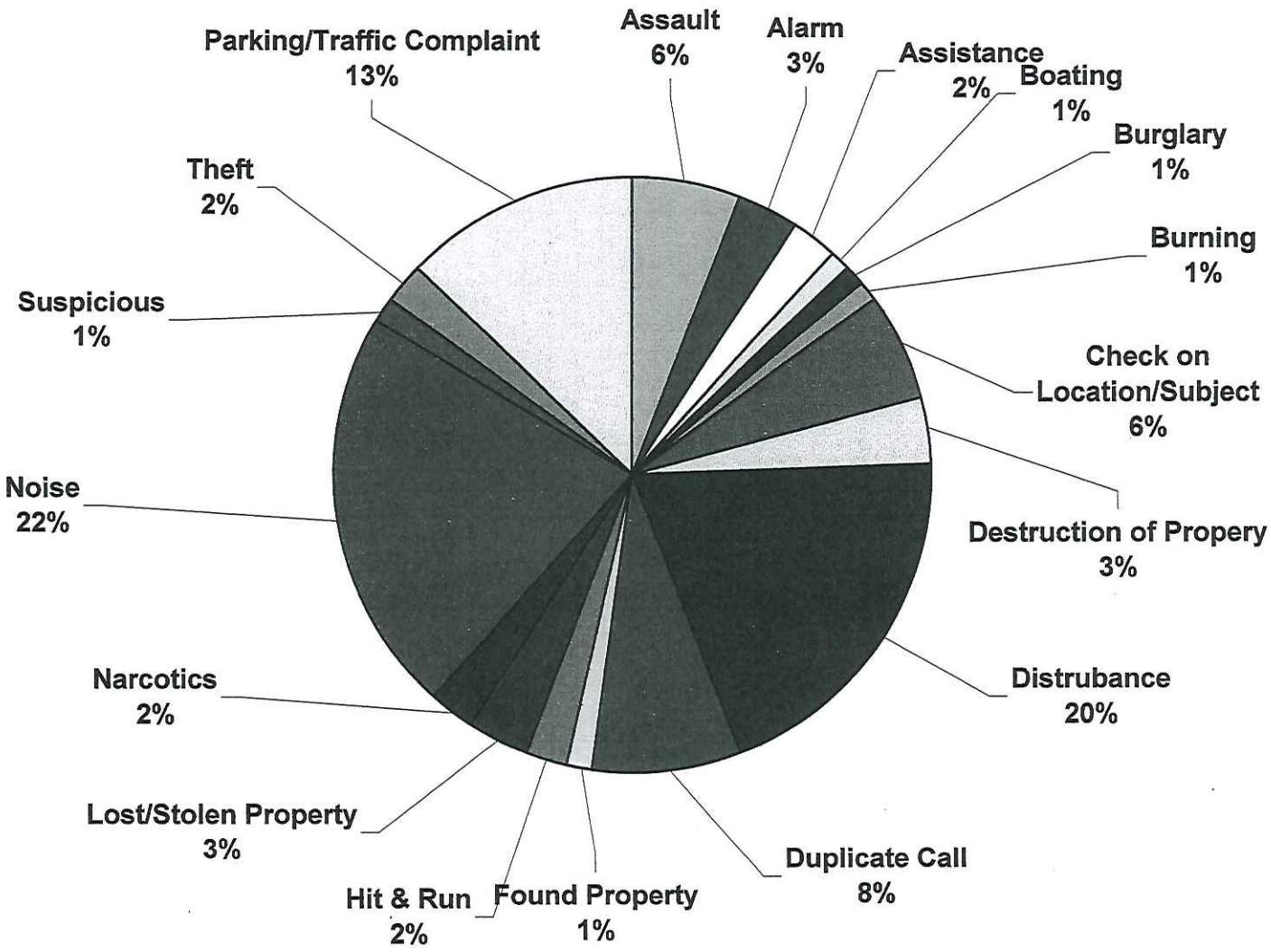
05.04.04-03.04.08

NUMBER OF CALLS
2004 - 03 Calls
2005 - 36 Calls
2006 - 25 Calls
2007 - 19 Calls
2008 - 03 Calls
TOTAL 86



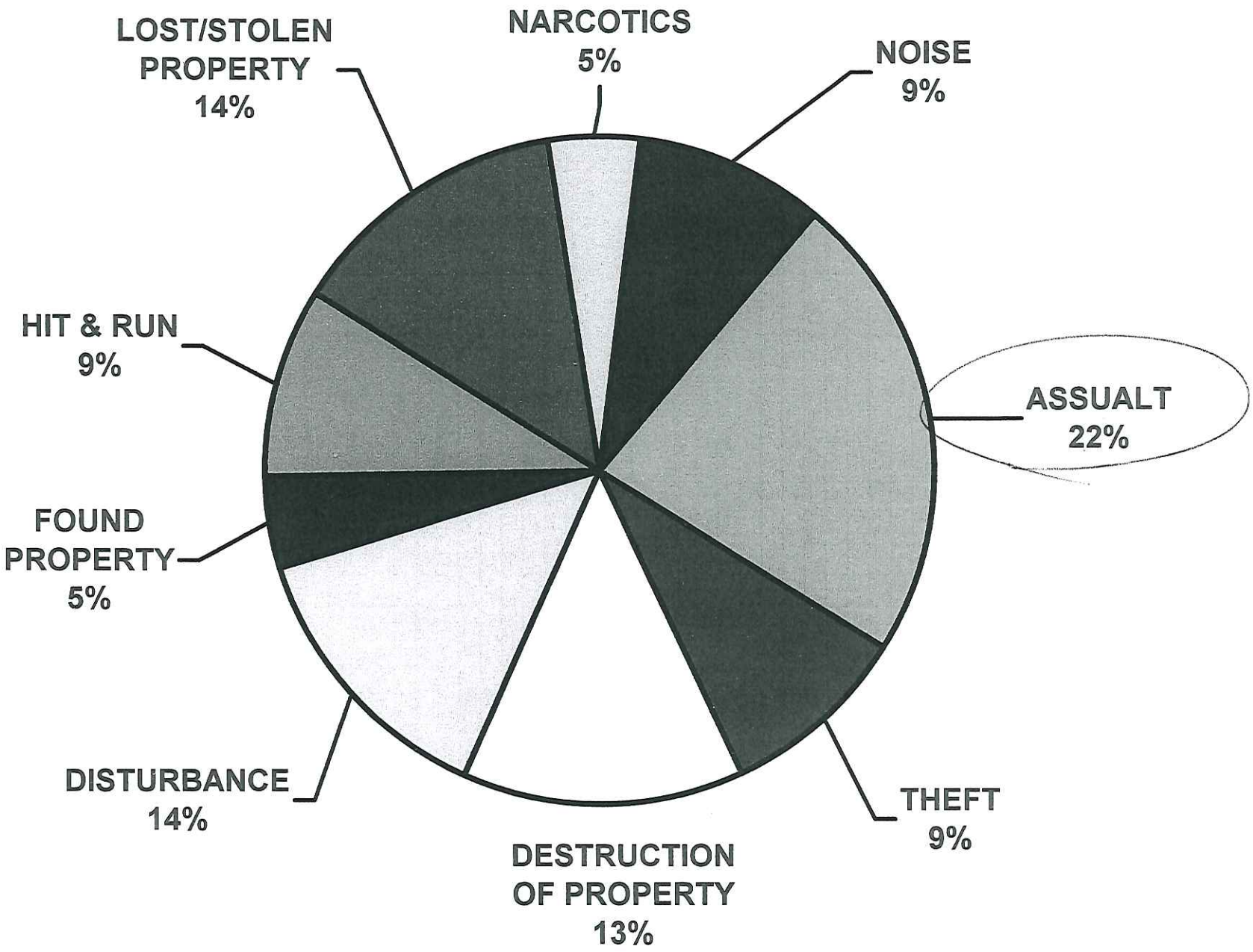
911 SERVICE CALL TYPE

Highest Percentage of Calls by Type
Noise - 22%, Distrubance - 20%, Parking/Traffic - 13%. Duplicate Call - 8%



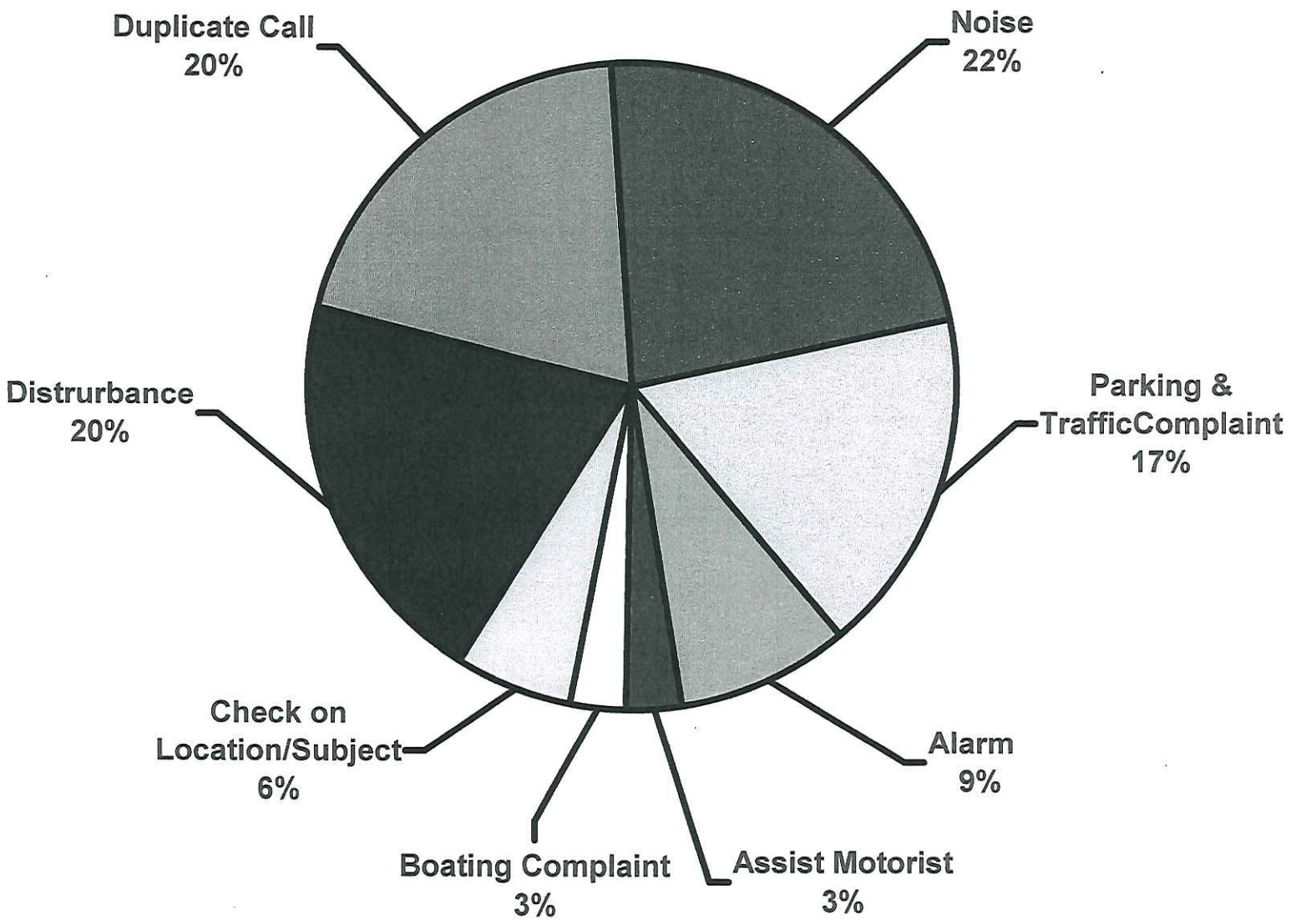
CODE 1 - REPORT WRITTEN

05.04.04 - 04.03.08



CODE 8 - NO REPORT WRITTEN

05.04.04-04.03.08



DEC. 2015

(1)

DOCK of the BAY

December 1 at 2:51pm ·

Dock of the Bay Zoning board hearing set for 10 am February 17, 2016.

When I purchased Dock of the Bay I was advised by the former owner and by a former operating partner that there was a noise restriction placed on the former owner that would vacate when the liquor license was transferred. Upon that transfer I scheduled music to start and was then advised by the zoning commissioner that the sanctions were against the property, not the former owner. While that didn't make any sense to me, I confirmed this with counsel. In April 2015 I hired counsel to appeal the court's decision since the former owner was in fact no longer operating a night club and since I was not operating a night club. I did not ask for any special privileges just asked for the same privileges granted to every other restaurant in Baltimore County.

Since I have owned Dock of the Bay for more than one year, we have not only been a good neighbor, we have been a good and positive resident of Millers Island. We have hosted fund raisers for FEAR, ladies traveling softball team, North Point Edgemere Volunteer fire department, Komen for the Cure and have donated the use of our entire parking lot for fundraisers hosted by others on two occasions. We have expanded our handicap parking and regularly host groups of seniors with mobility concerns. We have been a good neighbor without having a single liquor license violation and not a single incident requiring police assistance. We have been and will be good for the economic and social well-being of Millers Island and Edgemere.

At the first hearing on September 28, 2015, to my great surprise we were greeted in the court room by four neighbors that had banded together and hired an attorney for the purpose of defeating my motion to repeal the restrictions. Their attorney filed a motion of res judicata, which allowed the judge not to rule on the case and pass the case on to a higher court. Therefore we have a hearing set at that higher court for February 17th, 2016.

For the February 17th hearing I will invite all interested parties to participate in the hearing. I will invite both those that feel that The Dock of the Bay should have restrictions as well as those that think that The Dock of the Bay should be granted the same privileges of every other restaurant in Baltimore County. I hope that on that day the court will repeal the restrictions and allow for Dock of the Bay to be a positive influence on the lives of the residents of Millers Island.

Sincerely

Ken Boone

Like Comment Share
Top Comments
174 people like this.
55 shares

Commets

DOCK of the BAY Thank you for all of the support! Please join our event page to support MUSIC for DOCK of the BAY https://www.facebook.com/events/974764222561957/

Protestant exhibit 18

DOCK of the BAY

1st post

December 1, 2015 ·

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Sincerely

Ken Boone



Like
Comment
Share
Top Comments
177177
55 shares

Comments



Protestant exhibit 20

4/27/2016 4:57 PM

News Feed

RECENT ACTIVITY

DOCK of the BAY

February 17 ·

Thank you to many of the many supporters that showed up at the hearing today. I do appreciate it and will always remember your support.

For those of you that were not that there that have interest in the results I will try to explain what happened.

Because of corruption during Spiro Agnew's tenure as Baltimore County executive, Baltimore County appointed a position of Peoples Counsel. In this case the People's counsel clearly took the position of the neighbors. It was two attorneys against one all day. Unfortunatley this people's counsel, Zimmerman, must have been getting paid by the hour. He turned a two hour hearing into 6 hours at which time only some of the neighbors witnesses had been heard so we had to adjurn to another day. A day when each counsel and People's counsel are available. People's counsel whispered that he may not be available for some time so we are adjourned until further notice.

Leaving the court room I asked People's Consel if he had ever been to Millers Island or Dock of the Bay and he said no. I told him that had he visited once he may have far less attitude toward the restaraunt.

So Unfortunately those of you planning to celebrate a victory on either side of the fence will have to wait now till we can reconvene.

Until then I will continue as I always do to the ordinance in place.

Once again thank you for your support both at the hearing and signing the petition.

Ken

12 Comments
2121
Like
Comment
Share

Comments

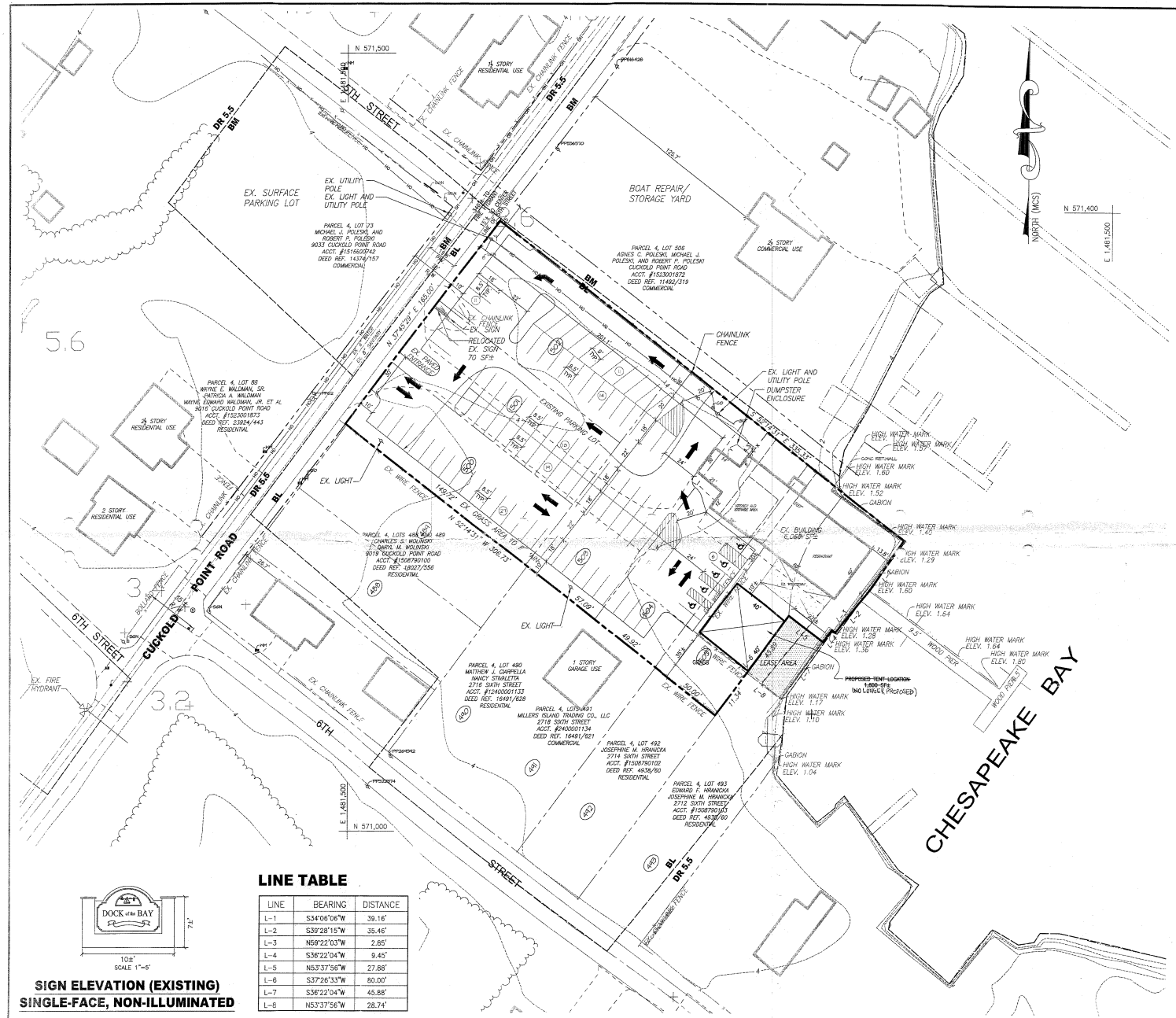
Protestant Exhibit 21

Case No.: 2016-0003-SPH

Exhibit Sheet

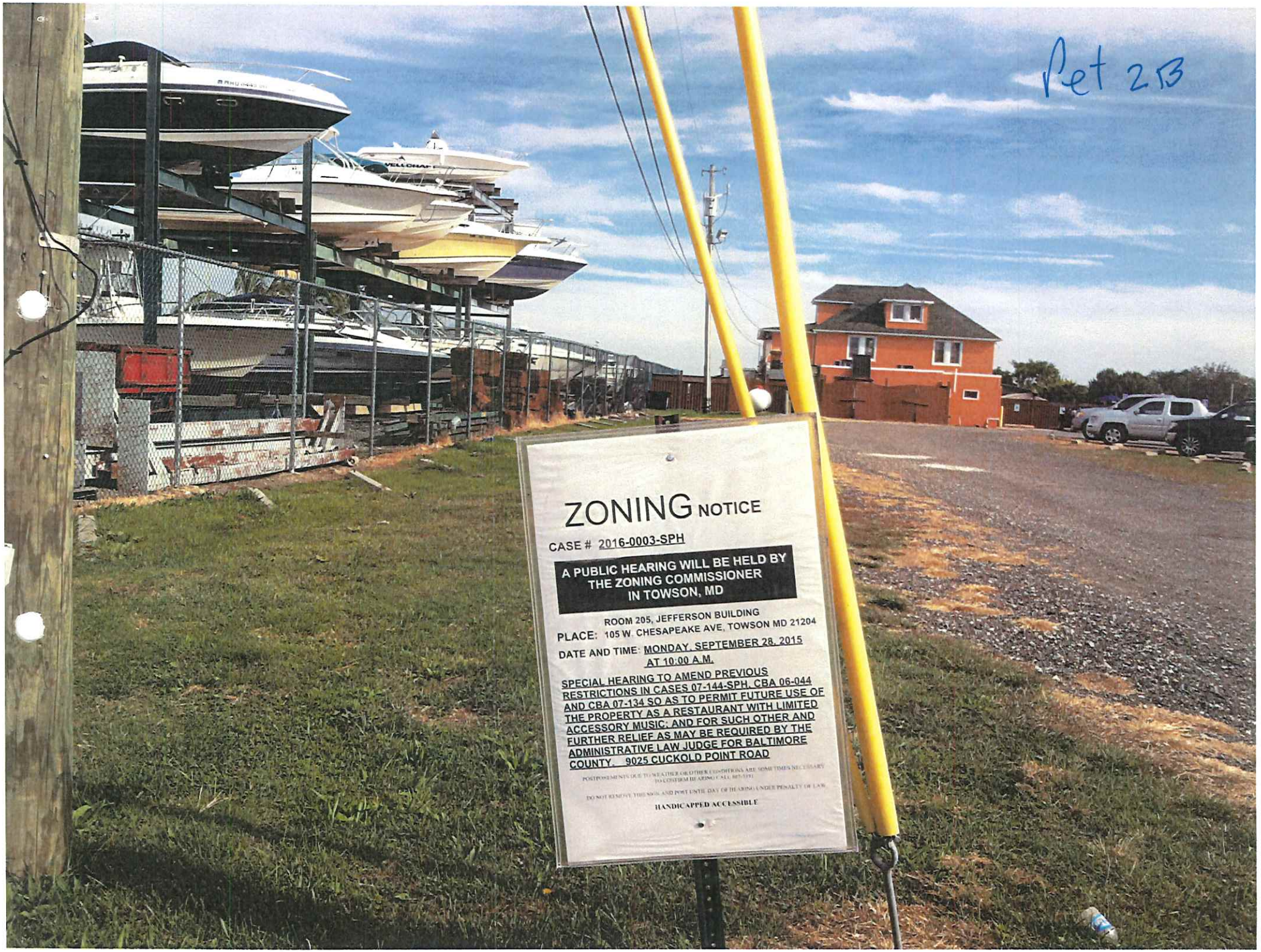
SLN 10-22-15

	Petitioner/Developer	Protestants
No. 1	Site plan	CBA opinion - 07-144 et. al.
No. 2	2A"-2O" Color photos	Circuit Ct. Order 03-C-08-9996
No. 3	3A-3C Aerial photos	Unreported CSA Opinion No. 610
No. 4		Photos
No. 5		
No. 6		
No. 7		
No. 8		
No. 9		
No. 10		
No. 11		
No. 12		


N 571,500
E 1,481,500
6TH STREET
EX. SURFACE PARKING LOT
EX. UTILITY POLE
EX. LIGHT AND UTILITY POLE
BOAT REPAIR/ STORAGE YARD
3½ STORY COMMERCIAL USE
3½ STORY RESIDENTIAL USE
2 STORY RESIDENTIAL USE
1 STORY GARAGE USE
CHAINLINK FENCE
EX. CHAINLINK FENCE
EX. CHAINLINK FENCE & GATE
EX. CHAINLINK FENCE & SIGN
RELOCATED EX. SIGN TO SF±
EX. FENCED ENTRANCE
EX. LIGHT AND UTILITY POLE DUMPSTER ENCLOSURE
EXISTING PARKING LOT
EX. LIGHT
EX. WIRE FENCE
EX. GRASS AREA TO BE PAVED
EX. BUILDING 6,060± SF
GAZEBO
GAZEBO RESTAURANT
HIGH WATER MARK ELEV. 1.60
HIGH WATER MARK ELEV. 1.52
HIGH WATER MARK ELEV. 1.64
HIGH WATER MARK ELEV. 1.28
HIGH WATER MARK ELEV. 1.38
HIGH WATER MARK ELEV. 1.17
HIGH WATER MARK ELEV. 1.10
HIGH WATER MARK ELEV. 1.04
WOOD PIER
LEASE AREA
PROPOSED TENT LOCATION 1,600 SF± (NO LONGER PROPOSED)
CUCKOLD POINT ROAD
CHESAPEAKE BAY
PARCEL 4, LOT 73 MICHAEL J. POLESKI, AND ROBERT P. POLESKI 9033 CUCKOLD POINT ROAD ACCT. #1516000742 DEED REF. 14376/157 COMMERCIAL
PARCEL 4, LOT 506 AGNES C. POLESKI, MICHAEL J. POLESKI, AND ROBERT P. POLESKI CUCKOLD POINT ROAD ACCT. #1523001872 DEED REF. 11492/319 COMMERCIAL
PARCEL 4, LOT 88 WAYNE E. WALDMAN, SR. PATRICIA A. WALDMAN WAYNE EDWARD WALDMAN, JR. ET AL 9016 CUCKOLD POINT ROAD ACCT. #1523001873 DEED REF. 2324/443 RESIDENTIAL
PARCEL 4, LOTS 488 AND 489 CHARLES S. WOLINSKI & DARYL M. WOLINSKI 9019 CUCKOLD POINT ROAD ACCT. #1508790100 DEED REF. 18027/556 RESIDENTIAL
PARCEL 4, LOT 490 MATTHEW J. CAMPELLA NANCY STRALETTA 2716 SIXTH STREET ACCT. #1240001133 DEED REF. 16491/628 RESIDENTIAL
PARCEL 4, LOTS 491, MILLERS ISLAND TRADING CO., LLC 2718 SIXTH STREET ACCT. #2400001134 DEED REF. 16491/621 COMMERCIAL
PARCEL 4, LOT 492 JOSEPHINE M. HRANICKA 2714 SIXTH STREET ACCT. #1508790102 DEED REF. 4938/80 RESIDENTIAL
PARCEL 4, LOT 493 EDWARD F. HRANICKA JOSEPHINE M. HRANICKA 2712 SIXTH STREET ACCT. #1508790103 DEED REF. 4938/80 RESIDENTIAL
EX. FIRE HYDRANT
EX. WATER METER
EX. SEWER MANHOLE
EX. WATER MANHOLE
EX. GAS METER
EX. GAS VALVE
EX. TELEPHONE PEDESTAL
EX. ELECTRIC METER
EX. ELECTRIC MANHOLE
EX. ELECTRIC TRANSFORMER
EX. ELECTRIC VAULT
EX. TELEPHONE MANHOLE
EX. TELEPHONE VAULT
EX. TELEPHONE BOX
EX. TELEPHONE RISER
EX. CABLE TV RISER
EX. CABLE TV VAULT
EX. CABLE TV BOX
EX. CABLE TV PEDESTAL
EX. CABLE TV MANHOLE
EX. CABLE TV TRANSFORMER
EX. CABLE TV METER
EX. CABLE TV VALVE

Pet 2A




Pet 2B
ZONING NOTICE
CASE # 2016-0003-SPH
A PUBLIC HEARING WILL BE HELD BY THE ZONING COMMISSIONER IN TOWSON, MD
ROOM 205, JEFFERSON BUILDING
PLACE: 105 W. CHESAPEAKE AVE, TOWSON MD 21204
DATE AND TIME: MONDAY, SEPTEMBER 28, 2015 AT 10:00 A.M.
SPECIAL HEARING TO AMEND PREVIOUS RESTRICTIONS IN CASES 07-144-SPH, CBA 06-044 AND CBA 07-134 SO AS TO PERMIT FUTURE USE OF THE PROPERTY AS A RESTAURANT WITH LIMITED ACCESSORY MUSIC; AND FOR SUCH OTHER AND FURTHER RELIEF AS MAY BE REQUIRED BY THE ADMINISTRATIVE LAW JUDGE FOR BALTIMORE COUNTY. 9025 CUCKOLD POINT ROAD
POSTPONEMENTS DUE TO WEATHER OR OTHER CONDITIONS ARE SOMETIMES NECESSARY TO CONFIRM HEARING CALL 887-3391
DO NOT REMOVE THIS SIGN AND POST UNTIL DAY OF HEARING UNDER PENALTY OF LAW
HANDICAPPED ACCESSIBLE

Pet 2c



Pet 2 D



Pet 2 E




Pet 2F
SAMUEL ADAMS
SAMUEL ADAMS

Ret 2 G

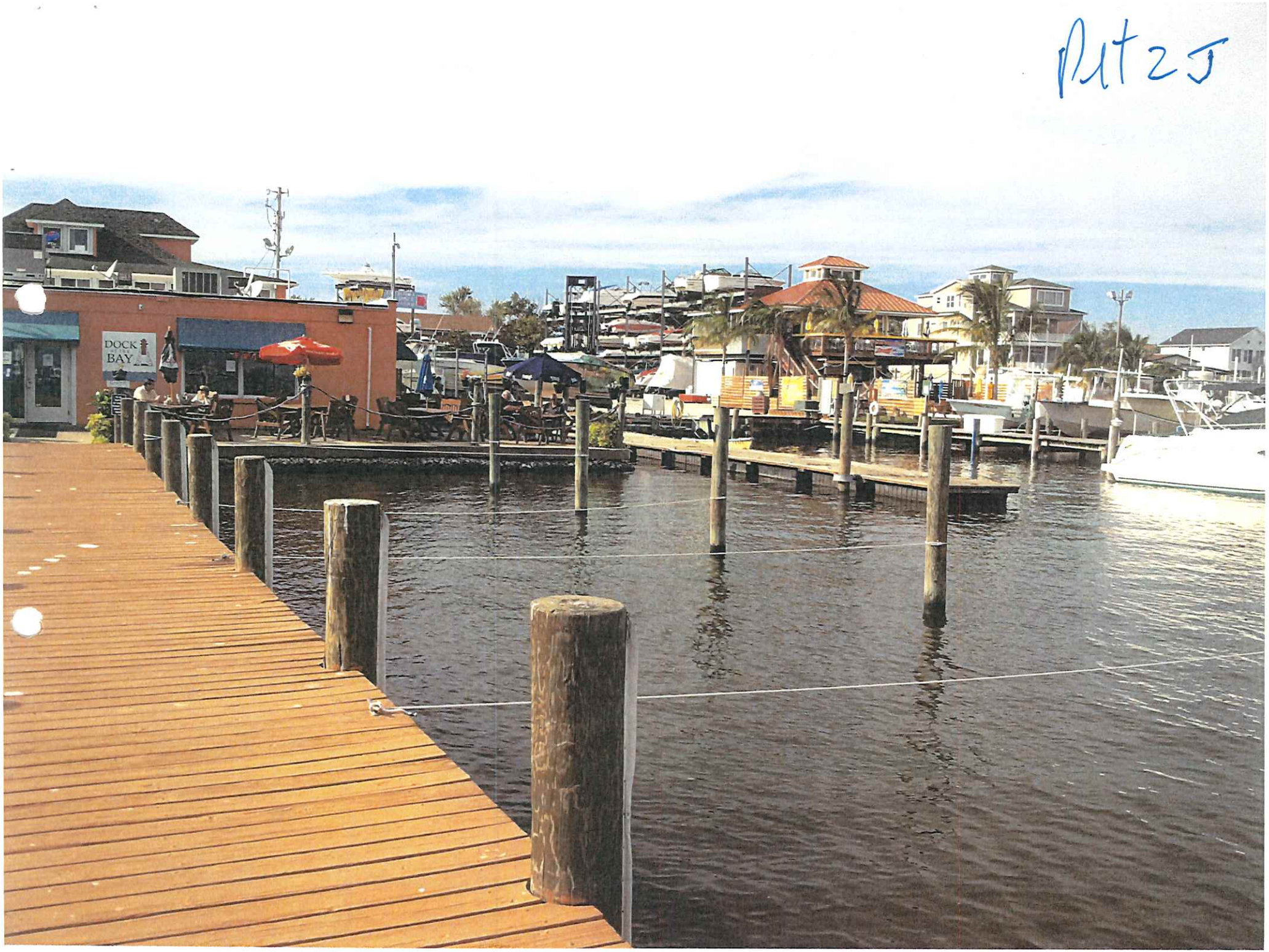




Pet 2.14


Ret 2I

Pt 25



Pet
2K.

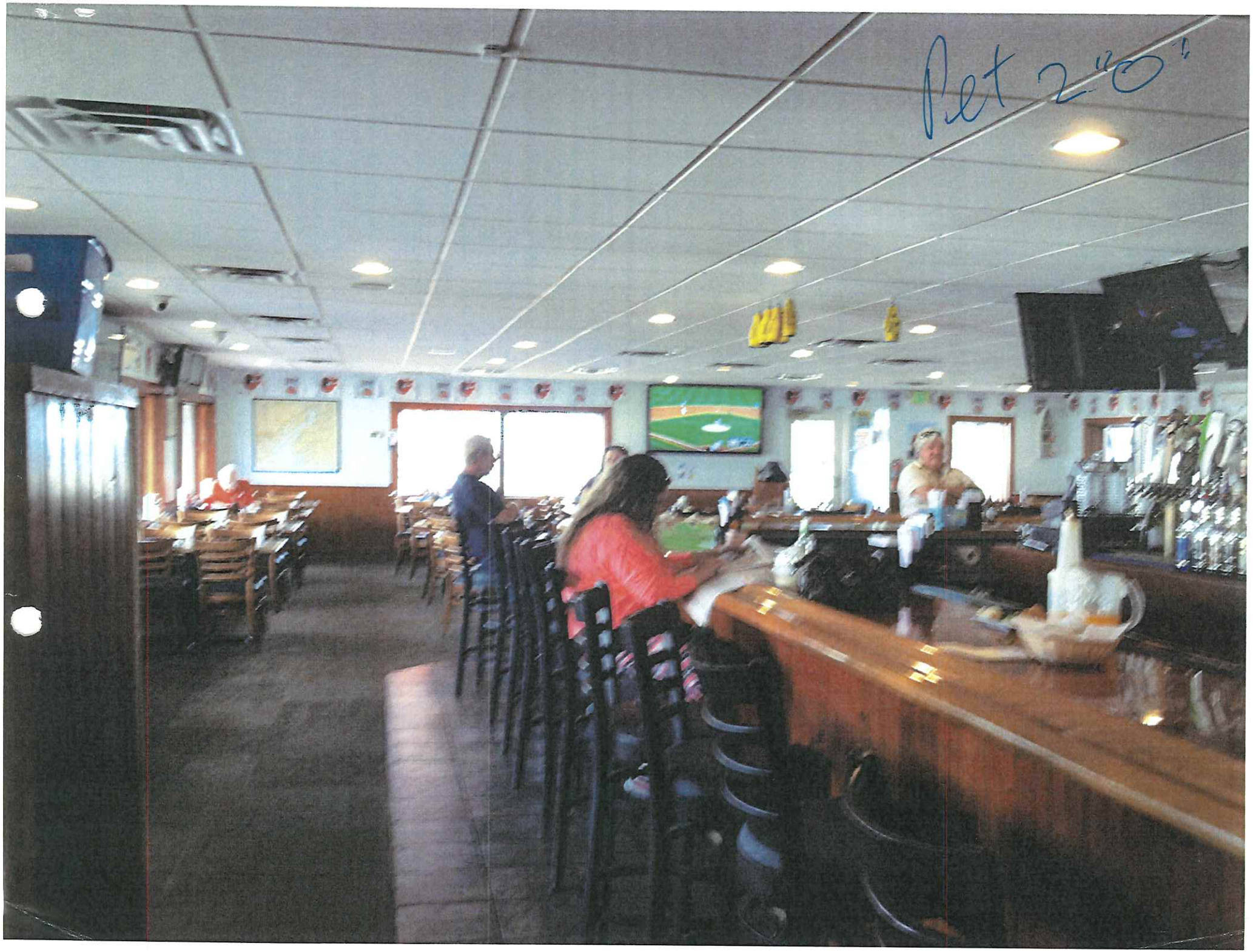

DOCK
of the
BAY
Sorry NO PETS
TO BE SEATED AT TABLES PLEASE SEE HOSTESS INSIDE

Pet 2


DOCK OF THE BAY
PIRATE SHIP RULES
• Children must be supervised by a parent.
• No throwing of any objects.
• No jumping off of the ship.
• Unruly children or children playing in an unsafe manner will be asked to leave the play area.


Pet 2 m


Ret 2 N


Pet 2"0"



Ped 3A

My Neighborhood Map

Created By
Baltimore County
My Neighborhood

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Plot. 1

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	* * * *	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	* * * *	Case No. CBA-07-134

* * * * * * *

MAJORITY OPINION

These cases come to the Board on appeal from two decisions of the Code Enforcement Hearing Officer and a decision of the Zoning Commissioner. The two decisions of the Code Enforcement Hearing Officer found the Petitioner, Fifth Street, LLC, guilty of violations of the County Code and levied fines of $5,000.00 and $1,000.00. The appeal from the decision of the Zoning Commissioner found that the Dock of the Bay, operated by Fifth Street, LLC, was classified as a nightclub under the Baltimore County Zoning Regulations (BCZR) and was in violation of the BCZR for operating a nightclub within a Business Limited (B.L.) zone.

Since the cases basically involved an interpretation of the County zoning regulations and the same sets of circumstances, the Board consolidated the cases for hearing. A hearing on the merits was held on January 15, 2008. Testimony was taken in Case No. 07-144-SPH, and oral

argument was conducted in Cases No. CBA-06-044 and No. CBA-07-134. Petitioner, Fifth Street, LLC, and Lawrence Thanner, Legal Owner, was represented by J. Carroll Holzer, Esquire. Protestants, Matthew J. and Nancy Jean Ciarpella, Phil and Kay Sessa, Charlie and Darrell Wolinski, Michael and Robert Poleski, David and Vena Sheck, Ken Schoyl and Tammy Novak, Doug W. Waldmann, et al, Louis Petrovia, Robert Haas, David Znamirowski, David McWilliams, and Terri Poleski, were represented by Francis X. Borgerding, Jr., Esquire. Baltimore County was represented by Nancy C. West, Assistant County Attorney. The parties were given the opportunity to file briefs on February 19, 2008. A public deliberation was held on March 13, 2008.

Background

Fifth Street, LLC, and Lawrence J. Thanner, its Resident Agent, operates the Dock of the Bay restaurant offering dining facilities and services at its location at 9025 Cuckold Point Road, Millers Island, in Baltimore County, Maryland. On August 8, 2006, the Dock of the Bay was cited for a Code violation, with a proposed penalty of $5,000.00, for operating a nightclub in a B.L. zone. In addition, Fifth Street, LLC, was cited for erecting a tent on the premises without obtaining the required permit from the County. A hearing was held before the Code Enforcement Hearing Officer on August 23, 2006, and a decision was rendered on August 25, 2006, ordering the Respondent to remove the tent and finding that the property "is being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use and continued unabated despite receiving notice of violation on May 12, 2006. A restaurant with dancing and/or live or recorded entertainment is not a permitted use in a B.L. zone."

After that hearing, Fifth Street, LLC, filed a Petition for Special Hearing in Case No. 07-144-SPH. This Petition requested the Zoning Commissioner to interpret the zoning regulations for Baltimore County with respect to the operation of a nightclub.

The decision of the Zoning Commissioner finding that Fifth Street, LLC, and the Dock of the Bay was a restaurant providing music during the day and was a "nightclub" as defined in BCZR § 101, 102.1, and 230, was dated May 30, 2007. Subsequent to that date, Fifth Street, LLC, was again cited for violation of the *Baltimore County Code* (BCC) for failure to obtain a permit for a tent and also for violation of BCZR § 101, 102.1, 230, and 500.6 for failure to cease operation of a nightclub in a B.L. zone. A second hearing was held before the Code Enforcement Hearing Officer and, by decision dated August 16, 2007, the Code Enforcement Hearing Officer again found Dock of the Bay in violation of BCZR for operating a nightclub in a B.L. zone and erecting a tent without obtaining the required permit. The Hearing Officer imposed a $1,000.00 fine in that case.

Testimony and Evidence

Petitioner presented Lawrence J. Thanner, Managing Member of Fifth Street, LLC, as their principal witness. Mr. Thanner stated that the Dock of the Bay has been a restaurant since 1955 and, to his knowledge, always had music and on many occasions, providing live bands. Mr. Thanner opened the new Dock of the Bay restaurant in March of 2004 after refurbishing the building from the effects of Hurricane Isabel. Everything was completely refurbished and new equipment was installed in the restaurant.

Thanner stated that the restaurant has a 2,400 square foot rectangular bar at one end and has tables and chairs on the main floor to accommodate diners. He stated that the restaurant could seat about 150 to 160 patrons inside. In the summertime, he has an outside patio with an outside bar and tables with umbrellas and chairs for patrons to utilize. The restaurant has 14 boat

slips for transient boat customers. The restaurant also has a playground for children, with a wooden pirate ship to allow children to play on the playground. The restaurant opens every day at 11:00 a.m. and closes at 2:00 a.m. In the winter, the restaurant will close early when customers are gone. Thanner testified that the restaurant kitchen closes at 11:00 p.m., but that the bar will stay open until 2:00 a.m. He stated that the restaurant has a full commercial kitchen and provides a full menu of seafood, steaks, sandwiches, etc. He has licenses from the Baltimore County Health Department, which states that he is a restaurant, and a basic license from the State of Maryland, which also states that it is a restaurant.

The restaurant has ten television sets inside and two out on the patio. There is a house music system that plays radio and satellite radio inside and outside. There are outside speakers. The television sets are on all the time except when they have live entertainment.

Mr. Thanner stated that he does have live entertainment at the restaurant with a D.J. playing for karaoke participants and live bands on Friday and Saturday nights. On those occasions, the entertainment goes from 9:00 p.m. to 1:00 a.m. During the previous summer, he stated that he had live music on Saturday afternoon and Sunday afternoon from 4:00 p.m. to 8:00 p.m.

Mr. Thanner stated that he had stopped the music after 8:00 p.m. after the Liquor Board had told him to cease the music. He stated that he had full-scale bands in 2004 with no complaints, but in 2005, a Liquor Board inspector told him to "pipe down" and he still had the bands, but mostly duos or steel bands. He received complaints in May of 2006 from the outside music and wrote a letter to the County asking for clarification on May 14, 2006. This letter was sent to C. Raynor, inspector in the Baltimore County Department of Code Inspections and Enforcement. The letter listed a number of activities, which Mr. Thanner proposed to conduct at the Dock of the Bay and requested clarification as to how these items qualified as a nightclub

under the citation that he had received. This letter was presented as Petitioner's Exhibit #2 to the Board. Thanner stated that he received no response to his letter.

After he sent the letter, he contacted Attorney Carroll Holzer to file for a special hearing. Mr. Thanner stated that 70 percent of the sales at his restaurant were in food and 30 percent are beverages. He indicated that he does not charge for the live entertainment and is open until 2:00 a.m. when the live music is played. Mr. Thanner also stated that, when he has live entertainment, he does lower the lighting level in the restaurant. He stated that the live bands play quite loudly but that he has never been cited for having a noise level about 65 decibels at the property line. He also stated that he does not have any stage accessories for the bands except in the summertime when there is a small stage erected outside on the patio. His operating hours are 11:00 a.m. to 2:00 a.m., which he considered to be normal, but under State law, you cannot sell alcohol past 2:00 a.m. With respect to defined aisles for the tables and chairs, he stated that tables and chairs are set in certain ways to form aisles. He did admit that some time when the bands are playing inside people would move the tables and chairs and dance between the tables. He does have facilities for serving alcoholic beverages and, as previously stated, the restaurant will accommodate 150 to 160 patrons.

Mr. Thanner argued that his operation should not be considered a nightclub based upon the criteria set forth in the International Building Code which has been adopted by the County. It was Mr. Thanner's position that he could not survive in the wintertime without the live music because the restaurant would not pay for itself based solely on food and drinks served during normal times without the music being available.

Mr. James H. Thompson, Supervisor of Code Enforcement, was called by Protestants as a witness and testified that he has worked in Zoning for 31 years, 13 of which as Supervisor of Code Enforcement, and that his office cited Mr. Thanner for being a nightclub operating in a

B.L. zone. Mr. Thompson stated that his office operates on a complaint basis only. He stated that they had had no complaints about the restaurant property before Mr. Thanner took over the property. It was his testimony that his office only reviews a situation based upon a complaint and, if the operation being considered provides live entertainment in a B.L. zone, it would be considered a nightclub and would not be allowed to operate. This would include karaoke, a person playing a piano, and strolling minstrels.

The Protestants presented Matthew Ciarpella, who has resided on Sixth Street adjacent to the Dock of the Bay for 3 years. Mr. Ciarpella complained of hearing the music even though the band was inside and it was wintertime. He stated that Monday through Thursday there were no problems since no music was played, and that when the music was played, it was loud enough for him to hear in his house even though it was not played outside.

Kay Sessa also testified stating that she lived at Sixth Street, which is about 650 feet from the Dock of the Bay. She stated that she heard the karaoke being played and that, although the previous restaurant had live bands, they stopped playing in 1970. She stated that she has been bothered by the live bands of the Dock of the Bay since 2004.

Patricia Waldmann, Charles Wolinski, and Brad Metheny and Bonnie Metheny all testified that they were neighbors living approximately 100 to 250 feet from the Dock of the Bay and that the music played on Friday and Saturday nights was so loud that they could not enjoy a peaceful night's sleep. Wolinski testified that he had gone into the Dock of the Bay and had witnessed that the tables were moved when the bands were playing and that there were not always aisles for the tables.

Finally, George Abendschoen, the Administrator of the Baltimore County Liquor Board, testified that there had been a file opened by his office on the Dock of the Bay. Based upon complaints that were received by the Liquor Board concerning the music that was played, an

inspector, Dan Crockett, had gone to the Dock of the Bay to investigate the matter. There was no determination by the Liquor Board. The report by the inspector, Dan Crockett, was received for identification only but was not admitted as part of the evidence in this matter.

Cases No. CBA-06-044 and No. CBA-07-134

Subsequent to the evidence presented in the special hearing case, the parties argued with respect to the civil citations and the decisions of the Hearing Officer in the above matters. Mr. Holzer contended that, under § 500.6 and 7 of the BCZR, the Hearing Officer had no authority or jurisdiction to interpret the *Baltimore County Zoning Regulations* with respect to whether or not the Dock of the Bay fell under the definition of nightclub. He stated that that was restricted solely to the authority of the Zoning Commissioner. These cases should be determined on the basis of the decision that this Board makes with respect to finding as to whether or not the Dock of the Bay is a nightclub under the BCZR. Mr. Holzer argued that Mr. Thanner had, in good faith, sought clarification in the Baltimore County Department of Code Inspection and Enforcement and received no clarification from that office. He also stated that § 3103 of the *International Building Code*, which has been adopted by the County, applies to structures erected for less than 180 days. He stated that Counsel for the Protestants in his letter claims that, in addition to live music, the tent was up for over 8 months. If that is the case, he felt that his client was cited under the wrong citation. He stated that it was not clear what the fine of $5,000.00 covered and requested a reduction in the fine if the Board finds that the operation is a nightclub. There was no indication as to whether or not there was any evidence presented to the Code Enforcement Hearing Officer with respect to how long the tent was erected at the Dock of the Bay operation.

With respect to the second citation, Mr. Holzer indicated that the second charge should have been given the same file number, even though the first charge was on appeal to the Board.

He stated that the Code Enforcement Hearing Officer in Case No. CBA-07-134 found that the Zoning Commissioner had determined that the playing of outdoor music must be discontinued but did not address the playing of indoor music. The Code Enforcement Hearing Officer found the Dock of the Bay to be a nightclub and therefore in violation of the BCZR. Mr. Holzer wanted further clarification of the fine levied in the second hearing.

In addition, Mr. Holzer indicated that the Zoning Commissioner had received an inquiry from the Liquor Board with respect to his decision. Evidently, the Zoning Commissioner replied to the inquiry, stating that he had determined that the music being played inside and outside the building was prohibited. Mr. Holzer felt that he had to appeal this letter because it was his position that the Zoning Commissioner had not taken any position with respect to the inside music.

Counsel for the Protestants argued to affirm the decision of the Code Enforcement Hearing Officer. He argued that both decisions were affirmed by the decision of the Zoning Commissioner in which he found that the operation was a nightclub. There was no prejudice or reversible error committed and that the Hearing Officer should be affirmed on his findings with respect to the nightclub definition. With respect to the tent, he argued that the tent had been put up on two separate occasions and that the Hearing Officer was correct in finding a violation on both occasions.

Ms. West argued solely with respect to the jurisdictional aspect and it was her position that, under the Code, Article 3, § 6-101, the Hearing Officer had the authority to hear the two cases for finding and was correct in finding the violations.

Decision

There is no question that the Dock of the Bay restaurant is located in a B.L. zone. The B.L. zone uses permitted, as of right, include under § 230.4 a standard restaurant, tea room,

convenience store, and dairy barn. Section 101 of the BCZR defines a standard restaurant as "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment."

The definition of "nightclub" is found in BCZR § 101, List of Definitions, and states:

> A tavern or other establishment which permits live or recorded entertainment with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County.

Section 101 also defines a tavern as:

> An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of a nightclub, as defined in these regulations, shall be considered a nightclub.

A tavern and standard restaurant are allowed in a B.L. zone; a nightclub is not allowed.

The International Building Code, adopted in Bill No. 1-05 by the County Council, includes, in § 303.1:

> 303.1 Assembly Group A:
>
> Assembly Group A occupancy includes, among others, the use of a building or structure or a portion thereof, for the gathering together of persons for purposes such as civic, social, or religious functions, recreation, food or drink consumption, or awaiting transportation....

Following the major assembly group are the five sub-assembly groups. A-2 is the primary group with which we are concerned in this matter.

> A-2. Assembly uses intended for food and/or drink consumption, including but not limited to:
>
> banquet halls
> nightclubs
> restaurants
> taverns and bars

In a discussion of the various groups, the Code states:

> ...In the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high....Darkened spaces in theaters, nightclubs, and the like serve to increase hazards. In emergencies, the congestion caused by large numbers of people rushing to exits can cause panic conditions.

The characteristics for sub-assembly group A2 state:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - low light levels;
> - entertainment by a live band or recorded music generating above-normal sound levels;
> - no theatrical stage accessories;
> - later than average operating hours;
> - tables and seating arranged or positioned so as to create ill-defined aisles;
> - a specific area designated for dancing;
> - service facilities for alcoholic beverages and food; and
> - high occupant load density.

There follows an example which states:

> Example: The Downtown Club, a popular local nightclub /dance hall, features a different band every weekend [See figure 303.1(5)]. It is equipped with a bar and basic kitchen facilities so that beverages and appetizers can be served. There is a platform for a band to perform on, a dance floor in front of the platform, and numerous cocktail tables and chairs. The tables and chairs are not fixed, resulting in a haphazard arrangement such that there are no distinct aisles. When the band performs, the houselights are dimmed and spotlights are keyed in on the performers. The club is equipped with a sound system that is used at loud levels. The club is open until 3:00 a.m. – the latest time the local jurisdiction will allow.

From this descript of The Downtown Club, one can readily see that the appropriate classification is Group A-2. Sometimes, however, it is not this easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building.

The Board recognizes that this decision could have far-reaching effects in the County. The definition of "nightclub" in the BCZR is certainly far from being crystal clear. As testified to by the Building Inspector, the inspection department operates solely on a complaint basis. Their criteria for finding a nightclub would be any restaurant, tavern or bar which provides live

entertainment. This could be anything from a piano player playing background music, a strolling minstrel, or a 12-piece orchestra.

In reviewing the characteristics for the group of facilities classified as A-2 in the Building Code, the Board finds as follows:

1. Low light levels.

Mr. Thanner testified that normally the restaurant is lit at what one would consider a normal level. However, when the band is playing, he did admit that the lights were turned down.

2. Entertainment by a live band or recorded music generating above-normal sound levels.

Mr. Thanner indicated that on Fridays, Saturdays, and Sundays, he has live entertainment, be it karaoke, a D.J., or a small band. In fact, this is a major part of his business and he feels that, without the music, the Dock of the Bay cannot survive during the winter months. The question of whether or not the band and the music is played above normal sound levels is one that would probably be determined by the persons listening to it. Certainly, the neighbors surrounding the Dock of the Bay feel that the sound level of the music is above normal, even during the winter months when music is played inside. There has been no indication that the restaurant has been declared to be in violation of noise levels under the Maryland Occupational Safety and Health Act. However, there is no question that the bands do play at sound levels which extend beyond the four walls of the restaurant.

3. No theatrical stage accessories.

Mr. Thanner testified that there are no theatrical stage accessories, particularly during the winter months. He did state that on weekends during the summer time there is a small stage for the bands that play outside until 8:00 p.m.

4. Later than average operating hours.

Mr. Thanner testified that normal operating hours of the restaurant are 11:00 a.m. to 2:00 p.m. He stated that during the winter the restaurant would close early if there were no patrons. He also indicated that his kitchen closes at 11:00 p.m.; however, the facility will stay open until 2:00 a.m., which is the normal closing hour required by the County for facilities serving liquor.

5. Tables and seating arranged or positioned so as to create ill-defined aisles.

Mr. Thanner again testified that the tables and chairs in the restaurant are generally fixed according to aisles for serving. However, he did state that when a band plays it is normal for individuals to move chairs and tables to allow for the band and also to allow people to dance in between the tables.

6. Specific area designated for dancing.

Mr. Thanner testified that there is no specific dance area. However, once again he did indicate that when the bands are playing people would move the tables and dance in the aisles among the tables.

7. Service facilities for alcoholic beverages and food.

There is no question that the Dock of the Bay serves alcohol and food. Mr. Thanner was quite emphatic that 70 percent of his business comes from the food operation and probably 28 to 30 percent from the alcoholic beverages.

8. High occupant load density.

There is no definition of what a high occupant load density is. Mr. Thanner testified that the restaurant would seat 150 to 160 individuals. On nights when there are bands playing, there appears to be a large crowd coming into the restaurant and one would probably find that it is filled to capacity.

The Board finds that the Dock of the Bay meets at least six of the criteria set forth in Group A-2. This would be criteria 1, 2, 3, 4, 7 and 8.

While our dissenting Member would find that there is no violation when the music is played inside the facility, he would find that it is a nightclub when music is played outside. The Majority finds that the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR. The second criterion does not differentiate between inside and outside noise. The fact that the Dock of the Bay does not provide music Monday through Thursday is not controlling in the opinion of this Board. Playing loud music on Friday through Sunday that can be heard by the neighbors makes the operation a nightclub under the present definition of the BCZR.

The Board is not unmindful that the definition of a nightclub, under the BCZR, can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.M. zones, might be considered "nightclubs" under the present criteria of the BCZR. It is not for the Board to change the definition but for the County Council to consider.

Cases No. CBA-06-044 and No. CBA-07-134

The Board has considered the arguments and evidence presented to the Board and the Code Enforcement Hearing Officer in the above matters.

The Board finds that the Code Enforcement Hearing Officer is authorized to interpret the definition of a nightclub under his duties to hold hearings and issue final orders under § 3-6-206 of the BCZR. In any event, the Zoning Commissioner had found the Dock of the Bay to be a nightclub prior to the holding of the second Code Enforcement hearing. Therefore, the Code Enforcement Hearing Officer could rely on that decision to uphold his findings.

The Board will affirm the decision of the Hearing Officer in both matters but will reduce the penalty to a $1,000.00 fine for operating as a nightclub in a B.L. zone and a $1,000.00 for failure to obtain a permit to erect a tent on a temporary basis at the Dock of the Bay restaurant.

ORDER

IT IS THEREFORE this 4th day of June, 2008, by the Board of Appeals for Baltimore County,

ORDERED that the Petition for Special Hearing pursuant to § 500.6 and 500.7 of the Baltimore County Zoning Regulations requesting a determination as to whether the use of the B.L. zoned property at 9025 Cuckold Point Road is in violation of the zoning regulations, and, specifically, as to whether the facility which provides music at this location is a "nightclub" as defined in the BCZR §§ 101, 102.1 and 230 is hereby answered in the affirmative and the playing of music by way of speaker system, live or recorded entertainment must be discontinued; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-06-044 be and is hereby **AFFIRMED;** and further that the fine is reduced to $1,000.00 for operating a nightclub in a B.L. zone; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-07-134 for operating a nightclub in a B.L. zone and for erecting a temporary tent without a permit be and is hereby **AFFIRMED**; and further that the fine of $1,000.00 for the erection of the tent is **AFFIRMED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules.*

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Wendell H. Grier

Prot. 2

IN THE PETITION OF **FIFTH STREET, LLC** FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY	*	IN THE
	*	CIRCUIT COURT
IN THE CASE OF **FIFTH STREET, LLC** LEGAL OWNERS/PETITIONERS FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE S/E corner of Cuckold Point Road & Fifth Street (9025 Cuckold Point Road) 15th Election District, 7th Councilmanic District	*	FOR
	*	BALTIMORE COUNTY
Case Nos. 07-144-SPH, CBA-06-044, CBA-07-134 Before the County Board of Appeals	*	Case No.: 03-C-08-09996

* * * * * * * * * * * * * *

FINAL ORDER

Upon judicial review of the record, of memoranda filed by the parties, and of oral argument by counsel in open hearing on May 6, 2009, and for reasons stated at the conclusion of the hearing, it is, this 14th day of May, 2009, **ORDERED by the Circuit Court for Baltimore County, that the Order of the Majority Opinion of the County Board of Appeals of Baltimore County dated June 4, 2008**, as finalized by the September 12, 2008 denial of petitioner Fifth Street, LLC's Motion for Reconsideration, **be and hereby is, AFFIRMED** in its entirety, as to the County Board of Appeals' *de novo* determination upon Fifth Street, LLC's petition for special hearing in Case 07-144-SPH and as to the County Board of Appeals' Orders affirming Code Enforcement Hearing Officer decisions in Case Nos. CBA-06-144 and CBA- 07-134.

True Copy Test
SUZANNE MENSH, Clerk
Per Kathy L. McCabe
Assistant Clerk

Lawrence R. Daniels
LAWRENCE R. DANIELS, JUDGE
Circuit Court for Baltimore County

APPROVED AS TO FORM:

Francis X. Borgerding, Jr, Esquire, Attorney for Respondents

J. Carroll Holzer, Esquire, Atty for Petitioner

Peter Max Zimmerman
Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County

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FILED JUN 3 2009

Post-3

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 810

September Term, 2009

FIFTH STREET, LLC., ET AL.

v.

MATTHEW CIARPELLA, ET AL.

Eyler, Deborah S.,
Woodward,
Kehoe,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 9, 2010

Fifth Street, LLC, and its managing member, Lawrence J. Thanner, Jr. (collectively "FSLLC"), the appellants, own the Dock of the Bay, a restaurant and bar located at 9025 Cuckold Point Road in Baltimore County.[1] They appeal from the judgment of the Circuit Court for Baltimore County affirming a decision of the Baltimore County Board of Appeals ("Board"), finding them in violation of the Baltimore County Zoning Code ("Zoning Code") for operating a nightclub in a B.L. (Business Local) zone. The appellees are People's Counsel for Baltimore County ("the County") and Matthew Ciarpella, who resides near the restaurant. The FSLLC presents four questions for our review, which we have consolidated and rephrased as follows:

I. Did the Board err in concluding that the Dock of the Bay operates as a nightclub, as defined in the Zoning Code?

II. Is the definition of a "night club" in the Zoning Code so arbitrary and confusing as to deprive the appellants of their due process rights?

III. Did the Code Enforcement Division hearing officer err in concluding that the appellants violated the Zoning Code by erecting a tent without a permit?[2]

---

[1]We will refer to the Dock of the Bay as a restaurant, as all parties seem to agree that it performs this function, but we do not intend this description to be in any way determinative of the central issue in this case.

[2]As framed by FSLLC, the question presented are:

1. In Special Hearing Case No.: CBA-07-144-SPH, the County Board of Appeals erred as a matter of law in determining that the Dock of the Bay restaurant was a night club under the Baltimore County Zoning Regulations definition.

2. In Zoning Violation Case No.: 06-044, the finding of violation was in error as a matter of law.

(continued...)

For the reasons that follow, we shall affirm the judgment of the circuit court.

ZONING REGULATIONS

The Zoning Code establishes three types of business zones: B.L. (Business Local), B.R. (Business Roadside), and B.M. (Business Major). Zoning Code § 100.1.A.2. As noted above, the Dock of the Bay is located in the B.L. zone. The B.L. zone is the most restrictive of the three business zones.

Zoning Code section 230.1.A sets forth the permitted uses in the B.L. zone, which include the operation of a "standard restaurant" and a "tavern." Combinations of permitted uses also are allowed. Zoning Code § 230.1.A.10. A "nightclub" is not among the permitted uses in the B.L. zone, nor is it permitted by special exception. Zoning Code § 230.3.[3]

A "standard restaurant" is defined in the Zoning Code as follows:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term

---

[2](...continued)

3. If the Dock of the Bay is a restaurant, Civil Citation in Case No.: 07-134 and Case No.: 06-044 must be reversed.

4. County's arbitrary and confusing definition of night club violates Appellants' due process rights, violates standards for discretionary enforcement; leaves enforcement to the arbitrary discretion of County officials and constitutes undue favoritism by the County as established in the testimony before the Board of Appeals. Further, that the County's classification of night club must be reasonable and the evidence before the Board and the Board's conclusions established that the use of I.B.C. Group A-2 to define night club is unusable, arbitrary and capricious.

[3]A nightclub is a permitted use in the B.M. zone. Zoning Code § 233.1.

> includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

Id. at § 100.1. A "tavern" is defined as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." *Id.* Lastly, a "nightclub" is defined as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County." *Id.*

In 2005, the Baltimore County Council passed Bill No. 1-05, adopting the ICC International Building Code, 2003 Edition ("IBC"),[4] with some modifications, as the Building Code of Baltimore County. Chapter 3 of the IBC governs "Use and Occupancy Classification." IBC at 23. IBC section 303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." *Id.* at 24. Subgroup A-2 includes:

> Assembly uses intended for food and/or drink consumption including, but not limited to:
>
> Banquet halls
> Night clubs

[4]International Code Council, *International Building Code* (2003).

Restaurants
Taverns and bars

Id.

The commentary to the IBC explains, "[b]ecause of the arrangement and density of the occupant load associated with occupancies classified in the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high." ICC, *IBC Commentary - Vol. 1*, at 3-16 (2003) ("IBC Commentary"). It then provides a description of each subgroup classification. Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - Low lighting levels;
> - Entertainment by a live band or recorded music generating above-normal sound levels;
> - No theatrical stage accessories;
> - Later-than-average operating hours;
> - Tables and seating arranged or positioned so as to create ill-defined aisles;
> - A specific area designated for dancing;
> - Service facilities for alcoholic beverages and food; and
> - High occupant load density.

Id. at 3-17 - 3-18. The IBC Commentary explains that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. *Id.* at 3-18. Finally, it notes that the characteristics listed above "are only advisory in determining whether Group A-2 is the appropriate classification." *Id.*

FACTS AND PROCEEDINGS

The underlying facts are largely undisputed. The Dock of the Bay has been in operation since approximately 1955. It is situated on the Miller's Island peninsula between the Back River, to the west, and the Chesapeake Bay, to the east. To the south are residences that, like the Dock of the Bay, are zoned B.L. To the north and west of the property is a marina with attendant parking facilities. These properties are zoned B.M.

In September 2003, the Dock of the Bay was destroyed by Hurricane Isabel. One month later, FSLLC purchased the restaurant. Thanner then spent five months rebuilding the restaurant before reopening it in March 2004.

The interior of the restaurant is about 2,400 square feet. The first floor consists of a rectangular bar at one end and tables and chairs in most of the remaining open space. The second floor is used only for storage and office space. The business is licenced as a restaurant and is authorized to serve approximately 150-160 people. It also holds a Class-D liquor license.

Outside the restaurant is a patio area with more tables and chairs and an outside bar. Adjacent to the patio is a children's play area with a wooden pirate ship. The patio overlooks the Chesapeake Bay. FSLLC also owns a dock with 14 "transient" boatslips for customer use.

The restaurant is open daily from 11:00 a.m. until 2:00 a.m., although it frequently closes earlier on week nights, especially in the wintertime. It serves a full lunch and dinner

menu, with an emphasis on seafood. It also serves alcohol. Food service ends at 11:00 p.m. Approximately 70% of its sales are food, 28% beverages, including alcohol, and 2% T-shirts and cookbooks.

There are ten television sets inside the restaurant and another two at the outside bar. A house music system, connected to speakers inside and outside, plays satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered.

Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.

On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

Although there is no dance floor, during live performances patrons often dance in between the tables.

On April 21, 2006, a little over two years after the Dock of the Bay reopened under FSLLC's management, the Code Enforcement Division ("CED") of the Baltimore County Department of Permits and Development Management ("DPDM") received a letter of

complaint from Matthew Ciarpella, through counsel, regarding live music at the restaurant.[5] The letter alleged that the Dock of the Bay was operating as a nightclub, which is not a permitted use in the B.L. Zone.

In May, June, and August of 2006, the Dock of the Bay was cited for operating a nightclub in a B.L. zone, erecting a tent without a permit, and failing to cease nightclub operations and to remove the tent.[6]

On August 18, 2006, FSLLC filed a "Petition for Special Hearing," presenting two questions:

> 1.. Whether the use of the property at 9025 Cuckold Point Rd., Millers Island 21219 is in violation of the [Zoning Code ?]
> 2. Is the use by Fifth Street, LLC, a restaurant, at 9025 Cuckold Point Rd., which provides music during the day, . . . a "night club" as defined in the [Zoning Code]?

On August 23, 2006, before the petition for special hearing was ruled upon, the case came before a CED Hearing Officer at the DPDM. The hearing officer heard testimony from Thanner, Ciarpella, and another nearby resident, Wayne Walkman, Jr. Evidence consisting of advertisements highlighting the music offered at the Dock of the Bay also were introduced. The hearing officer issued "Findings of Fact and Conclusion[s] of Law." He found that the Dock of the Bay offered live and recorded music, both inside and outside. He

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[5]This was not the first complaint about the property. In the summer of 2005, Ciarpella and other nearby residents made numerous noise complaints.

[6]After the first of the citations, Thanner wrote to the inspector to request clarification as to the nature of his violation. He received no response to his letter.

then referenced the IBC and the IBC Commentary, concluding that the property "exhibits some of the listed characteristics" in the IBC Commentary for Subgroup A-2. He ruled that the Dock of the Bay was "being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use." He imposed a civil penalty of $5,000 and ordered FSLLC to "dismantle the outside speaker system and cease live and/or recorded entertainment immediately." He further concluded that the tent was erected without a permit in violation of IBC sections 3102.1, 3103.1 and 3103.1.1 and ordered it removed.

A two-day, public special hearing was held before the Zoning Commissioner ("Commissioner") to determine if the Dock of the Bay, "which provides music [] during the day, [is] a 'nightclub' as defined in [the Zoning Code]." Thanner testified at the hearing. Three past and present residents of Millers Island testified in support of FSLLC. Twenty-two nearby residents testified as protestants about the loud music, parking overflow, and noisy patrons leaving the property late at night. Finally, the CED officer who had cited the property and James H. Thompson, CED Supervisor, testified.

On May 30, 2007, the Commissioner issued his opinion. After reciting the "relatively simple" facts, the Commissioner addressed the question whether the Dock of the Bay is a "nightclub or simply a restaurant where ancillary entertainment is provided." He looked to the definition of "nightclub" in the Zoning Code and to the IBC and IBC Commentary. He concluded that, under the plain language of the Zoning Code definition, any establishment

that "provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub" under the IBC is an impermissible use in a B.L. zone. He further concluded that the use of the term "categorized" means only that the establishment necessarily falls under the IBC "Use and Occupancy Classification" category that includes "nightclubs." The Commissioner ruled that the Dock of the Bay is a "nightclub" under the Zoning Code and ordered "that the playing of outdoor music either by way of an outside speaker system, live/or recorded entertainment, must be discontinued."

After the special hearing, FSLLC was cited for continuing nightclub and tent violations. A second hearing before a hearing officer was held and the Dock of the Bay again was found in violation.

FSLLC appealed to the Board from the decision of the Commissioner, as well as from the decisions of the hearing officers. The cases were consolidated before the Board.

On January 15, 2008, a three-member panel of the Board took testimony and heard argument.[7] FSLLC called Thanner and also called Thompson, as an adverse witness. In addition to the facts already adduced concerning the nature of his business, Thanner testified that live entertainment was a significant draw for the Dock of the Bay, especially during the

[7]Pursuant to Zoning Code section 501.6, appeals from the Zoning Commissioner are heard "*de novo*." Accordingly, the Board took testimony on the issues presented at the special hearing. The appeal of the code enforcement rulings, however, were reviewed on the record before the hearing officer pursuant to section 3-6-303 of the Baltimore County Code (2003).

slower winter months, and that he would likely have to close down if forced to discontinue it.

Thompson testified that the CED operates on a "complaint basis only," meaning that it investigates alleged code violations only after receiving a complaint about a property or business. It does not undertake investigations of potential violations on its own initiative. He also testified that, in his opinion, based on his experience enforcing the Zoning Code, a property could operate as a "dual use," meaning that it could fit into multiple categories of use simultaneously. He explained that it was the practice of the CED to treat live music, but not recorded entertainment, as a code violation in the B.L. zone.

Numerous residents also testified. For the most part, their testimony was not relevant to the issues on appeal.[8] There was testimony that music played at the dock of the Bay was loud enough to be heard inside residents' houses.

At the conclusion of testimony and arguments, the Board allowed the parties to submit briefs. On June 4, 2008, a two-member majority of the Board issued an opinion concluding that the Dock of the Bay was operating as a nightclub and affirming the hearing officer's

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[8]FSLLC filed a motion to limit testimony with respect to expected resident testimony concerning noise at the restaurant and related complaints about the establishment. The Board granted the motion, opining that this type of testimony generally was not relevant to the legal issue whether the business was a nightclub under the Zoning Code, the only issue under *de novo* review. Despite that ruling, many residents testified. Their testimony was cut short by relevance objections, however.

An employee of the Liquor Board also testified and counsel for Ciarpella attempted to introduce into evidence records related to prior noise complaints from 2005. The Board granted FSLLC's hearsay objections to this testimony and evidence, however.

rulings. The Board reduced the $5,000 fine imposed for operating as a nightclub to $1,000 and upheld a $1,000 fine imposed by the hearing officer for the tent violation. FSLLC was ordered to discontinue the "playing of music by way of speaker system" and "live or recorded entertainment."

In its opinion, after reciting the facts, the Board majority looked to the definition of "nightclub" in the Zoning Code. Having noted already that the Dock of the Bay offered "live or recorded entertainment," it turned to the IBC and the IBC Commentary to determine if the business was "categorized as a nightclub." Like the Commissioner, it considered whether the eight non-exclusive characteristics of Subgroup A-2 applied to the Dock of the Bay. It found that six of the eight factors were met: low light levels, entertainment by a live band or recorded music generating above normal sound levels, no theatrical stage accessories, later than average operating hours, service facilities for alcoholic beverages and food, and high occupant load density. It found that two factors – tables and seating arranged or positioned so as to create ill-defined aisles and a specific area for dancing – did not apply.

Based on its finding that the Dock of the Bay exhibited six of the eight characteristics of Subgroup A-2, the Board majority concluded that the restaurant was operating as a nightclub. Its decision closed as follows:

> The Board is not unmindful that the definition of a nightclub, under the [Zoning Code], can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.[L.] zones, might be considered "nightclubs" under the present criteria of the [Zoning Code]. It is not for the Board to change the definition but for the County Council to consider.

One of the three Board panel members issued a dissenting opinion. He emphasized the undisputed facts that characterized the Dock of the Bay as a family restaurant, such as the full-service menu, table seating for 150-160 persons, a pirate ship play area, no cover charge, and the vast majority of sales being food related. He described the "nightclub" definition in the Zoning Code as "exceedingly unclear and circuitous" and characterized the IBC as a "'one size fits all'" building code that fails to reflect the "particular realities and common sense observations of this jurisdiction." In particular, the dissenter took issue with the IBC's practice of grouping restaurants together with such "disparate uses" as banquet halls and nightclubs. He noted that the IBC Commentary even distinguishes between buildings in which people congregate for "*drinking and dancing* (e.g., nightclubs, dancehalls, banquet halls, cabarets, etc.)" and buildings in which people congregate for "food and drink consumption (e.g., restaurants)." (Emphasized in dissenting opinion.)

Finally, the dissenter stated that, even if it were appropriate to apply the Subgroup A-2 criteria, the evidence did not support the Board majority's findings with respect to several of the criteria. Specifically, he found from the testimony that the lighting only was dimmed occasionally, for ambiance; that the business never had been cited for allowing the music to generate above-normal sound levels; that there was no evidence that the business hours from 11:00 p.m. to 2:00 a.m. were "later than average operating hours"; and that "high-occupant load density" is too ambiguous a characteristic to be applied.

The dissenter closed by observing that the Board majority was turning "a blind eye to common sense," when, as here, the facts were clear that the Dock of the Bay was a restaurant offering some musical entertainment on the side. He also noted that "selective enforcement" of the Zoning Code, as testified to by Thompson, seem "contrary to the spirit and intent of any well-written regulation, [] arbitrary and capricious, and possibly an 'Equal Protection under the laws' violation."

FSLLC moved for reconsideration of the Board decision, asking the Board to clarify how many of the IBC Commentary criteria must be satisfied before a business is considered a nightclub; to amend its order to direct the Dock of the Bay to "discontinue its nightclub operation" as opposed to discontinuing all music and live or recorded entertainment;[9] to reconsider the imposition of any fine for the nightclub violation, given the difficulty the Board itself had in determining whether a violation had occurred; and to reconsider the finding of a tent violation. FSLLC also argued that testimony of a number of nearby residents should not have been allowed. The motion was denied in its entirety.

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[9]FSLLC suggested certain changes it could make, short of discontinuing all live and recorded music, to reduce the number of Subgroup A-2 characteristics applicable to it. It stated that it would keep lighting levels at medium, use theatrical accessories, not remain open later than average, keep defined aisles, not have a dance area, close the kitchen during live entertainment so that there would not be "service facilities for food and drink," and not exceed the occupant load limit as set forth by the fire department.

FSLLC petitioned the circuit court for judicial review. Oral argument was heard,[10] and the circuit court issued a ruling on the record affirming the Board's decision. FSLLC timely appealed the judgment of the circuit court.

We shall include additional facts in our discussion of the issues.

STANDARD OF REVIEW

The Court of Appeals has described our circumscribed role in reviewing an agency decision as follows:

> A court's role in reviewing an administrative agency adjudicatory decision is narrow, *United Parcel v. People's Counsel*, 336 Md. 569, 576, 650 A.2d 226, 230 (1994); it "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel*, 336 Md. at 577, 650 A.2d at 230. *See also* [Md.] Code (1984, 1995 Repl. Vol.), § 10-222(h) of the State Government Article; *District Council v. Brandywine*, 350 Md. 339, 349, 711 A.2d 1346, 1350-1351 (1998); *Catonsville Nursing v. Loveman*, 349 Md. 560, 568-569, 709 A.2d 749, 753 (1998).
>
> In applying the substantial evidence test, a reviewing court decides """whether a reasoning mind reasonably could have reached the factual conclusion the agency reached."""" *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978). *See Anderson v. Dep't of Public Safety*, 330 Md. 187, 213, 623 A.2d 198, 210 (1993). A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. *CBS v. Comptroller*, 319 Md. 687, 698, 575 A.2d 324, 329 (1990). A reviewing court "'must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence' and to draw inferences from that evidence." *CBS v. Comptroller*, *supra*, 319 Md.

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[10]The judge indicated to the parties that his main concern was "with the 14th Amendment to the United States Constitution that guarantees every citizen the right of due process."

at 698, 575 A.2d at 329, quoting *Ramsay, Scarlett & Co. v. Comptroller*, 302 Md. 825, 834-835, 490 A.2d 1296, 1301 (1985). *See Catonsville Nursing v. Loveman, supra*, 349 Md. at 569, 709 A.2d at 753 (final agency decisions "are *prima facie* correct and carry with them the presumption of validity").

Despite some unfortunate language that has crept into a few of our opinions, a "court's task on review is *not* to ""'substitute its judgment for the expertise of those persons who constitute the administrative agency,'"'" *United Parcel v. People's Counsel, supra*, 336 Md. at 576-577, 650 A.2d at 230, quoting *Bulluck v. Pelham Wood Apts., supra*, 283 Md. at 513, 390 A.2d at 1124. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. *Lussier v. Md. Racing Commission*, 343 Md. 681, 696-697, 684 A.2d 804, 811-812 (1996), and cases there cited; *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881, 886 (1989) ("The interpretation of a statute by those officials charged with administering the statute is . . . entitled to weight"). Furthermore, the expertise of the agency in its own field should be respected. *Fogle v. H & G Restaurant*, 337 Md. 441, 455, 654 A.2d 449, 456 (1995); *Christ v. Department of Natural Resources*, 335 Md. 427, 445, 644 A.2d 34, 42 (1994) (legislative delegations of authority to administrative agencies will often include the authority to make "significant discretionary policy determinations"); *Bd. of Ed. For Dorchester Co. v. Hubbard*, 305 Md. 774, 792, 506 A.2d 625, 634 (1986) ("application of the State Board of Education's expertise would clearly be desirable before a court attempts to resolve the" legal issues).

Bd. of Physician Quality Assurance v. Banks, 354 Md. 59, 67-69 (1999) (footnotes omitted).

In *Marzullo v. Kahl*, 366 Md. 158 (2001), the Court reaffirmed the principle that agencies are owed due deference in their interpretation of the zoning regulations they are tasked with enforcing. In that case, like the instant case, the agency was the Board and the regulations at issue were part of the Baltimore County Zoning Code. The Court opined that the Board's "expertise should be taken into consideration and its decision should be afforded

appropriate deference in our analysis of whether it was 'premised upon an erroneous conclusion of law.'" *Id.* at 173 (quoting *Banks, supra*, 354 Md. at 68) (footnote omitted).

DISCUSSION

I.

FSLLC challenges the legal foundation for the Board's decision and the factual findings supporting it. We begin with the legal contentions. The Zoning Code's definition of "nightclub" is comprised of three elements: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor" and 3) "categorized as a nightclub by the Building Code of Baltimore County." It is undisputed that the Dock of the Bay is a "tavern or other commercial establishment" that offers both live and recorded entertainment in the form of bands, karaoke, DJs, satellite radio, and television. Thus, the central focus of FSLLC's legal argument is that the Board erred in concluding that the Dock of the Bay is "categorized as a nightclub by the Building Code of Baltimore County."

FSLLC points out that the IBC does not define "nightclub." Rather, it groups certain structures, including nightclubs and restaurants, as fitting in Assembly Subgroup A-2. Therefore, according to FSLLC, a finding that the Dock of the Bay meets characteristics of Subgroup A-2 is of no moment because it does not answer the ultimate question: is the Dock of the Bay a nightclub?

Before we address this contention, some history is helpful. Since at least 1956, the Baltimore County Building Code ("BCBC") has adopted the standards of a model building code. *See Metius v. Julio*, 27 Md. App. 491, 497 n.3 (1975). Baltimore County is not unique in this practice. Since the early part of the 20th century, at both the municipal and state levels, building codes around the country have been based on model codes. Three regional model code groups promulgated the codes – the International Conference of Building Officials ("ICBO"), the Building Officials Code Administrators International ("BOCA") and the Southern Building Code Conference International ("SBCCI"). *See* www.iccsafe.org/ABOUTICC/Pages/default.aspx. BOCA, a code designed for the east coast and the midwest, previously had been adopted by the Baltimore County Council. *See Swinson v. Lords Landing Village Condo.*, 360 Md. 462, 479 (2000) (noting that, since at least 1981, most counties in Maryland have had building codes patterned on the BOCA model code); *Metius, supra*, 27 Md. App. at 497 n.3 (noting that Baltimore County adopted the BOCA standards beginning in 1956).

In 1994, these three regional groups consolidated to form the ICC. The first version of the IBC was published in 2000.[11] The IBC does not differ substantially from the BOCA code that it replaced. As relevant to the instant case, however, the category in which a "restaurant" was placed changed. Under the BOCA code, a restaurant was categorized in

[11]Pursuant to Md. Code (2003, 2009 Supp.), section 12-503 of the Public Safety Article, the Maryland Department of Housing and Community Development is required to adopt the IBC as its model building code, subject to some permitted modifications.

Assembly Subgroup A-3.[12] *See* Building Officials Code Administrators, *The BOCA National Building Code/1999* 18 (14th ed. 1999). As discussed, *supra*, under the IBC, restaurants are categorized in Subgroup A-2. Under both BOCA and IBC, nightclubs are categorized in Subgroup A-2. The IBC Commentary, discussed *supra*, setting forth the eight non-exclusive characteristics of Subgroup A-2, appears to have been lifted verbatim from the BOCA Commentary that preceded it. *See In the Matter of the Application of Rampart Partnership (Club 101)*, Case No. 96-60-XA at 18-19 (Aug. 28, 1998) ("*Club 101*") (quoting from the Commentary to the BOCA Code with respect to Subgroup A-2).

Returning to FSLLC's argument, we agree that the IBC does not define a nightclub. The Zoning Code definition of "nightclub" merely requires that the IBC "categorize" an establishment as a "nightclub." The IBC (and the BOCA Code before it) do exactly that. They categorize structures for purposes of numerous safety regulations. That a restaurant and a nightclub fall into the same sub-category under the IBC "Use and Occupancy Classifications" does not affect the analysis under the Zoning Code, however. The Board correctly looked to the IBC and the characteristics of structures that fall within Subgroup A-2 to determine if the Dock of the Bay property is categorized in that grouping. If it is, then it met the Zoning Code definition of "nightclub."

Moreover, as mentioned above, we accord the Board "a degree of deference . . . in its application of the law." *Banks*, *supra*, 354 Md. at 69. In the instant case, the Board's

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[12]Interestingly, that subgroup included "restaurants other than nightclubs."

decision was informed by its experience applying these characteristics, as evidenced by its *Club 101* decision.[13] In *Club 101*, the Board considered whether, under the Zoning Code, a club was operating as a nightclub or an after-hours club. It applied the eight non-exclusive criteria in the commentary to the then applicable BOCA code in analyzing the issue and determined that the club was operating as an after-hours club, in violation of the Zoning Code.[14] The decision reveals, as discussed *supra*, that the eight criteria applied in the instant case were developed at a time when restaurants were not included in Subgroup A-2, thus adding further support to the Board's conclusion that these factors are relevant to the determination whether a structure is "categorized as a nightclub" under the IBC.

FSLLC also maintains that the Dock of the Bay must be *either* a "nightclub" or a "standard restaurant" as those terms are defined under the Zoning Code. FSLLC focuses on the use of the word "primarily" in the definition of "standard restaurant," arguing that, if the Dock of the Bay is "primarily" engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant. We disagree. Several types of restaurants are defined in the Zoning Code, including "carry-out," "fast-food," and "fast-food, drive-through only." *See* Zoning Code § 101. We read the

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[13]The *Club 101* decision was cited by FSLLC both on appeal and before the Board in support of its argument that the Dock of the Bay must be either a "nightclub" or a "restaurant." We will discuss this argument further, *infra*.

[14]In that case, the property owner actively advocated for a finding that the property met the eight characteristics because a "night club" was a permitted use in the zone in question.

phrase "primarily for serving meals and beverages to persons seated at tables on the premises of the establishment" as being intended to distinguish a "standard restaurant" from the other types of restaurants defined in the Zoning Code. This conclusion is buttressed further by the fact that the definition specifically permits a standard restaurant to "offer a carry-out service, provided that such service is accessory to the principal restaurant operations." *Id.*

We also find support in the Zoning Code for the proposition that a property can operate as a "dual use." Section 230.1.A of the Zoning Code sets forth the permissible uses in a B.L. zone. Section 230.1.A.10 lists as a permissible use "combinations of the above uses." It is implicit in this section that properties may operate with dual permissible uses. It follows that a property also could be operating as a dual use with one use being permissible and one use being impermissible. Thompson also testified to this effect before the Board based on his experience in the CED.

Moreover, the only legal authority FSLLC cites for the proposition that a property cannot operate as a dual use actually supports the opposite position. In *Club 101*, the Board explicitly stated that the club could not be both a "night club" and an "after hours club." The then existing definition of an "after hours club" provided, however, that "[a]n after hours club is not a nightclub as defined in the zoning regulations or the building code of Baltimore

County." No such limitation appears in the definition of a "standard restaurant" in the Zoning Code.[15]

FSLLC also challenges the Board's factual finding that six of the eight characteristics of Subgroup A-2 were met. As discussed, *supra*, we review these findings under the deferential substantial evidence standard. We have reviewed the transcript and the record and are satisfied that there was substantial evidence in the record to support these findings.[16]

Finally, FSLLC echoes the concerns expressed by both the majority and dissenting members of the Board that the definition of a nightclub under the Zoning Code is extremely broad. We agree with the Board majority that this is a matter for the Baltimore County Council to address if it is deemed necessary. "The 'wisdom or expediency' of the [zoning ordinance] in its current form is not a matter for judicial intervention." *Lonaconing Trap*

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[15]Moreover, the Board found that, while Club 101 exhibited most of the eight characteristics in the BOCA Commentary, it nonetheless was an after hours club because of other characteristics that distinguished its operation. This is similar to the finding in this case that, while the Dock of the Bay may have met the definition of a restaurant, it nonetheless was operating as a nightclub because of distinguishing characteristics. We perceive no error in this conclusion.

[16]For example, the FSLLC challenges the finding of "low level lights." Thanner himself testified, however, that the lights were dimmed "every evening" for live entertainment; that they were turned down "for dinners as well"; and that they also were turned down "[o]n nights when we are open and do not have live entertainment."

Similarly, FSLLC challenges the finding of "above-normal sound levels" on the basis that there was no evidence in the agency record of prior noise violations. There was evidence, however, that the music that was being played at the Dock of the Bay was loud enough to be heard inside the homes of nearby residents. That evidence plainly supported a finding of "above-normal sound levels."

Club, Inc. v. Md. Dep't of the Env't, 410 Md. 326, 349 (2009) (quoting *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 48 (1973)).

II.

FSLLC contends the definition of "nightclub" under the Zoning Code is "arbitrary, unreasonable and confusing" and therefore the application of that definition is a violation of its due process rights. It also maintains that the County's practice of "discretionary enforcement" of the Zoning Code is unconstitutional.

FSLLC raises these arguments for the first time on appeal. Accordingly, they are not preserved for review.[17] *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *see also Heft v. Maryland Racing Comm'n*, 323 Md. 257, 273-74 (1991) (party may not obtain judicial review of an issue not raised before administrative agency); *Gonzales v. Ghinger*, 218 Md. 132, 135 (1958) (attack on validity of a section of the Baltimore City Code raised for the first time on appeal would not be

[17]As discussed, *supra*, the dissenting member of the Board suggested the possibility of a due process violation in his opinion. The circuit court judge presiding over this case on judicial review also commented on this issue during oral argument, but ultimately affirmed the Board's decision. FSLLC did not raise this issue in its appeal to the Board in its motion for reconsideration or in its petition for judicial review, however.

heard). Moreover, FSLLC cites to no Maryland authority for its propositions.[18] We decline to consider these arguments on appeal.

III.

Finally, FSLLC contends it was error for the CED to charge it with a violation of IBC section 3103 for erecting a tent without a permit. It follows that it was error for the hearing officer to find the violation and for the Board to affirm the finding. This contention is based on the letter of complaint to the CED from Ciarpella's counsel stating that FSLLC had "constructed a 40 X 60 foot reception tent . . . which has been on the property for approximately eight months." According to FSLLC, section 3103 of the IBC is inapplicable to structures in place for more than 180 days.

FSLLC received two citations related to the tent. On August 14, 2006, it was charged with violating section 3103 and ordered to "remove tent or obtain permit." A hearing before a hearing officer was held nine days later and a violation was found. On July 5, 2007, it was again charged with violating section 3103 for having a "tent erected without permit," in addition to continuing nightclub violations. A little over a month later, a hearing was held and a violation was found. In the first case, FSLLC was fined $5,000 both for the nightclub violation and the tent violation. As discussed, *supra*, the Board reduced this fine to $1,000.

---

[18]FSLLC instead relies upon section 18:11 of *The Law of Municipal Corporations* pertaining to the standards for discretionary enforcement. Eugene McQuillin, *The Law of Municipal Corporations* (3d ed. 2004). Our research reveals that this section has never been cited in a reported opinion of this Court or the Court of Appeals.

In the second case, a fine of $1,000 was imposed, again without distinction between the tent and nightclub violations.

FSLLC does not point us to any place in the record where it made the argument raised on appeal before the hearing officer.[19] It was raised before the Board, but the Board only reviewed the issue on the record before the hearing officer and found that the hearing officer's decision was supported by substantial evidence and was not premised on an erroneous conclusion of law.

Even if preserved, we find no error in this decision. IBC section 3103 governs "Temporary Structures." Section 3103.1 explains the applicability of this section as follows:

> The provisions of this section shall apply to structures erected for a period of less than 180 days. Tents and other membrane structures erected for a period of less than 180 days shall comply with the *International Fire Code*. Those erected for a longer period of time shall comply with applicable sections of this code.
>
> > **Exception:** Provisions of the *International Fire Code* shall apply to tents and membrane structures erected for a period of less than 180 days.
> >
> > **3103.1.1 Permit Required.** Temporary structures that cover an area in excess of 120 square feet (11.16 m^2), including connecting areas or spaces with a common means of egress or entrance which are used or intended to be used for the gathering together of 10 or more persons, shall not be erected, operated or maintained for any purpose without obtaining a permit from the building official.

(Underlined emphasis added.)

---

[19]No transcript of those proceedings is provided in the record extract.

This provision states that tents erected for less than 180 days must comply with the *International Fire Code*, whereas tents erected for "longer periods of time" must comply with the "applicable sections of this code." In other words, contrary to FSLLC's argument, an exception is carved out of section 3103 for tents erected for less than 180 days, but a tent erected for longer must comply with the permit requirement found either in that section or in section 105.1. Accordingly, we find no merit in FSLLC's contention that it was charged under the wrong section of the IBC.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.

Prot. 4



DOB PARKING LOT - ~~AERIAL~~ TAKEN FROM TAMMY'S DECK.



PARKING LOT + DOB - TAKEN FROM WOCINSKI'S DECK
LOT 489


08/09/200



TAKEN FROM LOT 494, SESSA.

DOB PIER, PATIO, BACK DOOR


METHADY
approx. 106'
HRANICKA
SESSA
approx. 40' PIER
CAPPELLA
WOLINSKI'S
DECK
DOCK BAR
DOB PIER
08/11/2007



DOB + PARKING LOT - TAKEN FROM MATT'S

MAIN ENTRANCE

LOT 490 -


Dock
Shuttle
07/12/2007



TAKEN FROM LOT 493 - HRANICKA; -> OUTSIDE DECK, BAR, PIER AREA

Motion's Hearing

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondylas, LLC

Exhibit List

Party: People's Counsel/Motion Date: 2-17-16

Exhibit No:	Description:
✓ Motion 1	compilation of BCZR, opinion of OAH (Case No. 2016-0003-SPH), Trial Memorandum from appellant (Case No. 2016-003-SPH), definition of anticipate, unreported Court of Special appeals of Maryland (No. 810 September Term 2009, filed July 9, 2010), Majority Opinion of Baltimore County Board of appeals (Case No.s CBA-06-044 and CBA No. 07-134)
✓ 2	Zoning checklist/ Department of
	VERIFIED BY KC DATE: 2/19/16

Martin exhibit 1

People's Counsel exhibit 1

MUSEUM

A building or buildings serving as a repository for a collection of natural, scientific, historic, artistic, or literary objects designed to be viewed by members of the public, which collection has an appraised value in excess of $20,000,000. The following activities are included in the definition of a museum: acquisition, conservation, documentation, study, exhibition, and educational interpretation of such objects.
[Bill No. 6-2008]

NANOBREWERY

An establishment that produces and bottles, on site, no more than 3,000 barrels of malt beverages annually for self-distribution, and no more than 500 barrels annually for on-site consumption.
[Bill No. 19-2015]

NEIGHBORHOOD CAR RENTAL AGENCY

The principal use of land for the rental of motor vehicles weighing 7,000 pounds (GVW) or less, including the parking of no more than 25 such vehicles on the premises. The term does not include a business that rents or leases motor vehicles as an accessory use, or rents or leases trailers, or trucks weighing over 7,000 pounds (GVW), or supplies limousines for hire, or that is a taxicab service. (See also "garage, service.")
[Bill No. 122-2005]

NIGHTCLUB

A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County.
[Bill No. 110-1993]

NONCONFORMING USE

A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use.
[Bill No. 18-1976]

NONINDUSTRIAL USE

Any use other than an industrial, quasi-industrial or industry-related use.
[Bill No. 178-1979]

NUDITY

A state of dress in which a human buttock, anus, genitalia or female breast is completely bared.
[Bill No. 137-1990]

NUDITY, PARTIAL

A state of dress in which clothing covers no more than the genitals, pubic region and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.
[Bill No. 137-1990]

NURSERY, HORTICULTURAL

An agricultural operation primarily engaged in the production and marketing of trees, shrubs and plants. The plant materials may be produced on the premises and may be purchased elsewhere at any stage of maturity for further production. Horticultural nurseries may engage in accessory uses such as storage of plant materials, sale of products necessary for the health of the nursery stock, and provision of limited landscape services. A nursery which sells plant materials grown exclusively on-site and which does not offer any of the accessory services permitted at horticultural nurseries shall be considered a farm.
[Bill No. 41-1992]

convenience store, and dairy barn. Section 101 of the BCZR defines a standard restaurant as "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment."

The definition of "nightclub" is found in BCZR § 101, List of Definitions, and states:

> A tavern or other establishment which permits live or recorded entertainment with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County.

Section 101 also defines a tavern as:

> An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of a nightclub, as defined in these regulations, shall be considered a nightclub.

A tavern and standard restaurant are allowed in a B.L. zone; a nightclub is not allowed.

The International Building Code, adopted in Bill No. 1-05 by the County Council, includes, in § 303.1:

> 303.1 Assembly Group A:
>
> Assembly Group A occupancy includes, among others, the use of a building or structure or a portion thereof, for the gathering together of persons for purposes such as civic, social, or religious functions, recreation, food or drink consumption, or awaiting transportation....

Following the major assembly group are the five sub-assembly groups. A-2 is the primary group with which we are concerned in this matter.

> A-2. Assembly uses intended for food and/or drink consumption, including but not limited to:
>
> banquet halls
> nightclubs
> restaurants
> taverns and bars

In a discussion of the various groups, the Code states:

> ...In the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high....Darkened spaces in theaters, nightclubs, and the like serve to increase hazards. In emergencies, the congestion caused by large numbers of people rushing to exits can cause panic conditions.

The characteristics for sub-assembly group A2 state:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - low light levels;
> - entertainment by a live band or recorded music generating above-normal sound levels;
> - no theatrical stage accessories;
> - later than average operating hours;
> - tables and seating arranged or positioned so as to create ill-defined aisles;
> - a specific area designated for dancing;
> - service facilities for alcoholic beverages and food; and
> - high occupant load density.

There follows an example which states:

> Example: The Downtown Club, a popular local nightclub /dance hall, features a different band every weekend [See figure 303.1(5)]. It is equipped with a bar and basic kitchen facilities so that beverages and appetizers can be served. There is a platform for a band to perform on, a dance floor in front of the platform, and numerous cocktail tables and chairs. The tables and chairs are not fixed, resulting in a haphazard arrangement such that there are no distinct aisles. When the band performs, the houselights are dimmed and spotlights are keyed in on the performers. The club is equipped with a sound system that is used at loud levels. The club is open until 3:00 a.m. – the latest time the local jurisdiction will allow.

From this descript of The Downtown Club, one can readily see that the appropriate classification is Group A-2. Sometimes, however, it is not this easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building.

The Board recognizes that this decision could have far-reaching effects in the County. The definition of "nightclub" in the BCZR is certainly far from being crystal clear. As testified to by the Building Inspector, the inspection department operates solely on a complaint basis. Their criteria for finding a nightclub would be any restaurant, tavern or bar which provides live

IN THE MATTER OF: Boone Kondylas, LLC 9025 Cuckold Point Road	*	BEFORE THE
	*	BOARD OF APPEALS
	*	FOR
15th Election District 7th Councilmanic Districts	*	BALTIMORE COUNTY
	*	Case No. 2016-003-SPH

RECEIVED BY
FEB 01 2016
PEOPLE'S COUNSEL FOR
BALTIMORE COUNTY

* * * * * * * * * * * * *

TRIAL MEMORANDUM

Boone Kondylas LLC, Petitioner/Appellant, through Lawrence E. Schmidt and Smith, Gildea and Schmidt, its attorneys, submits this Trial Memorandum and respectfully states the following.

Facts

This matter comes before the Board of Appeals ("Board") as an appeal by Boone Kondylas, LLC (property owner) of the denial of a Petition For Special Hearing by the County Administrative Law Judge ("ALJ"). By written decision dated October 22, 2015 ALJ John E. Beverungen denied the Petitioner's Petition for Special Hearing, holding that consideration of the same was barred by the doctrine of res judicata. Petitioner avers that such decision is erroneous and offers the following in support of its contention.

The relevant facts related to this case are largely not in dispute. The subject property is a water front property in the Millers' Island community of eastern Baltimore County. The property is zoned BL. The property is 55,594 square feet (1.276 acres) in area. The property is improved with a commercial building and associated parking

without incident. The primary focus of the business is to serve meals to its patrons. Indeed, more than three quarters of the restaurant's revenue is derived from food sales, the rest from sales of alcohol.

It is proffered that the current operation of the restaurant is different from Fifth Street's operation, including but not limited insofar as to the following characteristics:

- Lighting levels do not change when entertainment will be provided.
- The nature of the entertainment is markedly different. The owner anticipates "solo acts" of adult contemporary music geared towards a mature crowd and not live rock and roll bands.
- There will be no stage or stage accessories.
- The restaurant typically stays open until midnight and closes earlier on weekdays. The restaurant operates year round.
- The tables and seating are laid out to create defined aisles.
- There is no dance floor or dancing.
- The primary focus of the business is to serve meals, not provide entertainment.
- The restaurant is typically not over crowded or even at capacity.

In April 2015, the operator of the Dock of the Bay arranged for a solo acoustic guitar solo player to provide music one weekend night to enhance the patrons dining experience. Shortly thereafter, an inspector from the Department of Permits, Approvals and Inspections (Code Citation Division) appeared at the restaurant and advised the manager that the playing of any music was not allowed and that "you'll be shut down"

anticipate

see definition of anticipate

show all

verb expect; predict *verb* act in advance of

assun

33 Synonyms found for anticipate

Relevance A-Z Complexity Length

Synonyms for anticipate

Common Informal

verb expect; predict

assume	conjecture	suppose	foretaste
await	divine	visualize	have a hunch
count on	entertain	wait	hope for
forecast	figure	bargain for	jump the gun
foresee	foretell	be afraid	look for
prepare for	prognosticate	count chickens	look forward to
see	prophesy	cross the bridge	plan on
prevision			
promise oneself			
see coming			
see in the cards			
wait for			

Antonyms for anticipate

doubt	be surprised	be unready
be amazed		

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Word Origin & History

anticipate 1530s, "to cause to happen sooner," from L. anticipatus, pp. of anticipare "take (care of) ahead of time," lit. "taking into possession beforehand," from ante "before" (see ante) + capere "to take" (see capable). Later "to be aware of (something) coming at a future time" (1640s). Used in the sense of "expect, look forward to" since 1749, but anticipate has an element of "prepare for, forestall" that should prevent its being used as a synonym for expect. Related: Anticipatory (1660s).

Usage Notes

Despite claims that **anticipate** should only be used to mean "to perform (an action) or respond to (a question, etc.) in advance" or "to forestall," it has been used widely since the 18th century as a synonym for *expect*, often with an implication of pleasure: We **anticipate** a large turnout at the next meeting. This use is standard in all types of speech and writing.

More words related to **anticipate**

abide
verb. stop temporarily and wait for

anticipate	linger	rest	stick around
bide	pause	sojourn	stop
expect	remain	stay	tarry
wait			

Example Sentences for anticipate

"I do not **anticipate** much difficulty as to that," answered the professor.

This was indeed an honour I had scarcely dared to **anticipate**.

It was hoped to **anticipate** the demands of the Conference by a scheme of reform wider than they were likely to advise.

He looked for a minute as if he were trying to **anticipate** that day by the exercise of his reason.

EXPAND

await
verb. wait with expectation

anticipate	be ready for	hang around	hope
attend	cool one's heels	hang in	look for
be prepared for	count on	hang out	look forward to
stay			
sweat			
sweat it out			

bargain for
verb. expect

aim for	contemplate	foresee	look for
anticipate	count on	imagine	plan on
reckon on			

calculate
verb. plan on

aim	build	intend	rely on
anticipate	count on	judge	suppose
assume	depend on	plan	think likely
bank on	design	reckon	trust

discern
verb. catch sight of; recognize and understand

anticipate	discover	focus	note
apprehend	discrepate	foresee	notice
ascertain	discriminate	get a load of	observe
behold	distinguish	get the picture	perceive
descry	divine	get wise to	pick out
detect	espy	judge	read
determine	extricate	know	remark
difference	figure out	make distinction	rubberneck
differentiate	find out	make out	secern
see the light			
see through			
separate			
severalize			
spot			
take in			
view			

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synonyms typical

My Synonyms (0)

anticipate typical

typical

see definition of typical

show all

classi

adj **usual, conventional**

42 Synonyms found for typical

Relevance A-Z Complexity Length

Common Informal

Synonyms for typical

adj **usual, conventional**

classic	regular	expected	model
common	symbolic	general	old hat
commonplace	archetypal	habitual	orthodox
emblematic	archetypical	ideal	paradigmatic
exemplary	average	illustrative	patterned
natural	characteristic	in character	prevalent
normal	classical	in keeping	prototypal
ordinary	essential	indicative	prototypical
quintessential	everyday	matter-of-course	representative
standard			
standardized			
stock			
suggestive			
typic			
unexceptional			

Word Origin & History

typical c.1600, "symbolic, emblematic," from M.L. typicalis "symbolic," from L.L. typicus "of or pertaining to a type," from Gk. typikos, from typos "impression" (see type). Sense of "characteristic" is first recorded 1850. Related: Typically.

Antonyms for typical

abnormal	extraordinary	rare	unusual
different	infrequent	refined	atypical
eccentric	irregular	uncommon	unconventional
unorthodox			

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More words related to **typical**

accustomed
adj. normal, usual

accepted	customary	general	regular
chronic	established	habitual	routine
common	everyday	ordinary	set
conventional	expected	orthodox	traditional
typical			

Example Sentences for typical

In him you may see a typical and beautiful example of the Survival of the Fittest.

This single example is, as we may be sure, typical of a whole series of actions.

It is an habitual way of reacting to a definite and typical situation.

They were more your idea of typical Americans, weren't they?

EXPAND

classic
adj. characteristic, regular

prototypal
prototypical
representative
simple
standard
time-honored
typical
usual
vintage

common
adj. average, ordinary

accepted
banal
bourgeois
casual
characteristic
colloquial
comformable
commonplace
conventional
current
customary
daily
everyday
familiar
frequent
general
habitual
hackneyed
homely
humdrum
informal
mediocre
monotonous
natural
passable
plain
prevailing
prevalent
probable
prosaic
regular
routine
run-of-the-mill
simple
stale
standard
stereotyped
stock
trite
trivial
typical
undistinguished
universal
unvaried
usual
wearisome
workaday
worn-out

commonplace
adj. usual, everyday

boiler plate
characterless
clichéd
colorless
conventional
corny
customary
dime-a-dozen
familiar
familiar tune
garden variety
hackneyed
humdrum
lowly
mainstream
matter-of-course
mediocre
middle-of-the-road
middling
mundane
natural
normal
obvious
ordinary
pedestrian
plebeian
prevalent
prosaic
run-of-the-mill
stale
starch
stereotyped
threadbare
trite
typical
uneventful
unexceptional
uninteresting
unnoteworthy
vanilla
widespread
workaday
worn-out

conventional
adj. common, normal

accepted
accustomed
button-down
commonplace
everyday
expected
fashionable
formal
orthodox
plain
popular
predominant
ritual
routine
square
standard

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-07-134

* * * * * * *

MAJORITY OPINION

These cases come to the Board on appeal from two decisions of the Code Enforcement Hearing Officer and a decision of the Zoning Commissioner. The two decisions of the Code Enforcement Hearing Officer found the Petitioner, Fifth Street, LLC, guilty of violations of the County Code and levied fines of $5,000.00 and $1,000.00. The appeal from the decision of the Zoning Commissioner found that the Dock of the Bay, operated by Fifth Street, LLC, was classified as a nightclub under the Baltimore County Zoning Regulations (BCZR) and was in violation of the BCZR for operating a nightclub within a Business Limited (B.L.) zone.

Since the cases basically involved an interpretation of the County zoning regulations and the same sets of circumstances, the Board consolidated the cases for hearing. A hearing on the merits was held on January 15, 2008. Testimony was taken in Case No. 07-144-SPH, and oral

argument was conducted in Cases No. CBA-06-044 and No. CBA-07-134. Petitioner, Fifth Street, LLC, and Lawrence Thanner, Legal Owner, was represented by J. Carroll Holzer, Esquire. Protestants, Matthew J. and Nancy Jean Ciarpella, Phil and Kay Sessa, Charlie and Darrell Wolinski, Michael and Robert Poleski, David and Vena Sheck, Ken Schoyl and Tammy Novak, Doug W. Waldmann, et al, Louis Petrovia, Robert Haas, David Znamirowski, David McWilliams, and Terri Poleski, were represented by Francis X. Borgerding, Jr., Esquire. Baltimore County was represented by Nancy C. West, Assistant County Attorney. The parties were given the opportunity to file briefs on February 19, 2008. A public deliberation was held on March 13, 2008.

Background

Fifth Street, LLC, and Lawrence J. Thanner, its Resident Agent, operates the Dock of the Bay restaurant offering dining facilities and services at its location at 9025 Cuckold Point Road, Millers Island, in Baltimore County, Maryland. On August 8, 2006, the Dock of the Bay was cited for a Code violation, with a proposed penalty of $5,000.00, for operating a nightclub in a B.L. zone. In addition, Fifth Street, LLC, was cited for erecting a tent on the premises without obtaining the required permit from the County. A hearing was held before the Code Enforcement Hearing Officer on August 23, 2006, and a decision was rendered on August 25, 2006, ordering the Respondent to remove the tent and finding that the property "is being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use and continued unabated despite receiving notice of violation on May 12, 2006. A restaurant with dancing and/or live or recorded entertainment is not a permitted use in a B.L. zone."

After that hearing, Fifth Street, LLC, filed a Petition for Special Hearing in Case No. 07-144-SPH. This Petition requested the Zoning Commissioner to interpret the zoning regulations for Baltimore County with respect to the operation of a nightclub.

The decision of the Zoning Commissioner finding that Fifth Street, LLC, and the Dock of the Bay was a restaurant providing music during the day and was a "nightclub" as defined in BCZR § 101, 102.1, and 230, was dated May 30, 2007. Subsequent to that date, Fifth Street, LLC, was again cited for violation of the *Baltimore County Code* (BCC) for failure to obtain a permit for a tent and also for violation of BCZR § 101, 102.1, 230, and 500.6 for failure to cease operation of a nightclub in a B.L. zone. A second hearing was held before the Code Enforcement Hearing Officer and, by decision dated August 16, 2007, the Code Enforcement Hearing Officer again found Dock of the Bay in violation of BCZR for operating a nightclub in a B.L. zone and erecting a tent without obtaining the required permit. The Hearing Officer imposed a $1,000.00 fine in that case.

Testimony and Evidence

Petitioner presented Lawrence J. Thanner, Managing Member of Fifth Street, LLC, as their principal witness. Mr. Thanner stated that the Dock of the Bay has been a restaurant since 1955 and, to his knowledge, always had music and on many occasions, providing live bands. Mr. Thanner opened the new Dock of the Bay restaurant in March of 2004 after refurbishing the building from the effects of Hurricane Isabel. Everything was completely refurbished and new equipment was installed in the restaurant.

Thanner stated that the restaurant has a 2,400 square foot rectangular bar at one end and has tables and chairs on the main floor to accommodate diners. He stated that the restaurant could seat about 150 to 160 patrons inside. In the summertime, he has an outside patio with an outside bar and tables with umbrellas and chairs for patrons to utilize. The restaurant has 14 boat

slips for transient boat customers. The restaurant also has a playground for children, with a wooden pirate ship to allow children to play on the playground. The restaurant opens every day at 11:00 a.m. and closes at 2:00 a.m. In the winter, the restaurant will close early when customers are gone. Thanner testified that the restaurant kitchen closes at 11:00 p.m., but that the bar will stay open until 2:00 a.m. He stated that the restaurant has a full commercial kitchen and provides a full menu of seafood, steaks, sandwiches, etc. He has licenses from the Baltimore County Health Department, which states that he is a restaurant, and a basic license from the State of Maryland, which also states that it is a restaurant.

The restaurant has ten television sets inside and two out on the patio. There is a house music system that plays radio and satellite radio inside and outside. There are outside speakers. The television sets are on all the time except when they have live entertainment.

Mr. Thanner stated that he does have live entertainment at the restaurant with a D.J. playing for karaoke participants and live bands on Friday and Saturday nights. On those occasions, the entertainment goes from 9:00 p.m. to 1:00 a.m. During the previous summer, he stated that he had live music on Saturday afternoon and Sunday afternoon from 4:00 p.m. to 8:00 p.m.

Mr. Thanner stated that he had stopped the music after 8:00 p.m. after the Liquor Board had told him to cease the music. He stated that he had full-scale bands in 2004 with no complaints, but in 2005, a Liquor Board inspector told him to "pipe down" and he still had the bands, but mostly duos or steel bands. He received complaints in May of 2006 from the outside music and wrote a letter to the County asking for clarification on May 14, 2006. This letter was sent to C. Raynor, inspector in the Baltimore County Department of Code Inspections and Enforcement. The letter listed a number of activities, which Mr. Thanner proposed to conduct at the Dock of the Bay and requested clarification as to how these items qualified as a nightclub

under the citation that he had received. This letter was presented as Petitioner's Exhibit #2 to the Board. Thanner stated that he received no response to his letter.

After he sent the letter, he contacted Attorney Carroll Holzer to file for a special hearing. Mr. Thanner stated that 70 percent of the sales at his restaurant were in food and 30 percent are beverages. He indicated that he does not charge for the live entertainment and is open until 2:00 a.m. when the live music is played. Mr. Thanner also stated that, when he has live entertainment, he does lower the lighting level in the restaurant. He stated that the live bands play quite loudly but that he has never been cited for having a noise level about 65 decibels at the property line. He also stated that he does not have any stage accessories for the bands except in the summertime when there is a small stage erected outside on the patio. His operating hours are 11:00 a.m. to 2:00 a.m., which he considered to be normal, but under State law, you cannot sell alcohol past 2:00 a.m. With respect to defined aisles for the tables and chairs, he stated that tables and chairs are set in certain ways to form aisles. He did admit that some time when the bands are playing inside people would move the tables and chairs and dance between the tables. He does have facilities for serving alcoholic beverages and, as previously stated, the restaurant will accommodate 150 to 160 patrons.

Mr. Thanner argued that his operation should not be considered a nightclub based upon the criteria set forth in the International Building Code which has been adopted by the County. It was Mr. Thanner's position that he could not survive in the wintertime without the live music because the restaurant would not pay for itself based solely on food and drinks served during normal times without the music being available.

Mr. James H. Thompson, Supervisor of Code Enforcement, was called by Protestants as a witness and testified that he has worked in Zoning for 31 years, 13 of which as Supervisor of Code Enforcement, and that his office cited Mr. Thanner for being a nightclub operating in a

B.L. zone. Mr. Thompson stated that his office operates on a complaint basis only. He stated that they had had no complaints about the restaurant property before Mr. Thanner took over the property. It was his testimony that his office only reviews a situation based upon a complaint and, if the operation being considered provides live entertainment in a B.L. zone, it would be considered a nightclub and would not be allowed to operate. This would include karaoke, a person playing a piano, and strolling minstrels.

The Protestants presented Matthew Ciarpella, who has resided on Sixth Street adjacent to the Dock of the Bay for 3 years. Mr. Ciarpella complained of hearing the music even though the band was inside and it was wintertime. He stated that Monday through Thursday there were no problems since no music was played, and that when the music was played, it was loud enough for him to hear in his house even though it was not played outside.

Kay Sessa also testified stating that she lived at Sixth Street, which is about 650 feet from the Dock of the Bay. She stated that she heard the karaoke being played and that, although the previous restaurant had live bands, they stopped playing in 1970. She stated that she has been bothered by the live bands of the Dock of the Bay since 2004.

Patricia Waldmann, Charles Wolinski, and Brad Metheny and Bonnie Metheny all testified that they were neighbors living approximately 100 to 250 feet from the Dock of the Bay and that the music played on Friday and Saturday nights was so loud that they could not enjoy a peaceful night's sleep. Wolinski testified that he had gone into the Dock of the Bay and had witnessed that the tables were moved when the bands were playing and that there were not always aisles for the tables.

Finally, George Abendschoen, the Administrator of the Baltimore County Liquor Board, testified that there had been a file opened by his office on the Dock of the Bay. Based upon complaints that were received by the Liquor Board concerning the music that was played, an

inspector, Dan Crockett, had gone to the Dock of the Bay to investigate the matter. There was no determination by the Liquor Board. The report by the inspector, Dan Crockett, was received for identification only but was not admitted as part of the evidence in this matter.

Cases No. CBA-06-044 and No. CBA-07-134

Subsequent to the evidence presented in the special hearing case, the parties argued with respect to the civil citations and the decisions of the Hearing Officer in the above matters. Mr. Holzer contended that, under § 500.6 and 7 of the BCZR, the Hearing Officer had no authority or jurisdiction to interpret the *Baltimore County Zoning Regulations* with respect to whether or not the Dock of the Bay fell under the definition of nightclub. He stated that that was restricted solely to the authority of the Zoning Commissioner. These cases should be determined on the basis of the decision that this Board makes with respect to finding as to whether or not the Dock of the Bay is a nightclub under the BCZR. Mr. Holzer argued that Mr. Thanner had, in good faith, sought clarification in the Baltimore County Department of Code Inspection and Enforcement and received no clarification from that office. He also stated that § 3103 of the *International Building Code*, which has been adopted by the County, applies to structures erected for less than 180 days. He stated that Counsel for the Protestants in his letter claims that, in addition to live music, the tent was up for over 8 months. If that is the case, he felt that his client was cited under the wrong citation. He stated that it was not clear what the fine of $5,000.00 covered and requested a reduction in the fine if the Board finds that the operation is a nightclub. There was no indication as to whether or not there was any evidence presented to the Code Enforcement Hearing Officer with respect to how long the tent was erected at the Dock of the Bay operation.

With respect to the second citation, Mr. Holzer indicated that the second charge should have been given the same file number, even though the first charge was on appeal to the Board.

He stated that the Code Enforcement Hearing Officer in Case No. CBA-07-134 found that the Zoning Commissioner had determined that the playing of outdoor music must be discontinued but did not address the playing of indoor music. The Code Enforcement Hearing Officer found the Dock of the Bay to be a nightclub and therefore in violation of the BCZR. Mr. Holzer wanted further clarification of the fine levied in the second hearing.

In addition, Mr. Holzer indicated that the Zoning Commissioner had received an inquiry from the Liquor Board with respect to his decision. Evidently, the Zoning Commissioner replied to the inquiry, stating that he had determined that the music being played inside and outside the building was prohibited. Mr. Holzer felt that he had to appeal this letter because it was his position that the Zoning Commissioner had not taken any position with respect to the inside music.

Counsel for the Protestants argued to affirm the decision of the Code Enforcement Hearing Officer. He argued that both decisions were affirmed by the decision of the Zoning Commissioner in which he found that the operation was a nightclub. There was no prejudice or reversible error committed and that the Hearing Officer should be affirmed on his findings with respect to the nightclub definition. With respect to the tent, he argued that the tent had been put up on two separate occasions and that the Hearing Officer was correct in finding a violation on both occasions.

Ms. West argued solely with respect to the jurisdictional aspect and it was her position that, under the Code, Article 3, § 6-101, the Hearing Officer had the authority to hear the two cases for finding and was correct in finding the violations.

Decision

There is no question that the Dock of the Bay restaurant is located in a B.L. zone. The B.L. zone uses permitted, as of right, include under § 230.4 a standard restaurant, tea room,

convenience store, and dairy barn. Section 101 of the BCZR defines a standard restaurant as "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment."

The definition of "nightclub" is found in BCZR § 101, List of Definitions, and states:

> A tavern or other establishment which permits live or recorded entertainment with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County.

Section 101 also defines a tavern as:

> An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of a nightclub, as defined in these regulations, shall be considered a nightclub.

A tavern and standard restaurant are allowed in a B.L. zone; a nightclub is not allowed.

The International Building Code, adopted in Bill No. 1-05 by the County Council, includes, in § 303.1:

> 303.1 Assembly Group A:
>
> Assembly Group A occupancy includes, among others, the use of a building or structure or a portion thereof, for the gathering together of persons for purposes such as civic, social, or religious functions, recreation, food or drink consumption, or awaiting transportation....

Following the major assembly group are the five sub-assembly groups. A-2 is the primary group with which we are concerned in this matter.

> A-2. Assembly uses intended for food and/or drink consumption, including but not limited to:
>
> banquet halls
> nightclubs
> restaurants
> taverns and bars

In a discussion of the various groups, the Code states:

> ...In the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high....Darkened spaces in theaters, nightclubs, and the like serve to increase hazards. In emergencies, the congestion caused by large numbers of people rushing to exits can cause panic conditions.

The characteristics for sub-assembly group A2 state:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - low light levels;
> - entertainment by a live band or recorded music generating above-normal sound levels;
> - no theatrical stage accessories;
> - later than average operating hours;
> - tables and seating arranged or positioned so as to create ill-defined aisles;
> - a specific area designated for dancing;
> - service facilities for alcoholic beverages and food; and
> - high occupant load density.

There follows an example which states:

> Example: The Downtown Club, a popular local nightclub /dance hall, features a different band every weekend [See figure 303.1(5)]. It is equipped with a bar and basic kitchen facilities so that beverages and appetizers can be served. There is a platform for a band to perform on, a dance floor in front of the platform, and numerous cocktail tables and chairs. The tables and chairs are not fixed, resulting in a haphazard arrangement such that there are no distinct aisles. When the band performs, the houselights are dimmed and spotlights are keyed in on the performers. The club is equipped with a sound system that is used at loud levels. The club is open until 3:00 a.m. – the latest time the local jurisdiction will allow.

From this descript of The Downtown Club, one can readily see that the appropriate classification is Group A-2. Sometimes, however, it is not this easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building.

The Board recognizes that this decision could have far-reaching effects in the County. The definition of "nightclub" in the BCZR is certainly far from being crystal clear. As testified to by the Building Inspector, the inspection department operates solely on a complaint basis. Their criteria for finding a nightclub would be any restaurant, tavern or bar which provides live

entertainment. This could be anything from a piano player playing background music, a strolling minstrel, or a 12-piece orchestra.

In reviewing the characteristics for the group of facilities classified as A-2 in the Building Code, the Board finds as follows:

1. Low light levels.

Mr. Thanner testified that normally the restaurant is lit at what one would consider a normal level. However, when the band is playing, he did admit that the lights were turned down.

2. Entertainment by a live band or recorded music generating above-normal sound levels.

Mr. Thanner indicated that on Fridays, Saturdays, and Sundays, he has live entertainment, be it karaoke, a D.J., or a small band. In fact, this is a major part of his business and he feels that, without the music, the Dock of the Bay cannot survive during the winter months. The question of whether or not the band and the music is played above normal sound levels is one that would probably be determined by the persons listening to it. Certainly, the neighbors surrounding the Dock of the Bay feel that the sound level of the music is above normal, even during the winter months when music is played inside. There has been no indication that the restaurant has been declared to be in violation of noise levels under the Maryland Occupational Safety and Health Act. However, there is no question that the bands do play at sound levels which extend beyond the four walls of the restaurant.

3. No theatrical stage accessories.

Mr. Thanner testified that there are no theatrical stage accessories, particularly during the winter months. He did state that on weekends during the summer time there is a small stage for the bands that play outside until 8:00 p.m.

4. Later than average operating hours.

Mr. Thanner testified that normal operating hours of the restaurant are 11:00 a.m. to 2:00 p.m. He stated that during the winter the restaurant would close early if there were no patrons. He also indicated that his kitchen closes at 11:00 p.m.; however, the facility will stay open until 2:00 a.m., which is the normal closing hour required by the County for facilities serving liquor.

5. Tables and seating arranged or positioned so as to create ill-defined aisles.

Mr. Thanner again testified that the tables and chairs in the restaurant are generally fixed according to aisles for serving. However, he did state that when a band plays it is normal for individuals to move chairs and tables to allow for the band and also to allow people to dance in between the tables.

6. Specific area designated for dancing.

Mr. Thanner testified that there is no specific dance area. However, once again he did indicate that when the bands are playing people would move the tables and dance in the aisles among the tables.

7. Service facilities for alcoholic beverages and food.

There is no question that the Dock of the Bay serves alcohol and food. Mr. Thanner was quite emphatic that 70 percent of his business comes from the food operation and probably 28 to 30 percent from the alcoholic beverages.

8. High occupant load density.

There is no definition of what a high occupant load density is. Mr. Thanner testified that the restaurant would seat 150 to 160 individuals. On nights when there are bands playing, there appears to be a large crowd coming into the restaurant and one would probably find that it is filled to capacity.

The Board finds that the Dock of the Bay meets at least six of the criteria set forth in Group A-2. This would be criteria 1, 2, 3, 4, 7 and 8.

While our dissenting Member would find that there is no violation when the music is played inside the facility, he would find that it is a nightclub when music is played outside. The Majority finds that the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR. The second criterion does not differentiate between inside and outside noise. The fact that the Dock of the Bay does not provide music Monday through Thursday is not controlling in the opinion of this Board. Playing loud music on Friday through Sunday that can be heard by the neighbors makes the operation a nightclub under the present definition of the BCZR.

The Board is not unmindful that the definition of a nightclub, under the BCZR, can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.M. zones, might be considered "nightclubs" under the present criteria of the BCZR. It is not for the Board to change the definition but for the County Council to consider.

Cases No. CBA-06-044 and No. CBA-07-134

The Board has considered the arguments and evidence presented to the Board and the Code Enforcement Hearing Officer in the above matters.

The Board finds that the Code Enforcement Hearing Officer is authorized to interpret the definition of a nightclub under his duties to hold hearings and issue final orders under § 3-6-206 of the BCZR. In any event, the Zoning Commissioner had found the Dock of the Bay to be a nightclub prior to the holding of the second Code Enforcement hearing. Therefore, the Code Enforcement Hearing Officer could rely on that decision to uphold his findings.

The Board will affirm the decision of the Hearing Officer in both matters but will reduce the penalty to a $1,000.00 fine for operating as a nightclub in a B.L. zone and a $1,000.00 for failure to obtain a permit to erect a tent on a temporary basis at the Dock of the Bay restaurant.

ORDER

IT IS THEREFORE this 4th day of June, 2008, by the Board of Appeals for Baltimore County,

ORDERED that the Petition for Special Hearing pursuant to § 500.6 and 500.7 of the Baltimore County Zoning Regulations requesting a determination as to whether the use of the B.L. zoned property at 9025 Cuckold Point Road is in violation of the zoning regulations, and, specifically, as to whether the facility which provides music at this location is a "nightclub" as defined in the BCZR §§ 101, 102.1 and 230 is hereby answered in the affirmative and the playing of music by way of speaker system, live or recorded entertainment must be discontinued; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-06-044 be and is hereby **AFFIRMED;** and further that the fine is reduced to $1,000.00 for operating a nightclub in a B.L. zone; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-07-134 for operating a nightclub in a B.L. zone and for erecting a temporary tent without a permit be and is hereby **AFFIRMED**; and further that the fine of $1,000.00 for the erection of the tent is **AFFIRMED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules.*

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Wendell H. Grier

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 810

September Term, 2009

FIFTH STREET, LLC., ET AL.

v.

MATTHEW CIARPELLA, ET AL.

Eyler, Deborah S.,
Woodward,
Kehoe,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 9, 2010

Fifth Street, LLC, and its managing member, Lawrence J. Thanner, Jr. (collectively "FSLLC"), the appellants, own the Dock of the Bay, a restaurant and bar located at 9025 Cuckold Point Road in Baltimore County.[1] They appeal from the judgment of the Circuit Court for Baltimore County affirming a decision of the Baltimore County Board of Appeals ("Board"), finding them in violation of the Baltimore County Zoning Code ("Zoning Code") for operating a nightclub in a B.L. (Business Local) zone. The appellees are People's Counsel for Baltimore County ("the County") and Matthew Ciarpella, who resides near the restaurant. The FSLLC presents four questions for our review, which we have consolidated and rephrased as follows:

I. Did the Board err in concluding that the Dock of the Bay operates as a nightclub, as defined in the Zoning Code?

II. Is the definition of a "night club" in the Zoning Code so arbitrary and confusing as to deprive the appellants of their due process rights?

III. Did the Code Enforcement Division hearing officer err in concluding that the appellants violated the Zoning Code by erecting a tent without a permit?[2]

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[1]We will refer to the Dock of the Bay as a restaurant, as all parties seem to agree that it performs this function, but we do not intend this description to be in any way determinative of the central issue in this case.

[2]As framed by FSLLC, the question presented are:

1. In Special Hearing Case No.: CBA-07-144-SPH, the County Board of Appeals erred as a matter of law in determining that the Dock of the Bay restaurant was a night club under the Baltimore County Zoning Regulations definition.

2. In Zoning Violation Case No.: 06-044, the finding of violation was in error as a matter of law.

(continued...)

Assembly Subgroup A-3.[12] *See* Building Officials Code Administrators, *The BOCA National Building Code/1999* 18 (14th ed. 1999). As discussed, *supra*, under the IBC, restaurants are categorized in Subgroup A-2. Under both BOCA and IBC, nightclubs are categorized in Subgroup A-2. The IBC Commentary, discussed *supra*, setting forth the eight non-exclusive characteristics of Subgroup A-2, appears to have been lifted verbatim from the BOCA Commentary that preceded it. *See In the Matter of the Application of Rampart Partnership (Club 101)*, Case No. 96-60-XA at 18-19 (Aug. 28, 1998) ("*Club 101*") (quoting from the Commentary to the BOCA Code with respect to Subgroup A-2).

Returning to FSLLC's argument, we agree that the IBC does not define a nightclub. The Zoning Code definition of "nightclub" merely requires that the IBC "categorize" an establishment as a "nightclub." The IBC (and the BOCA Code before it) do exactly that. They categorize structures for purposes of numerous safety regulations. That a restaurant and a nightclub fall into the same sub-category under the IBC "Use and Occupancy Classifications" does not affect the analysis under the Zoning Code, however. The Board correctly looked to the IBC and the characteristics of structures that fall within Subgroup A-2 to determine if the Dock of the Bay property is categorized in that grouping. If it is, then it met the Zoning Code definition of "nightclub."

Moreover, as mentioned above, we accord the Board "a degree of deference . . . in its application of the law." *Banks*, *supra*, 354 Md. at 69. In the instant case, the Board's

[12]Interestingly, that subgroup included "restaurants other than nightclubs."

decision was informed by its experience applying these characteristics, as evidenced by its *Club 101* decision.[13] In *Club 101*, the Board considered whether, under the Zoning Code, a club was operating as a nightclub or an after-hours club. It applied the eight non-exclusive criteria in the commentary to the then applicable BOCA code in analyzing the issue and determined that the club was operating as an after-hours club, in violation of the Zoning Code.[14] The decision reveals, as discussed *supra*, that the eight criteria applied in the instant case were developed at a time when restaurants were not included in Subgroup A-2, thus adding further support to the Board's conclusion that these factors are relevant to the determination whether a structure is "categorized as a nightclub" under the IBC.

FSLLC also maintains that the Dock of the Bay must be *either* a "nightclub" or a "standard restaurant" as those terms are defined under the Zoning Code. FSLLC focuses on the use of the word "primarily" in the definition of "standard restaurant," arguing that, if the Dock of the Bay is "primarily" engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant. We disagree. Several types of restaurants are defined in the Zoning Code, including "carry-out," "fast-food," and "fast-food, drive-through only." *See* Zoning Code § 101. We read the

[13]The *Club 101* decision was cited by FSLLC both on appeal and before the Board in support of its argument that the Dock of the Bay must be either a "nightclub" or a "restaurant." We will discuss this argument further, *infra*.

[14]In that case, the property owner actively advocated for a finding that the property met the eight characteristics because a "night club" was a permitted use in the zone in question.

phrase "primarily for serving meals and beverages to persons seated at tables on the premises of the establishment" as being intended to distinguish a "standard restaurant" from the other types of restaurants defined in the Zoning Code. This conclusion is buttressed further by the fact that the definition specifically permits a standard restaurant to "offer a carry-out service, provided that such service is accessory to the principal restaurant operations." *Id.*

We also find support in the Zoning Code for the proposition that a property can operate as a "dual use." Section 230.1.A of the Zoning Code sets forth the permissible uses in a B.L. zone. Section 230.1.A.10 lists as a permissible use "combinations of the above uses." It is implicit in this section that properties may operate with dual permissible uses. It follows that a property also could be operating as a dual use with one use being permissible and one use being impermissible. Thompson also testified to this effect before the Board based on his experience in the CED.

Moreover, the only legal authority FSLLC cites for the proposition that a property cannot operate as a dual use actually supports the opposite position. In *Club 101*, the Board explicitly stated that the club could not be both a "night club" and an "after hours club." The then existing definition of an "after hours club" provided, however, that "[a]n after hours club is not a nightclub as defined in the zoning regulations or the building code of Baltimore

County." No such limitation appears in the definition of a "standard restaurant" in the Zoning Code.[15]

FSLLC also challenges the Board's factual finding that six of the eight characteristics of Subgroup A-2 were met. As discussed, *supra*, we review these findings under the deferential substantial evidence standard. We have reviewed the transcript and the record and are satisfied that there was substantial evidence in the record to support these findings.[16]

Finally, FSLLC echoes the concerns expressed by both the majority and dissenting members of the Board that the definition of a nightclub under the Zoning Code is extremely broad. We agree with the Board majority that this is a matter for the Baltimore County Council to address if it is deemed necessary. "The 'wisdom or expediency' of the [zoning ordinance] in its current form is not a matter for judicial intervention." *Lonaconing Trap*

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[15]Moreover, the Board found that, while Club 101 exhibited most of the eight characteristics in the BOCA Commentary, it nonetheless was an after hours club because of other characteristics that distinguished its operation. This is similar to the finding in this case that, while the Dock of the Bay may have met the definition of a restaurant, it nonetheless was operating as a nightclub because of distinguishing characteristics. We perceive no error in this conclusion.

[16]For example, the FSLLC challenges the finding of "low level lights." Thanner himself testified, however, that the lights were dimmed "every evening" for live entertainment; that they were turned down "for dinners as well"; and that they also were turned down "[o]n nights when we are open and do not have live entertainment."

Similarly, FSLLC challenges the finding of "above-normal sound levels" on the basis that there was no evidence in the agency record of prior noise violations. There was evidence, however, that the music that was being played at the Dock of the Bay was loud enough to be heard inside the homes of nearby residents. That evidence plainly supported a finding of "above-normal sound levels."

Club, Inc. v. Md. Dep't of the Env't, 410 Md. 326, 349 (2009) (quoting *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 48 (1973)).

II.

FSLLC contends the definition of "nightclub" under the Zoning Code is "arbitrary, unreasonable and confusing" and therefore the application of that definition is a violation of its due process rights. It also maintains that the County's practice of "discretionary enforcement" of the Zoning Code is unconstitutional.

FSLLC raises these arguments for the first time on appeal. Accordingly, they are not preserved for review.[17] *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *see also Heft v. Maryland Racing Comm'n*, 323 Md. 257, 273-74 (1991) (party may not obtain judicial review of an issue not raised before administrative agency); *Gonzales v. Ghinger*, 218 Md. 132, 135 (1958) (attack on validity of a section of the Baltimore City Code raised for the first time on appeal would not be heard). Moreover, FSLLC cites to no Maryland authority for its propositions.[18] We decline to consider these arguments on appeal.

[17]As discussed, *supra*, the dissenting member of the Board suggested the possibility of a due process violation in his opinion. The circuit court judge presiding over this case on judicial review also commented on this issue during oral argument, but ultimately affirmed the Board's decision. FSLLC did not raise this issue in its appeal to the Board in its motion for reconsideration or in its petition for judicial review, however.

III.

Finally, FSLLC contends it was error for the CED to charge it with a violation of IBC section 3103 for erecting a tent without a permit. It follows that it was error for the hearing officer to find the violation and for the Board to affirm the finding. This contention is based on the letter of complaint to the CED from Ciarpella's counsel stating that FSLLC had "constructed a 40 X 60 foot reception tent . . . which has been on the property for approximately eight months." According to FSLLC, section 3103 of the IBC is inapplicable to structures in place for more than 180 days.

FSLLC received two citations related to the tent. On August 14, 2006, it was charged with violating section 3103 and ordered to "remove tent or obtain permit." A hearing before a hearing officer was held nine days later and a violation was found. On July 5, 2007, it was again charged with violating section 3103 for having a "tent erected without permit," in addition to continuing nightclub violations. A little over a month later, a hearing was held and a violation was found. In the first case, FSLLC was fined $5,000 both for the nightclub violation and the tent violation. As discussed, *supra*, the Board reduced this fine to $1,000.

[18]FSLLC instead relies upon section 18:11 of *The Law of Municipal Corporations* pertaining to the standards for discretionary enforcement. Eugene McQuillin, *The Law of Municipal Corporations* (3d ed. 2004). Our research reveals that this section has never been cited in a reported opinion of this Court or the Court of Appeals.

10/22/15

IN RE: **PETITION FOR SPECIAL HEARING** **(9025 Cuckold Point Road)** 15th Election District 7th Council District	*	BEFORE THE
	*	OFFICE OF
	*	ADMINISTRATIVE HEARINGS
Boone Kondylas, LLC *Legal Owner* Petitioner	*	FOR BALTIMORE COUNTY
	*	**Case No. 2016-0003-SPH**

* * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Boone Kondylas, LLC, legal owner. The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

Ken Boone appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioner. Several neighbors, represented by Francis Borgerding, Esq., attended and opposed the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Bureau of Development Plans Review (DPR). Neither agency opposed the request, but suggested certain conditions be imposed if relief is granted.

The subject property is 1.27 acres and zoned B.L. The property is improved with a restaurant known as "Dock of the Bay." The restaurant has new ownership, which proposes to offer limited music and live entertainment as an "accessory" use to the food and beverage service. This property and business have been the subject of protracted litigation concerning loud music and unruly patrons which disturbed the neighborhood. The operation was found by the court of

special appeals to constitute a "nightclub," a use prohibited in the B.L. zone. Protestants contend the petition is barred by *res judicata,* while Petitioner argues that unlike the former operation the current business is first and foremost a restaurant, with music offered to compliment the dining experience.

Under Maryland law, an agency determination affirmed on appeal is entitled to preclusive effect. Esslinger v. Balto. City, 95 Md. App. 607, 621 (1993). This is the case, and *res judicata* will apply, unless there is a significant change in circumstances between the earlier and subsequent action. *See, e.g.*, Alvey v. Hedin, 243 Md. 334, 340 (1966). In light of this authority I believe the doctrine of *res judicata* mandates that the petition in this case be dismissed.

As an initial matter, I do not believe the OAH has the authority to "amend" restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the board of appeals, circuit court and then the court of special appeals. In an unreported opinion (No. 810, September Term, 2009) the appellate court affirmed the agency findings, which necessarily included the conditions and restrictions found in those orders. To amend those restrictions at this juncture would be akin to reversing the appellate court, which an administrative agency cannot do.

I believe the Petition must also be denied based on *res judicata.* As discussed above, *res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard. For example, if the owner of the subject property was now proposing to operate a barbershop or beauty salon at the site, that would constitute a significant change and *res judicata* would not apply. But here, I do not believe there

have been significant changes; Petitioner is still proposing to operate a restaurant that would offer live and/or recorded music.

The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010).

THEREFORE, IT IS ORDERED this **22nd** day of October, **2015** by this Administrative Law Judge, that the Petition for Special Hearing pursuant to B.C.Z.R. § 500.7 to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music, be and is hereby DENIED.

Any appeal of this decision must be filed within thirty (30) days of the date of this Order.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln

DOCK of the BAY

Contact Info: 9025 Cuckold Point Road, Sparrows Point, MD
(410) 477-8100
Hours: Monday - Thursday: 11am - 11pm and Friday - Saturday: 11am - 1am
Sunday: 9am breakfast buffet. Close at 8pm.

Directions

Our Menu

Gallery

Plat
PC. Motion
Ex. 2

Zoning Review
Department of Permits, Approvals and Inspections
Baltimore County Office Building
Towson, MD 21204

ZONING CHECKLIST

PART I: NON-RESIDENTIAL BUILDING PERMITS AND/OR PART II: ZONING PUBLIC HEARING APPLICATIONS

Please be aware that this checklist is for your information only and **it is not intended to offer, or to be considered, legal advice.**

Revised 5/21/14

This checklist is a guide in preparing plans and information for building permit (PART I) and/or zoning public hearing (PARTS I and II) applicarions. Ten (10) copies of the site plan must accompany an application for a building permit, while for zoning hearings twelve (12), or fourteen (14) if in or near a floodplain, are needed. TO AVOID TIME-CONSUMING AND COSTLY DELAYS, ALL CHECKLIST INFORMATION MUST BE INCLUDED ON THE PLAN AND/OR IN THE HEARING APPLICATION.

1. ____ NORTH ARROW, ELECTION DISTRICT, COUNTY COUNCIL DISTRICT, ZONING MAP NUMBER(S) AND TITLE PLAN "PLAN TO ACCOMPANY _____ PERMIT", (OR HEARING TYPE(S) AS APPLICABLE) AND THE DATE. Zoning Hearing Plans and Descriptions **must be sealed by a MD registered Professional Engineer, Surveyor or Landscape Architect.**

2. ____ SCALE OF DRAWING: Use Engineers Scale of 1" = 10', 1" = 20', 1" = 30', 1" = 40', 1" = 50', or 1" = 60'. If acreage exceeds 40 acres, use 1" = 100' scale.

3. ____ OUTLINE OF PROPERTY: Indicated by a **heavy bold line** and bearings, distances, gross and net area (acres and square feet) of parcel(s). This also applies to zoning hearing areas on the site with the POB and intersecting street name and distance shown and matching the sealed zoning description(s) required for all zoning hearing applications.

4. ____ VICINITY MAP: A vicinity map must be included on all site plans with the scales of 1" = 200', 1" = 500', or 1" = 1,000' WITH THE SITE AND HEARING LOCATIONS CLEARLY AND ACCURATELY OUTLINED AND LABELED.

5. ____ PREVIOUS COMMERCIAL PERMIT: Number(s) and the work on the same property and the approximate date of the last improvement listed on the plan or if very old, age of building and parking spaces.

6. ____ ZONING HEARINGS, CRG, DRC, WAIVERS: The case number(s), date of the order(s), what was granted or denied, and any restrictions must be listed and addressed in detail on the plan.List any CRG, DRC, or waiver approval dates and file numbers and dates on the plan, along with the type granted. Also reference any authorized changes on a previously approved plan. State if or not the property is under active zoning violation(s), state the reason for citation, and add the case number and the inspectors name.

7. ____ ZONING: Zone lines on and adjacent to the site must be clearly shown and labeled on the plan. Copies of the GIS zoning map may be obtained from PAI, room 111, County Office Building.

8. ____ OWNERSHIP: Of parcel(s) and relation of parcel(s) to adjacent property including tax account number (10 digits), deed reference numbers, lot numbers, and subdivision name.

9. ____ LOCATION: Street address and name of adjoining street(s) and distance from property corner to the nearest intersecting public street centerline. For hearing plans, match it to zoning description.

10. ____ STREETS, WIDENING, RIGHT-OF-WAY, EASEMENTS: Include all existing public boundary streets with the existing right-of-way width and paving width. ALSO INCLUDE ANY RIGHT-OF-WAY WIDENING REQUIRED, EITHER BY BALTIMORE COUNTY DEPARTMENT OF PUBLIC WORKS OR THE STATE OF MARYLAND. Include any existing or proposed easements or right(s)-of-way and indicate public or private. (For Baltimore County roads, Room 200 and Room 206, County Office Building; State Highways: phone number 410-545-5600.)

11. ____ USES, BUILDINGS: Existing location and proposed use of all buildings (or additions) and property, show building locations, orientations and uses on adjacent properties. Note height and number of stories.

12. ____ DIMENSIONS, SETBACKS: Dimensions and orientation of buildings and setbacks from property lines, include all setbacks between buildings.

13. ____ STREET SETBACKS: And use of all permanent commercial buildings within 100 feet of each side property line to establish average street setbacks an BL, BM, and BR zones per Section 303.2, BCZR, and Policy 3-2.1. Also see average setback requirements if in a CR District in 259.3.C.2.

14. ____ ENTRANCES: Location and width of existing and/or proposed entrances (traffic channelization) and their relation to entrances on adjacent properties and properties across the street. Indicate method - curbing, R/R ties. (For County requirements, Developers Engineering at 887-3751 or State Highways at 410-545-5600.)

15. ____ SIGNS: All existing and proposed, location, height, square footage, illumination, setback from existing or proposed right-of-way, and note if single or double-faced. See Permit Drawing/Detail Checklist on the County Website at the Zoning Forms Summary under Permits, Approvals and Inspections. Note all signs will comply with Section 450 BCZR or list the required relief and BCZR Section references for the zoning hearing.

16. ____ UTILITIES: Show location and size of public utilities and the right-of-way both adjacent to and on-site. In the event that no public water or sewer exist, the means for providing proper well and septic system must be indicated. (Public utilities, room 206, County Office Building.)

17. ____ FEATURES: Location of streams, storm water management systems, drainage, and pipe systems on or within 50 feet of the property and the 100-year floodplain, if any. State flood plain status.

18. ____ FLOOR AREA, GROSS (Floor Area Ratio) CALCULATIONS: . (Used for parking calculations.)The floor area ratio is the total gross floor area of all the floor areas of all the buildings on a site, divided by the gross site area. The gross site area includes up to one-half of the boundary streets to which the property has right of access, up to a maximum of 30 feet.

19. ____ HEIGHT DETERMINATION: Tent must be included for buildings above 40 feet (see Section 231, BCZR). Where a building height determination is required and Section 231 does not apply, use Zoning Policy 1-8 and show a scaled detailed drawing on the plan.

20. ____ AMENITY OPEN SPACE (AOS): Location and square foot calculations in the following zones: R.A.E.-1, R.A.E.-2, R.O., OR-1, OR-2, O.T., S-E, B.L.-C.C.C., B.L.-C.T., B.M.-C.C.C., B.M.-C.T., B.R.-C.C.C., and B.R.-C.T. The qualifying AOS areas within the net lot area must be shaded, dimensioned and separate areas subtotaled in square feet on the plan print and included in the AOS calculations in the notes.

21. ____ FIRE HYDRANTS: Location of fire hydrants and distance to the property.

22. ____ SITE PLANS: Must be trimmed to a neat 8-1/2" x 11" or, where larger prints are necessary, they shall be folded to that size with the title block showing. THEY MUST BE LEGIBLE, AND NO LARGER THAN 24" X 36" (unless authorized by the intake review Planner).

23. ____ REQUIRED OFF-STREET PARKING AND CALCULATIONS: On the site plan for all uses on the property pursuant to Section 409, BCZR, and the attached standards and samples.

24. ____ SPECIAL USE REQUIREMENTS: Must show compliance on the plan with the applicable zoning regulations and BCZR Sections, to include, but not limited to the following: Farm and agricultural operations (S. 404); waterfront construction / facilities (S. 417); car wash (S. 419 and 409.10); amusement devices (S. 422 and 423); child care (S. 424); assisted living (S. 432); truck facilities (S. 410, also see online chklst.) ; service stations (S. 405); damaged or disabled vehicles and parts (S. 405.A); uses with automotive stacking such as banks, drive-through restaurants, etc. (S. 409.10); business / industrial parking in a residential zone (S. 409.8.B.2); In DR zones, RTA requirements (1B01.1.B.1).

25. ____ BASIC SERVICES MAPS: State if the site is, or is not, in any failed Basic Services Map areas. If in a failed area, identify it and state what action is being taken to resolve the issue.

26. ____ ZERO SETBACK BUILDINGS: Must meet building code, as well as fire code requirements, with regard to type of construction, windows, etc.

27. ____ FEES: For the permit filing fees contact Permits and Licenses at (410-887-3900). For all required development review fees contact Development Management at (410-887- 3335). Zoning Hearing fees vary; contact Zoning Review at (410-887-3391) to confirm filing costs.

RESERVED SPACE FOR FUTURE REVISIONS

REQUIRED NUMBER OF OFF-STREET PARKING SPACES

THIS CHART IS ONLY A GUIDE AND IT DOES NOT SUPERCEDE SECTION 409 BCZR

RETAIL/BEAUTY OR BARBER SHOP/SKATING RINK.....5/1,000

SHOPPING CENTER 100,000 SQ. FT. G.L.A. **.....5/1,000

HOTEL/MOTEL/ROOMING&BOARDING/TOURIST HOME...1/RM / SUITE

NURSING HOME OR ASSISTED LIVING FACILITY (ALF)*.....1/3 BEDS

MANUFACTURING/WAREHOUSE.....1/EMP

POOL(community).....1/7 PERSONS (capacity per Health Dept.)

RESTAURANT (standard, ie; with seating (no CLASS "D" LIC).....16/1,000

TAVERN/NIGHT CLUB/DANCE HALL/CATERING HALL.....20/1,000

ATHLETIC CLUB/HEALTH SPA (3/COURT) OTHERWISE.....10/1,000

HOUSING FOR THE ELDERLY.. CLASS A..1/1.5DWU,,CLASS B.. 1/DWU

BOWLING ALLEY.....4/LANE

AUTO SALES..DISPLAY/OFFICES/PARTS..5/1,000.. SERVICE..3.3/1,000

FURNITURE/CARPET STORE..RESEARCH & LAB USES.....2.5/1,000

DORMITORY...1/4BEDS...FRAT OR SORORITY HOUSE.....1/2BEDS

CAR WASH.....SEE SECTION 419

TOWSON (C.T.) DISTRICT PARKING**,..... SEE SECTION 409

OFFICE (GENERAL) / PERSONAL SERVICE.....3.3/1,000

GROUP CHILD CARE/NURSERY SCHOOL...1/Emp. (Minimum 2)

HOSPITAL 1.5/BED

MARINA/BOAT YD.....0.5/SLIP / STORAGE SPACE ON LAND

POOL HALL/ARCADE.....4/1,000

SCHOOLS (ALL)...1/EMP ..VISITOR/STUDENT.....PER REVIEW

POOL (commercial).....1/4 PERSONS (capacity per Health Dept.)

RESTAURANT (carry-out only).....5/1,000

CLASS "D" LIQUOR. LIC. USES (ALL) 20/1000

CONTINUING CARE FACILITY.....1/DWU..ALF/NURSING SEE*

GOLF COURSE..8/HOLE...DRIVE RANGE/MINI GOLF...1.5/TEE

RELIGIOUS ASSEMBLY/THEATRE/AUDITORIUM.....1/4SEATS

SERVICE GARAGE (no fuel sales).....3.3/1,000

FUNERAL HOME..... 10/1,000...1/2EMP...1/BUSINESS VEHICLE

FUEL (AUTO) SERVICE STATION.....SEE SECTION 405

TRUCKING FACILITIES**...SEE SECTIONS 410 /409/TF CHKLST

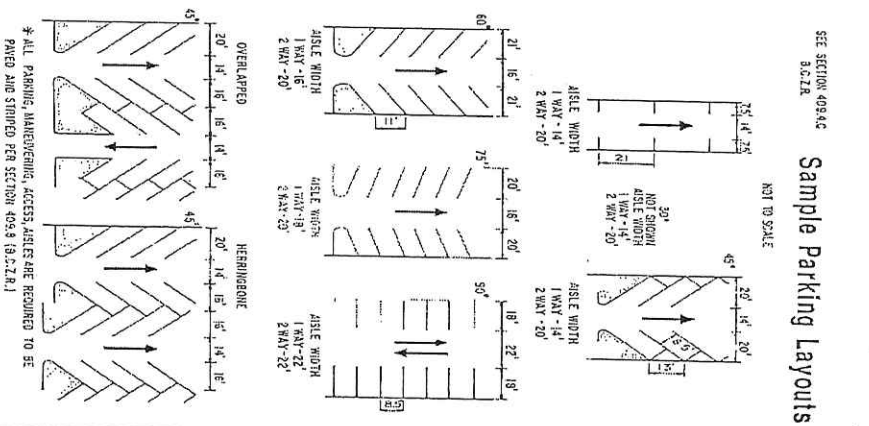
HISTORIC BUILDINGS**.....SEE SECTION 409

OFFICE (MED)/CLINIC..VETS OFFICE/VETERINARIUM..4.5/1,000

NOTES:

CONTACT ZONING REVIEW FOR PARKING CALCULATIONS NOT LISTED
MIXED USES MEANS MIXED CALCULATIONS SUBTOTALED AND OVERALL
ROUND EACH FRACTIONAL CALCULATION TO THE HIGHER WHOLE NUMBER
Example: 5 parking space per 1,000 sq. ft. of gross floor area is written as 5/1,000
Employee: 1 parking space per employee is written as 1/Emp.
** = see Section 409 for details/exeptions'special regulations
DWU = Dwelling Unit

Sample: required / provided parking space calculations:
Proposed general office: 6,000 sq. ft. @ 3.3/1,000 = 19.8 or 20
Proposed retail space: 3,500 sq. ft @ 5/1,000 = 17.5 or 18
Total required parking spaces = 38
Total parking provided (on-site parking spaces) = ##



OFF-STREET PARKING REQUIREMENTS

1. ____ PAVING (type and extent), STRIPING, AND 10-FOOT SETBACK TO A STREET R/W (8 feet if existing on 5/26/88 and documented) and must be clearly indicated on the plan and notes.

2. ____ DESIGN STANDARDS, SCREENING, AND LANDSCAPING must be provided in accordance with the Landscape Manual and all other manuals adopted pursuant to Section 32-4-404 of the Baltimore County Code. (See Section 409.8.A.1, BCZR.) Contact County Landscape Architect at 410-887-3751.

3. ____ CURBING or anchored wheel stops must be provided around parking lots and must be located not to interfere with the required landscaping and screening. Show a detail for wheel stops.

4. ____ DEAD-END PARKING BAYS require a back-around or turn-around. Traffic circulation must be shown by the use of arrows on the plan. (See Section 409.8.A.5, BCZR.)

5. ____ LIGHTING: Add note: "Any fixture used to illuminate an off-street parking area shall be so arranged as to reflect the light away from adjacent residential site and public streets." Indicate placement, height, and direction on the plan and show protected by curbing or landscaping. If no lighting, state so. (See Section 409.8.A.3, BCZR.)

6. ____ ENTRANCES on County roads for one-way traffic; 17 feet wide. Two-way traffic; not less than 24 feet nor more than 30 feet wide. Monumental entrances shall be provided with a minimum 2-foot wide median. Traffic lanes; not less than 17 feet nor more than 24 feet wide. Inbound lane not less than 18 feet the nor more than 36 feet wide for outbound. Entrances minimum 7.5 ft to property line. (Contact Developers Engineering, 410-887-3751)

7. ____ ENTRANCES on State roads are subject to the approval of the State Highway Administration. (Contact: Bureau of Access Permits at 410-545-5600.)

8. ____ DRIVE-THROUGH STACKING REQUIRED: BANK - 5 for first station, 2 for each additional station; RESTAURANT - 7 per station and 5 behind order board; CAR WASH - see Section 419, BCZR; OTHER USES - as determined by Zoning Review. *NOTE:* Do not count the space(s) at the service window(s). Drive-through lanes must be clearly marked by striping or pavement markings, may not block parking spaces, manuevering aisles or cross the (clearly shown) principal pedestrian access.

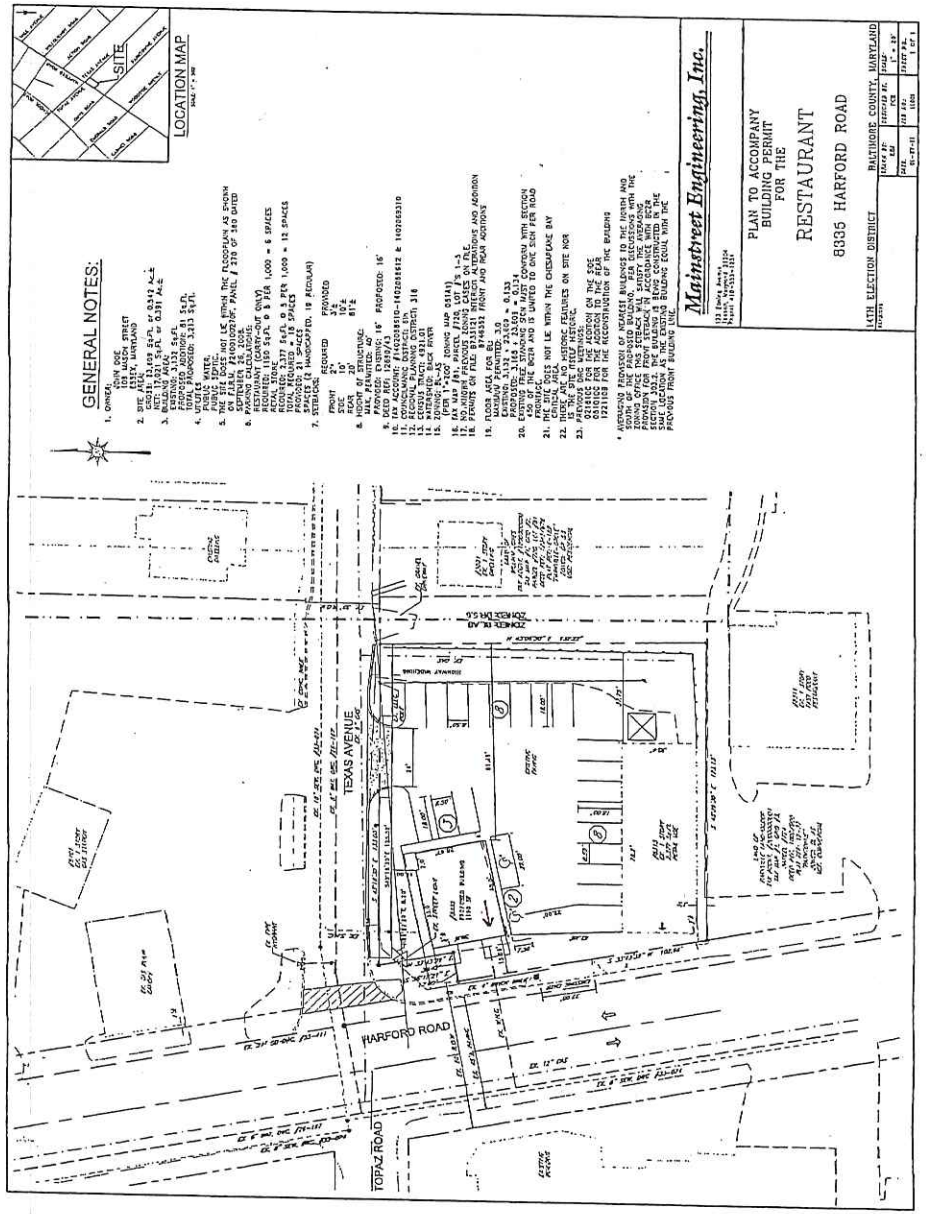
9. ____ COMPACT OR SMALL CAR SPACES: When more than 50 spaces are provided in office and industrial uses and parking structures for residential and lodging uses only. Space size 7.5 x 16 feet (angled) and 7.5 x 18 feet (parallel) are permitted up to 40% maximum of the required spaces. All dimensions, calculations, and typical spaces must be on the plan.(Section 409.5)

10. ____ LOADING: (commercial or Industrial) must be shown on the plan and be adequate to accommodate the size and use of the building in addition to all other parking requirements. Loading spaces may not impede normal vehicle circulation or block required spaces.

11. ____ HANDICAPPED: For parking space requirements, (Contact: Plans Review 410-887-3987).

12. ____ ADJUSTMENTS (allowed in office and industrial): TRANSIT - 5% reduction; RIDESHARING - 10% reduction; SHARED PARKING - see Section 409.6.B.3, BCZR.

13. ____ BUSINESS OR INDUSTRIAL PARKING IN A RESIDENTIAL ZONE may be granted by the Office Of Administrative Law after a 15 day posting procedure. If a request for a public hearing is filed within this time period, a Special Hearing is required (see Section 409.8.B, BCZR). *NOTE:* In the D.R.zone,within a residential transition area, all RTA requirements must be met or a variance must be granted. (see Section 1B01.1.B.1, BCZR)



ZONING CHECKLIST PART II:

ADDITIONAL INFORMATION FOR NON-RESIDENTIAL ZONING PUBLIC HEARING APPLICATIONS (to be included with PART I / Checklist site plans when filing a petition)

FOR NON- RESIDENTIAL VARIANCES, SPECIAL HEARINGS, SPECIAL EXCEPTIONS, WAIVERS AND USE PERMITS

First, and most importantly: You must understand that the relief you have requested is a quasi-judicial decision and you are responsible for meeting the burden of law required by the Baltimore County Zoning Regulations (BCZR). A judicial hearing is an adversary process and, therefore, there may be opposition to your request. During a judicial hearing, the parties will be permitted to testify, present evidence, and cross-examine witnesses. The Office of Administrative Law will rule on the evidence and testimony to determine whether or not the petition will be granted.

Second: You must understand that if a hearing is required, you are permitted to have representation by an attorney of your choice. Unless incorporated, you are not required to have an attorney, but it is strongly recommended that you consider obtaining legal representation. If you are incorporated, it is a requirement that you be represented by an attorney.

Third: It is strongly recommended that you read and understand the requirements of the BCZR.

Fourth: No employee of the Department of Permits, Approvals and Inspections (PAI) may provide legal advice to anyone. The representations and opinions of any employee are not to be construed as definitive in any case. Only the decision of the Administrative Law Judge rendered after the statutory required public hearing is considered dispositive in matters relating to the interpretation of the BCZR. Even though there may not be opposition in a given case, your request may be denied.

YOU MUST MAKE AN APPOINTMENT TO FILE A PETITION

When you have completed the following steps, call 410-887-3391 to make an appointment. Due to the exacting review necessary for petition filing, **petitions or revisions will not be processed or accepted if they are just delivered or mailed. Revisions must be filed with the original intake Planner.**

AUTHORITY AND PETITIONER'S BURDEN:

INFORMATION ONLY, NOT LEGAL ADVICE

All requests for non-residential variances, special hearings, special exceptions, and use permits are handled by the Department of Permits, Approvals and Inspections (PAI). *Applications are obtained from and filed with the Zoning Review section of PAI* and all hearings are scheduled before an Office of Administrative Law Judge (**ALJ**). The enabling legislation providing the Administrative Law Judge (**ALJ**) with this authority is in Sections 307 and 500 of the Baltimore County Zoning Regulations (BCZR). The Director of PAI interprets and enforces the BCZR. Any disagreement with said interpretation may be taken to the Office of Administrative Law per Section 500.7 (BCZR). If the site in question is to be approved by the Administrative Law Judge (**ALJ**) as part of the development process, the public zoning requests will be considered concurrently with the development proposal.

Legal representation is recommended in all cases, but in the case of a corporation, it is a requirement. The information that proceeds is provided to give the petitioner a basic understanding of the legal burden of proof that must be satisfied prior to the granting of the petition. It is not a substitute for private legal counsel nor should it be construed as legal advice.

VARIANCES:

Under the authority of Section 307.1 (BCZR), the Administrative Law Judge, (**ALJ**) applying the two-step test set forth in Cromwell v. Ward, 100 Md. App. 691 (1995), has the authority to grant variance from the height, area, parking, and sign regulations.

A. The first step requires the petitioner to prove, to the satisfaction of the ALJ, that the property whereon structures are to be placed (or uses conducted) is unique, unusual, and different from the surrounding properties such that the uniqueness causes the zoning provision to impact more on the subject property than on the surrounding properties.

B. The second step of the test requires that the petitoner must demonstrate that strict compliance with the BCZR would result in either practical difficulty or unreasonable hardship. The Court of Special Appeals in Anderson v. Board of Appeals, Town of Chesapeake Beach, 22 Md. App. 28, stated:

1. "To prove undue hardship for a use variance, the following three criteria must be met:
   (i) Applicant must be unable to secure a reasonable return or make any reasonable use of his property (mere financial hardship or opportunity for greater profit is not enough).
   (ii) The difficulties or hardship is peculiar to the subject property in contrast with other properties in the zoning district.
   (iii) Hardship was not the result of applican'ts own actions.

To provide practical difficulty for an area variance, the following criteria must be met:

Whether strict compliance with requirement would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome.
   (i) Whether the grant would be substanial injustice to applicant, as well as other property owners in district, or whether a lesser realization than that applied for would give substantial relief.
   (ii) Whether relief can be granted in such fashion that the spirit of the ordiance will be observed and public safety and welfare secured."

C. No increase in residential density beyond that allowed by the zoning regulations shall be permitted.

D. The relief requested must be in strict harmony with the spirit and intent of height, area, off-street parking, or sign regulations.

E. And only in such manner as to grant relief without substantial injury to public health, safety, and general welfare.

SPECIAL HEARINGS:

Under the authority of Section 500.6 (BCZR), the Office of Administrative Law has the power, upon notice to the parties in interest, to conduct hearings involving any violation or alleged violation or noncompliance with any zoning regulations, or the proper interpretation thereof, and to pass his order regarding this matter.

Under the authority of Section 500.7 (BCZR), any person can petition the Office of Administrative Law to hold a public hearing to determine the existence of any purported nonconforming use on any premises or to determine any rights whatsoever of such a person in any property insofar as they are effected by the BCZR.

USE PERMITS AND WAIVERS:

Certain uses have singular, individual characteristics which make it necessary, in the public interest (even though other County permits may not be required), to specify regulations for each zoning classification. Under the authority of Section 500.4 (BCZR), the Director of PAI has the power to issue certain use permits (certain others are issued under the authority of the Office of Administrative Law) provided that all of the conditions for that particular use specified in the BCZR are met. Under the authority of Section 500.7 (BCZR), the Director has the right to require a public hearing whenever the Director deems it in the public interest. Waivers, such as for flood plain construction also require a public hearing and must follow the zoning hearing intake and filing procedures.

SPECIAL EXCEPTIONS:

Because not all uses fit neatly into permitted categories or zones, and under certain conditions various uses could be detrimental; the uses listed as special exceptions in the BCZR are permitted only if granted by the Office of Administrative Law, under the authority of Section 500.5 (BCZR). In cases of petitions for special exceptions under Section 502 of these regulations, the Office of Administrative Law shall hold a public hearing. After the hearing, the ALJ shall pass his order granting or refusing the special exception. In granting any special exception, the Administrative Law Judge must find that the use for which the special exception is requested will not:

A. be detrimental to the health, safety, or general welfare of the area;
B. create congestion in roads, streets, or alleys;
C. create a potential hazard from fire, panic, or other dangers;
D. overcrowd land and cause undue concentration of population;
E. interfere with adequate provisions for schools, parks, water, sewerage, transporation, or other public requirements, conveniences, or improvements;
F. interfere with adequate light and air;
G. be inconsistent with the spirit and intent of the BCZR;
H. be inconsistent with the impermeable surface and vegetative retention provisions of the BCZR.

In granting any special exception, the ALJ may impose such conditions, restrictions, or regulations as he deems necessary or advisable for the protection of surrounding and neighboring properties.

GENERAL APPLICATION PROCEDURE:

A zoning hearing can only address issues as regulated by the BCZR. (Certain hearings, such as flood plain waiver public hearings are an exception to this.) You must contact other county/state agencies to determine if your plan meets their requirements!

Normally before granting any relief, the Office of Administrative Law shall require advertising and posting of the property and shall require, as applicable, a public hearing. All orders of an ALJ shall contain a finding of fact specifying the reason or reasons for granting or denying each request.

The normal time period from time of filing a petition until the time of receipt of the written order is usually somewhere between 45 and 60 days. Also, in addition to filing fees, costs are incurred for posting the property and advertising the hearing in area newspapers.

At the time of petition filing, petitioners will pay the filing costs. The petitioner will also receive a list of approved sign posters and the petitioner is responsible for hiring one of these approved posters to properly post the subject property. The posting sign must remain *visible* on the property for a period of at least 15 days before the hearing and/or closing date.

Zoning petitions may be filed with PAI **by appointment only**. Applications/forms are available from Zoning Review **or online****. All information on the forms must be typed or printed and they must be signed by the legal owner(s) or a corporate officer, with his/her title, the address, zip code, work and home telephone numbers and Email address provided. While the planner will assist the petitioner in interpreting those provisions of the BCZR applicable to the particular case, the final wording of the request and other information submitted, as set forth in the application, shall be the sole responsibility of the petitioner(s).

** http://www.baltimorecountymd.gov/Agencies/permits/pdm_zoning/zonforms.html#forms

THE APPLICATION MUST CONTAIN:

- **Petition** -- 3 (three) original petition forms signed and filled out as indicated. Any person signing as an authorized agent of the petitioner or contract purchaser must be able to bind the petitioner or contract purchaser to a legal contract. Their position must be indicated and where any doubt as to the person's authority may exist, a letter of authorization is required.
- **Plats** -- 12 (twelve) or 14 (fourteen) for flood zone properties, copies of a **sealed** hearing plan with all information as indicated in this checklist.
- **Description** -- 3 (three) separate copies of a **sealed description** of the property, beginning with the distance to the nearest improved intersecting street centerline, **as indicated in this checklist.**
- **Zoning Map** -- 1 (one) copy of the GIS zoning map with the location and boundaries of the property accurately depicted (matching the sealed description) and the official 5 digit zoning map number (example: 070A2). See Example 4.
- **Fee** -- 1 (one) filing fee of $385.00 for variance or special hearing and $450.00 for special exception for each separate request (maximum charge of $950.00 for one property/lot). Checks must be made payable to Baltimore County, Maryland. (Be aware that fees are subject to change without notice)
- **Advertising Form** -- 1 (one) completed copy of the advertising form. You will be billed directly by the newspapers.
- **Posting** -- Applicant is responsible for the posting (securing and paying an approved sign poster). The current list of approved sign posters is available in the Zoning Review Office.

REVIEW AGENCIES:

Prior to preparing the required plans, the petitioner or the engineer should contact the following agencies for pertinent data that may be required.

1. Assessments (SDAT) 410-512-4906
2. Development Plans Review (traffic issues) 410-887-3751
3. Fire Department 410-887-3998
4. State Highway Administration 410-545-5600
5. County Roads 410-887-3739
6. Planning (design, screening, landscaping, historic) 410-887-3211
7. Plans Review (construction/fire/floodplain plans) 410-887-3987
8. Department of Environmental Protection and Sustainability (DEPS) (see note) 410-887-3980
9. If *floodplain*, Department of Natural Resources 410-631-3902
10. If *critical area*, Maryland Office of Planning 410-767-4485

NOTE: For CBCA (Critical Area) sites: Without **DEPS comments** the ALJ will not write an order. **Floodplains and historic buildings should be identified and addressed as needed. Flood Plain** determination/issues call the Dept.of Public Works at 410-887-3300. **Historic** issues/questions call the Office of Planning at 410-887-3480.

THE ZONING HEARING PROPERTY DESCRIPTION:

Three (3) typed copies (separate pages) of the **zoning description of the property** is required. Standard 8-1/2" x 11" sheets are acceptable. Most property descriptions, as stated on a deed, are too wordy but some of the information must be used. (Note: Old deed information such as perches or a stone, etc. cannot be used as is.) Read your deed, your location survey and your State Assessment record to determine which of the three options you should use. DO NOT PHOTOCOPY THE DESCRIPTION IN THE DEED. The zoning property description must comply with Part A and Part B:

PART A (START DESCRIPTION WITH THE FOLLOWING):

ZONING PROPERTY DESCRIPTION FOR_____
(address or location)

*Beginning at a point on the (north, south, east or west) side of (name of street on which property fronts) which is (number of feet of right-of-way width) wide at the distance of (number of feet) (north, south, east or west) of the centerline of the nearest improved intersecting street (name of street) which is (number of feet of right-of-way width) wide.

ALERT!
*Be aware that the Beginning Point and the distance in feet to the street centerline intersection, as stated in the zoning property description, must be shown and labeled on the hearing plan. The lot area (total square feet or acres) on the hearing plan and the zoning description must agree.

PART B (CONTINUE DESCRIPTION WITH ONE OF THE FOLLOWING 3 OPTIONS):

OPTION 1 (Metes and Bounds Sample – lot not part of record plat or minor subdivision):

THIS IS A SAMPLE ONLY: Thence the following courses and distances: (1st Point of Call-"POC") N.87 12' 13" E. 321.1', (2nd POC) S.18 27' 03" E. 87.2', (3rd POC) S.62 19' 00" W. 318', and (4th POC) N.08 15' 22" W. 80', back to the point of beginning as recorded in Deed Liber (__), Folio (___), containing (number of total square feet or acres in lot). Located in the (__) Election District and (___) Council District.

OPTION 2 (Subdivision Lot – lot is part of record plat):

Being Lot #(__), Block (__), Section #(__) in the subdivision of (name of subdivision) as recorded in Baltimore County Plat Book #(___), Folio #(___), containing (number of total square feet or acres in lot). Located in the (__) Election District and (___) Council District.

OPTION 3 (Minor Subdivision Lot Sample):

THIS IS A SAMPLE ONLY: Thence the following courses and distances: (1st Point of Call-"POC") N.87 12' 13" E. 321.1', (2nd POC) S.18 27' 03" E. 87.2', (3rd POC) S.62 19' 00" W. 318', and (4th POC) N.08 15' 22" W. 80' back to the point of beginning, as recorded in Deed Liber (____), Folio (____), containing (number of total square feet or acres in lot). Located in the (__) Election District and (___) Council District. Also known as Lot #(___) in the minor subdivision of (name of minor subdivision), minor subdivision # (_ _-_ _ _-M), as maintained by the Development Management Division of the Department of Permits, Approvals and Inspections.

EXAMPLE 4 – ZONING MAP

This is available from the Zoning Review Counter.
A GIS System color copy zoning map is required for filing a petition.
This black and white sample is keyed to the map information.
Mark your site clearly on the map.



DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS
ZONING REVIEW OFFICE

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

The Baltimore County Zoning Regulations (BCZR) require that notice be given to the general public/neighboring property owners relative to property which is the subject of an upcoming zoning hearing. For those petitions which require a public hearing, this notice is accomplished by posting a sign on the property (responsibility of the legal owner/petitioner) and placement of a notice in a newspaper of general circulation in the County, both at least fifteen (15) days before the hearing.

Zoning Review will ensure that the legal requirements for advertising are satisfied. However, the legal owner/petitioner is responsible for the costs associated with these requirements. The newspaper will bill the person listed below for the advertising. This advertising is due upon receipt and should be remitted directly to the newspaper.

OPINIONS MAY NOT BE ISSUED UNTIL ALL ADVERTISING COSTS ARE PAID.

For Newspaper Advertising:

Case Number: _____

Property Address: _____

Property Description: _____

_____

Legal Owners (Petitioners): _____

Contract Purchaser/Lessee: _____

PLEASE FORWARD ADVERTISING BILL TO:

Name: _____

Company/Firm (if applicable): _____

Address: _____

_____

_____

Telephone Number: _____

Revised 5/20/2014

PETITION FOR ZONING HEARING(S)

To be filed with the Department of Permits, Approvals and Inspections

To the Office of Administrative Law of Baltimore County for the property located at:

Address _____ which is presently zoned _____

Deed References: _____ 10 Digit Tax Account # _ _ _ _ _ _ _ _ _ _

Property Owner(s) Printed Name(s) _____

(SELECT THE HEARING(S) BY MARKING X AT THE APPROPRIATE SELECTION AND PRINT OR TYPE THE PETITION REQUEST)

The undersigned legal owner(s) of the property situate in Baltimore County and which is described in the description and plan attached hereto and made a part hereof, hereby petition for:

1.____ a **Special Hearing** under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

2.____ a **Special Exception** under the Zoning Regulations of Baltimore County to use the herein described property for

3.____ a **Variance** from Section(s)

of the zoning regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons: **(Indicate below your hardship or practical difficulty or indicate below "TO BE PRESENTED AT HEARING". If you need additional space, you may add an attachment to this petition)**

Property is to be posted and advertised as prescribed by the zoning regulations.
I, or we, agree to pay expenses of above petition(s), advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.
Legal Owner(s) Affirmation: I / we do so solemnly declare and affirm, under the penalties of perjury, that I / We are the legal owner(s) of the property which is the subject of this / these Petition(s).

Contract Purchaser/Lessee:

Name- Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

Legal Owners (Petitioners):

Name #1 – Type or Print / Name #2 – Type or Print

Signature #1 / Signature # 2

Mailing Address City State

Zip Code Telephone # Email Address

Attorney for Petitioner:

Name- Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

Representative to be contacted:

Name – Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

CASE NUMBER_____ **Filing Date** ___/___/_____ **Do Not Schedule Dates:** _____ **Reviewer**_____

REV. 10/4/11

Motion's Hearing

03C-16-10551

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondylas, LLC

Exhibit List

Party: Protestant / motion Date: 2-17-16

Exhibit No:	Description:
✓ 1	Opinion and Order OAH (Case No. 2016-003-SPH) dated October 22, 2015
✓ 2	Unreported opinion Court of Special Appeals No: 810, September Term 2009, Filed July 2010
	VERIFIED BY KC DATE: 2/19/16

10/22/15

IN RE: **PETITION FOR SPECIAL HEARING** **(9025 Cuckold Point Road)** 15th Election District 7th Council District	*	BEFORE THE
	*	OFFICE OF
	*	ADMINISTRATIVE HEARINGS
Boone Kondylas, LLC *Legal Owner* Petitioner	*	FOR BALTIMORE COUNTY
	*	**Case No. 2016-0003-SPH**

* * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Boone Kondylas, LLC, legal owner. The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

Ken Boone appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioner. Several neighbors, represented by Francis Borgerding, Esq., attended and opposed the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Bureau of Development Plans Review (DPR). Neither agency opposed the request, but suggested certain conditions be imposed if relief is granted.

The subject property is 1.27 acres and zoned B.L. The property is improved with a restaurant known as "Dock of the Bay." The restaurant has new ownership, which proposes to offer limited music and live entertainment as an "accessory" use to the food and beverage service. This property and business have been the subject of protracted litigation concerning loud music and unruly patrons which disturbed the neighborhood. The operation was found by the court of

Protestant motion exhibit 1

special appeals to constitute a "nightclub," a use prohibited in the B.L. zone. Protestants contend the petition is barred by *res judicata,* while Petitioner argues that unlike the former operation the current business is first and foremost a restaurant, with music offered to compliment the dining experience.

Under Maryland law, an agency determination affirmed on appeal is entitled to preclusive effect. Esslinger v. Balto. City, 95 Md. App. 607, 621 (1993). This is the case, and *res judicata* will apply, unless there is a significant change in circumstances between the earlier and subsequent action. *See, e.g.*, Alvey v. Hedin, 243 Md. 334, 340 (1966). In light of this authority I believe the doctrine of *res judicata* mandates that the petition in this case be dismissed.

As an initial matter, I do not believe the OAH has the authority to "amend" restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the board of appeals, circuit court and then the court of special appeals. In an unreported opinion (No. 810, September Term, 2009) the appellate court affirmed the agency findings, which necessarily included the conditions and restrictions found in those orders. To amend those restrictions at this juncture would be akin to reversing the appellate court, which an administrative agency cannot do.

I believe the Petition must also be denied based on *res judicata.* As discussed above, *res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard. For example, if the owner of the subject property was now proposing to operate a barbershop or beauty salon at the site, that would constitute a significant change and *res judicata* would not apply. But here, I do not believe there

have been significant changes; Petitioner is still proposing to operate a restaurant that would offer live and/or recorded music.

The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010).

THEREFORE, IT IS ORDERED this 22nd day of October, 2015 by this Administrative Law Judge, that the Petition for Special Hearing pursuant to B.C.Z.R. § 500.7 to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music, be and is hereby DENIED.

Any appeal of this decision must be filed within thirty (30) days of the date of this Order.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln

Protestant exhibit 2 (Motion)

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 810

September Term, 2009

FIFTH STREET, LLC., ET AL.

v.

MATTHEW CIARPELLA, ET AL.

Eyler, Deborah S.,
Woodward,
Kehoe,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 9, 2010

Fifth Street, LLC, and its managing member, Lawrence J. Thanner, Jr. (collectively "FSLLC"), the appellants, own the Dock of the Bay, a restaurant and bar located at 9025 Cuckold Point Road in Baltimore County.[1] They appeal from the judgment of the Circuit Court for Baltimore County affirming a decision of the Baltimore County Board of Appeals ("Board"), finding them in violation of the Baltimore County Zoning Code ("Zoning Code") for operating a nightclub in a B.L. (Business Local) zone. The appellees are People's Counsel for Baltimore County ("the County") and Matthew Ciarpella, who resides near the restaurant. The FSLLC presents four questions for our review, which we have consolidated and rephrased as follows:

I. Did the Board err in concluding that the Dock of the Bay operates as a nightclub, as defined in the Zoning Code?

II. Is the definition of a "night club" in the Zoning Code so arbitrary and confusing as to deprive the appellants of their due process rights?

III. Did the Code Enforcement Division hearing officer err in concluding that the appellants violated the Zoning Code by erecting a tent without a permit?[2]

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[1]We will refer to the Dock of the Bay as a restaurant, as all parties seem to agree that it performs this function, but we do not intend this description to be in any way determinative of the central issue in this case.

[2]As framed by FSLLC, the question presented are:

1. In Special Hearing Case No.: CBA-07-144-SPH, the County Board of Appeals erred as a matter of law in determining that the Dock of the Bay restaurant was a night club under the Baltimore County Zoning Regulations definition.

2. In Zoning Violation Case No.: 06-044, the finding of violation was in error as a matter of law.

(continued...)

For the reasons that follow, we shall affirm the judgment of the circuit court.

ZONING REGULATIONS

The Zoning Code establishes three types of business zones: B.L. (Business Local), B.R. (Business Roadside), and B.M. (Business Major). Zoning Code § 100.1.A.2. As noted above, the Dock of the Bay is located in the B.L. zone. The B.L. zone is the most restrictive of the three business zones.

Zoning Code section 230.1.A sets forth the permitted uses in the B.L. zone, which include the operation of a "standard restaurant" and a "tavern." Combinations of permitted uses also are allowed. Zoning Code § 230.1.A.10. A "nightclub" is not among the permitted uses in the B.L. zone, nor is it permitted by special exception. Zoning Code § 230.3.[3]

A "standard restaurant" is defined in the Zoning Code as follows:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term

---

[2](...continued)

3. If the Dock of the Bay is a restaurant, Civil Citation in Case No.: 07-134 and Case No.: 06-044 must be reversed.

4. County's arbitrary and confusing definition of night club violates Appellants' due process rights, violates standards for discretionary enforcement; leaves enforcement to the arbitrary discretion of County officials and constitutes undue favoritism by the County as established in the testimony before the Board of Appeals. Further, that the County's classification of night club must be reasonable and the evidence before the Board and the Board's conclusions established that the use of I.B.C. Group A-2 to define night club is unusable, arbitrary and capricious.

[3]A nightclub is a permitted use in the B.M. zone. Zoning Code § 233.1.

> includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

Id. at § 100.1. A "tavern" is defined as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." *Id.* Lastly, a "nightclub" is defined as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County." *Id.*

In 2005, the Baltimore County Council passed Bill No. 1-05, adopting the ICC International Building Code, 2003 Edition ("IBC"),[4] with some modifications, as the Building Code of Baltimore County. Chapter 3 of the IBC governs "Use and Occupancy Classification." IBC at 23. IBC section 303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." *Id.* at 24. Subgroup A-2 includes:

> Assembly uses intended for food and/or drink consumption including, but not limited to:
>
> Banquet halls
> Night clubs

[4]International Code Council, *International Building Code* (2003).

Restaurants
Taverns and bars

Id.

The commentary to the IBC explains, "[b]ecause of the arrangement and density of the occupant load associated with occupancies classified in the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high." ICC, *IBC Commentary - Vol. 1,* at 3-16 (2003) ("IBC Commentary"). It then provides a description of each subgroup classification. Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - Low lighting levels;
> - Entertainment by a live band or recorded music generating above-normal sound levels;
> - No theatrical stage accessories;
> - Later-than-average operating hours;
> - Tables and seating arranged or positioned so as to create ill-defined aisles;
> - A specific area designated for dancing;
> - Service facilities for alcoholic beverages and food; and
> - High occupant load density.

Id. at 3-17 - 3-18. The IBC Commentary explains that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. *Id.* at 3-18. Finally, it notes that the characteristics listed above "are only advisory in determining whether Group A-2 is the appropriate classification." *Id.*

FACTS AND PROCEEDINGS

The underlying facts are largely undisputed. The Dock of the Bay has been in operation since approximately 1955. It is situated on the Miller's Island peninsula between the Back River, to the west, and the Chesapeake Bay, to the east. To the south are residences that, like the Dock of the Bay, are zoned B.L. To the north and west of the property is a marina with attendant parking facilities. These properties are zoned B.M.

In September 2003, the Dock of the Bay was destroyed by Hurricane Isabel. One month later, FSLLC purchased the restaurant. Thanner then spent five months rebuilding the restaurant before reopening it in March 2004.

The interior of the restaurant is about 2,400 square feet. The first floor consists of a rectangular bar at one end and tables and chairs in most of the remaining open space. The second floor is used only for storage and office space. The business is licenced as a restaurant and is authorized to serve approximately 150-160 people. It also holds a Class-D liquor license.

Outside the restaurant is a patio area with more tables and chairs and an outside bar. Adjacent to the patio is a children's play area with a wooden pirate ship. The patio overlooks the Chesapeake Bay. FSLLC also owns a dock with 14 "transient" boatslips for customer use.

The restaurant is open daily from 11:00 a.m. until 2:00 a.m., although it frequently closes earlier on week nights, especially in the wintertime. It serves a full lunch and dinner

menu, with an emphasis on seafood. It also serves alcohol. Food service ends at 11:00 p.m. Approximately 70% of its sales are food, 28% beverages, including alcohol, and 2% T-shirts and cookbooks.

There are ten television sets inside the restaurant and another two at the outside bar. A house music system, connected to speakers inside and outside, plays satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered.

Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.

On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

Although there is no dance floor, during live performances patrons often dance in between the tables.

On April 21, 2006, a little over two years after the Dock of the Bay reopened under FSLLC's management, the Code Enforcement Division ("CED") of the Baltimore County Department of Permits and Development Management ("DPDM") received a letter of

complaint from Matthew Ciarpella, through counsel, regarding live music at the restaurant.[5] The letter alleged that the Dock of the Bay was operating as a nightclub, which is not a permitted use in the B.L. Zone.

In May, June, and August of 2006, the Dock of the Bay was cited for operating a nightclub in a B.L. zone, erecting a tent without a permit, and failing to cease nightclub operations and to remove the tent.[6]

On August 18, 2006, FSLLC filed a "Petition for Special Hearing," presenting two questions:

> 1. Whether the use of the property at 9025 Cuckold Point Rd., Millers Island 21219 is in violation of the [Zoning Code ?]
> 2. Is the use by Fifth Street, LLC, a restaurant, at 9025 Cuckold Point Rd., which provides music during the day, . . . a "night club" as defined in the [Zoning Code]?

On August 23, 2006, before the petition for special hearing was ruled upon, the case came before a CED Hearing Officer at the DPDM. The hearing officer heard testimony from Thanner, Ciarpella, and another nearby resident, Wayne Walkman, Jr. Evidence consisting of advertisements highlighting the music offered at the Dock of the Bay also were introduced. The hearing officer issued "Findings of Fact and Conclusion[s] of Law." He found that the Dock of the Bay offered live and recorded music, both inside and outside. He

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[5]This was not the first complaint about the property. In the summer of 2005, Ciarpella and other nearby residents made numerous noise complaints.

[6]After the first of the citations, Thanner wrote to the inspector to request clarification as to the nature of his violation. He received no response to his letter.

then referenced the IBC and the IBC Commentary, concluding that the property "exhibits some of the listed characteristics" in the IBC Commentary for Subgroup A-2. He ruled that the Dock of the Bay was "being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use." He imposed a civil penalty of $5,000 and ordered FSLLC to "dismantle the outside speaker system and cease live and/or recorded entertainment immediately." He further concluded that the tent was erected without a permit in violation of IBC sections 3102.1, 3103.1 and 3103.1.1 and ordered it removed.

A two-day, public special hearing was held before the Zoning Commissioner ("Commissioner") to determine if the Dock of the Bay, "which provides music [] during the day, [is] a 'nightclub' as defined in [the Zoning Code]." Thanner testified at the hearing. Three past and present residents of Millers Island testified in support of FSLLC. Twenty-two nearby residents testified as protestants about the loud music, parking overflow, and noisy patrons leaving the property late at night. Finally, the CED officer who had cited the property and James H. Thompson, CED Supervisor, testified.

On May 30, 2007, the Commissioner issued his opinion. After reciting the "relatively simple" facts, the Commissioner addressed the question whether the Dock of the Bay is a "nightclub or simply a restaurant where ancillary entertainment is provided." He looked to the definition of "nightclub" in the Zoning Code and to the IBC and IBC Commentary. He concluded that, under the plain language of the Zoning Code definition, any establishment

that "provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub" under the IBC is an impermissible use in a B.L. zone. He further concluded that the use of the term "categorized" means only that the establishment necessarily falls under the IBC "Use and Occupancy Classification" category that includes "nightclubs." The Commissioner ruled that the Dock of the Bay is a "nightclub" under the Zoning Code and ordered "that the playing of outdoor music either by way of an outside speaker system, live/or recorded entertainment, must be discontinued."

After the special hearing, FSLLC was cited for continuing nightclub and tent violations. A second hearing before a hearing officer was held and the Dock of the Bay again was found in violation.

FSLLC appealed to the Board from the decision of the Commissioner, as well as from the decisions of the hearing officers. The cases were consolidated before the Board.

On January 15, 2008, a three-member panel of the Board took testimony and heard argument.[7] FSLLC called Thanner and also called Thompson, as an adverse witness. In addition to the facts already adduced concerning the nature of his business, Thanner testified that live entertainment was a significant draw for the Dock of the Bay, especially during the

[7]Pursuant to Zoning Code section 501.6, appeals from the Zoning Commissioner are heard "*de novo*." Accordingly, the Board took testimony on the issues presented at the special hearing. The appeal of the code enforcement rulings, however, were reviewed on the record before the hearing officer pursuant to section 3-6-303 of the Baltimore County Code (2003).

slower winter months, and that he would likely have to close down if forced to discontinue it.

Thompson testified that the CED operates on a "complaint basis only," meaning that it investigates alleged code violations only after receiving a complaint about a property or business. It does not undertake investigations of potential violations on its own initiative. He also testified that, in his opinion, based on his experience enforcing the Zoning Code, a property could operate as a "dual use," meaning that it could fit into multiple categories of use simultaneously. He explained that it was the practice of the CED to treat live music, but not recorded entertainment, as a code violation in the B.L. zone.

Numerous residents also testified. For the most part, their testimony was not relevant to the issues on appeal.[8] There was testimony that music played at the dock of the Bay was loud enough to be heard inside residents' houses.

At the conclusion of testimony and arguments, the Board allowed the parties to submit briefs. On June 4, 2008, a two-member majority of the Board issued an opinion concluding that the Dock of the Bay was operating as a nightclub and affirming the hearing officer's

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[8]FSLLC filed a motion to limit testimony with respect to expected resident testimony concerning noise at the restaurant and related complaints about the establishment. The Board granted the motion, opining that this type of testimony generally was not relevant to the legal issue whether the business was a nightclub under the Zoning Code, the only issue under *de novo* review. Despite that ruling, many residents testified. Their testimony was cut short by relevance objections, however.

An employee of the Liquor Board also testified and counsel for Ciarpella attempted to introduce into evidence records related to prior noise complaints from 2005. The Board granted FSLLC's hearsay objections to this testimony and evidence, however.

rulings. The Board reduced the $5,000 fine imposed for operating as a nightclub to $1,000 and upheld a $1,000 fine imposed by the hearing officer for the tent violation. FSLLC was ordered to discontinue the "playing of music by way of speaker system" and "live or recorded entertainment."

In its opinion, after reciting the facts, the Board majority looked to the definition of "nightclub" in the Zoning Code. Having noted already that the Dock of the Bay offered "live or recorded entertainment," it turned to the IBC and the IBC Commentary to determine if the business was "categorized as a nightclub." Like the Commissioner, it considered whether the eight non-exclusive characteristics of Subgroup A-2 applied to the Dock of the Bay. It found that six of the eight factors were met: low light levels, entertainment by a live band or recorded music generating above normal sound levels, no theatrical stage accessories, later than average operating hours, service facilities for alcoholic beverages and food, and high occupant load density. It found that two factors – tables and seating arranged or positioned so as to create ill-defined aisles and a specific area for dancing – did not apply.

Based on its finding that the Dock of the Bay exhibited six of the eight characteristics of Subgroup A-2, the Board majority concluded that the restaurant was operating as a nightclub. Its decision closed as follows:

> The Board is not unmindful that the definition of a nightclub, under the [Zoning Code], can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.[L.] zones, might be considered "nightclubs" under the present criteria of the [Zoning Code]. It is not for the Board to change the definition but for the County Council to consider.

One of the three Board panel members issued a dissenting opinion. He emphasized the undisputed facts that characterized the Dock of the Bay as a family restaurant, such as the full-service menu, table seating for 150-160 persons, a pirate ship play area, no cover charge, and the vast majority of sales being food related. He described the "nightclub" definition in the Zoning Code as "exceedingly unclear and circuitous" and characterized the IBC as a "'one size fits all'" building code that fails to reflect the "particular realities and common sense observations of this jurisdiction." In particular, the dissenter took issue with the IBC's practice of grouping restaurants together with such "disparate uses" as banquet halls and nightclubs. He noted that the IBC Commentary even distinguishes between buildings in which people congregate for "*drinking and dancing* (e.g., nightclubs, dancehalls, banquet halls, cabarets, etc.)" and buildings in which people congregate for "food and drink consumption (e.g., restaurants)." (Emphasized in dissenting opinion.)

Finally, the dissenter stated that, even if it were appropriate to apply the Subgroup A-2 criteria, the evidence did not support the Board majority's findings with respect to several of the criteria. Specifically, he found from the testimony that the lighting only was dimmed occasionally, for ambiance; that the business never had been cited for allowing the music to generate above-normal sound levels; that there was no evidence that the business hours from 11:00 p.m. to 2:00 a.m. were "later than average operating hours"; and that "high-occupant load density" is too ambiguous a characteristic to be applied.

The dissenter closed by observing that the Board majority was turning "a blind eye to common sense," when, as here, the facts were clear that the Dock of the Bay was a restaurant offering some musical entertainment on the side. He also noted that "selective enforcement" of the Zoning Code, as testified to by Thompson, seem "contrary to the spirit and intent of any well-written regulation, [] arbitrary and capricious, and possibly an 'Equal Protection under the laws' violation."

FSLLC moved for reconsideration of the Board decision, asking the Board to clarify how many of the IBC Commentary criteria must be satisfied before a business is considered a nightclub; to amend its order to direct the Dock of the Bay to "discontinue its nightclub operation" as opposed to discontinuing all music and live or recorded entertainment;[9] to reconsider the imposition of any fine for the nightclub violation, given the difficulty the Board itself had in determining whether a violation had occurred; and to reconsider the finding of a tent violation. FSLLC also argued that testimony of a number of nearby residents should not have been allowed. The motion was denied in its entirety.

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[9]FSLLC suggested certain changes it could make, short of discontinuing all live and recorded music, to reduce the number of Subgroup A-2 characteristics applicable to it. It stated that it would keep lighting levels at medium, use theatrical accessories, not remain open later than average, keep defined aisles, not have a dance area, close the kitchen during live entertainment so that there would not be "service facilities for food and drink," and not exceed the occupant load limit as set forth by the fire department.

FSLLC petitioned the circuit court for judicial review. Oral argument was heard,[10] and the circuit court issued a ruling on the record affirming the Board's decision. FSLLC timely appealed the judgment of the circuit court.

We shall include additional facts in our discussion of the issues.

STANDARD OF REVIEW

The Court of Appeals has described our circumscribed role in reviewing an agency decision as follows:

> A court's role in reviewing an administrative agency adjudicatory decision is narrow, *United Parcel v. People's Counsel*, 336 Md. 569, 576, 650 A.2d 226, 230 (1994); it "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel*, 336 Md. at 577, 650 A.2d at 230. *See also* [Md.] Code (1984, 1995 Repl. Vol.), § 10-222(h) of the State Government Article; *District Council v. Brandywine*, 350 Md. 339, 349, 711 A.2d 1346, 1350-1351 (1998); *Catonsville Nursing v. Loveman*, 349 Md. 560, 568-569, 709 A.2d 749, 753 (1998).
>
> In applying the substantial evidence test, a reviewing court decides ""'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'"" *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978). *See Anderson v. Dep't of Public Safety*, 330 Md. 187, 213, 623 A.2d 198, 210 (1993). A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. *CBS v. Comptroller*, 319 Md. 687, 698, 575 A.2d 324, 329 (1990). A reviewing court "'must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence' and to draw inferences from that evidence." *CBS v. Comptroller, supra*, 319 Md.

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[10]The judge indicated to the parties that his main concern was "with the 14th Amendment to the United States Constitution that guarantees every citizen the right of due process."

> at 698, 575 A.2d at 329, quoting *Ramsay, Scarlett & Co. v. Comptroller*, 302 Md. 825, 834-835, 490 A.2d 1296, 1301 (1985). *See Catonsville Nursing v. Loveman, supra*, 349 Md. at 569, 709 A.2d at 753 (final agency decisions "are *prima facie* correct and carry with them the presumption of validity").
>
> Despite some unfortunate language that has crept into a few of our opinions, a "court's task on review is *not* to ""'substitute its judgment for the expertise of those persons who constitute the administrative agency,'""" *United Parcel v. People's Counsel, supra*, 336 Md. at 576-577, 650 A.2d at 230, quoting *Bulluck v. Pelham Wood Apts., supra*, 283 Md. at 513, 390 A.2d at 1124. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. *Lussier v. Md. Racing Commission*, 343 Md. 681, 696-697, 684 A.2d 804, 811-812 (1996), and cases there cited; *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881, 886 (1989) ("The interpretation of a statute by those officials charged with administering the statute is . . . entitled to weight"). Furthermore, the expertise of the agency in its own field should be respected. *Fogle v. H & G Restaurant*, 337 Md. 441, 455, 654 A.2d 449, 456 (1995); *Christ v. Department of Natural Resources*, 335 Md. 427, 445, 644 A.2d 34, 42 (1994) (legislative delegations of authority to administrative agencies will often include the authority to make "significant discretionary policy determinations"); *Bd. of Ed. For Dorchester Co. v. Hubbard*, 305 Md. 774, 792, 506 A.2d 625, 634 (1986) ("application of the State Board of Education's expertise would clearly be desirable before a court attempts to resolve the" legal issues).

Bd. of Physician Quality Assurance v. Banks, 354 Md. 59, 67-69 (1999) (footnotes omitted).

In *Marzullo v. Kahl*, 366 Md. 158 (2001), the Court reaffirmed the principle that agencies are owed due deference in their interpretation of the zoning regulations they are tasked with enforcing. In that case, like the instant case, the agency was the Board and the regulations at issue were part of the Baltimore County Zoning Code. The Court opined that the Board's "expertise should be taken into consideration and its decision should be afforded

appropriate deference in our analysis of whether it was 'premised upon an erroneous conclusion of law.'" *Id.* at 173 (quoting *Banks, supra*, 354 Md. at 68) (footnote omitted).

DISCUSSION

I.

FSLLC challenges the legal foundation for the Board's decision and the factual findings supporting it. We begin with the legal contentions. The Zoning Code's definition of "nightclub" is comprised of three elements: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor" and 3) "categorized as a nightclub by the Building Code of Baltimore County." It is undisputed that the Dock of the Bay is a "tavern or other commercial establishment" that offers both live and recorded entertainment in the form of bands, karaoke, DJs, satellite radio, and television. Thus, the central focus of FSLLC's legal argument is that the Board erred in concluding that the Dock of the Bay is "categorized as a nightclub by the Building Code of Baltimore County."

FSLLC points out that the IBC does not define "nightclub." Rather, it groups certain structures, including nightclubs and restaurants, as fitting in Assembly Subgroup A-2. Therefore, according to FSLLC, a finding that the Dock of the Bay meets characteristics of Subgroup A-2 is of no moment because it does not answer the ultimate question: is the Dock of the Bay a nightclub?

Before we address this contention, some history is helpful. Since at least 1956, the Baltimore County Building Code ("BCBC") has adopted the standards of a model building code. *See Metius v. Julio*, 27 Md. App. 491, 497 n.3 (1975). Baltimore County is not unique in this practice. Since the early part of the 20th century, at both the municipal and state levels, building codes around the country have been based on model codes. Three regional model code groups promulgated the codes – the International Conference of Building Officials ("ICBO"), the Building Officials Code Administrators International ("BOCA") and the Southern Building Code Conference International ("SBCCI"). *See* www.iccsafe.org/ABOUTICC/Pages/default.aspx. BOCA, a code designed for the east coast and the midwest, previously had been adopted by the Baltimore County Council. *See Swinson v. Lords Landing Village Condo.*, 360 Md. 462, 479 (2000) (noting that, since at least 1981, most counties in Maryland have had building codes patterned on the BOCA model code); *Metius, supra*, 27 Md. App. at 497 n.3 (noting that Baltimore County adopted the BOCA standards beginning in 1956).

In 1994, these three regional groups consolidated to form the ICC. The first version of the IBC was published in 2000.[11] The IBC does not differ substantially from the BOCA code that it replaced. As relevant to the instant case, however, the category in which a "restaurant" was placed changed. Under the BOCA code, a restaurant was categorized in

[11]Pursuant to Md. Code (2003, 2009 Supp.), section 12-503 of the Public Safety Article, the Maryland Department of Housing and Community Development is required to adopt the IBC as its model building code, subject to some permitted modifications.

Assembly Subgroup A-3.[12] *See* Building Officials Code Administrators, *The BOCA National Building Code/1999* 18 (14th ed. 1999). As discussed, *supra*, under the IBC, restaurants are categorized in Subgroup A-2. Under both BOCA and IBC, nightclubs are categorized in Subgroup A-2. The IBC Commentary, discussed *supra*, setting forth the eight non-exclusive characteristics of Subgroup A-2, appears to have been lifted verbatim from the BOCA Commentary that preceded it. *See In the Matter of the Application of Rampart Partnership (Club 101)*, Case No. 96-60-XA at 18-19 (Aug. 28, 1998) ("*Club 101*") (quoting from the Commentary to the BOCA Code with respect to Subgroup A-2).

Returning to FSLLC's argument, we agree that the IBC does not define a nightclub. The Zoning Code definition of "nightclub" merely requires that the IBC "categorize" an establishment as a "nightclub." The IBC (and the BOCA Code before it) do exactly that. They categorize structures for purposes of numerous safety regulations. That a restaurant and a nightclub fall into the same sub-category under the IBC "Use and Occupancy Classifications" does not affect the analysis under the Zoning Code, however. The Board correctly looked to the IBC and the characteristics of structures that fall within Subgroup A-2 to determine if the Dock of the Bay property is categorized in that grouping. If it is, then it met the Zoning Code definition of "nightclub."

Moreover, as mentioned above, we accord the Board "a degree of deference . . . in its application of the law." *Banks*, *supra*, 354 Md. at 69. In the instant case, the Board's

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[12]Interestingly, that subgroup included "restaurants other than nightclubs."

decision was informed by its experience applying these characteristics, as evidenced by its *Club 101* decision.[13] In *Club 101*, the Board considered whether, under the Zoning Code, a club was operating as a nightclub or an after-hours club. It applied the eight non-exclusive criteria in the commentary to the then applicable BOCA code in analyzing the issue and determined that the club was operating as an after-hours club, in violation of the Zoning Code.[14] The decision reveals, as discussed *supra*, that the eight criteria applied in the instant case were developed at a time when restaurants were not included in Subgroup A-2, thus adding further support to the Board's conclusion that these factors are relevant to the determination whether a structure is "categorized as a nightclub" under the IBC.

FSLLC also maintains that the Dock of the Bay must be *either* a "nightclub" or a "standard restaurant" as those terms are defined under the Zoning Code. FSLLC focuses on the use of the word "primarily" in the definition of "standard restaurant," arguing that, if the Dock of the Bay is "primarily" engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant. We disagree. Several types of restaurants are defined in the Zoning Code, including "carry-out," "fast-food," and "fast-food, drive-through only." *See* Zoning Code § 101. We read the

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[13]The *Club 101* decision was cited by FSLLC both on appeal and before the Board in support of its argument that the Dock of the Bay must be either a "nightclub" or a "restaurant." We will discuss this argument further, *infra*.

[14]In that case, the property owner actively advocated for a finding that the property met the eight characteristics because a "night club" was a permitted use in the zone in question.

phrase "primarily for serving meals and beverages to persons seated at tables on the premises of the establishment" as being intended to distinguish a "standard restaurant" from the other types of restaurants defined in the Zoning Code. This conclusion is buttressed further by the fact that the definition specifically permits a standard restaurant to "offer a carry-out service, provided that such service is accessory to the principal restaurant operations." *Id.*

We also find support in the Zoning Code for the proposition that a property can operate as a "dual use." Section 230.1.A of the Zoning Code sets forth the permissible uses in a B.L. zone. Section 230.1.A.10 lists as a permissible use "combinations of the above uses." It is implicit in this section that properties may operate with dual permissible uses. It follows that a property also could be operating as a dual use with one use being permissible and one use being impermissible. Thompson also testified to this effect before the Board based on his experience in the CED.

Moreover, the only legal authority FSLLC cites for the proposition that a property cannot operate as a dual use actually supports the opposite position. In *Club 101*, the Board explicitly stated that the club could not be both a "night club" and an "after hours club." The then existing definition of an "after hours club" provided, however, that "[a]n after hours club is not a nightclub as defined in the zoning regulations or the building code of Baltimore

County." No such limitation appears in the definition of a "standard restaurant" in the Zoning Code.[15]

FSLLC also challenges the Board's factual finding that six of the eight characteristics of Subgroup A-2 were met. As discussed, *supra*, we review these findings under the deferential substantial evidence standard. We have reviewed the transcript and the record and are satisfied that there was substantial evidence in the record to support these findings.[16]

Finally, FSLLC echoes the concerns expressed by both the majority and dissenting members of the Board that the definition of a nightclub under the Zoning Code is extremely broad. We agree with the Board majority that this is a matter for the Baltimore County Council to address if it is deemed necessary. "The 'wisdom or expediency' of the [zoning ordinance] in its current form is not a matter for judicial intervention." *Lonaconing Trap*

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[15]Moreover, the Board found that, while Club 101 exhibited most of the eight characteristics in the BOCA Commentary, it nonetheless was an after hours club because of other characteristics that distinguished its operation. This is similar to the finding in this case that, while the Dock of the Bay may have met the definition of a restaurant, it nonetheless was operating as a nightclub because of distinguishing characteristics. We perceive no error in this conclusion.

[16]For example, the FSLLC challenges the finding of "low level lights." Thanner himself testified, however, that the lights were dimmed "every evening" for live entertainment; that they were turned down "for dinners as well"; and that they also were turned down "[o]n nights when we are open and do not have live entertainment."

Similarly, FSLLC challenges the finding of "above-normal sound levels" on the basis that there was no evidence in the agency record of prior noise violations. There was evidence, however, that the music that was being played at the Dock of the Bay was loud enough to be heard inside the homes of nearby residents. That evidence plainly supported a finding of "above-normal sound levels."

Club, Inc. v. Md. Dep't of the Env't, 410 Md. 326, 349 (2009) (quoting *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 48 (1973)).

II.

FSLLC contends the definition of "nightclub" under the Zoning Code is "arbitrary, unreasonable and confusing" and therefore the application of that definition is a violation of its due process rights. It also maintains that the County's practice of "discretionary enforcement" of the Zoning Code is unconstitutional.

FSLLC raises these arguments for the first time on appeal. Accordingly, they are not preserved for review.[17] *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *see also Heft v. Maryland Racing Comm'n,* 323 Md. 257, 273-74 (1991) (party may not obtain judicial review of an issue not raised before administrative agency); *Gonzales v. Ghinger*, 218 Md. 132, 135 (1958) (attack on validity of a section of the Baltimore City Code raised for the first time on appeal would not be

[17]As discussed, *supra*, the dissenting member of the Board suggested the possibility of a due process violation in his opinion. The circuit court judge presiding over this case on judicial review also commented on this issue during oral argument, but ultimately affirmed the Board's decision. FSLLC did not raise this issue in its appeal to the Board in its motion for reconsideration or in its petition for judicial review, however.

heard). Moreover, FSLLC cites to no Maryland authority for its propositions.[18] We decline to consider these arguments on appeal.

III.

Finally, FSLLC contends it was error for the CED to charge it with a violation of IBC section 3103 for erecting a tent without a permit. It follows that it was error for the hearing officer to find the violation and for the Board to affirm the finding. This contention is based on the letter of complaint to the CED from Ciarpella's counsel stating that FSLLC had "constructed a 40 X 60 foot reception tent . . . which has been on the property for approximately eight months." According to FSLLC, section 3103 of the IBC is inapplicable to structures in place for more than 180 days.

FSLLC received two citations related to the tent. On August 14, 2006, it was charged with violating section 3103 and ordered to "remove tent or obtain permit." A hearing before a hearing officer was held nine days later and a violation was found. On July 5, 2007, it was again charged with violating section 3103 for having a "tent erected without permit," in addition to continuing nightclub violations. A little over a month later, a hearing was held and a violation was found. In the first case, FSLLC was fined $5,000 both for the nightclub violation and the tent violation. As discussed, *supra*, the Board reduced this fine to $1,000.

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[18]FSLLC instead relies upon section 18:11 of *The Law of Municipal Corporations* pertaining to the standards for discretionary enforcement. Eugene McQuillin, *The Law of Municipal Corporations* (3d ed. 2004). Our research reveals that this section has never been cited in a reported opinion of this Court or the Court of Appeals.

In the second case, a fine of $1,000 was imposed, again without distinction between the tent and nightclub violations.

FSLLC does not point us to any place in the record where it made the argument raised on appeal before the hearing officer.[19] It was raised before the Board, but the Board only reviewed the issue on the record before the hearing officer and found that the hearing officer's decision was supported by substantial evidence and was not premised on an erroneous conclusion of law.

Even if preserved, we find no error in this decision. IBC section 3103 governs "Temporary Structures." Section 3103.1 explains the applicability of this section as follows:

> The provisions of this section shall apply to structures erected for a period of less than 180 days. Tents and other membrane structures erected for a period of less than 180 days shall comply with the *International Fire Code*. Those erected for a longer period of time shall comply with applicable sections of this code.
>
> > **Exception:** Provisions of the *International Fire Code* shall apply to tents and membrane structures erected for a period of less than 180 days.
> >
> > **3103.1.1 Permit Required.** Temporary structures that cover an area in excess of 120 square feet (11.16 m^2), including connecting areas or spaces with a common means of egress or entrance which are used or intended to be used for the gathering together of 10 or more persons, shall not be erected, operated or maintained for any purpose without obtaining a permit from the building official.

(Underlined emphasis added.)

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[19]No transcript of those proceedings is provided in the record extract.

This provision states that tents erected for less than 180 days must comply with the *International Fire Code*, whereas tents erected for "longer periods of time" must comply with the "applicable sections of this code." In other words, contrary to FSLLC's argument, an exception is carved out of section 3103 for tents erected for less than 180 days, but a tent erected for longer must comply with the permit requirement found either in that section or in section 105.1. Accordingly, we find no merit in FSLLC's contention that it was charged under the wrong section of the IBC.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
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December 30, 2019

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
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409 Washington Avenue, Suite 600
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Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: Petition for Judicial Review
Circuit Court Civil Action No.: C-03-CV-19-003515
In the Matter of: Boone Kondylas, LLC
Board of Appeals Case No.: 16-003-SPH

Dear Counsel:

Kindly note that the Proceedings before the Administrative Law Judge and the Board of Appeals of Baltimore County have been filed with the Circuit Court for Baltimore County via the Maryland Electronic Courts and E-filing system. Enclosed is a copy for your records.

If you have any questions, please do not hesitate to contact us.

Sincerely,

Tammy A. Zahner

Tammy A. Zahner
Legal Secretary

Multiple Original Letters
Enclosure

c: Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY	*	
	*	
PETITION OF: BOONE KONDYLAS, LLC	*	
FOR JUDICIAL REVIEW OF THE OPINION OF THE BOARD OF APPEALS OF BALTIMORE COUNTY Jefferson Building, Suite 203 105 W. Chesapeake Avenue Towson, Maryland 21204	*	CIVIL ACTION NO.: C-03-CV-19-003515
	*	
IN THE MATTER OF: BOONE KONDYLAS, LLC - Petitioner	*	
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	
	*	
County Board of Appeals Case No.: 16-003-SPH		

* * * * * * * * * * * * *

PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes the Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the original papers on file in the Department of Permits, Approvals and Inspections and the Board of Appeals of Baltimore County:

ENTRIES FROM THE DOCKET OF THE BOARD OF APPEALS AND DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS OF BALTIMORE COUNTY

July 6, 2015	Petition for Special Hearing filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC under Section 500.7 of the Baltimore County Zoning Regulations to amend previous restrictions imposed in

	Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.
July 23, 2015	Entry of Appearance filed by People's Counsel for Baltimore County.
September 6, 2015	Certificate of Posting.
September 8, 2015	Certificate of Publication in newspaper
September 23, 2015	ZAC Comments.
September 28, 2015	Hearing held before the Office of Administrative Hearings.
October 13, 2015	Closing Memorandum filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner.
October 13, 2015	Protestants' Memorandum filed by Francis X. Borgerding, Jr., Esquire
October 14, 2015	E-mail to ALJ Beverungen from Lawrence E. Schmidt, Esquire objecting to the offering of new evidence as part of Mr. Borgerding's post-hearing memorandum.
October 22, 2015	Opinion and Order issued by the Administrative Law Judge wherein the Petition for Special Hearing was DENIED.
November 13, 2015	Notice of Appeal filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
November 16, 2015	Appeal received by the Board.
November 24, 2015	Notice of Assignment issued by the Board.
January 28, 2016	Letter and Trial Memorandum filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
February 12, 2016	E-mail to Board from People's Counsel submitting preliminary background of four County Board of Appeals decisions involving the *res judicata* doctrine.
February 12, 2016	E-mail to Board from People's Counsel attaching the Court of Special Appeals decision in Fifth Street V. Ciarpella (Dock of the Bay) case.

February 16, 2016 Protestant's Response to Petitioner's Trial Memorandum filed by Francis X. Borgerding, Jr., Esquire on behalf of Charles Wolinski, et al., Protestants.

February 17, 2016 Board convened for a Hearing, Day 1.

Exhibits submitted at Motion Hearing before the Board of Appeals:

Protestants' Exhibit No.

1 – Opinion and Order of OAH (Case No. 2016-0003-SPH) dated October 22, 2015

2 – Unreported Opinion of Court of Special Appeals No. 810, Sept. Term 2009, filed July 9, 2010

People's Counsel Exhibit No.

1 – Compilation of BCZR, Opinion of OAH (Case No. 2016-0003-SPH), Trial Memorandum from Appellant (Case No. 2016-0003-SPH), definition of anticipate, Unreported Court of Special Appeals of Maryland (No. 810 Sept. Term 2009, filed July 9, 2010), Majority Opinion of Baltimore County Board of Appeals (Case Nos. CBA-06-044 and CBA-07-134)

2 – Zoning Checklist/PAI

February 19, 2016 E-mails between Board and counsel regarding scheduling and witnesses.

March 8, 2016 Notice of Reassignment issued by the Board.

April 28, 2016 Board convened for a Hearing, Day 2.

Exhibits submitted at Hearings before the Board of Appeals:

Petitioner's Exhibit No.

1 – Site Plan

2A – Majority Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2B – Dissenting Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2C – Ruling on Motion for Reconsideration and Clarification (Case Nos. 07-144-SPH, CBA-06-044, and CBA-07-134)

3 – Circuit Court Opinion, Final Order, Case No. 03-C-08-009996

4 – Unreported Opinion, Court of Special Appeals, No. 810, Sept. Term, 2009, Filed July 9, 2010
5 – Memorandum Opinion (Exhibit) Contempt-Circuit Court for Baltimore County, Case No. 03-C-08-009996
6 – My Neighborhood Map/aerial photograph of "Dock of the Bay"
7 – My Neighborhood Map/aerial photograph of Millers Island, thumbtack showing Dock of the Bay
8A – Photo of entrance to Dock of the Bay/Boatyard
8B – Photo of Zoning Notice/Dock of the Bay
8C – Photo of Boatyard
8D – Photo of Dock of the Bay
8E – Photo of Dock of the Bay pier
8F – Photo of outdoor seating for Dock of the Bay
8G – Photo of seating at Dock of the Bay
8H – Photo of seating and chairs at Dock of the Bay
8I – Photo of pier at Dock of the Bay
8J – Photo of Row Boat Willie's
8K – Photo of Dock of the Bay
8L – Photo of Dock of the Bay play area for children
8M – Photo of seating inside of Dock of the Bay
8N – Photo of seating at Dock of the Bay
8O – Photo of Bar with patrons at Dock of the Bay
9 – Business license issued by MD to operate a restaurant
10 – Photo of sign viewed as you leave Dock of the Bay, neighbor respect sign
11A – Petition of residents of Millers Island in support
11B – Petition of non-residents of Millers Island in support
12A – Petition from resident customers of Dock of the Bay in support
12B – Petition from non-resident customers of Dock of the Bay in support
13 – Letter from Mark Alan to the Zoning Commission

Protestants' Exhibit No.

1 – Letter dated September 24, 2014 to Mike and Donna Kondylas from Francis X. Borgerding, Jr., Esquire
2 – Letter dated September 12, 2014 to Francis X. Borgerding, Jr., Esquire from Adam Rosenblatt, Assistant County Attorney (ID ONLY/NOT ADMITTED/NOT IN FILE)
3 – MDE – State Noise Pollution – noise that annoys
4 – (NOT IN FILE – NO NOTATION)
5 – My Neighborhood Map aerial photo of Dock of the Bay and surrounding residences

6 – Photo of Dock of the Bay from balcony
7 – Photo of Dock of the Bay
8 – Photo of seating at Dock of the Bay
9 – Thanner's ownership of Dock of the Bay re: sound and decibel levels letter dated May 13, 2008
10 – Letter dated June 9, 2008, letter measured decibel levels emanating from the Dock of the Bay
11 – Letter dated October 3, 2007 measuring the decibel levels from Dock of the Bay
12 – Photograph of Row Boat Willie's building
13 – Large map of aerial view of Dock of the Bay and area, 2016 Google Imaging
14 – My Neighborhood Map printed 4/27/2016, aerial view of Dock of the Bay and area
15 – 2015 Alcoholic Beverage License for Dock of the Bay
16 – Baltimore County Police Records, Sgt. Parrish
17 – Summary of Calls from Exhibit 16
18 – Facebook posts for Dock of the Bay 2/17/16 Boone Letter
19 – Facebook posts for Dock of the Bay 2/21/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
20 – Facebook post for Dock of the Bay 4/27/16 4:57 p.m. Boone Letter
21 – Facebook post for Dock of the Bay 4/27/16 5:24 p.m. Boone Letter
22 – Facebook post from Dock of the Bay 2/22/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
23 – Facebook posts from Dock of the Bay (ID ONLY/NOT ADMITTED/NOT IN FILE)

People's Counsel Exhibit No.

1 – Website photo showing hours of operation
2A – SDAT record showing 9025 Cuckold Point Road, Lot 504
2B – SDAT record showing Cuckold Point Road, Lot 500
2C – SDAT record showing Cuckold Point Road, Lot 502
2D – SDAT record showing Cuckold Point Road, Lot 501
3 – Deed to 9025 Cuckold Point Road dated September 30, 2014
4 – Deed to 9025 Cuckold Point Road dated March 10, 1999
5 – People's Counsel Sign-In Sheet, 2/17/16
6 – People's Counsel Sign-In Sheet, 4/28/16
7 – Map – Property ID and Zoning, 2014 image
8A – Map
8B – Map (color)
8C – Map

9 – Comprehensive Zoning Map
10 – Website page for Mark Alan date 4/26/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
11A – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
11B – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
12 – Letter dated April 27, 2016 from Denise Haas

May 18, 2016	Memorandum of People's Counsel for Baltimore County
May 19, 2016	Protestant's Memorandum filed by Francis X. Borgerding, Jr., Esquire on behalf of Charlie Wolinsky, Brad Metheny, Bonnie Metheny, Matt Charpella, Wayne Waldman and Mike Kondylas, Protestants.
May 19, 2016	Closing Memorandum in Lieu of Oral Argument filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/ Appellant.
June 14, 2016	Board convened for Public Deliberation.
September 15, 2016	Opinion and Order issued by the Board wherein the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music was DENIED.
October 14, 2016	Petition for Judicial Review filed in the Circuit Court for Baltimore County by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
October 19, 2016	Copy of Petition for Judicial Review received from the Circuit Court for Baltimore County by the Board of Appeals.
October 20, 2016	Certificate of Compliance sent to all parties and interested persons.
October 20, 2016	Response to Petition for Judicial Review filed by People's Counsel for Baltimore County.
November 3, 2016	Response to Petition for Judicial Review filed by Francis X. Borgerding, Jr., Esquire on behalf of Charles Wolinski, et al., Protestants.

December 14, 2016	Transcript of testimony filed.
December 14, 2016	Record of Proceedings filed in the Circuit Court for Baltimore County, Case No. 03-C-16-010551.
June 1, 2017	Argument before the Circuit Court for Baltimore County.
June 2, 2017	Order of the Circuit Court for Baltimore County wherein the case was REMANDED to the Board of Appeals.
June 6, 2017	Notice of Appeal to Court of Special Appeals filed by Francis X. Borgerding, Jr., Esquire on behalf of Charles Wolinski, et al.
June 14, 2017	Notice of Appeal to the Court of Special Appeals filed by People's Counsel for Baltimore County.
November 9, 2018	Unreported Opinion of the Court of Special Appeals wherein the appellants' appeal was dismissed as premature.
April 11, 2019	File retrieved from the Circuit Court for Baltimore County.
May 16, 2019	Notice of Deliberation on Remand from the Circuit Court for Baltimore County issued by the Board.
May 22, 2019	Letter to the Board from Francis X. Borgerding, Jr., Esquire requesting a postponement of the Public Deliberation.
May 29, 2019	Letter to the Board from Lawrence E. Schmidt, Esquire objecting to the postponement request of Mr. Borgerding.
May 31, 2019	Letter to Francis X. Borgerding, Jr., Esquire from the Board denying his request for a postponement of the Public Deliberation as participation is not allowed and attendance is not required.
May 31, 2019	Letter to People's Counsel for Baltimore County from the Board returning his letter of May 29, 2019 as the record is closed.
June 20, 2019	Board convened for Public Deliberation on Remand from the Circuit Court for Baltimore County.
August 22, 2019	Opinion and Order on Remand from the Circuit Court for Baltimore County issued by the Board wherein the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-

06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music was DENIED.

September 23, 2019 Petition for Judicial Review filed in the Circuit Court for Baltimore County by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner.

September 26, 2019 Line Requesting Removal of Respondent filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner.

October 28, 2019 Copy of Petition for Judicial Review received from the Circuit Court for Baltimore County by the Board of Appeals.

November 1, 2019 Certificate of Compliance and notification letters sent to all parties.

November 4, 2019 Response to Petition for Judicial Review filed by People's Counsel for Baltimore County.

November 8, 2019 Response to Petition for Judicial Review filed by Francis X. Borgerding, Jr., Esquire on behalf of Charles Wolinski, *et al.*, Protestants.

December 30, 2019 Transcript of testimony filed.

December 30, 2019 Record of Proceedings filed in the Circuit Court for Baltimore County.

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.

Tammy A. Zahner, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of December, 2019, a copy of the foregoing was mailed, first class mail, postage prepaid to the following:

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Kenneth Boone
Boone Kondylas, LLC
9025 Cuckold Point Road
Sparrows Point, MD 21219

Charles Wolinski
9019 Cuckold Point Road
Baltimore, MD 21219

Brad Metheny
2704 6th Street
Baltimore, MD 21219

Bonnie Metheny
2704 6th Street
Baltimore, MD 21219

Francis X. Borgerding, Jr., Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

Matt Ciarpella
2716 6th Street
Baltimore, MD 21219

Tammy Waldmann
9014 Cuckold Point Road
Baltimore, MD 21219

Tammy A. Zahner
Tammy A. Zahner

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY

*

PETITION OF:
BOONE KONDYLAS, LLC *

CIVIL ACTION
FOR JUDICIAL REVIEW OF THE * NO. C-03-cv-19–3515
OPINION OF THE BOARD OF APPEALS
OF BALTIMORE COUNTY *
Jefferson Building, Suite 203
105 W. Chesapeake Avenue *
Towson, Maryland 21204

*

IN THE MATTER OF:
BOONE KONDYLAS, LLC - Petitioner *

RE: Petition for Special Hearing to * RECEIVED
amend previous Restrictions imposed
in Cases 07-144-SPH, CBA-06-044 * NOV 12 2019
and CBA-07-134 so as to permit future
use of the property as a restaurant * BALTIMORE COUNTY
with limited accessory music BOARD OF APPEALS

*

County Board of Appeals
Case No.: 16-003-SPH *

* * * * * * * * * * * * *

RESPONSE TO PETITION FOR JUDICIAL REVIEW

Charles Wolinski, et al., in accordance with Maryland Rule 7-204, submits this response to the Petition for Judicial Review filed by Boone Kondylas, LLC and state that they oppose the Petition.

FRANCIS X. BORGERDING, JR.
CPF# 8812150059
409 Washington Avenue, Suite 600
Towson, Maryland 21204
410-296-6820 Fax: 410-296-6884
borgerdinglaw@aol.com

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 9th day of January, 2019, a copy of the foregoing was either mailed or served via MDEC to:

Lawrence Schmidt, Esquire
600 Washington Avenue, Suite 200
Towson, MD 21204

Peter Max Zimmerman, Esquire
Carole S. Demilio, Esquire
People's Counsel for Baltimore County
The Jefferson Building
105 West Chesapeake Avenue
Suite 204
Towson, MD 21204

Baltimore County Board of Appeals
105 West Chesapeake Avenue
Suite 203
Towson, MD 21204

FRANCIS X. BORGERDING, JR.
CPF# 8812150059

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY

PETITION OF:
BOONE KONDYLAS, LLC

FOR JUDICIAL REVIEW OF THE OPINION OF THE BOARD OF APPEALS OF BALTIMORE COUNTY
Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204

CIVIL ACTION
NO.: C-03-CV-19-003515

IN THE MATTER OF:
BOONE KONDYLAS, LLC – Petitioner

RE: Petition for Special Hearing to amend previous Restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music

County Board of Appeals Case No.: 16-003-SPH

RECEIVED
NOV 04 2019
BALTIMORE COUNTY
BOARD OF APPEALS

RESPONSE TO PETITION FOR JUDICIAL REVIEW

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, in accordance with Maryland Rule 7-204, submits this response to the Petition for Judicial Review filed by BOONE KONDYLAS, LLC and states that it intends to participate in this action for Judicial Review. The undersigned participated in the proceeding before the County Board of Appeals.

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County
The Jefferson Building
105 West Chesapeake Avenue, Suite 204
Towson, MD 21204
(410) 887-2188
pzimmerman@baltimorecountymd.gov
CPF# 7212010276

CAROLE S. DEMILIO
Deputy People's Counsel
The Jefferson Building
105 West Chesapeake Avenue, Suite 204
Towson, MD 21204
(410) 887-2188
cdemilio@baltimorecountymd.gov
CPF# 7412010076

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November 2019, a copy of the foregoing Response to Petition for Judicial Review was sent, via electronic filing to:

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Lawrence Schmidt, Esquire
600 Washington Avenue, Suite 200
Towson, Maryland 21204

And via first class mail, postage prepaid, to:

Baltimore County Board of Appeals
105 West Chesapeake Avenue, Suite 203
Towson, Maryland 21204

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY

*

PETITION OF:
BOONE KONDYLAS, LLC *

FOR JUDICIAL REVIEW OF THE OPINION OF * CIVIL ACTION
THE BOARD OF APPEALS NO.: C-03-CV-19-003515
OF BALTIMORE COUNTY *
Jefferson Building, Suite 203
105 W. Chesapeake Avenue *
Towson, Maryland 21204

*

IN THE MATTER OF:
BOONE KONDYLAS, LLC - Petitioner *

RE: Petition for Special Hearing to amend previous *
restrictions imposed in Cases 07-144-SPH, CBA-06-044
and CBA-07-134 so as to permit future use of the property *
as a restaurant with limited accessory music

*

County Board of Appeals Case No.: 16-003-SPH

* * * * * * * * * * * * *

CERTIFICATE OF COMPLIANCE

Madam Clerk:

Pursuant to the Provisions of Rule 7-202(d) of the *Maryland Rules*, the Board of Appeals of Baltimore County has given notice by mail of the filing of the Petition for Judicial Review to the representative of every party to the proceeding before it; namely:

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Kenneth Boone
Boone Kondylas, LLC
9025 Cuckold Point Road
Sparrows Point, MD 21219

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

Charles Wolinski
9019 Cuckold Point Road
Baltimore, MD 21219

Matt Ciarpella
2716 6th Street
Baltimore, MD 21219

Brad Metheny
2704 6th Street
Baltimore, MD 21219

Tammy Waldmann
9014 Cuckold Point Road
Baltimore, MD 21219

Bonnie Metheny
2704 6th Street
Baltimore, MD 21219

A copy of said Notice is attached hereto and prayed that it may be made a part hereof.

I HEREBY CERTIFY that on this 1st day of November, 2019 a copy of the foregoing Certificate of Compliance has been mailed to the individuals listed above.

Tammy A. Zahner

Tammy A. Zahner, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

November 1, 2019

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 220
Towson, Maryland 21204

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: Petition for Judicial Review
Circuit Court Civil Action No.: C-03-CV-19-003515
In the Matter of: Boone Kondylas, LLC
Board of Appeals Case No.: 16-003-SPH

Dear Counsel:

Notice is hereby given, in accordance with the Maryland Rules that a Petition for Judicial Review was filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, in the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter. The County Board of Appeals received written notification of acceptance from the Circuit Court for Baltimore County on October 28, 2019. Any party wishing to oppose the petition must file a response with the Circuit Court for Baltimore County within 30 days after the date of this letter, pursuant to the Maryland Rules.

In accordance with the Maryland Rules, the Board of Appeals is required to submit the record of proceedings of the Petition for Judicial Review within 60 days. Transcripts have previously been provided by Counsel. Additional copies can be purchased from the Board of Appeals in accordance with the County's copying policy.

A copy of the Certificate of Compliance has been enclosed for your convenience.

Very truly yours,

Tammy A. Zahner
Legal Secretary

Multiple Original Cover Letters
Enclosure

c: Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad Metheny
Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

E-FILED; Baltimore County Circuit Court
Docket: 9/23/20 3:56 PM; Submission: 10/2/2019 3:56 PM

PETITION OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	IN THE
	*	CIRCUIT COURT
	*	FOR
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY Jefferson Building, Suite 203 105 W. Chesapeake Avenue Towson, MD 21204	*	BALTIMORE COUNTY
	*	
	*	**Case No.:** **C-03-CV-19-003515**
IN THE MATTER OF: BOONE KONDYLAS, LLC - Petitioner	*	
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	
	*	
	*	
County Board of Appeals Case No. 16-003-SPH		

RECEIVED
OCT 28 2019
BALTIMORE COUNTY
BOARD OF APPEALS

* *

PETITION FOR JUDICIAL REVIEW

Petitioner, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, requests judicial review of the Opinion of the Board of Appeals for Baltimore County dated August 22, 2019, a copy of which is attached as Exhibit A, in the above referenced matter. Petitioner was a party below and fully participated, individually and through other counsel, in the proceedings.

This Petition is filed pursuant to Rules 7-202 and 7-203(b) of the Maryland Rules of Procedure.

/s/

LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
lschmidt@sgs-law.com
CPF # 7905010152

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **23rd** day of **September, 2019,** a copy of the foregoing Petition for Judicial Review was mailed, via first class mail to:

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Krysundra Cannington, Administrator
County Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carol S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

/s/
LAWRENCE E. SCHMIDT

RECEIVED
SEP 27 2019
BALTIMORE COUNTY
BOARD OF APPEALS

PETITION OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	IN THE CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY Jefferson Building, Suite 203 105 W. Chesapeake Avenue Towson, MD 21204	*	FOR BALTIMORE COUNTY
	*	**Case No.: C-03-CV-19-003515**
IN THE MATTER OF: BOONE KONDYLAS, LLC - Petitioner	*	
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	
County Board of Appeals Case No. 16-003-SPH	*	

* *

LINE REQUESTING REMOVAL OF RESPONDENT

Now comes the Petitioner, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, and hereby says the following:

1. A Petition for Judicial Review ("Petition") was e-filed on September 23, 2019 requesting judicial review of the Opinion of the Board of Appeals for Baltimore County pursuant to MD Rule 7-202.
2. In order to e-file the Petition, per MDEC, my paralegal had to include a Respondent on the initial filing.
3. Thereafter, I received a notice of deficient filing indicating "all parties included in File and Serve must also be included on the document and match exactly".
4. Upon contacting the Clerk's office, Petitioner's counsel was advised that the Office of People's Counsel was listed as a Respondent on the matter and, as such, would either

need to be identified as a party in the caption of the Petition or removed as a party to this matter by filing a Line.

5. As such, Petitioner requests the Court remove the Office of People's Counsel as a Respondent in this matter and issue a notice accepting the Petition as filed on September 23, 2019.

6. Any individual or entity that wishes to participate in this matter, including but not limited to the Office of People's Counsel, may file a Notice of Intent to Participate pursuant to MD Rule 7-204 and thereafter be entered into the case.

/s/
LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
lschmidt@sgs-law.com
CPF # 7905010152

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **26th** day of **September, 2019,** a copy of the foregoing Line Requesting Removal of Respondent was mailed, via first class mail to:

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Krysundra Cannington, Administrator
Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carol S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

/s/
LAWRENCE E. SCHMIDT

PETITION OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	IN THE
	*	CIRCUIT COURT
	*	FOR
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY Jefferson Building, Suite 203 105 W. Chesapeake Avenue Towson, MD 21204	*	BALTIMORE COUNTY
	*	
	*	**Case No.:** _____
IN THE MATTER OF: BOONE KONDYLAS, LLC - Petitioner	*	
	*	
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	
	*	
	*	
County Board of Appeals Case No. 16-003-SPH		

RECEIVED
SEP 25 2019
BALTIMORE COUNTY
BOARD OF APPEALS

* *

PETITION FOR JUDICIAL REVIEW

Petitioner, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, requests judicial review of the Opinion of the Board of Appeals for Baltimore County dated August 22, 2019, a copy of which is attached as Exhibit A, in the above referenced matter. Petitioner was a party below and fully participated, individually and through other counsel, in the proceedings.

This Petition is filed pursuant to Rules 7-202 and 7-203(b) of the Maryland Rules of Procedure.

LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
lschmidt@sgs-law.com
CPF # 7905010152

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **23rd** day of **September, 2019,** a copy of the foregoing Petition for Judicial Review was mailed, via first class mail to:

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Krysundra Cannington, Administrator
County Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carol S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

LAWRENCE E. SCHMIDT

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

August 22, 2019

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

Dear Counsel:

Enclosed please find a copy of the Opinion and Order on Remand from the Circuit Court for Baltimore County issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Sunny Cannington

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Multiple Original Cover Letters

c: Kenneth Boone/Boone Kondylas, LLC
Lawrence M. Stahl, Managing Administrative Law Judge
C. Pete Gutwald, Director/Department of Planning
Michael D. Mallinoff, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

EXHIBIT
tabbies
A

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE BOARD OF APPEALS
	*	OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION AND ORDER ON REMAND
FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY

This case comes to the Board on remand from the Circuit Court for Baltimore County from an appeal of an Order of this Board denying a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music (the "Remand Order").

The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire and Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation on the Remand Order was held on June 20, 2019.

Factual and Procedural Background

The subject property is located on the water front in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" ("DOB"). The Property is also improved with boat slips for patrons to dock their boats and access

DOB via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, DOB came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation (aka the "Thanner Era"), music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement complaints beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing before this Board to request a determination that DOB - with its associated live music - did not constitute a "nightclub." In our June 4, 2008 Opinion (the "2008 Opinion"), we held that Mr. Thanner's operation of DOB, along with music played, met the definition of "nightclub" in §101.1 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a "nightclub" was not permitted in a BL zone (even by special exception), this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (2008 Opinion, p. 14).

Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record before this Board supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. (CSA Opinion, 7/9/2010).

In or about 2014, the Petitioner purchased the Property and reopened DOB. Petitioner filed the instant Petition for Special Hearing to request that the restriction on live music be removed. A public hearing *de novo* was held before this Board on February 17, 2016 and April 28, 2016.

In our Opinion and Order dated September 15, 2016 (the "2016 Opinion"), from which this Remand Order originated, we concluded that the Petitioner's proposal here, would constitute a "nightclub" under BCZR §101, just as it did when Fifth Street, LLC owned and operated DOB. (See 2016 Opinion, p. 13). Succinctly, we stated that: "there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner…or before this Board after a *de novo* hearing." (*Id.*).

In weighing the evidence presented at that time and in issuing our 2016 Opinion, we incorporated - *in its entirety* - our 2008 Opinion. (2016 Opinion, p. 9). In doing so, our 2016 Opinion adopted our 2008 analysis of the facts under the definition of "nightclub" in BCZR, §101.1, as well as the eight (8) characteristics listed in the International Building Code ("IBC") for facilities within the "A-2 classification." According, in our 2016 Opinion, when we decided that the Petitioner's proposed use was the same as the 2008 operation by Thanner, we adopted all factual determinations we previously made.

Additionally, our 2016 Opinion referred to: "the facts and holdings as set forth in the Court of Special Appeals decision dated July 9, 2010" which affirmed our 2008 Opinion. (See 2016 Opinion, p. 9). This is the same appellate decision now referred to by the Circuit Court in the Remand Order as: "*Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009" from which the Circuit Court now requires further analysis.

Issues on Remand

The Remand Order instructs this Board to do the following:

> ….for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC's v. Ciarpella*, No. 810, September

> Term, 2009 which includes consideration of the criteria in the International Building Code (IBC).

Notwithstanding the language of our 2016 Opinion, and in order to comply with the Remand Order, we analyze the facts presented under the BCZR definition of "nightclub" and the criteria in the IBC. As stated by the Court of Special Appeals in *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, a "nightclub" is comprised of three elements under BCZR, §100.1: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor," and 3) "categorized as a nightclub by the Building Code of Baltimore County." (See CSA Opinion, 7/9/2010, p. 16).

The Court of Special Appeals in *Ciarpella*, noted that, in 2005, Baltimore County adopted the IBC as the Building Code of Baltimore County. (See CSA Opinion, 7/9/2010, p. 3). The Appellate Court further stated that IBC, §303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." (*Id.*).

Within Assembly Group A, Subgroup A-2 includes:

Assembly uses intended for food and/or drink consumption including, but not limited to:

> Banquet halls
> Night clubs
> Restaurants
> Taverns and bars

(IBC at 24).

Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g.,

restaurants.) The uniqueness of these occupancies is characterized by some or all of the following:

1) Low lighting levels;
2) Entertainment by a live band or recorded music generating above-normal sound levels;
3) No theatrical stage accessories;
4) Later-than-average operating hours;
5) Tables and seating arranged or positioned so as to create ill-defined aisles;
6) A specific area designated for dancing;
7) Service facilities for alcoholic beverages and food; and
8) High occupant load density.

(IBC at 3-17; 3-18).

The Court of Special Appeals in *Fifth Street* emphasized that the IBC Commentary explained that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. (See CSA Opinion, 7/9/2010, p. 4). The Court further noted that the 8 characteristics listed above "are advisory in determining whether Group A-2 is the appropriate classification." (*Id.*). The Court also stated that these eight (8) characteristics are "non-exclusive." (*Id.* at p. 11).

It is important to highlight that the Appellate Court in *Fifth Street* rejected Thanner's argument that DOB must either be a "standard restaurant" or a "nightclub". Mr. Thanner argued that if the DOB is primarily engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant, and not a "nightclub." (CSA Opinion, 7/9/2010, p. 19). The Appellate Court disagreed and held that the terms "standard restaurant" and "nightclub" are not mutually exclusive. The Court interpreted the phrase "standard restaurant" as being distinguishable from other types of restaurants such as "carry-outs", "fast-food," or "drive-through only." (*Id.*).

The Court added that permissible uses in a BL zone actually included dual uses (*i.e.* combinations of permissible uses). BCZR, §230.1.A.10. As a result, a property located in a BL zone could be operating as a dual use, such that one use is permissible and one use is not. (CSA Opinion, 7/9/2010, p. 20).

Here, in the Petitioner's case on the merits, Mr. Boone was the sole witness who testified about his proposed plan. His testimony only addressed some of the IBC characteristics. The other witnesses who testified on behalf of DOB were character witnesses for Mr. Boone. Each of those character witnesses either worked at Dock of Bay, or were related to someone who worked there. They were collectively of the opinion that live music should be permitted by this Board because Mr. Boone is a good person.

On this point, we repeat what we said in our 2016 Opinion that our decision now and then, does not reflect on Mr. Boone personally:

> We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that [he would] be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

(2016 Opinion, p. 13).

In regard to the eight (8) IBC characteristics, we find as follows:

1) **Low lighting levels**.

Petitioner failed to testify about, or provide any evidence regarding, his proposed plan for lighting levels.

2) **Entertainment by a live band or recorded music generating above-normal sound levels**.

DOB is open 7 days a week. (T. p. 55). Mr. Boone testified that he wants live music to be played every day. (T. pp. 104, 114). He wants live music played both inside and outside DOB at varying times. (T. p. 98). He wants to compete with eight (8) other bars/restaurants which are located on the peninsula and offer live music, even on weekdays. (T. p. 62-63). Mr. Boone testified that those competing businesses offer Sunday afternoon music from 1:00 pm to 5:00 or 6:00 pm. (T. 113-114). According to Mr. Boone, those establishments also have music on Wednesdays, Thursdays and Fridays. (T. p. 103). However, Mr. Boone also acknowledged that his competitors are located in a "business, major (BM) zone," which zone permits live music.

As for "live bands," the Court of Special Appeals reiterated that, during the Thanner era, live entertainment was offered on the following days and times, both inside and outside the restaurant:

> Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.
>
> On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

(CSA Opinion, p. 6).

In April of 2015, Mr. Boone hired Mark Allen as a soloist act to play on a Saturday night. (T. p. 57). While it is more expensive, Mr. Boone indicated that he has the option to hire Mr. Allen along with his band. (T. p. 58). In addition to Mr. Allen, Mr. Boone hired a Frank Sinatra singer and an Oomph band to play for Octoberfest. (T, p. 58). Mr. Boone hired a disc jockey on New Year's Eve. (T. p. 51).

As we stated in our 2016 Opinion, Mr. Boone would not agree to any limitation on the type of live music. (T. p. 104-105). Indeed, when asked in direct examination whether he would agree to a restriction on type of music, Mr. Boone would only agree to time restrictions:

> MR. SCHMIDT: Okay and if the Board proposed limitations on the type of music or the volume of music, you would, you would be amenable to those and follow those limitations?
>
> MR. BOONE: I'd be very happy to live within sound restrictions on outside music, time restrictions on both indoor and outdoor music and I do not want to cater to the young crowd and I'd be happy to live with time restrictions, both inside and outside.

(T. pp. 59-60).

Mr. Boone's concession that he would be amenable to a sound level restriction was not persuasive. Mr. Boone had the burden to prove to the Board what constitutes "above-normal sound levels" and how the proposed live music (whether soloist or band) would stay below those levels.

When asked on cross examination how Mr. Boone would implement his plan, he sarcastically responded that: "I'll have an army of people with sound meters." (T. p. 112). Although appearing to the Board as an after-thought during his direct testimony, Mr. Boone's proposal is to use a decibel monitoring device each time live music is played outside DOB. He testified that there should be an "agreeable" sound level for outside music and that bands would play within that sound level. (T. p. 107). Yet, Mr. Boone could not provide the Board with maximum sound level that he was proposing. (T. p. 111). When pressed for his maximum sound level, Mr. Boone responded that it would "be determined at a later time." (T. p. 113).

Mr. Boone testified on cross examination that he did not know what kind of noise levels would meet decibel levels of 55-65. (T. p. 80). He admitted that he would not personally be at the DOB full time to measure sound levels. (T. p. 97). Indeed, he conceded that he has never

personally operated a decibel monitoring device. (T. p. 120). Mr. Boone is not an expert in music or sound. (T. p. 111). DOB does not employ a sound engineer. (*Id.*).

In addition, Mr. Boone did not dispute that there would be amplification of music as he stated that: "Most of the sound will be controlled by the level of amplification." (T. p. 113). Russell McClelland was a witness who testified that during the Thanner Era, reggae music was played at amplified levels, after dark until 11:00 pm or 12:00 am, all days of the week. (T. p. 134). Mr. Boone candidly revealed that he has no previous experience operating a business where live music is played. (T. p. 116).

The Board finds that Mr. Boone's proposal was not credible. His testimony left unanswered critical aspects as to how he would implement his plan. It is beyond the expertise of this Board to determine what is "above-normal sound levels" or to determine how such sound should be measured. The Board is left to speculate as to what might happen if live music is permitted inside and/or outside DOB. Thus, the proposed plan is both impractical and unenforceable.

As for sound emanating from live music inside the DOB, Mr. Boone did not acknowledge the known problem which occurred during the Thanner era with sound escaping beyond the four (4) walls of the building. We consider this issue in light of Mr. Boone's testimony that, other than the footprint of the kitchen area (which he expanded by pouring a concrete pad), he has not made any changes to the DOB since the Thanner Era. As Mr. Boone said: "...the four walls are still the four walls." (T. pp. 40-41). Thus, there is no additional sound proofing of the building which may alleviate sound levels inside.

Mr. Boone interjected that currently (without live music), his typical customer is between 40-70 years old; average age is 50 years old. (T. 55). While he indicated that he does not intend

to cater to a younger crowd, if the type of live music draws a younger crowd, he would not be able to exclude those customers. (T. pp. 99-100). During boating season, DOB draws customers from all over Baltimore County. (T. p. 68).

Accordingly, while Mr. Boone initially suggested hiring a solo guitarist or a Frank Sinatra singer, Mr. Boone would not agree to a restriction on the type of music which DOB could offer. (T. pp. 104-105). In fact, he testified that he believed the restriction on music at DOB would be lifted when the liquor license was transferred from Thanner to the Petitioner. (T. p. 79).

As for "recorded music," Mr. Boone already offers recorded music by way of radios and televisions inside the DOB. (T. p. 52). The Court of Special Appeals noted that Thanner had: "ten television sets inside the restaurant, and another two at the outside bar. A house music system, connected to speakers inside and outside, played satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered." (CSA Opinion, 7/9/2010, p. 6). According, we find that the use and availability of recorded music has not changed.

Consequently, as to whether proposed live band or recorded music will generate above-normal sound levels, the Board finds that live band or live music will generate above-normal sounds levels and Mr. Boone's testimony did not persuade us otherwise.

3) **No theatrical stage accessories.**

Mr. Boone testified that he has no plans to build a stage from which a live band could perform. (T. p. 63). However, this Board is mindful, that a stage or at least a stage-like area (both inside and outside) would have to be created if live bands were to perform.

4) **Later-than-average operating hours.**

Mr. Boone verified that DOB is open seven (7) days a week. (T. p.55). He testified that during fall, spring, and winter seasons, DOB is opened Monday through Saturday from 11:00 am

until 10:00 pm; on Sundays, DOB closes around 9:00 pm. (T. p.55; p. 63). In the summer, on the weekends, he said DOB opens at 9:00 am for breakfast. (*Id.*). The outside space at DOB is open from April through October. (T. p. 48).

On cross examination, Mr. Boone's direct testimony as to current operating hours was contradicted with the introduction of a copy of the DOB website which confirms that DOB is actually open Monday through Thursday from 11:00 am to 11:00 pm; and Friday and Saturday 11:00 am until 1:00 am. (PC Ex. 1). (T. p. 96). Mr. Boone admitted that he arranged and approved the website, but had forgotten about the hours of operation listed there. (*Id.*).

He initially testified on direct that his plan was to have music on Friday and Saturday nights from 6:00 pm to 10:00 pm with last call for alcohol at midnight; he hopes DOB will then be cleared out by 12:30. (T. p. 60). He then stated that he would like music outside on Sundays: "probably 5:00 til 8:30 outside.....I don't expect to have music outside after dark." (T. p. 61).

Then, on cross examination, he denied that his proposal was to have all music stop on Friday and Saturday nights at 10:00 pm. (T. p. 103). Notwithstanding his direct testimony at the Board hearing, he added hours for both inside and outside music which would apply to all weekdays and weekends:

> What I said is that music inside would stop at 11:00 pm on Fridays and Saturdays, stop at 7:00 pm on Sundays, music outside would stop at dusk.

(T. p. 103). Mr. Boone agreed that, in summer months, "dusk" could be as late as 9:00 pm. (T. p. 104). Even Mr. Thanner's outside music ended at 8:00 pm. (CSA Opinion, 7/9/2010, p. 6).

We find that Mr. Boone's testimony on this factor was not credible. The DOB website, which Mr. Boone arranged and approved, reveals later than average operating hours for a restaurant. Accordingly, DOB hours are akin to those of a nightclub.

5) **Tables and seating arranged or positioned so as to create ill-defined aisles**.

Photographs of the tables and chairs both inside and outside the DOB reveal that neither are fixed or in any way anchored to the floor. (Pet. Ex. 8E, 8F, 8G, 8H, 8K, 8M and 8N). Additionally, Mr. Boone did not testify that the tables and chairs were attached to the floor. Accordingly, while both seating areas have aisles to permit serving food and beverages, nothing prevents such tables and chairs from being moved into ill-defined aisles, to allow for a band or for people to dance as in the Thanner Era. Indeed, this Board can reasonably expect that customers will rearrange tables and chairs so as to permit dancing when live music performs. This factor closely resembles a nightclub, rather than a restaurant.

6) **A specific area designated for dancing**.

Mr. Boone testified that the restaurant does not have a dance floor and that he has no plans to build a dance floor. (T. p. 63). In our 2008 Opinion, we likewise found that there was no specific dance area during the Thanner era. (BOA 2008 Opinion, p. 12; CSA Opinion, 7/9/2010, p. 6). Although the Appellate Court reaffirmed that there was no dance floor, it noted that: "....during live performances patrons often dance in between the tables." (CSA Opinion, 7/9/2010, p. 6).

Ironically, the existence of a dance floor under this IBC factor is a characteristic of a nightclub. Yet, the definition of "nightclub" in BCZR §101.1 is a facility "with or without a dance floor." Given that this is a proposed use, we must consider what is more likely to occur than not if live music is permitted. Based on Mr. Boone's testimony, the seating arrangement and layout of tables and chairs both inside and outside the restaurant is substantially similar to that of the Thanner Era, we find that there is nothing to prohibit patrons from dancing between the tables. It certainly would be reasonable to expect patrons to want to dance if live music is permitted.

Further, if there is no designated dance floor, nothing prevents patrons from moving tables and chairs to create a dance area.

7) **Service facilities for alcoholic beverages and food.**

There is no dispute that DOB serves both alcohol and food. Mr. Boone testified that, without live music, the food/alcohol ratio is consistently 80% food, 20% alcohol. (T. p. 56). During the Thanner Era, approximately 70% of sales was on food, 28% was on alcohol and 2% was on t-shirts and cookbooks. (CSA Opinion, p. 6). As a result, we find that the food/alcohol ratio is substantially similar to those during the Thanner Era. We can also reasonably expect that the sale of alcohol will increase if live music is permitted.

8) **High occupant load density.**

At full capacity, Mr. Boone testified that DOB has the capacity to *seat* over 223 people (98 people at inside seating, plus 25 more people at the inside bar; and an additional 100 people can sit outside). (T. p. 53). The Court of Special Appeals noted that, based on Mr. Thanner's testimony before this Board in 2008, the DOB had the capacity to serve 150-160 people and that, with those numbers, there was a high occupant load density. (CSA Opinion, p.5).

As set forth above, the description in Subgroup A-2 includes "occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants.)." Based on Mr. Boone's testimony of 223 people who can be seated at DOB, and giving consideration to even more people who would be standing and/or dancing, we find that DOB has a high occupant load density.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. The Board finds that DOB meets 7 of the 8 criteria set forth in Group A-2. This would be criteria 2, 3, 4, 5, 6, 7, and 8 (with no evidence presented as to criteria #1). Simply put, as we stated in our 2016 Opinion and based on the IBC characteristics above, we find that music, under the Petitioner's proposal, whether played inside or outside, is a factor in finding that the DOB is classified as a "nightclub" under the definition set forth in BCZR, §101.1.

DOB proposed operations are substantially the same as in 2008. Both Mr. Thanner and Mr. Boone expressed the desire for live music to boost revenue and compete with the neighboring restaurants located in BM zones. Moreover, there has been no change to the physical layout of the building, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of inside live music on the neighboring properties.

The County Council has determined that "nightclubs" can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in that zone. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101.1. The facts presented by the Petitioner here have not changed that determination.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 22nd day of August, 2019, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Deborah C. Dopkin

Jason S. Garber

Board of Appeals of Baltimore County

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August 22, 2019

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RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

Dear Counsel:

Enclosed please find a copy of the Opinion and Order on Remand from the Circuit Court for Baltimore County issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Multiple Original Cover Letters

c: Kenneth Boone/Boone Kondylas, LLC
Lawrence M. Stahl, Managing Administrative Law Judge
C. Pete Gutwald, Director/Department of Planning
Michael D. Mallinoff, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE BOARD OF APPEALS OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION AND ORDER ON REMAND
FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY

This case comes to the Board on remand from the Circuit Court for Baltimore County from an appeal of an Order of this Board denying a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music (the "Remand Order").

The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire and Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation on the Remand Order was held on June 20, 2019.

Factual and Procedural Background

The subject property is located on the water front in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" ("DOB"). The Property is also improved with boat slips for patrons to dock their boats and access

DOB via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, DOB came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation (aka the "Thanner Era"), music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement complaints beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing before this Board to request a determination that DOB - with its associated live music - did not constitute a "nightclub." In our June 4, 2008 Opinion (the "2008 Opinion"), we held that Mr. Thanner's operation of DOB, along with music played, met the definition of "nightclub" in §101.1 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a "nightclub" was not permitted in a BL zone (even by special exception), this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (2008 Opinion, p. 14).

Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record before this Board supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. (CSA Opinion, 7/9/2010).

In or about 2014, the Petitioner purchased the Property and reopened DOB. Petitioner filed the instant Petition for Special Hearing to request that the restriction on live music be removed. A public hearing *de novo* was held before this Board on February 17, 2016 and April 28, 2016.

In our Opinion and Order dated September 15, 2016 (the "2016 Opinion"), from which this Remand Order originated, we concluded that the Petitioner's proposal here, would constitute a "nightclub" under BCZR §101, just as it did when Fifth Street, LLC owned and operated DOB. (See 2016 Opinion, p. 13). Succinctly, we stated that: "there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner...or before this Board after a *de novo* hearing." (*Id.*).

In weighing the evidence presented at that time and in issuing our 2016 Opinion, we incorporated - *in its entirety* - our 2008 Opinion. (2016 Opinion, p. 9). In doing so, our 2016 Opinion adopted our 2008 analysis of the facts under the definition of "nightclub" in BCZR, §101.1, as well as the eight (8) characteristics listed in the International Building Code ("IBC") for facilities within the "A-2 classification." According, in our 2016 Opinion, when we decided that the Petitioner's proposed use was the same as the 2008 operation by Thanner, we adopted all factual determinations we previously made.

Additionally, our 2016 Opinion referred to: "the facts and holdings as set forth in the Court of Special Appeals decision dated July 9, 2010" which affirmed our 2008 Opinion. (See 2016 Opinion, p. 9). This is the same appellate decision now referred to by the Circuit Court in the Remand Order as: "*Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009" from which the Circuit Court now requires further analysis.

Issues on Remand

The Remand Order instructs this Board to do the following:

> ....for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC's v. Ciarpella*, No. 810, September

> Term, 2009 which includes consideration of the criteria in the International Building Code (IBC).

Notwithstanding the language of our 2016 Opinion, and in order to comply with the Remand Order, we analyze the facts presented under the BCZR definition of "nightclub" and the criteria in the IBC. As stated by the Court of Special Appeals in *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, a "nightclub" is comprised of three elements under BCZR, §100.1: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor," and 3) "categorized as a nightclub by the Building Code of Baltimore County." (See CSA Opinion, 7/9/2010, p. 16).

The Court of Special Appeals in *Ciarpella*, noted that, in 2005, Baltimore County adopted the IBC as the Building Code of Baltimore County. (See CSA Opinion, 7/9/2010, p. 3). The Appellate Court further stated that IBC, §303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." (*Id.*).

Within Assembly Group A, Subgroup A-2 includes:

Assembly uses intended for food and/or drink consumption including, but not limited to:

> Banquet halls
> Night clubs
> Restaurants
> Taverns and bars

(IBC at 24).

Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g.,

restaurants.) The uniqueness of these occupancies is characterized by some or all of the following:

1) Low lighting levels;
2) Entertainment by a live band or recorded music generating above-normal sound levels;
3) No theatrical stage accessories;
4) Later-than-average operating hours;
5) Tables and seating arranged or positioned so as to create ill-defined aisles;
6) A specific area designated for dancing;
7) Service facilities for alcoholic beverages and food; and
8) High occupant load density.

(IBC at 3-17; 3-18).

The Court of Special Appeals in *Fifth Street* emphasized that the IBC Commentary explained that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. (See CSA Opinion, 7/9/2010, p. 4). The Court further noted that the 8 characteristics listed above "are advisory in determining whether Group A-2 is the appropriate classification." (*Id.*). The Court also stated that these eight (8) characteristics are "non-exclusive." (*Id.* at p. 11).

It is important to highlight that the Appellate Court in *Fifth Street* rejected Thanner's argument that DOB must either be a "standard restaurant" or a "nightclub". Mr. Thanner argued that if the DOB is primarily engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant, and not a "nightclub." (CSA Opinion, 7/9/2010, p. 19). The Appellate Court disagreed and held that the terms "standard restaurant" and "nightclub" are not mutually exclusive. The Court interpreted the phrase "standard restaurant" as being distinguishable from other types of restaurants such as "carry-outs", "fast-food," or "drive-through only." (*Id.*).

The Court added that permissible uses in a BL zone actually included dual uses (*i.e.* combinations of permissible uses). BCZR, §230.1.A.10. As a result, a property located in a BL zone could be operating as a dual use, such that one use is permissible and one use is not. (CSA Opinion, 7/9/2010, p. 20).

Here, in the Petitioner's case on the merits, Mr. Boone was the sole witness who testified about his proposed plan. His testimony only addressed some of the IBC characteristics. The other witnesses who testified on behalf of DOB were character witnesses for Mr. Boone. Each of those character witnesses either worked at Dock of Bay, or were related to someone who worked there. They were collectively of the opinion that live music should be permitted by this Board because Mr. Boone is a good person.

On this point, we repeat what we said in our 2016 Opinion that our decision now and then, does not reflect on Mr. Boone personally:

> We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that [he would] be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

(2016 Opinion, p. 13).

In regard to the eight (8) IBC characteristics, we find as follows:

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Petitioner failed to testify about, or provide any evidence regarding, his proposed plan for lighting levels.

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> MR. SCHMIDT: Okay and if the Board proposed limitations on the type of music or the volume of music, you would, you would be amenable to those and follow those limitations?
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(T. pp. 59-60).

Mr. Boone's concession that he would be amenable to a sound level restriction was not persuasive. Mr. Boone had the burden to prove to the Board what constitutes "above-normal sound levels" and how the proposed live music (whether soloist or band) would stay below those levels.

When asked on cross examination how Mr. Boone would implement his plan, he sarcastically responded that: "I'll have an army of people with sound meters." (T. p. 112). Although appearing to the Board as an after-thought during his direct testimony, Mr. Boone's proposal is to use a decibel monitoring device each time live music is played outside DOB. He testified that there should be an "agreeable" sound level for outside music and that bands would play within that sound level. (T. p. 107). Yet, Mr. Boone could not provide the Board with maximum sound level that he was proposing. (T. p. 111). When pressed for his maximum sound level, Mr. Boone responded that it would "be determined at a later time." (T. p. 113).

Mr. Boone testified on cross examination that he did not know what kind of noise levels would meet decibel levels of 55-65. (T. p. 80). He admitted that he would not personally be at the DOB full time to measure sound levels. (T. p. 97). Indeed, he conceded that he has never

personally operated a decibel monitoring device. (T. p. 120). Mr. Boone is not an expert in music or sound. (T. p. 111). DOB does not employ a sound engineer. (*Id.*).

In addition, Mr. Boone did not dispute that there would be amplification of music as he stated that: "Most of the sound will be controlled by the level of amplification." (T. p. 113). Russell McClelland was a witness who testified that during the Thanner Era, reggae music was played at amplified levels, after dark until 11:00 pm or 12:00 am, all days of the week. (T. p. 134). Mr. Boone candidly revealed that he has no previous experience operating a business where live music is played. (T. p. 116).

The Board finds that Mr. Boone's proposal was not credible. His testimony left unanswered critical aspects as to how he would implement his plan. It is beyond the expertise of this Board to determine what is "above-normal sound levels" or to determine how such sound should be measured. The Board is left to speculate as to what might happen if live music is permitted inside and/or outside DOB. Thus, the proposed plan is both impractical and unenforceable.

As for sound emanating from live music inside the DOB, Mr. Boone did not acknowledge the known problem which occurred during the Thanner era with sound escaping beyond the four (4) walls of the building. We consider this issue in light of Mr. Boone's testimony that, other than the footprint of the kitchen area (which he expanded by pouring a concrete pad), he has not made any changes to the DOB since the Thanner Era. As Mr. Boone said: "...the four walls are still the four walls." (T. pp. 40-41). Thus, there is no additional sound proofing of the building which may alleviate sound levels inside.

Mr. Boone interjected that currently (without live music), his typical customer is between 40-70 years old; average age is 50 years old. (T. 55). While he indicated that he does not intend

to cater to a younger crowd, if the type of live music draws a younger crowd, he would not be able to exclude those customers. (T. pp. 99-100). During boating season, DOB draws customers from all over Baltimore County. (T. p. 68).

Accordingly, while Mr. Boone initially suggested hiring a solo guitarist or a Frank Sinatra singer, Mr. Boone would not agree to a restriction on the type of music which DOB could offer. (T. pp. 104-105). In fact, he testified that he believed the restriction on music at DOB would be lifted when the liquor license was transferred from Thanner to the Petitioner. (T. p. 79).

As for "recorded music," Mr. Boone already offers recorded music by way of radios and televisions inside the DOB. (T. p. 52). The Court of Special Appeals noted that Thanner had: "ten television sets inside the restaurant, and another two at the outside bar. A house music system, connected to speakers inside and outside, played satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered." (CSA Opinion, 7/9/2010, p. 6). According, we find that the use and availability of recorded music has not changed.

Consequently, as to whether proposed live band or recorded music will generate above-normal sound levels, the Board finds that live band or live music will generate above-normal sounds levels and Mr. Boone's testimony did not persuade us otherwise.

3) **No theatrical stage accessories.**

Mr. Boone testified that he has no plans to build a stage from which a live band could perform. (T. p. 63). However, this Board is mindful, that a stage or at least a stage-like area (both inside and outside) would have to be created if live bands were to perform.

4) **Later-than-average operating hours.**

Mr. Boone verified that DOB is open seven (7) days a week. (T. p.55). He testified that during fall, spring, and winter seasons, DOB is opened Monday through Saturday from 11:00 am

until 10:00 pm; on Sundays, DOB closes around 9:00 pm. (T. p.55; p. 63). In the summer, on the weekends, he said DOB opens at 9:00 am for breakfast. (*Id.*). The outside space at DOB is open from April through October. (T. p. 48).

On cross examination, Mr. Boone's direct testimony as to current operating hours was contradicted with the introduction of a copy of the DOB website which confirms that DOB is actually open Monday through Thursday from 11:00 am to 11:00 pm; and Friday and Saturday 11:00 am until 1:00 am. (PC Ex. 1). (T. p. 96). Mr. Boone admitted that he arranged and approved the website, but had forgotten about the hours of operation listed there. (*Id.*).

He initially testified on direct that his plan was to have music on Friday and Saturday nights from 6:00 pm to 10:00 pm with last call for alcohol at midnight; he hopes DOB will then be cleared out by 12:30. (T. p. 60). He then stated that he would like music outside on Sundays: "probably 5:00 til 8:30 outside.....I don't expect to have music outside after dark." (T. p. 61).

Then, on cross examination, he denied that his proposal was to have all music stop on Friday and Saturday nights at 10:00 pm. (T. p. 103). Notwithstanding his direct testimony at the Board hearing, he added hours for both inside and outside music which would apply to all weekdays and weekends:

> What I said is that music inside would stop at 11:00 pm on Fridays and Saturdays, stop at 7:00 pm on Sundays, music outside would stop at dusk.

(T. p. 103). Mr. Boone agreed that, in summer months, "dusk" could be as late as 9:00 pm. (T. p. 104). Even Mr. Thanner's outside music ended at 8:00 pm. (CSA Opinion, 7/9/2010, p. 6).

We find that Mr. Boone's testimony on this factor was not credible. The DOB website, which Mr. Boone arranged and approved, reveals later than average operating hours for a restaurant. Accordingly, DOB hours are akin to those of a nightclub.

5) **Tables and seating arranged or positioned so as to create ill-defined aisles**.

Photographs of the tables and chairs both inside and outside the DOB reveal that neither are fixed or in any way anchored to the floor. (Pet. Ex. 8E, 8F, 8G, 8H, 8K, 8M and 8N). Additionally, Mr. Boone did not testify that the tables and chairs were attached to the floor. Accordingly, while both seating areas have aisles to permit serving food and beverages, nothing prevents such tables and chairs from being moved into ill-defined aisles, to allow for a band or for people to dance as in the Thanner Era. Indeed, this Board can reasonably expect that customers will rearrange tables and chairs so as to permit dancing when live music performs. This factor closely resembles a nightclub, rather than a restaurant.

6) **A specific area designated for dancing**.

Mr. Boone testified that the restaurant does not have a dance floor and that he has no plans to build a dance floor. (T. p. 63). In our 2008 Opinion, we likewise found that there was no specific dance area during the Thanner era. (BOA 2008 Opinion, p. 12; CSA Opinion, 7/9/2010, p. 6). Although the Appellate Court reaffirmed that there was no dance floor, it noted that: "....during live performances patrons often dance in between the tables." (CSA Opinion, 7/9/2010, p. 6).

Ironically, the existence of a dance floor under this IBC factor is a characteristic of a nightclub. Yet, the definition of "nightclub" in BCZR §101.1 is a facility "with or without a dance floor." Given that this is a proposed use, we must consider what is more likely to occur than not if live music is permitted. Based on Mr. Boone's testimony, the seating arrangement and layout of tables and chairs both inside and outside the restaurant is substantially similar to that of the Thanner Era, we find that there is nothing to prohibit patrons from dancing between the tables. It certainly would be reasonable to expect patrons to want to dance if live music is permitted.

Further, if there is no designated dance floor, nothing prevents patrons from moving tables and chairs to create a dance area.

7) **Service facilities for alcoholic beverages and food.**

There is no dispute that DOB serves both alcohol and food. Mr. Boone testified that, without live music, the food/alcohol ratio is consistently 80% food, 20% alcohol. (T. p. 56). During the Thanner Era, approximately 70% of sales was on food, 28% was on alcohol and 2% was on t-shirts and cookbooks. (CSA Opinion, p. 6). As a result, we find that the food/alcohol ratio is substantially similar to those during the Thanner Era. We can also reasonably expect that the sale of alcohol will increase if live music is permitted.

8) **High occupant load density**.

At full capacity, Mr. Boone testified that DOB has the capacity to *seat* over 223 people (98 people at inside seating, plus 25 more people at the inside bar; and an additional 100 people can sit outside). (T. p. 53). The Court of Special Appeals noted that, based on Mr. Thanner's testimony before this Board in 2008, the DOB had the capacity to serve 150-160 people and that, with those numbers, there was a high occupant load density. (CSA Opinion, p.5).

As set forth above, the description in Subgroup A-2 includes "occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants.)." Based on Mr. Boone's testimony of 223 people who can be seated at DOB, and giving consideration to even more people who would be standing and/or dancing, we find that DOB has a high occupant load density.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. The Board finds that DOB meets 7 of the 8 criteria set forth in Group A-2. This would be criteria 2, 3, 4, 5, 6, 7, and 8 (with no evidence presented as to criteria #1). Simply put, as we stated in our 2016 Opinion and based on the IBC characteristics above, we find that music, under the Petitioner's proposal, whether played inside or outside, is a factor in finding that the DOB is classified as a "nightclub" under the definition set forth in BCZR, §101.1.

DOB proposed operations are substantially the same as in 2008. Both Mr. Thanner and Mr. Boone expressed the desire for live music to boost revenue and compete with the neighboring restaurants located in BM zones. Moreover, there has been no change to the physical layout of the building, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of inside live music on the neighboring properties.

The County Council has determined that "nightclubs" can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in that zone. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101.1. The facts presented by the Petitioner here have not changed that determination.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 22nd day of August, 2019, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Deborah C. Dopkin

Jason S. Garber

BOARD OF APPEALS OF BALTIMORE COUNTY
MINUTES OF DELIBERATION

IN THE MATTER OF: Boone Kondylas, LLC 16-003-SPH

DATE: June 20, 2019

BOARD/PANEL: Maureen E. Murphy, Panel Chair
Deborah C. Dopkin
Jason S. Garber

RECORDED BY: Tammy Zahner, Legal Secretary

PURPOSE: To deliberate the following:

1. Order of the Circuit Court for Baltimore County remanding this matter to the Board for a determination of whether the proposed use of the subject property (the Dock of the Bay) would constitute a "nightclub" as defined by the BCZR under the analysis approved by the Court of Special Appeals in the matter of *Fifth Street, LLC v. Ciarpella,* No. 810, September Term 2009, which includes consideration of the criteria in the International Building Code (IBC).

PANEL MEMBERS DISCUSSED THE FOLLOWING:

- The Board discussed the history of this matter, which was the subject of Board of Appeals Opinions in 2016 and 2008. The Petitioner's request in the 2016 case was to amend previous restrictions in prior cases to permit future use of the property as a restaurant with limited accessory music.

- The 2008 Opinion of the Board found that the playing of music met 6 of the 8 criteria set forth in the International Building Code for a finding of a nightclub under the definition set forth in the BCZR. The Board Opinion was affirmed by the Circuit Court for Baltimore County and the Court of Special Appeals in an Unreported Opinion.

- The Board, in its 2016 Opinion, made findings of fact and also adopted and incorporated the Board of Appeals 2008 Opinion and the Court of Special Appeals Opinion in the *Fifth Street* case.

- One Member noted that on a practical point, a restaurant should be able to have background music and occasionally be able to dim the lights and have live music. However, the Board noted they are bound by the definition of "nightclub", and the facts of the case.

- The Board pointed out that during the hearing in the 2016 case, there was testimony concerning possible conditions and/or accommodations that could be made but the Petitioner did not want to be limited to a particular type of music, and there was inconsistency in the hours proposed for live music.

- The Board determined that the analysis has already taken place, additional testimony and evidence is not necessary, and that the only change between the cases was a change in ownership, and slight change to the floorplan.

CONCLUSION: After thorough review of the facts and law in this matter, the Board unanimously determined that the proposed use of the subject property constitutes a "nightclub" as defined by the BCZR under the analysis approved by the Court of Special Appeals in the matter of *Fifth Street, LLC v. Ciarpella,* No. 810, September Term 2009, which includes consideration of the criteria in the International Building Code (IBC).

NOTE: These minutes, which will become part of the case file, are intended to indicate for the record that a public deliberation took place on the above date regarding this matter. The Board's final decision and the facts and findings thereto will be set out in the written Opinion and Order to be issued by the Board.

Respectfully Submitted,

Tammy A. Zahner

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

May 31, 2019

Peter M. Zimmerman, Esquire
People's Counsel for Baltimore County
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: In the matter of: Boone Kondylas, LLC
Case No.: 16-003-SPH

Dear Mr. Zimmerman:

We received your enclosed letter on May 29, 2019 and it is herewith returned to you.

As you know, the Board concluded the hearing in this matter on April 28, 2016; the parties filed closing memoranda on May 19, 2016; and the record is now closed. Public deliberation on remand from the Circuit Court for Baltimore County will take place on June 20, 2019 at 9:00 a.m.

Accordingly, no further argument, evidence, or documentation may be submitted at this time, therefore I am returning to you the enclosed letter, which cannot be placed in the subject file nor become a part of the record in this matter.

Should the Board decide to reopen this matter after deliberation, you would be invited to resubmit your letter at that time.

Very truly yours,

Sunny Cannington

Krysundra Cannington
Administrator

Enclosure: Original letter and three copies dated May 29, 2019

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

May 31, 2019

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

RE: In the matter of: Boone Kondylas, LLC
Case No.: 16-003-SPH

Dear Mr. Borgerding:

I am writing in response to your letter of May 22, 2019, in which you request a postponement of the public deliberation in the above referenced matter scheduled for June 20, 2019. The Board is also in receipt of Mr. Schmidt's letter of opposition to your request, dated May 29, 2019.

Generally, the Board does not postpone public deliberations as participation is not allowed and attendance is not required. The minutes of the deliberation will be posted on our website upon completion. Therefore, your postponement request is denied. The Board will convene as scheduled on June 20, 2019 at 9:00 a.m.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Sunny Cannington

Krysundra Cannington
Administrator

c: Lawrence E. Schmidt, Esquire
Peter M. Zimmerman, Esquire/People's Counsel for Baltimore County

SMITH, GILDEA & SCHMIDT LLC

MICHAEL PAUL SMITH
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LAUREN D. BENJAMIN
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CARMELO D. MORABITO
ZACHARY J. WILKINS
of counsel:
EUGENE A. ARBAUGH, JR.
DAVID T. LAMPTON
MARY G. LOKER
STEPHEN J. NOLAN

May 29, 2019

Sent Via Hand Delivery
Ms. Krysundra L. Cannington, Administrator
Board of Appeals of Baltimore County
Jefferson Building
Second Floor, Suite 203
105 W. Chesapeake Avenue
Towson, MD 21204

RECEIVED
MAY 29 2019
BALTIMORE COUNTY
BOARD OF APPEALS

Re: In the Matter of: Boone Kondylas, LLC
Case No. 16-003-SPH

Dear Ms. Cannington,

I am writing to respond to Mr. Borgerding's request for postponement of the Deliberation scheduled for June 20, 2019 in the above referenced matter. Although I typically try to accommodate opposing counsel, I respectfully object to his request for postponement in this matter and ask that the Board deny it.

As we are all well versed in the process of a deliberation, the parties are not permitted to participate in the public deliberation and are not even required to attend. The Board produces minutes of the deliberation and a final order is thereafter issued. Under these circumstances, neither Mr. Borgerding's nor my attendance is required or necessary. We can both obtain the minutes thereafter.

I will likewise be out of the Country on the date of the Deliberation, however, I am not requesting a postponement as it will only serve to unnecessarily delay this matter.

I appreciate the Board's attention to this request and please do not hesitate to contact me should you have any questions. Thank you for your courtesy.

Very truly yours,

Lawrence E. Schmidt

LES/am
cc: Francis X. Borgerding, Jr., Esquire
Peter Max Zimmerman, Esquire

FRANCIS X. BORGERDING, JR.
ATTORNEY AT LAW

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RECEIVED
MAY 23 2019
BALTIMORE COUNTY
BOARD OF APPEALS

May 22, 2019

Board of Appeals of Baltimore County
Jefferson Building
Second Floor, Suite 203
105 W. Chesapeake Avenue
Towson, MD 21204

RE: In the Matter of: Boone Kondylas, LLC
16-003-SPH

Dear Sir/Madam:

I am writing to respectfully request a postponement of the Deliberation scheduled in the above-captioned matter for June 20, 2019 at 9:00 a.m. The reason for the postponement is that I will be out of the country on a pre-planned family vacation on that day.

Thank you for your anticipated cooperation.

Very truly yours,

FRANCIS X. BORGERDING, JR.

FXBJr:bjk
cc: Lawrence Schmidt, Esquire
Peter M. Zimmerman, Esquire

Board of Appeals of Baltimore County

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May 16, 2019

NOTICE OF DELIBERATION ON REMAND FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY

IN THE MATTER OF: Boone Kondylas, LLC
9025 Cuckold Point Road
16-003-SPH 15th Election District; 7th Councilmanic District

Re: Petition for Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044, and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music

Memorandum Opinion and Order issued by the Circuit Court for Baltimore County remanding this matter to the Board of Appeals. A public deliberation is scheduled for the following:

DATE AND TIME: **JUNE 20, 2019 at 9:00 a.m.**

LOCATION: Jefferson Building - Second Floor
Hearing Room #2 - Suite 206
105 W. Chesapeake Avenue

NOTE: PUBLIC DELIBERATIONS ARE OPEN WORK SESSIONS WHICH ALLOW THE PUBLIC TO WITNESS THE DECISION-MAKING PROCESS. A WRITTEN OPINION AND ORDER WILL BE ISSUED BY THE BOARD WITHIN A REASONABLE TIMEFRAME AFTER DELIBERATION AND A COPY SENT TO ALL PARTIES.

For further information, including our inclement weather policy, please visit our website www.baltimorecountymd.gov/Agencies/appeals/index.html

Krysundra "Sunny" Cannington
Administrator

---

c: Counsel for Petitioner/Appellant : Lawrence E. Schmidt, Esquire
Petitioner/Appellant : Boone Kondylas, LLC/Ken Boone

Counsel for Protestants : Francis X. Borgerding, Esquire
Protestants : Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella, and Tammy Waldmann

C. Pete Gutwald, Director/Department of Planning
Michael Field, County Attorney, Office of Law
Nancy West, Assistant County Attorney

Lawrence M. Stahl, Managing Administrative Law Judge
Michael Mallinoff, Director/PAI
Office of People's Counsel

16-003-SPH

Circuit Court for Baltimore City
Case No.: 03-C-16-010551

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 638

September Term, 2017

IN THE MATTER OF BOONE KONDYLAS, LLC

Meredith,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 9, 2018

RECEIVED
NOV 14 2018
BALTIMORE COUNTY
BOARD OF APPEALS

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Boone Kondylas, LLC ("Boone"), appellee, filed a zoning petition for special hearing in the Baltimore County Office of Administrative Hearings ("OAH"), seeking an amendment to, or rescission of, restrictions previously placed on Boone's waterfront property ("the property"), to permit the use of the property as a restaurant with limited accessory music and entertainment. Following the special hearing, an OAH administrative law judge ("ALJ") denied Boone's zoning petition on the ground that it was barred by *res judicata,* as a result of this Court's 2010 unreported opinion in *Fifth Street, LLC, et al. v. Matthew Ciarpella, et al.*, No. 810, September Term, 2009 (filed July 9, 2010) ("*DOB I*"), wherein we held that the operation by the previous owner comprised a use as both a restaurant and a nightclub, and that use as a nightclub was prohibited by the applicable zoning regulations.

Boone appealed the ALJ's decision to the Board of Appeals of Baltimore County ("Board"), which also denied Boone's petition as barred by *res judicata.* Boone petitioned for judicial review, and the Circuit Court for Baltimore County remanded the matter to the Board for a determination of whether the subject property, under Boone's ownership, currently meets the definition of a nightclub, in light of the factors cited in our opinion in *DOB I.*

Appellants, Charles Wolinski, *et al.* ("Wolinski")—residential neighbors of the property—and People's Counsel of Baltimore County ("People's Counsel"), appealed the decision of the circuit court.

The questions presented, as set forth in Wolinski's brief, are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition?

2. As a matter of law, should the Opinion of the County Board of Appeals in this matter dated September 15, 2016 have been affirmed by the Circuit Court for Baltimore County?

3. Does an administrative agency or on appeal a reviewing Court have the authority to amend the zoning restriction previously granted by the Court of Special Appeals?

The questions as presented by People's Counsel are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition, which alleges essentially a cosmetic change in management style or operation?

2. Is the County Board of Appeals' opinion correct and at least legally sufficient based on the deferential, contextual and interpretive scope of judicial review?

3. Does the Circuit Court remand misapply *res judicata*; exceed the prudential scope of judicial review, fail to exercise judicial self-restraint, and both disrespect and undermine the administrative function[?]

For the reasons that follow, we shall dismiss appellants' appeal as premature.

FACTS AND LEGAL PROCEEDINGS

The waterfront property at the center of the controversy in this matter is located on Cuckold Point Road on Miller's Island in Baltimore County. The 1.27 acre property is improved by a restaurant/bar called Dock of the Bay ("DOB").[1]

In October 2003, shortly after it suffered extensive damage from Hurricane Isabel, Fifth Street, LLC ("FSLLC"), purchased DOB.[2] After a lengthy rebuilding period, FSLLC

[1] A restaurant, under various names and owners, has operated on the property since the 1950s.

[2] For the background of DOB before Boone purchased it, we rely primarily on the factual recitation set forth in *DOB I*.

reopened DOB in March 2004. It was licensed as a restaurant with a capacity of approximately 150-160 patrons and held a Class D liquor license. On an outdoor patio, there was more seating and a bar, along with a children's play area. DOB had an in-house music system to play satellite radio inside and outside, and it offered live entertainment by disc jockeys, bands and karaoke performers.

In 2006, residential neighbors of DOB complained to the Baltimore County Department of Permits and Development Management that the live music was too loud and disruptive and that DOB was operating as a nightclub, which was not permitted in the applicable business zone.[3] DOB was cited three times for: operating a nightclub in a B.L.

[3] DOB is located in a B.L. (Business Local) business zone. Baltimore County Zoning Regulation ("BCZR") §230.1, permits the operation of a "standard restaurant" and a "tavern" in a B.L. zone but does not permit a "nightclub," even by special exception. BCZR §230.3.

BCZR §101.1 defines "standard restaurant" as:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

The same code section defines a "tavern" as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." Finally, "nightclub" is defined by the Code section as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County."

(continued . . .)

zone; erecting a tent without a permit and; failing to cease nightclub operations and to remove the tent.

In August 2006, FSLLC filed a petition for special hearing, seeking a determination of whether DOB was a nightclub in violation of BCZR.[4] The zoning commissioner determined that DOB was a nightclub under BCZR and the International Building Code and ordered DOB to discontinue the playing of music by way of speaker system. On appeal, a majority of the members of the Board affirmed that determination.[5] Upon judicial review, the Circuit Court for Baltimore County also affirmed the determination. In an unreported opinion by a panel of this Court in *DOB I*, we affirmed the circuit court's judgment, concluding that the transcript and record provided substantial evidence to support the Board's finding that DOB was operating as a nightclub. In reaching that

(. . . continued)

The International Building Code, which was adopted as the Building Code of Baltimore County, sets forth advisory characteristics in determining whether an establishment may be characterized as, *e.g.*, a nightclub, dance hall, banquet hall, or cabaret, to include some or all of the following: low lighting levels; entertainment by a live band or recorded music generating above-normal sound levels; no theatrical stage accessories; later than average operating hours; tables and seating arranged or positioned so as to create ill-defined aisles; a specific area designed for dancing; services facilities for alcoholic beverages and food; and high occupant load density.

[4] A "request for special hearing is, in legal effect, a request for a declaratory judgment." *Antwerpen v. Baltimore County*, 163 Md. App. 194, 209 (2005).

[5] One board member dissented, finding that DOB was a restaurant offering some musical entertainment on the side.

conclusion, we analyzed DOB's operation, using the criteria (for determining whether premises are being used as a nightclub) set forth in the International Building Code.

In 2010, Baltimore County filed a petition for contempt alleging that FSLLC continued to operate DOB in violation of the Board's order. At a hearing on the matter, FSLLC argued that DOB was no longer operating as a nightclub because it was not playing music outside the restaurant.

The circuit court, citing the Board's ruling that "the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR," found FSLLC in violation of the Board's order for "continuing to play live and/or recorded entertainment on the premises." The court found FSLLC to be in contempt of court and ordered that FSLLC permanently dismantle any outdoor speaker system at DOB and refrain from allowing "any live band, Disc Jockey, karaoke or any other form of live or recorded entertainment to perform at the Site" for a period of one year beginning November 10, 2010.

DOB closed in 2012. In 2014, Boone purchased the property from FSLLC and reopened DOB. In 2015, Boone filed a petition for special hearing to "amend previous restrictions imposed . . . so as to permit future use of the property as a restaurant with limited accessory music." Before the ALJ, Boone argued that, unlike FSLLC's use of DOB as a nightclub, its business was first and foremost a restaurant, with music to be offered only as a complement to the dining experience.

In his October 22, 2015 written opinion and order, the ALJ concluded that FSLLC's zoning violation and special hearing case had been appealed to the Board, the circuit court, and this Court, all of which had affirmed the agency's finding that DOB was a nightclub, subject to the conditions and restrictions contained in the agency's order. Therefore, the ALJ concluded, "*res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard." In the absence of any evidence of such significant changes by Boone, the ALJ continued, the ruling that DOB was both a restaurant and a nightclub must stand. Boone's petition was therefore denied.

Boone appealed the ALJ's decision to the Board on November 13, 2015. The Board heard argument on the matter on February 17 and April 28, 2016.

At the start of the hearing, People's Counsel argued that the doctrine of *res judicata* permitted the Board to dispose of the matter on a motion to dismiss. Counsel for DOB's residential neighbors agreed and added that amending the zoning restrictions would require a reversal of this Court's 2010 unreported decision, which the Board was not permitted to do. Boone claimed that there had been some significant changes since 2010 that should cause this Board to come to a different conclusion.

Boone's attorney, although acknowledging that FSLLC had operated a nightclub with loud rock music, which was not permitted in the pertinent B.L. zone, argued that Boone was not operating a nightclub, but a restaurant with the occasional "single acoustic guitar player" providing music. With regard to the *res judicata* argument, counsel averred

that *res judicata* did not apply because there had been a significant change in the facts of the case since *DOB I* was decided.

The Board reserved ruling on the *res judicata* issue and heard testimony.

Kenneth Boone ("Mr. Boone") the sole managing member of Boone Kondylas, LLC,[6] testified that DOB is licensed to operate as a restaurant and maintains a Class D liquor license, which Boone purchased from FSLLC. The restaurant averages 80% food / 20% alcohol sales.

Since Mr. Boone's purchase of DOB, his corporation has expanded the restaurant's kitchen to permit the outdoor steaming of crabs and removed the outdoor stage and tent that FSLLC had erected. Indoors, he said, DOB has seating for approximately 125 patrons at dining room tables and the bar, and there is outdoor seating for approximately 100 additional patrons. DOB has no dance floor or stage, and Mr. Boone has no plans to create either one.

DOB is presently open seven days a week, with posted hours of 11:00 a.m. to midnight, but the restaurant generally closes between 9:00 and 10:00 p.m. during winter months when business is slow. The average patron is between 40 and 70 years of age.

Other than a DJ on New Year's Eve 2014, Mr. Boone testified that he had hesitated to book live performers, as he was initially unfamiliar with what the applicable zoning code permitted. His hesitation appears to have been well founded because in 2015, when Mr.

[6] Mike and Donna Kondylas, the "Kondylas" of "Boone Kondylas, LLC" were no longer in partnership with Mr. Boone by the time of the hearing.

Boone scheduled an acoustic guitarist to play on a Saturday night, the neighbors complained about the potential for noise and disruption, and a zoning official threatened to pull DOB's liquor license if the musician played. Mr. Boone cancelled the guitarist, as well as scheduled performances by a Frank Sinatra cover singer and an "oompah" band for Oktoberfest, and he had not scheduled any live music since then.

Boone's petition centered on his desire to "cater to the demographic" and book soloists to play at DOB. Mr. Boone said he was willing to "live within sound restrictions on outside music [and] time restrictions of both indoor and outdoor music" in anticipation of offering live music outdoors on Friday and Saturday nights from 6:00 until 10:00 p.m. (with last call for alcohol at midnight) and on Sunday afternoons from 5:00 until 8:30 p.m.

Several neighborhood residents testified on Boone's behalf, stating that when FSLLC owned DOB, it hired "[v]ery loud, heavy metal" full-sized bands, which played until midnight or 1:00 a.m. on weekends. In contrast, DOB under Boone's ownership has a family atmosphere with an older demographic. The supporters advocated giving Boone a chance to have live music at DOB.

Charles Wolinski, whose house is approximately 200 feet from DOB, testified that he had fought with FSLLC for seven years over the loud music and the disorderly patrons in the parking lot. In his opinion, everything at DOB now that Boone owns it is "exactly the same" as when FSLLC owned it (other than the playing of live music), and the addition of live music would return the establishment to the level of disruption it had created during FSLLC's ownership.

In the opinion of Matthew Ciarpella, who was also a neighborhood protestant in the FSLLC litigation, the playing of any outdoor music at DOB would re-introduce the same noise problems that had been previously litigated. Other neighbors who had heard the loud music played when FSLLC owned DOB also protested the reinstatement of live music outside the restaurant.

The Board issued its written opinion on September 15, 2016. Therein, the Board noted that as the parties, or their privy, and the property had been involved in the previous litigation regarding the same zoning issue of whether live music should be permitted at the DOB, which led to the Board's 2008 opinion, the only manner in which the Board could act upon the new application for special permit previously denied would be if there had been a substantial change in the facts from those previously litigated. The Board found that the restaurant operations and layout and Boone's proposal for live music were substantially the same as when FSLLC owned the premises and litigated the matter. In the Board's view, a change in the restaurant's ownership or management style did not amount to a substantial change. Having previously determined that DOB comprised a nightclub not permitted in a B.L. zone, and having currently determined that no substantial change to the property existed that would support re-litigation of the issue, the Board denied Boone's petition to amend the previous restrictions imposed upon DOB.

Boone filed a petition for judicial review in the circuit court on October 17, 2016. The court heard argument on the petition on June 1, 2017.

Boone initially argued that the Board, in denying his petition on *res judicata* grounds, never decided the merits of the matter, that is, whether DOB can play live music and, if so, under what circumstances. Counsel for Boone said "whether the zoning is the same, the building is the same, the neighbors are the same, that doesn't matter. The Board of Appeals focused on the wrong inquiry" and "got this wrong" in failing to make a determination of the "ultimate issue." Counsel for Boone requested that the court reverse on the *res judicata* issue and remand to the Board for a determination of whether music should be allowed at DOB as an accessory use to the restaurant service and under what circumstances.[7] In the alternative, Boone argued that the court should find that the operative facts had changed since the time of FSLLC's ownership such that *res judicata* should not apply as a bar to the present litigation.

The circuit court observed that the Board had determined that the prior owner played music that was "loud and [performed by] rock bands and the neighbors didn't like it, therefore nobody can do anything different, because it might [move us] back into what the Dock of the Bay was under" the prior owner. The judge went on to say that the panel of this Court, in its *DOB I* decision was "very factually oriented" when it upheld the Board's determination that DOB was a nightclub while owned by FSLLC. In the circuit court's

[7] As the court pointed out, the applicable zoning regulations prohibit a nightclub from operating in a B.L. zone but does not prohibit music from being played. The Board appeared to use "live music" and "nightclub" interchangeably in its ruling.

view, for *res judicata* to apply, "the same analysis has to be done to see and determine whether the proposed use with the current owner would constitute a nightclub." In the court's words, "[i]f the facts were the same, then maybe *res judicata* would apply at this time . . ., but the analysis just was not done in this case."

Although the Board had found no substantial change in the facts as previously litigated, the circuit court observed that the Board did not perform an adequate analysis of the relevant criteria to determine whether DOB is currently a nightclub. Determining that that analysis should be done, the circuit court remanded the matter to the Board for a determination under the facts of this case as to "whether the proposed use would constitute a nightclub under the analysis used by the Court of Special Appeals in that prior case."

The circuit court issued its written order on June 2, 2017. The order remanded the matter to the Board "for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a 'nightclub' as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC)."[8]

[8] *See* footnote 3, *supra*, for the International Business Code criteria.

DISCUSSION

Although not raised by any party, before we may consider appellants' arguments, we must ensure that the appeal has been taken either from a final judgment or from an appealable interlocutory ruling. We shall hold that this appeal is premature.

Pursuant to Maryland Code (2013 Repl. Vol., 2017 Supp.) §12-301 of the Courts and Judicial Proceedings Article ("CJP"), a party may appeal from a final judgment in a civil case. The Court of Appeals has consistently stated that "a judgment or order of a court is final when it determines or concludes the rights of parties or when it denies the parties means of further prosecuting or defending their rights and interests in the subject matter of the proceeding." *Schultz v. Pritts*, 291 Md. 1, 5–6 (1981). We will dismiss an appeal if it is not taken from a final judgment entered in a civil case by a circuit court, or if a non-final judgment does not fit within the statutory exceptions or the collateral order doctrine. *Foy v. Baltimore City Det. Ctr.*, 235 Md. App. 37, 47 (2017), *cert. granted*, 457 Md. 660 (2018).

In general, where, as here, a circuit court orders a remand of the proceeding to an administrative agency, that is an appealable final order because when "a court remands a proceeding to an administrative agency, the matter reverts to the processes of the agency, and there is nothing further for the court to do. Such an order is an appealable final order because it terminates the judicial proceeding and denies the parties means of further prosecuting or defending their rights in the judicial proceeding." *Schultz*, 291 Md. at. 6 (citing *Fred W. Allnutt, Inc. v. Commissioner of Labor and Industry*, 289 Md. 35, 40

(1980)). Nevertheless, a circuit court's remand order in a judicial review action is not always an appealable final judgment. Although a remand after the circuit court has conducted a judicial review of the sole question raised in the administrative action, thereby precluding the parties from further contesting the validity of the agency's decision on the merits of the case, is an appealable final judgment, "a remand that precedes any judicial review is not a final judgment[.]" *Metro Maint. Sys. South, Inc. v. Milburn*, 442 Md. 289, 305, 310 (2015). As we suggested in *Foy*, *supra*, the "lack [of] any discernable conclusions of law or findings of fact" and the circuit court's apparent inability to assess the merits of the Board's decision may render the remand order a non-final judgment. 235 Md. App. at 52-53.

The sole issue before the circuit court in this matter was whether the Board was correct in denying Boone's petition on the ground of *res judicata*, based on the Board's determination that DOB was a nightclub when owned by FSLLC. The circuit court declared itself unable to make a finding on that sole claim because the Board had not determined whether DOB is currently a nightclub, pursuant to the International Business Code factors that were discussed in detail in *DOB I*.

The circuit court did not find any error of law on the part of the Board, nor did it affirm or reverse the Board's decision or decide or conclude the matter in dispute. In other words, the circuit court did not conduct judicial review. As in *Milburn*, the remand was to precede the circuit court's determination of whether there was substantial evidence in the record to support the Board's ruling and whether or not to affirm. 442 Md. at 308. In other

words, although the court did not specifically so state in its order, it deferred its ruling pending the remand, and the matter "contemplates that judicial review awaits the return of the case following the remand." *Id.* at 309. Specifically, once the Board has an opportunity to apply the International Business Code factors to the facts of this case, the circuit court will then determine whether *res judicata* would apply to support the denial of DOB's petition on that basis.

As noted in *Milburn*, 442 Md. at 309, although the parties "have, in a sense, been 'put out of court'. . . there is a strong potential, bordering on certainty, that the issue at hand—the viability of . . . an administrative decision—will be back for determination by the circuit court." The remand order in the subject case does not prevent the parties from continuing to defend or challenge the Board's decision following the remand; once the Board reconsiders its decision, the parties may continue to challenge or defend the Board's decision. All this was made clear in *Milburn*, where the Court said:

> It is true that, on remand, the Board of Appeals retains discretion to reconsider its decision. Finality, however, is not determined by considering what additional proceedings may occur before the agency, but what further proceedings, if any, will occur in the circuit court. *See Brewster* [*v. Woodhaven Bldg. & Dev., Inc.*, 360 Md. 602 (2000)] (proceedings before another forum are irrelevant to finality). Thus, the breadth of the additional proceedings at the agency level do not convert the remand order here into a final, appealable judgment.
>
> After the remand, the parties will have the opportunity to litigate their positions in the circuit court and pursue appellate review of those issues, including any contention that the remand was unlawful or an abuse of discretion. It may be, of course, that the lawfulness of the remand will no longer be at issue and that other issues concerning the validity of the Board's decisions will have become moot as a result of any modifications that the Board makes. In that respect, our holding that a remand that precedes any

judicial review is not a final judgment is consistent with the purpose of the final judgment rule—to promote judicial efficiency by limiting piecemeal appeals.

Id. at 310-11 (footnotes omitted).

APPEAL DISMISSED; COSTS TO BE PAID BY APPELLANTS.

PETITION OF BOONE KONDYLAS, LLC FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY	*	IN THE
	*	CIRCUIT COURT
IN THE CASE OF BOONE KONDYLAS, LLC LEGAL OWNERS/PETITION FOR SPECIAL HEARING ON PROPERTY LOCATED at 9025 Cuckold Point Road, Baltimore Maryland 21219	*	FOR
15TH Election and 7TH Councilmanic Districts	*	BALTIMORE COUNTY
Case No. 2016-003-SPH Before the County Board of Appeals	*	Case No. 03-C-16-010551

* * * * * * * * * * * * * *

NOTICE OF APPEAL TO THE COURT OF SPECIAL APPEALS

Dear Madam Clerk:

Please enter an appeal to the Court of Special Appeals of Maryland on behalf of the PEOPLE'S COUNSEL FOR BALTIMORE COUNTY from the final Circuit Court Order dated **June 2, 2017** (docketed **June 7, 2017**) in the above-captioned case. This follows the Notice of Appeal to Court of Special Appeals filed separately by Charles Wolinski, Brad & Bonnie Metheny, Matt Ciarpella, Wayne Waldman and Mike Kondylas by and through their attorney, Francis X. Borgerding, Esquire on June 6, 2017, Case No. 638, September Term 2017.

We respectfully request to be assigned the same Court of Special Appeals case number since both appeals relate to the final Order by Circuit Court Judge H. Patrick Stringer dated June 2, 2017.

RECEIVED AND FILED
2017 JUN 14 AM 11: 16

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

CAROLE S. DEMILIO
Deputy People's Counsel
The Jefferson Building
105 W. Chesapeake Avenue, Suite 204
Towson, MD 21204
(410) 887-2188
peoplescounsel@baltimorecountymd.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of June, 2017, a copy of the foregoing Notice of Appeal to the Court of Special Appeals was mailed to Lawrence Schmidt, Esquire, Smith, Gildea & Schmidt, 600 Washington Avenue, Suite 200, Towson, Maryland 21204 and Francis Borgerding, Jr, 409 Washington Avenue, Suite 600, Towson, Maryland 21204.

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

IN THE MATTER OF BOONE KONDYLAS, LLC Petitioner	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-16-010551

* *

ORDER

This matter came before the Court for a hearing on the *Petition for Judicial Review* of the opinion of the Board of Appeals for Baltimore County dated September 15, 206, filed by Petitioner, Boone Kondylas. Upon consideration of the Petitioner's *Memorandum in Support of Petition for Judicial Review*, the *Memorandum of People's Counsel for Baltimore County*, the *Memorandum in Opposition to Petition for Judicial Review* filed by the Protestants, and arguments of counsel, for the reasons stated on the record in open court, it is this 2nd day of June, 2017, by the Circuit Court for Baltimore County, hereby

ORDERED, that this matter is Remanded to the Board of Appeals for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC).

True Copy Test
JULIE L. ENSOR, Clerk
Per _____
Assistant Clerk

ENTERED JUN 07 2017
H. Patrick Stringer, Judge

FILED JUN 07 2017

IN THE MATTER OF:	*	IN THE
Boone Kondylas, LLC Petitioner	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No.: 03-C-16-010551

* * * * * * * * * * * * *

NOTICE OF APPEAL

Appellants, Charlie Wolinsky, Brad Metheny, Bonnie Metheny, Matt Charpella, Wayne Waldman and Mike Kondylas, by and through their attorney, Francis X. Borgerding, Jr., hereby note an appeal from the Order of the Circuit Court for Baltimore County, dated June 2, 2017, to the Court of Special Appeals of Maryland. A copy of said Order is attached hereto.

FRANCIS X. BORGERDING, JR.
409 Washington Avenue, Suite 600
Towson, Maryland 21204
410-296-6820
ATTORNEY FOR THE APPELLANTS

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 6 day of June, 2017, a copy of the foregoing was mailed, postage prepaid, to:

Larry Schmidt, Esquire
(via email)

Peter Max Zimmerman, Esquire
(via email)

RECEIVED AND FILED
2017 JUN -6 PM 3:13
CLERK OF THE CIRCUIT COURT

FRANCIS X. BORGERDING, JR.

IN THE MATTER OF BOONE KONDYLAS, LLC Petitioner	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-16-010551

* * * *

16-003-SPH

IN THE MATTER OF BOONE KONDYLAS, LLC Petitioner	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-16-010551

* *

ORDER

This matter came before the Court for a hearing on the *Petition for Judicial Review* of the opinion of the Board of Appeals for Baltimore County dated September 15, 206, filed by Petitioner, Boone Kondylas. Upon consideration of the Petitioner's *Memorandum in Support of Petition for Judicial Review*, the *Memorandum of People's Counsel for Baltimore County*, the *Memorandum in Opposition to Petition for Judicial Review* filed by the Protestants, and arguments of counsel, for the reasons stated on the record in open court, it is this 2nd day of June, 2017, by the Circuit Court for Baltimore County, hereby

ORDERED, that this matter is Remanded to the Board of Appeals for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC).

RECEIVED
JUN 08 2017
BALTIMORE COUNTY
BOARD OF APPEALS

H. Patrick Stringer, Judge

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

December 14, 2016

VIA HAND-DELIVERY
Civil Clerk
Circuit Court for Baltimore County
401 Bosley Avenue
Towson, Maryland 21204

RE: In the matter of: Boone Kondylas, LLC
Civil Action No.: 03-C-16-010551
Board of Appeals Case No.: 16-003-SPH

Dear Clerk:

Enclosed for filing please find the Proceedings before the Administrative Law Judge and the Board of Appeals for Baltimore County. Additionally, please allow this letter to reflect the filing of one accordion folder containing the entire Board of Appeals case file, exhibits, and transcript pursuant to Maryland Rule 7-206.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Enclosures

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY *

PETITION OF: *
BOONE KONDYLAS, LLC *

FOR JUDICIAL REVIEW OF THE OPINION OF * CIVIL ACTION
THE BOARD OF APPEALS NO. : 03-C-16-010551
OF BALTIMORE COUNTY *
JEFFERSON BUILDING – ROOM 203 *
105 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204 *

IN THE MATTER OF: *
BOONE KONDYLAS, LLC
FOR PROPERTY LOCATED AT *
9025 CUCKOLD POINT ROAD

15TH ELECTION DISTRICT *
7TH COUNCILMANIC DISTRICT

BOARD OF APPEALS CASE NO.: 16-003-SPH

* * * * * * * * * * * *

RECEIVED AND FILED
2016 DEC 14 A 11: 36
CLERK OF CIRCUIT COURT
BALTIMORE COUNTY

PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes the Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the original papers on file in the Department of Permits, Approvals and Inspections and the Board of Appeals of Baltimore County:

ENTRIES FROM THE DOCKET OF THE BOARD OF APPEALS AND DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS OF BALTIMORE COUNTY

July 6, 2015	Petition for Special Hearing filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC under Section 500.7 of the Baltimore County Zoning Regulations to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

July 23, 2015	Entry of Appearance filed by People's Counsel for Baltimore County.
September 6, 2015	Certificate of Posting.
September 8, 2015	Certificate of Publication in newspaper
September 23, 2015	ZAC Comments.
September 28, 2015	Hearing held before the Office of Administrative Hearings.
October 13, 2015	Closing Memorandum filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner.
October 13, 2015	Protestants' Memorandum filed by Francis X. Borgerding, Jr., Esquire
October 14, 2015	E-mail to ALJ Beverungen from Lawrence E. Schmidt, Esquire objecting to the offering of new evidence as part of Mr. Borgerding's post-hearing memorandum.
October 22, 2015	Opinion and Order issued by the Administrative Law Judge wherein the Petition for Special Hearing was DENIED.
November 13, 2015	Notice of Appeal filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
November 16, 2015	Appeal received by the Board.
November 24, 2015	Notice of Assignment issued by the Board.
January 28, 2016	Letter and Trial Memorandum filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
February 12, 2016	E-mail to Board from People's Counsel submitting preliminary background of four County Board of Appeals decisions involving the *res judicata* doctrine.
February 12, 2016	E-mail to Board from People's Counsel attaching the Court of Special Appeals decision in Fifth Street V. Ciarpella (Dock of the Bay) case.
February 16, 2016	Protestant's Response to Petitioner's Trial Memorandum filed by Francis X. Borgerding, Jr., Esquire on behalf of Charles Wolinski, et al., Protestants.

February 17, 2016 Board convened for a Hearing, Day 1.

Exhibits submitted at Motion Hearing before the Board of Appeals:

Protestants' Exhibit No.

1 – Opinion and Order of OAH (Case No. 2016-0003-SPH) dated October 22, 2015

2 – Unreported Opinion of Court of Special Appeals No. 810, Sept. Term 2009, filed July 9, 2010

People's Counsel Exhibit No.

1 – Compilation of BCZR, Opinion of OAH (Case No. 2016-0003-SPH), Trial Memorandum from Appellant (Case No. 2016-0003-SPH), definition of anticipate, Unreported Court of Special Appeals of Maryland (No. 810 Sept. Term 2009, filed July 9, 2010), Majority Opinion of Baltimore County Board of Appeals (Case Nos. CBA-06-044 and CBA-07-134)

2 – Zoning Checklist/PAI

February 19, 2016 E-mails between Board and counsel regarding scheduling and witnesses.

March 8, 2016 Notice of Reassignment issued by the Board.

April 28, 2016 Board convened for a Hearing, Day 2.

Exhibits submitted at Hearings before the Board of Appeals:

Petitioner's Exhibit No.

1 – Site Plan

2A – Majority Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2B – Dissenting Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2C – Ruling on Motion for Reconsideration and Clarification (Case Nos. 07-144-SPH, CBA-06-044, and CBA-07-134)

3 – Circuit Court Opinion, Final Order, Case No. 03-C-08-009996

4 – Unreported Opinion, Court of Special Appeals, No. 810, Sept. Term, 2009, Filed July 9, 2010

5 – Memorandum Opinion (Exhibit) Contempt-Circuit Court for Baltimore County, Case No. 03-C-08-009996

6 – My Neighborhood Map/aerial photograph of "Dock of the Bay"

7 – My Neighborhood Map/aerial photograph of Millers Island, thumbtack showing Dock of the Bay
8A – Photo of entrance to Dock of the Bay/Boatyard
8B – Photo of Zoning Notice/Dock of the Bay
8C – Photo of Boatyard
8D – Photo of Dock of the Bay
8E – Photo of Dock of the Bay pier
8F – Photo of outdoor seating for Dock of the Bay
8G – Photo of seating at Dock of the Bay
8H – Photo of seating and chairs at Dock of the Bay
8I – Photo of pier at Dock of the Bay
8J – Photo of Row Boat Willie's
8K – Photo of Dock of the Bay
8L – Photo of Dock of the Bay play area for children
8M – Photo of seating inside of Dock of the Bay
8N – Photo of seating at Dock of the Bay
8O – Photo of Bar with patrons at Dock of the Bay
9 – Business license issued by MD to operate a restaurant
10 – Photo of sign viewed as you leave Dock of the Bay, neighbor respect sign
11A – Petition of residents of Millers Island in support
11B – Petition of non-residents of Millers Island in support
12A – Petition from resident customers of Dock of the Bay in support
12B – Petition from non-resident customers of Dock of the Bay in support
13 – Letter from Mark Alan to the Zoning Commission

Protestants' Exhibit No.

1 – Letter dated September 24, 2014 to Mike and Donna Kondylas from Francis X. Borgerding, Jr., Esquire
2 – Letter dated September 12, 2014 to Francis X. Borgerding, Jr., Esquire from Adam Rosenblatt, Assistant County Attorney (ID ONLY/NOT ADMITTED/NOT IN FILE)
3 – MDE – State Noise Pollution – noise that annoys
4 – (NOT IN FILE – NO NOTATION)
5 – My Neighborhood Map aerial photo of Dock of the Bay and surrounding residences
6 – Photo of Dock of the Bay from balcony
7 – Photo of Dock of the Bay
8 – Photo of seating at Dock of the Bay
9 – Thanner's ownership of Dock of the Bay re: sound and decibel levels letter dated May 13, 2008

10 – Letter dated June 9, 2008, letter measured decibel levels emanating from the Dock of the Bay
11 – Letter dated October 3, 2007 measuring the decibel levels from Dock of the Bay
12 – Photograph of Row Boat Willie's building
13 – Large map of aerial view of Dock of the Bay and area, 2016 Google Imaging
14 – My Neighborhood Map printed 4/27/2016, aerial view of Dock of the Bay and area
15 – 2015 Alcoholic Beverage License for Dock of the Bay
16 – Baltimore County Police Records, Sgt. Parrish
17 – Summary of Calls from Exhibit 16
18 – Facebook posts for Dock of the Bay 2/17/16 Boone Letter
19 – Facebook posts for Dock of the Bay 2/21/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
20 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
21 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
22 – Facebook post from Dock of the Bay 2/22/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
23 – Facebook posts from Dock of the Bay (ID ONLY/NOT ADMITTED/NOT IN FILE)

People's Counsel Exhibit No.

1 – Website photo showing hours of operation
2A – SDAT record showing 9025 Cuckold Point Road, Lot 504
2B – SDAT record showing Cuckold Point Road, Lot 500
2C – SDAT record showing Cuckold Point Road, Lot 502
2D – SDAT record showing Cuckold Point Road, Lot 501
3 – Deed to 9025 Cuckold Point Road dated September 30, 2014
4 – Deed to 9025 Cuckold Point Road dated March 10, 1999
5 – People's Counsel Sign-In Sheet, 2/17/16
6 – People's Counsel Sign-In Sheet, 4/28/16
7 – Map – Property ID and Zoning, 2014 image
8A – Map
8B – Map (color)
8C – Map
9 – Comprehensive Zoning Map
10 – Website page for Mark Alan date 4/26/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
11A – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)

11B – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
12 – Letter dated April 27, 2016 from Denise Haas

May 18, 2016	Memorandum of People's Counsel for Baltimore County
May 19, 2016	Protestant's Memorandum filed by Francis X. Borgerding, Jr., Esquire on behalf of Charlie Wolinsky, Brad Metheny, Bonnie Metheny, Matt Charpella, Wayne Waldman and Mike Kondylas, Protestants.
May 19, 2016	Closing Memorandum in Lieu of Oral Argument filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
June 14, 2016	Board convened for Public Deliberation.
September 15, 2016	Opinion and Order issued by the Board wherein the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music was DENIED.
October 14, 2016	Petition for Judicial Review filed in the Circuit Court for Baltimore County by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
October 19, 2016	Copy of Petition for Judicial Review received from the Circuit Court for Baltimore County by the Board of Appeals.
October 20, 2016	Certificate of Compliance sent to all parties and interested persons.
October 20, 2016	Response to Petition for Judicial Review filed by People's Counsel for Baltimore County.
November 3, 2016	Response to Petition for Judicial Review filed by Francis X. Borgerding, Jr., Esquire on behalf of Charles Wolinski, et al., Protestants.
December 14, 2016	Transcript of testimony filed.
December 14, 2016	Record of Proceedings filed in the Circuit Court for Baltimore County.

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.

Tammy A. McDiarmid, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

PETITION OF BOONE KONDYLAS, LLC, JUDICIAL REVIEW OF THE DECISION OF THE BOARD OF APPEALS FOR BALTIMORE COUNTY	*	IN THE CIRCUIT COURT
IN THE MATTER OF BOONE KONDYLAS, LLC LEGAL OWNERS, PETITION FOR SPECIAL HEARING ON PROPERTY LOCATED at 9025 Cuckold Point Road, Sparrows Point, Maryland 21219	*	FOR BALTIMORE COUNTY Case No.: 03-C-16-010551
15th Election District, 7th Councilmanic District Case No.: 2016-003-SPH Before the County Board of Appeals	*	

* * * * * * * * * * * * *

RESPONSE TO PETITION FOR JUDICIAL REVIEW

Charles Wolinski, et al., in accordance with Maryland Rule 7-204, submits this response to the Petition for Judicial Review filed by Boone Kondylas, LLC and states that they oppose the Petition.

FRANCIS X. BORGERDING, JR.
409 Washington Avenue, Suite 600
Towson, Maryland 21204
410-296-6820

RECEIVED
NOV 07 2016
BALTIMORE COUNTY
BOARD OF APPEALS

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 7th day of November, 2016, a copy of the foregoing was mailed, postage prepaid, to:

Lawrence Schmidt, Esquire
600 Washington Avenue, Suite 200
Towson, MD 21204

Peter Max Zimmerman, Esquire
Carole S. Demilio, Esquire
People's Counsel for Baltimore County
The Jefferson Building
105 West Chesapeake Avenue
Suite 204
Towson, MD 21204

Baltimore County Board of Appeals
105 West Chesapeake Avenue
Suite 203
Towson, MD 21204

FRANCIS X. BORGERDING, JR.

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

October 27, 2016

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

Re: In the Matter of: *Boone Kondylas, LLC*
Case No. 16-003-SPH

Dear Mr. Schmidt:

I am in receipt of your request for transcript in the above referenced matter. Please be advised that we have sent the recording to the typist listed below.

The typist has been instructed to contact you by phone upon receipt of the recording. She will be able to provide you with the estimated cost, and required deposit. I have advised her that the original transcript is due to the Board no later than December 12, 2016.

Please direct all payments and questions regarding the transcript to the typist listed below.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Typist:	Christine Leary
Telephone #:	(443) 622-4898
Mailing Address:	9529 Fox Farm Road, Baltimore, MD 21236
E-mail Address:	crleary1@verizon.net

PETITION OF **BOONE KONDYLAS, LLC**, FOR JUDICIAL REVIEW OF THE DECISION OF THE BOARD OF APPEALS FOR BALTIMORE COUNTY	*	IN THE CIRCUIT COURT
IN THE MATTER OF BOONE KONDYLAS, LLC LEGAL OWNERS, PETITION FOR SPECIAL HEARING ON PROPERTY LOCATED at 9025 Cuckold Point Road, Sparrows Point, Maryland 21219	*	FOR BALTIMORE COUNTY
	*	Case No. 03-C-16-010551
15th Election District, 7th Councilmanic District	*	
Case No.: 2016-003-SPH Before the County Board of Appeals	*	

* * * * * * * * * * * * * *

RESPONSE TO PETITION FOR JUDICIAL REVIEW

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, in accordance with Maryland Rule 7-204, submits this response to the Petition for Judicial Review filed by BOONE KONDYLAS, LLC and states that it intends to participate in this action for Judicial Review. The undersigned participated in the proceeding before the County Board of Appeals.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Carole S Demilio

CAROLE S. DEMILIO
Deputy People's Counsel
The Jefferson Building
105 West Chesapeake Avenue, Suite 204
Towson, MD 21204
(410) 887-2188

RECEIVED
OCT 20 2016
BALTIMORE COUNTY
BOARD OF APPEALS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 2016, a copy of the foregoing Response to Petition for Judicial Review was mailed to:

Lawrence Schmidt, Esquire
600 Washington Avenue, Suite 200
Towson, Maryland 21204
Attorney for Boone Kondylas, LLC

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Baltimore County Board of Appeals
105 West Chesapeake Avenue, Suite 203
Towson, Maryland 21204

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY

*

PETITION OF:
BOONE KONDYLAS, LLC *

FOR JUDICIAL REVIEW OF THE OPINION OF * CIVIL ACTION
THE BOARD OF APPEALS NO. : 03-C-16-010551
OF BALTIMORE COUNTY *
JEFFERSON BUILDING – ROOM 203
105 W. CHESAPEAKE AVENUE *
TOWSON, MARYLAND 21204

*

IN THE MATTER OF:
BOONE KONDYLAS, LLC *
FOR PROPERTY LOCATED AT
9025 CUCKOLD POINT ROAD *

15TH ELECTION DISTRICT *
7TH COUNCILMANIC DISTRICT

*

BOARD OF APPEALS CASE NO.: 16-003-SPH

* * * * * * * * * *

RECEIVED AND FILED
2016 OCT 20 A 11:44
CLERK OF CIRCUIT COURT
BALTIMORE COUNTY

CERTIFICATE OF COMPLIANCE

Madam Clerk:

Pursuant to the Provisions of Rule 7-202(d) of the *Maryland Rules*, the Board of Appeals of Baltimore County has given notice by mail of the filing of the Petition for Judicial Review to the representative of every party to the proceeding before it; namely:

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Kenneth Boone
Boone Kondylas, LLC
9025 Cuckold Point Road
Sparrows Point, MD 21219

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

Charles Wolinski
9019 Cuckold Point Road
Baltimore, MD 21219

Brad and Bonnie Metheny
2704 6th Street
Baltimore, MD 21219

Matt Ciarpella
2716 6th Street
Baltimore, MD 21219

Tammy Waldmann
9014 Cuckold Point Road
Baltimore, MD 21219

Lawrence M. Stahl
Managing Administrative Law Judge
The Jefferson Building, Suite 103
105 W. Chesapeake Avenue
Towson, MD 21204

Andrea Van Arsdale, Director
Department of Planning
The Jefferson Building, Suite 100
105 W. Chesapeake Avenue
Towson, MD 21204

Arnold Jablon, Deputy Administrative Officer
Director of Permits, Approvals and Inspections
County Office Building
111 W. Chesapeake Avenue, Suite 105
Towson, MD 21204

Nancy C. West, Assistant County Attorney
Baltimore County Office of Law
The Historic Courthouse
400 Washington Avenue
Towson, MD 21204

Michael E. Field, County Attorney
Baltimore County Office of Law
The Historic Courthouse
400 Washington Avenue
Towson, MD 21204

A copy of said Notice is attached hereto and prayed that it may be made a part hereof.

I HEREBY CERTIFY that on this 20th day of October, 2016 a copy of the foregoing Certificate of Compliance has been mailed to the individuals listed above.

Tammy A. McDiarmid

Tammy A. McDiarmid, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

October 20, 2016

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 220
Towson, Maryland 21204

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: Petition for Judicial Review
Circuit Court Case No.: 03-C-16-010551
In the Matter of: Boone Kondylas, LLC
Board of Appeals Case No.: 16-003-SPH

Dear Counsel:

Notice is hereby given, in accordance with the Maryland Rules that a Petition for Judicial Review was filed on October 14, 2016 by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, in the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter. Any party wishing to oppose the petition must file a response with the Circuit Court for Baltimore County within 30 days after the date of this letter, pursuant to the Maryland Rules.

In accordance with the Maryland Rules, the Board of Appeals is required to submit the record of proceedings of the Petition for Judicial Review within 60 days. Mr. Schmidt, having taken the appeal on behalf of his client, is responsible for the cost of the transcript of the record and the transcript must be paid for in time to transmit the same to the Circuit Court within the 60 day timeframe as stated in the Maryland Rules.

Courtsmart was the official record of the hearings before the Board. The disk(s) will be copied by this office and provided to you for transcription. The transcriptionist must meet the requirements set forth in Maryland Rule 16-406d(B) which states: *"a stenographer, court reporter, or transcription service designated by the court for the purpose of preparing an official transcript from the recording."* The Board of Appeals can assist in obtaining a qualified transcriptionist upon request.

Please be advised that the ORIGINAL transcript must be provided to the Board of Appeals no later than DECEMBER 12, 2016 so that it may be transmitted to the Circuit Court with the record of proceedings, pursuant to the Maryland Rules.

A copy of the Certificate of Compliance has been enclosed for your convenience.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Multiple Original Cover Letters
Enclosure

c: Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

October 20, 2016

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 220
Towson, Maryland 21204

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: Petition for Judicial Review
Circuit Court Case No.: 03-C-16-010551
In the Matter of: Boone Kondylas, LLC
Board of Appeals Case No.: 16-003-SPH

Dear Counsel:

Notice is hereby given, in accordance with the Maryland Rules that a Petition for Judicial Review was filed on October 14, 2016 by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, in the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter. Any party wishing to oppose the petition must file a response with the Circuit Court for Baltimore County within 30 days after the date of this letter, pursuant to the Maryland Rules.

In accordance with the Maryland Rules, the Board of Appeals is required to submit the record of proceedings of the Petition for Judicial Review within 60 days. Mr. Schmidt, having taken the appeal on behalf of his client, is responsible for the cost of the transcript of the record and the transcript must be paid for in time to transmit the same to the Circuit Court within the 60 day timeframe as stated in the Maryland Rules.

Courtsmart was the official record of the hearings before the Board. The disk(s) will be copied by this office and provided to you for transcription. The transcriptionist must meet the requirements set forth in Maryland Rule 16-406d(B) which states: "*a stenographer, court reporter, or transcription service designated by the court for the purpose of preparing an official transcript from the recording.*" The Board of Appeals can assist in obtaining a qualified transcriptionist upon request.

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A copy of the Certificate of Compliance has been enclosed for your convenience.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Multiple Original Cover Letters
Enclosure

c: Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY	*	
	*	
PETITION OF: BOONE KONDYLAS, LLC	*	
FOR JUDICIAL REVIEW OF THE OPINION OF THE BOARD OF APPEALS OF BALTIMORE COUNTY JEFFERSON BUILDING – ROOM 203 105 W. CHESAPEAKE AVENUE TOWSON, MARYLAND 21204	*	CIVIL ACTION NO. : 03-C-16-010551
	*	
IN THE MATTER OF: BOONE KONDYLAS, LLC FOR PROPERTY LOCATED AT 9025 CUCKOLD POINT ROAD	*	
	*	
15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	
	*	
BOARD OF APPEALS CASE NO.: 16-003-SPH		

* * * * * * * * * * * *

CERTIFICATE OF COMPLIANCE

Madam Clerk:

Pursuant to the Provisions of Rule 7-202(d) of the *Maryland Rules*, the Board of Appeals of Baltimore County has given notice by mail of the filing of the Petition for Judicial Review to the representative of every party to the proceeding before it; namely:

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Kenneth Boone
Boone Kondylas, LLC
9025 Cuckold Point Road
Sparrows Point, MD 21219

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

Charles Wolinski
9019 Cuckold Point Road
Baltimore, MD 21219

Brad and Bonnie Metheny
2704 6th Street
Baltimore, MD 21219

Matt Ciarpella
2716 6th Street
Baltimore, MD 21219

Tammy Waldmann
9014 Cuckold Point Road
Baltimore, MD 21219

Lawrence M. Stahl
Managing Administrative Law Judge
The Jefferson Building, Suite 103
105 W. Chesapeake Avenue
Towson, MD 21204

Andrea Van Arsdale, Director
Department of Planning
The Jefferson Building, Suite 100
105 W. Chesapeake Avenue
Towson, MD 21204

Arnold Jablon, Deputy Administrative Officer
Director of Permits, Approvals and Inspections
County Office Building
111 W. Chesapeake Avenue, Suite 105
Towson, MD 21204

Nancy C. West, Assistant County Attorney
Baltimore County Office of Law
The Historic Courthouse
400 Washington Avenue
Towson, MD 21204

Michael E. Field, County Attorney
Baltimore County Office of Law
The Historic Courthouse
400 Washington Avenue
Towson, MD 21204

A copy of said Notice is attached hereto and prayed that it may be made a part hereof.

I HEREBY CERTIFY that on this 20th day of October, 2016 a copy of the foregoing Certificate of Compliance has been mailed to the individuals listed above.

Tammy A. McDiarmid

Tammy A. McDiarmid, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

PETITION OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	IN THE
	*	CIRCUIT COURT
	*	FOR
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY Jefferson Building, Suite 203 105 W. Chesapeake Avenue Towson, MD 21204	*	BALTIMORE COUNTY
	*	
	*	**Case No.:** 03-C-16-10551
IN THE MATTER OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	
	*	
	*	
15th Election District 7th Councilmanic District	*	
	*	
County Board of Appeals Case No. 16-003-SPH		

RECEIVED AND FILED
2016 OCT 14 A 11:54
CLERK OF CIRCUIT COURT
BALTIMORE COUNTY

* *

PETITION FOR JUDICIAL REVIEW

Petitioner, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, requests judicial review of the Opinion of the Board of Appeals for Baltimore County dated September 15, 2016, a copy of which is attached hereto, in the above referenced matter. Petitioner was a party below and fully participated, individually and through other counsel, in the proceedings.

This Petition is filed pursuant to Rules 7-202 and 7-203(b) of the Maryland Rules of Procedure.

RECEIVED
OCT 19 2016
BALTIMORE COUNTY
BOARD OF APPEALS

LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of **October, 2016,** a copy of the foregoing Petition for Judicial Review was delivered to:

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Krysundra Cannington, Administrator
County Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carol S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

LAWRENCE E. SCHMIDT

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE BOARD OF APPEALS
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	OF BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge (the "ALJ") in which the ALJ denied a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music.

A public hearing was held *de novo* on February 17, 2016 and April 28, 2016. The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire of Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Woliński, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation was held on June 14, 2016.

Factual Background

The subject property is water front property located in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" (the "Restaurant"). The Restaurant is open seven (7) days a week and has a total seating capacity of approximately 225 persons (125 persons inside and 100 persons outside). The Property is also

improved with boat slips for patrons to dock their boats and access the Restaurant via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, the Restaurant came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation, music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement actions beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing to request a determination that the Restaurant with its associated live music did not constitute a 'nightclub.' In our June 4, 2008 Opinion, this Board held that Mr. Thanner's operation of the Restaurant along with music played met the definition of "nightclub" in §101 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a 'nightclub' was not permitted in a BL zone, this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (Board Opinion 6/4/08, p. 14). Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. Thereafter, the Restaurant closed.

In or about August of 2014, the Petitioner purchased the Property. In or about October of 2014, the Petitioner reopened the Restaurant under the previous name – Dock of the Bay. At the hearing, Kenneth Boone, owner of Boone Kondylas, LLC, the Petitioner, testified before this Board that his ownership and operation of the Restaurant is one of three businesses he owns. The Restaurant has both a business license and a liquor license. The food menu varies from seafood to sandwiches, hamburgers and pasta.

The Petitioner described the minimal improvements that have been made to the Restaurant since August of 2014. These have included pouring a concrete pad where the customers can eat steamed crabs, expanding the kitchen, and removing the outside stage installed by Mr. Thanner where the musicians formerly played.

In April of 2015, the Petitioner hired Mark Allen, a guitar player, to perform at the Restaurant. Mr. Allen was also a regular performer at the Restaurant during the period that Mr Thanner owned it. When signs advertising Mr. Allen's performance were put up at the Restaurant, a Baltimore County inspector instructed the Petitioner that the Restaurant would be closed down if music was permitted to play.

Mr. Boone mentioned that 'Row Boat Willie's', a restaurant located next to the Property is permitted to have live music. Row Boat Willie's is located in a BM (Business-major) zone which permits 'nightclubs' to operate. The Petitioner is competing with 8 other restaurants, including the 'The New White Swan' located at 8821 Millers Island Blvd. and 'The Islander' located at 9008 Cuckold Point Rd., on or near the waterfront and all of them have some type of live music. Mr. Boone was certain that the Restaurant would not be able to survive financially without live music.

While not excluding any specific age of customers, the plan is to hire musical performers who cater to a 50 year-old audience, who want to hear music while enjoying lunch or dinner. The Petitioner does not want to cater to a younger crowd as he anticipated the potential problems that might arise with a younger audience. In the summer months, boaters from all over Baltimore County patronize the Restaurant. The types of musical acts envisioned by the Petitioner would range from solo acoustic or electric guitar players to Frank Sinatra and Oompa bands.

The proposed hours for the musical groups would be Friday and Saturday nights from 6:00 p.m. to 10:00 p.m., with the last call at midnight, in hopes that the customers might leave by 12:30

a.m. On Sundays, in the summer, music would be played outdoors from 5:00 p.m. to 8:30 p.m. Also, there would not be a dance floor or stage area.

The Petitioner is amenable to a decibel level restriction for the sound stemming from the music. However, Mr. Boone has not personally operated any type of device to monitor decibel levels at the Restaurant.

On cross examination, the Petitioner conceded that the Restaurant hours of operation are in fact stated on the website. The hours of operation stated in the website are Monday to Thursday, 11:00 a.m. to 11:00 p.m.; Friday and Saturday 11:00 a.m. to 1:00 a.m.; and Sunday from 9:00 a.m. to 8:00 p.m. Mr. Boone then changed his testimony on the time period during which musical acts would perform and indicated that the music would end at Friday and Saturday nights at 11:00 p.m., on Sundays at 7:00 p.m.; and, at dusk for outdoor performances in the summer months which would end as late as 9:00 p.m.

The Petitioner acknowledged that it did not want to be restricted to certain types of music but would entertain other types of music such as jazz quartet bands or Reggae bands. The Petitioner was uncertain about normal sound levels or how the proposed music might be regulated.

In support of the Petitioner's proposed business, several Miller's Island residents testified. Cheryl Gowers of 2812 Bay Drive has lived at that address since 1993. At the previous hearing, Ms. Gowers testified against Mr. Thanner's operation. She was familiar with the problems that resulted from Mr. Thanner's operation of the business which, she said permitted very loud music including heavy metal music and played until midnight or 1:00 a.m. on most weekends. Presently, Ms. Gowers works as a waitress in the Restaurant for the Petitioner. Having worked at both The New White Swan and The Islander, she corroborated that live music is played at those establishments.

Russell McClelland, 9011 Miller's Island Blvd. testified that he lives 400 yds. from the Property. Mr. McClelland was familiar with the complaints from neighbors and the level of sound

coming from Mr. Thanner's restaurant. He described music at Mr. Thanner's restaurant as being played from speakers mounted to a stage outside the Restaurant. The music was amplified over the water and would occur all days of the week until midnight. He recalled that Reggae music was played.

Mr. McClelland is in support of the Petitioner's request here because he believes, like Ms. Gowers, that Mr. Boone will not permit the type of problems associated with Mr. Thanner's operation. Mr. McClelland works for the Petitioner by cutting the grass and policing both the parking lots and boat slips. If this request is granted, he is willing to monitor the sound level.

Charles Boland and Jerri Boland, his wife, 2414 Eugene Avenue, Edgemere, MD live 1 ½ miles from the Restaurant. Mr. Boland is a retired Baltimore County police officer whose son is employed by the Petitioner. Mr. Boland frequents the Restaurant 4-5 times per week and testified that the Petitioner's operation is family-oriented. The Bolands have no objection to live music at the Restaurant.

Dorothy Reilly, 2809 3rd Street, Miller's Island, is located 2 blocks from the Restaurant. Ms. Reilly has observed loud music coming from The White Swann and The Islander. She reiterated that the Petitioner's restaurant is family oriented. She does not like loud music but would like to hear softer music while there.

In the Protestants' case in chief, Charles Wolinski, 9019 Cockhold Point Rd. testified that his home is adjacent to the Restaurant. Mr. Wolinski is a high school biology teacher at Sparrow's Point High School. He can see the Restaurant from his house. He has 4 children, ranging in age from 13 yrs. to 3 yrs. Mr. Wolinski described his family's life through the Thanner years as living through a "nightmare." He specifically described the problems with the loud music both indoor and outdoor which occurred every weekend. Disorderly patrons were loud while the music was playing and, after the music ended, the clapping and screaming was just as bad as the music itself.

These patrons would then spillover into the parking lot and would continue with loud, disruptive behavior.

Because of the loud noises made by patrons and the loud music, he can never open the windows in his home in the summer or winter. All the noise from the music and the patrons could still be heard inside the home; even in the shower with the fan running. This situation disrupted his family's sleep and the enjoyment of their home. Due to the configuration of the Restaurant's door leading to the outside, even the music played indoors by a live band can be heard in his home and it is disruptive. He explained that each time the outside door would open, the music and noise from inside the Restaurant would project outdoors. He further stated that the parking would overflow into the neighborhood streets. He described one incident where a Restaurant patron, who was blocked in by another car on the parking lot, drove across Mr. Wolinski's lawn in order to exit the parking lot. That incident forced Mr. Wolinski to incur the cost of erecting a fence. Mr. Wolinski was clear that Mr. Thanner never controlled the crowds that came with playing music at the Restaurant.

Mr. Wolinski is also familiar with Mr. Boone's operation of the Restaurant and explained that the physical layout of the Restaurant has not changed. He is very concerned that the same problems will reoccur whether the music is played inside or outdoors. Mark Allen is the same performer hired by Mr. Thanner. Mr. Allen's guitar is connected to an amplifier which Mr. Wolinski described as so loud that Mr. Allen was no longer permitted to play at Rowboat Willie's. Mr. Wolinski recalled that Mr. Thanner also hired steel drum bands. In his experience and from personal observation, the music from Rowboat Willie's does not impact him or his family. He indicated that The Islander only has karaoke music inside.

Mr. Wolinski stated that the litigation against Mr. Thanner's operation lasted seven (7) years through the various appeals in the Court system and that he and the other Protestants paid

substantial attorney's fees. Toward that end, he was surprised that the new owner could make the identical request for music when that request was previously denied in the various appeals.

Also testifying for the Protestants was Matthew Ciarpella, 2116 6th Street, Miller's Island where he has resided for 11 years. Mr. Ciarpella experienced first-hand Mr. Thanner's operation of the Restaurant and also endured seven (7) years of litigation. He opposes outdoor music at the Restaurant due the proximity of the Restaurant to his house. As such, even if the proposed music ends at 7:00 p.m., rather than 9:00 p.m., it would still be intrusive. His house, similar to others in the neighborhood is built on elevated foundations such that the sound travels upward. When wind blows from the north over the water, the sound travels. He could hear the music and loud patrons while inside his house with the windows closed. Each time the outside door opened, bursts of sound would travel. This problem occurred even with a 6' privacy fence and a wall of Leland Cypress trees.

Mr. Ciarella is convinced that the type of music will not be limited to acoustic or Reggae. He insists that the Petitioner will not repeatedly hire the same musical acts because, economically, the Restaurant will profit from hiring a variety of bands. Moreover, the more popular the band, the more revenue will be generated. Karaoke would not be a better option because a microphone will still be used. He is familiar with Mark Allen's guitar which is connected to an electric amplifier and/or microphone whether he is playing classic rock, 'oldies music' or Reggae.

Mr. Ciarpella added that when the popular rendition of a song was played, he would hear cheering, clapping and hooting for the music to continue. In contrast, this additional noise from cheering and clapping does not occur when a song is being played on a radio. At The Islander, he said that there is a DJ inside and that he cannot hear that from his house.

Mr. Ciarpella was familiar with the layout of Row Boat Willie's as he was involved with constructing the sound proofing of the pavilion where the live music plays. The pavilion consists

of a 32x30 square shape and is opened on north side. The pavilion also has table seating and an elevated deck.

In his view, the proposal presented here is the same one that was previously rejected by this Board and by the courts. He testified that there will be no regulation of decibel levels. During the Thanner years, the neighbors regulated the music levels by filing complaints with Code Enforcement. What he learned through the Thanner litigation is that there is no regulation of noise levels by Baltimore County; rather any nuisance is complaint driven. This puts a burden on the Protestants to seek enforcement against the Restaurant.

He further testified that along with bands comes the followers which he described as a 'different type of crowd' than would normally be expected with music that accompanies dinner. He also stated that the amount of traffic not only increased with the live music but the followers of those bands did not drive civilly.

Mr. Ciarpella anticipates that, if the Petitioner's request is granted, he and his neighbors will endure more litigation monitoring the Petitioner and again when the Restaurant is subsequently sold. Any live music played at this restaurant will negatively affect his property values.

Brad Metheny, 2704 6th Street, Miller's Island, testified that he too lived through the Thanner era. He recalled that the bands would play on Friday and Saturday nights until 1:30 a.m. He also heard all the music and noise while inside his house with the doors and windows closed, with the air conditioning running and the TV playing. He approximated that his home is located 180' from the Restaurant.

Mr. Metheny described the instant hearing as being the same that he heard when Mr. Thanner and his employees previously testified. Granting this request would open the door to the same problems he endured for the last 7 years. Since outside the Restaurant can accommodate 150 people, if outdoor music is combined with alcohol consumption by patrons and boaters who

dock outside the Restaurant, the situation becomes problematic. He does not want to suffer through the same 'constant battle and disruption.' Indeed, Mr. Metheny's son and his family were living at 2712 6th Street which Mr. Metheny also owns. Due to the noise problems, his son was forced to move with his 4 year old granddaughter to Bel Air.

Mr. Metheny's mother-in-law previously owned The Fisherman's Inn in the 1940s and 1950s. Mr. Metheny recalled that when the Restaurant was The Fisherman's Inn there were outdoor dining tables without any problems.

Following Mr. Metheny's testimony was his wife, Bonnie Metheny as well as a neighbor Wayne Waldmann of 9014 Cuckhold Point Road. Both of those neighbors also opposed any type of music at the Restaurant.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. In short, the Petitioner asks this Board to believe that the same problems will not result if live music is now permitted.

In our decision of June 4, 2008, which decision was affirmed by both the Circuit Court and the Court of Special Appeals, we made many findings of fact. We incorporate that Opinion in its entirety herein. We also refer to the facts and holding as set forth in the Court of Special Appeals Opinion dated July 9, 2010.

Specifically, we previously found that the Restaurant could seat 150-160 patrons inside. Outside of the Restaurant was a patio, two television sets, along with an outside bar, and tables for patrons to use. There were also outside speakers connected to a radio which played music both inside and outside. The Restaurant had 14 boat slips for "transient" boat customers.

The Restaurant opened every day from 11:00 a.m. and closed at 2:00 a.m. In the winter, the Restaurant closed early as customers left. The kitchen closed at 11:00 p.m. but the bar stayed

open until 2:00 a.m. as permitted by the liquor license. The food menu was seafood, steaks and sandwiches. We also found that 70% of sales were from food and 30% were in beverages.

On Friday and Saturday nights, we found that live bands played from 9:00 p.m. to 1:00 a.m. We also found that on Saturday and Sunday afternoons, live music played from 4:00 p.m. to 8:00 p.m. (with the caveat that the music stopped after 8:00 because of the code violation complaints).

The type of music were "mostly duos" or "steel bands." There was no charge for live entertainment and the Restaurant stayed open until 2:00 a.m. when live music was played. We also heard testimony that the Restaurant would close without live music being available. In that case, we also heard the testimony against the live music from Matthew Ciarpella, Charles Wolinski, Brad and Bonnie Metheny and Patricia Waldmann.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not even hear the facts before determining whether the doctrine of *res judicata* applies. *Id* at 995 A.2d 1070. The Court also stated that *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett*, 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

This Board's Opinion of June 4, 2008 meets this test. (1) The Board was acting in a judicial capacity by conducting a hearing on the Petition for Special Hearing, where evidence was presented, and rulings were made on disputed factual and legal issues; (2) The issue of whether music should be permitted at this location was actually litigated; and (3) the Board's Opinion of June 4, 2008 was necessary for a resolution of the issue.

Under *Deleon v. Slear*, 328 Md. 569 (1992), the Court of Appeals made clear that in determining whether claims are the same for the purposes of *res judicata*, the Court has in the past applied "same evidence test." However, the *Deleon* Court acknowledged that the concept of "claim" is broad and that "claim" is defined as a "group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from the narrow concept of a 'cause of action.'" *Id.* at 589. The *Deleon* Court, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), emphasized that the most recent test for determining when two claims or causes of action are the same for purposes of *res judicata* is the "transaction" test as set forth in §24 of the Restatement (Second) of Judgments.

The Court of Appeals in *Bilbrough*, recited the transaction test as follows:

> The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 497-498; *Deleon* at 589.

Specifically, with respect to whether the claims are the same, the *Deleon* Court reviewed the facts to see whether they "are related in time, space, origin or motivation." *Id.* at 591. As applied to the instant case, the same parties, or their privy, are involved here as were involved in the Thanner litigation which led to our June 4, 2008 Opinion. We further find that, the same piece

of property has been involved as well as the same zoning issue with respect to whether a music should be permitted on the Property.

With regard to amending previous restrictions or conditions where an earlier application has been denied by a zoning board, the Court of Appeals in *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1936) appropriately explained that:

> The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions..... This rule seems to rest not strictly on the doctrine of res judicata, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.
>
> * * * *
>
> The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County (3) decreased opposition of neighbors and some support by them; and (4) additional conditions attached to the granting of the permit.

Applying the reasoning of *Whittle* here, we find that there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner on the Petition for Special Hearing or before this Board after a *de novo* hearing. The same neighbors who incurred attorney fees and endured the Thanner era of ownership are still protesting both indoor and outdoor music.

The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that, in order to be successful on this request, the changes needed

under *Whittle* must be more than a change in the Restaurant's ownership or management style of the new owner.

We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that it be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

The County Council has determined that 'nightclubs' can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in the BM zone. In contrast, this restaurant is located in a BL zone which is not permitted to have live music. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101. The facts presented by the Petitioner here have not changed that determination.

We also cite our previous holding in *The Belvedere Baptist Church of Baltimore*, Case No. 15-004-SPH, wherein we declined to approve a request to amend a restriction in a previous ALJ Order. In that case, we applied the doctrine of *res judicata* and found that there was no substantial change in circumstances or facts between the first case and the second case to warrant the requested relief. Specifically, we found that: "there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decision." (Board Opinion, p.8).

In the Board's desire to be consistent in its holdings, we find that the facts of this case fit squarely within the relief requested in the *Belevedere Baptist* case. Here, there has been no change in the Property, the Restaurant, the neighborhood, the neighbors or the zoning that might lead to a different result.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Benfred B. Alston

Jane M. Hanley was on the panel and agreed with the majority opinion. She was not reappointed to the Board and her last day with the Board of Appeals was June 30, 2016.

PETITION OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	IN THE
	*	CIRCUIT COURT
	*	FOR
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY Jefferson Building, Suite 203 105 W. Chesapeake Avenue Towson, MD 21204	*	BALTIMORE COUNTY
	*	
	*	**Case No.:** _____
IN THE MATTER OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	
	*	
15th Election District 7th Councilmanic District	*	
	*	
County Board of Appeals Case No. 16-003-SPH		

RECEIVED
OCT 17 2016
BALTIMORE COUNTY
BOARD OF APPEALS

* *

PETITION FOR JUDICIAL REVIEW

Petitioner, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, requests judicial review of the Opinion of the Board of Appeals for Baltimore County dated September 15, 2016, a copy of which is attached hereto, in the above referenced matter. Petitioner was a party below and fully participated, individually and through other counsel, in the proceedings.

This Petition is filed pursuant to Rules 7-202 and 7-203(b) of the Maryland Rules of Procedure.

LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of **October, 2016,** a copy of the foregoing Petition for Judicial Review was delivered to:

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Krysundra Cannington, Administrator
County Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carol S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

LAWRENCE E. SCHMIDT

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE BOARD OF APPEALS OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge (the "ALJ") in which the ALJ denied a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music.

A public hearing was held *de novo* on February 17, 2016 and April 28, 2016. The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire of Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation was held on June 14, 2016.

Factual Background

The subject property is water front property located in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" (the "Restaurant"). The Restaurant is open seven (7) days a week and has a total seating capacity of approximately 225 persons (125 persons inside and 100 persons outside). The Property is also

improved with boat slips for patrons to dock their boats and access the Restaurant via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, the Restaurant came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation, music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement actions beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing to request a determination that the Restaurant with its associated live music did not constitute a 'nightclub.' In our June 4, 2008 Opinion, this Board held that Mr. Thanner's operation of the Restaurant along with music played met the definition of "nightclub" in §101 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a 'nightclub' was not permitted in a BL zone, this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (Board Opinion 6/4/08, p. 14). Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. Thereafter, the Restaurant closed.

In or about August of 2014, the Petitioner purchased the Property. In or about October of 2014, the Petitioner reopened the Restaurant under the previous name – Dock of the Bay. At the hearing, Kenneth Boone, owner of Boone Kondylas, LLC, the Petitioner, testified before this Board that his ownership and operation of the Restaurant is one of three businesses he owns. The Restaurant has both a business license and a liquor license. The food menu varies from seafood to sandwiches, hamburgers and pasta.

The Petitioner described the minimal improvements that have been made to the Restaurant since August of 2014. These have included pouring a concrete pad where the customers can eat steamed crabs, expanding the kitchen, and removing the outside stage installed by Mr. Thanner where the musicians formerly played.

In April of 2015, the Petitioner hired Mark Allen, a guitar player, to perform at the Restaurant. Mr. Allen was also a regular performer at the Restaurant during the period that Mr Thanner owned it. When signs advertising Mr. Allen's performance were put up at the Restaurant, a Baltimore County inspector instructed the Petitioner that the Restaurant would be closed down if music was permitted to play.

Mr. Boone mentioned that 'Row Boat Willie's', a restaurant located next to the Property is permitted to have live music. Row Boat Willie's is located in a BM (Business-major) zone which permits 'nightclubs' to operate. The Petitioner is competing with 8 other restaurants, including the 'The New White Swan' located at 8821 Millers Island Blvd. and 'The Islander' located at 9008 Cuckold Point Rd., on or near the waterfront and all of them have some type of live music. Mr. Boone was certain that the Restaurant would not be able to survive financially without live music.

While not excluding any specific age of customers, the plan is to hire musical performers who cater to a 50 year-old audience, who want to hear music while enjoying lunch or dinner. The Petitioner does not want to cater to a younger crowd as he anticipated the potential problems that might arise with a younger audience. In the summer months, boaters from all over Baltimore County patronize the Restaurant. The types of musical acts envisioned by the Petitioner would range from solo acoustic or electric guitar players to Frank Sinatra and Oompa bands.

The proposed hours for the musical groups would be Friday and Saturday nights from 6:00 p.m. to 10:00 p.m., with the last call at midnight, in hopes that the customers might leave by 12:30

a.m. On Sundays, in the summer, music would be played outdoors from 5:00 p.m. to 8:30 p.m. Also, there would not be a dance floor or stage area.

The Petitioner is amenable to a decibel level restriction for the sound stemming from the music. However, Mr. Boone has not personally operated any type of device to monitor decibel levels at the Restaurant.

On cross examination, the Petitioner conceded that the Restaurant hours of operation are in fact stated on the website. The hours of operation stated in the website are Monday to Thursday, 11:00 a.m. to 11:00 p.m.; Friday and Saturday 11:00 a.m. to 1:00 a.m.; and Sunday from 9:00 a.m. to 8:00 p.m. Mr. Boone then changed his testimony on the time period during which musical acts would perform and indicated that the music would end at Friday and Saturday nights at 11:00 p.m., on Sundays at 7:00 p.m.; and, at dusk for outdoor performances in the summer months which would end as late as 9:00 p.m.

The Petitioner acknowledged that it did not want to be restricted to certain types of music but would entertain other types of music such as jazz quartet bands or Reggae bands. The Petitioner was uncertain about normal sound levels or how the proposed music might be regulated.

In support of the Petitioner's proposed business, several Miller's Island residents testified. Cheryl Gowers of 2812 Bay Drive has lived at that address since 1993. At the previous hearing, Ms. Gowers testified against Mr. Thanner's operation. She was familiar with the problems that resulted from Mr. Thanner's operation of the business which, she said permitted very loud music including heavy metal music and played until midnight or 1:00 a.m. on most weekends. Presently, Ms. Gowers works as a waitress in the Restaurant for the Petitioner. Having worked at both The New White Swan and The Islander, she corroborated that live music is played at those establishments.

Russell McClelland, 9011 Miller's Island Blvd. testified that he lives 400 yds. from the Property. Mr. McClelland was familiar with the complaints from neighbors and the level of sound

coming from Mr. Thanner's restaurant. He described music at Mr. Thanner's restaurant as being played from speakers mounted to a stage outside the Restaurant. The music was amplified over the water and would occur all days of the week until midnight. He recalled that Reggae music was played.

Mr. McClelland is in support of the Petitioner's request here because he believes, like Ms. Gowers, that Mr. Boone will not permit the type of problems associated with Mr. Thanner's operation. Mr. McClelland works for the Petitioner by cutting the grass and policing both the parking lots and boat slips. If this request is granted, he is willing to monitor the sound level.

Charles Boland and Jerri Boland, his wife, 2414 Eugene Avenue, Edgemere, MD live 1 ½ miles from the Restaurant. Mr. Boland is a retired Baltimore County police officer whose son is employed by the Petitioner. Mr. Boland frequents the Restaurant 4-5 times per week and testified that the Petitioner's operation is family-oriented. The Bolands have no objection to live music at the Restaurant.

Dorothy Reilly, 2809 3rd Street, Miller's Island, is located 2 blocks from the Restaurant. Ms. Reilly has observed loud music coming from The White Swann and The Islander. She reiterated that the Petitioner's restaurant is family oriented. She does not like loud music but would like to hear softer music while there.

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These patrons would then spillover into the parking lot and would continue with loud, disruptive behavior.

Because of the loud noises made by patrons and the loud music, he can never open the windows in his home in the summer or winter. All the noise from the music and the patrons could still be heard inside the home; even in the shower with the fan running. This situation disrupted his family's sleep and the enjoyment of their home. Due to the configuration of the Restaurant's door leading to the outside, even the music played indoors by a live band can be heard in his home and it is disruptive. He explained that each time the outside door would open, the music and noise from inside the Restaurant would project outdoors. He further stated that the parking would overflow into the neighborhood streets. He described one incident where a Restaurant patron, who was blocked in by another car on the parking lot, drove across Mr. Wolinski's lawn in order to exit the parking lot. That incident forced Mr. Wolinski to incur the cost of erecting a fence. Mr. Wolinski was clear that Mr. Thanner never controlled the crowds that came with playing music at the Restaurant.

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of a 32x30 square shape and is opened on north side. The pavilion also has table seating and an elevated deck.

In his view, the proposal presented here is the same one that was previously rejected by this Board and by the courts. He testified that there will be no regulation of decibel levels. During the Thanner years, the neighbors regulated the music levels by filing complaints with Code Enforcement. What he learned through the Thanner litigation is that there is no regulation of noise levels by Baltimore County; rather any nuisance is complaint driven. This puts a burden on the Protestants to seek enforcement against the Restaurant.

He further testified that along with bands comes the followers which he described as a 'different type of crowd' than would normally be expected with music that accompanies dinner. He also stated that the amount of traffic not only increased with the live music but the followers of those bands did not drive civilly.

Mr. Ciarpella anticipates that, if the Petitioner's request is granted, he and his neighbors will endure more litigation monitoring the Petitioner and again when the Restaurant is subsequently sold. Any live music played at this restaurant will negatively affect his property values.

Brad Metheny, 2704 6th Street, Miller's Island, testified that he too lived through the Thanner era. He recalled that the bands would play on Friday and Saturday nights until 1:30 a.m. He also heard all the music and noise while inside his house with the doors and windows closed, with the air conditioning running and the TV playing. He approximated that his home is located 180' from the Restaurant.

Mr. Metheny described the instant hearing as being the same that he heard when Mr. Thanner and his employees previously testified. Granting this request would open the door to the same problems he endured for the last 7 years. Since outside the Restaurant can accommodate 150 people, if outdoor music is combined with alcohol consumption by patrons and boaters who

dock outside the Restaurant, the situation becomes problematic. He does not want to suffer through the same 'constant battle and disruption.' Indeed, Mr. Metheny's son and his family were living at 2712 6th Street which Mr. Metheny also owns. Due to the noise problems, his son was forced to move with his 4 year old granddaughter to Bel Air.

Mr. Metheny's mother-in-law previously owned The Fisherman's Inn in the 1940s and 1950s. Mr. Metheny recalled that when the Restaurant was The Fisherman's Inn there were outdoor dining tables without any problems.

Following Mr. Metheny's testimony was his wife, Bonnie Metheny as well as a neighbor Wayne Waldmann of 9014 Cuckhold Point Road. Both of those neighbors also opposed any type of music at the Restaurant.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. In short, the Petitioner asks this Board to believe that the same problems will not result if live music is now permitted.

In our decision of June 4, 2008, which decision was affirmed by both the Circuit Court and the Court of Special Appeals, we made many findings of fact. We incorporate that Opinion in its entirety herein. We also refer to the facts and holding as set forth in the Court of Special Appeals Opinion dated July 9, 2010.

Specifically, we previously found that the Restaurant could seat 150-160 patrons inside. Outside of the Restaurant was a patio, two television sets, along with an outside bar, and tables for patrons to use. There were also outside speakers connected to a radio which played music both inside and outside. The Restaurant had 14 boat slips for "transient" boat customers.

The Restaurant opened every day from 11:00 a.m. and closed at 2:00 a.m. In the winter, the Restaurant closed early as customers left. The kitchen closed at 11:00 p.m. but the bar stayed

open until 2:00 a.m. as permitted by the liquor license. The food menu was seafood, steaks and sandwiches. We also found that 70% of sales were from food and 30% were in beverages.

On Friday and Saturday nights, we found that live bands played from 9:00 p.m. to 1:00 a.m. We also found that on Saturday and Sunday afternoons, live music played from 4:00 p.m. to 8:00 p.m. (with the caveat that the music stopped after 8:00 because of the code violation complaints).

The type of music were "mostly duos" or "steel bands." There was no charge for live entertainment and the Restaurant stayed open until 2:00 a.m. when live music was played. We also heard testimony that the Restaurant would close without live music being available. In that case, we also heard the testimony against the live music from Matthew Ciarpella, Charles Wolinski, Brad and Bonnie Metheny and Patricia Waldmann.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n,* 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not even hear the facts before determining whether the doctrine of *res judicata* applies. *Id* at 995 A.2d 1070. The Court also stated that *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett,* 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

This Board's Opinion of June 4, 2008 meets this test. (1) The Board was acting in a judicial capacity by conducting a hearing on the Petition for Special Hearing, where evidence was presented, and rulings were made on disputed factual and legal issues; (2) The issue of whether music should be permitted at this location was actually litigated; and (3) the Board's Opinion of June 4, 2008 was necessary for a resolution of the issue.

Under *Deleon v. Slear*, 328 Md. 569 (1992), the Court of Appeals made clear that in determining whether claims are the same for the purposes of *res judicata*, the Court has in the past applied "same evidence test." However, the *Deleon* Court acknowledged that the concept of "claim" is broad and that "claim" is defined as a "group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from the narrow concept of a 'cause of action.'" *Id.* at 589. The *Deleon* Court, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), emphasized that the most recent test for determining when two claims or causes of action are the same for purposes of *res judicata* is the "transaction" test as set forth in §24 of the Restatement (Second) of Judgments.

The Court of Appeals in *Bilbrough*, recited the transaction test as follows:

> The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 497-498; *Deleon* at 589.

Specifically, with respect to whether the claims are the same, the *Deleon* Court reviewed the facts to see whether they "are related in time, space, origin or motivation." *Id.* at 591. As applied to the instant case, the same parties, or their privy, are involved here as were involved in the Thanner litigation which led to our June 4, 2008 Opinion. We further find that, the same piece

of property has been involved as well as the same zoning issue with respect to whether a music should be permitted on the Property.

With regard to amending previous restrictions or conditions where an earlier application has been denied by a zoning board, the Court of Appeals in *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1936) appropriately explained that:

> The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions..... This rule seems to rest not strictly on the doctrine of res judicata, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.
>
> * * * *
>
> The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County (3) decreased opposition of neighbors and some support by them; and (4) additional conditions attached to the granting of the permit.

Applying the reasoning of *Whittle* here, we find that there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner on the Petition for Special Hearing or before this Board after a *de novo* hearing. The same neighbors who incurred attorney fees and endured the Thanner era of ownership are still protesting both indoor and outdoor music.

The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that, in order to be successful on this request, the changes needed

under *Whittle* must be more than a change in the Restaurant's ownership or management style of the new owner.

We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that it be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

The County Council has determined that 'nightclubs' can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in the BM zone. In contrast, this restaurant is located in a BL zone which is not permitted to have live music. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101. The facts presented by the Petitioner here have not changed that determination.

We also cite our previous holding in *The Belvedere Baptist Church of Baltimore*, Case No. 15-004-SPH, wherein we declined to approve a request to amend a restriction in a previous ALJ Order. In that case, we applied the doctrine of *res judicata* and found that there was no substantial change in circumstances or facts between the first case and the second case to warrant the requested relief. Specifically, we found that: "there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decision." (Board Opinion, p.8).

In the Board's desire to be consistent in its holdings, we find that the facts of this case fit squarely within the relief requested in the *Belevedere Baptist* case. Here, there has been no change in the Property, the Restaurant, the neighborhood, the neighbors or the zoning that might lead to a different result.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Benfred B. Alston

Jane M. Hanley was on the panel and agreed with the majority opinion. She was not reappointed to the Board and her last day with the Board of Appeals was June 30, 2016.

Board of Appeals of Baltimore County

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September 15, 2016

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The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Multiple Original Cover Letters

c: Kenneth Boone/Boone Kondylas, LLC
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE BOARD OF APPEALS OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge (the "ALJ") in which the ALJ denied a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music.

A public hearing was held *de novo* on February 17, 2016 and April 28, 2016. The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire of Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation was held on June 14, 2016.

Factual Background

The subject property is water front property located in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" (the "Restaurant"). The Restaurant is open seven (7) days a week and has a total seating capacity of approximately 225 persons (125 persons inside and 100 persons outside). The Property is also

improved with boat slips for patrons to dock their boats and access the Restaurant via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, the Restaurant came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation, music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement actions beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing to request a determination that the Restaurant with its associated live music did not constitute a 'nightclub.' In our June 4, 2008 Opinion, this Board held that Mr. Thanner's operation of the Restaurant along with music played met the definition of "nightclub" in §101 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a 'nightclub' was not permitted in a BL zone, this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (Board Opinion 6/4/08, p. 14). Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. Thereafter, the Restaurant closed.

In or about August of 2014, the Petitioner purchased the Property. In or about October of 2014, the Petitioner reopened the Restaurant under the previous name – Dock of the Bay. At the hearing, Kenneth Boone, owner of Boone Kondylas, LLC, the Petitioner, testified before this Board that his ownership and operation of the Restaurant is one of three businesses he owns. The Restaurant has both a business license and a liquor license. The food menu varies from seafood to sandwiches, hamburgers and pasta.

The Petitioner described the minimal improvements that have been made to the Restaurant since August of 2014. These have included pouring a concrete pad where the customers can eat steamed crabs, expanding the kitchen, and removing the outside stage installed by Mr. Thanner where the musicians formerly played.

In April of 2015, the Petitioner hired Mark Allen, a guitar player, to perform at the Restaurant. Mr. Allen was also a regular performer at the Restaurant during the period that Mr. Thanner owned it. When signs advertising Mr. Allen's performance were put up at the Restaurant, a Baltimore County inspector instructed the Petitioner that the Restaurant would be closed down if music was permitted to play.

Mr. Boone mentioned that 'Row Boat Willie's', a restaurant located next to the Property is permitted to have live music. Row Boat Willie's is located in a BM (Business-major) zone which permits 'nightclubs' to operate. The Petitioner is competing with 8 other restaurants, including the 'The New White Swan' located at 8821 Millers Island Blvd. and 'The Islander' located at 9008 Cuckold Point Rd., on or near the waterfront and all of them have some type of live music. Mr. Boone was certain that the Restaurant would not be able to survive financially without live music.

While not excluding any specific age of customers, the plan is to hire musical performers who cater to a 50 year-old audience, who want to hear music while enjoying lunch or dinner. The Petitioner does not want to cater to a younger crowd as he anticipated the potential problems that might arise with a younger audience. In the summer months, boaters from all over Baltimore County patronize the Restaurant. The types of musical acts envisioned by the Petitioner would range from solo acoustic or electric guitar players to Frank Sinatra and Oompa bands.

The proposed hours for the musical groups would be Friday and Saturday nights from 6:00 p.m. to 10:00 p.m., with the last call at midnight, in hopes that the customers might leave by 12:30

a.m. On Sundays, in the summer, music would be played outdoors from 5:00 p.m. to 8:30 p.m. Also, there would not be a dance floor or stage area.

The Petitioner is amenable to a decibel level restriction for the sound stemming from the music. However, Mr. Boone has not personally operated any type of device to monitor decibel levels at the Restaurant.

On cross examination, the Petitioner conceded that the Restaurant hours of operation are in fact stated on the website. The hours of operation stated in the website are Monday to Thursday, 11:00 a.m. to 11:00 p.m.; Friday and Saturday 11:00 a.m. to 1:00 a.m.; and Sunday from 9:00 a.m. to 8:00 p.m. Mr. Boone then changed his testimony on the time period during which musical acts would perform and indicated that the music would end at Friday and Saturday nights at 11:00 p.m., on Sundays at 7:00 p.m.; and, at dusk for outdoor performances in the summer months which would end as late as 9:00 p.m.

The Petitioner acknowledged that it did not want to be restricted to certain types of music but would entertain other types of music such as jazz quartet bands or Reggae bands. The Petitioner was uncertain about normal sound levels or how the proposed music might be regulated.

In support of the Petitioner's proposed business, several Miller's Island residents testified. Cheryl Gowers of 2812 Bay Drive has lived at that address since 1993. At the previous hearing, Ms. Gowers testified against Mr. Thanner's operation. She was familiar with the problems that resulted from Mr. Thanner's operation of the business which, she said permitted very loud music including heavy metal music and played until midnight or 1:00 a.m. on most weekends. Presently, Ms. Gowers works as a waitress in the Restaurant for the Petitioner. Having worked at both The New White Swan and The Islander, she corroborated that live music is played at those establishments.

Russell McClelland, 9011 Miller's Island Blvd. testified that he lives 400 yds. from the Property. Mr. McClelland was familiar with the complaints from neighbors and the level of sound

coming from Mr. Thanner's restaurant. He described music at Mr. Thanner's restaurant as being played from speakers mounted to a stage outside the Restaurant. The music was amplified over the water and would occur all days of the week until midnight. He recalled that Reggae music was played.

Mr. McClelland is in support of the Petitioner's request here because he believes, like Ms. Gowers, that Mr. Boone will not permit the type of problems associated with Mr. Thanner's operation. Mr. McClelland works for the Petitioner by cutting the grass and policing both the parking lots and boat slips. If this request is granted, he is willing to monitor the sound level.

Charles Boland and Jerri Boland, his wife, 2414 Eugene Avenue, Edgemere, MD live 1 ½ miles from the Restaurant. Mr. Boland is a retired Baltimore County police officer whose son is employed by the Petitioner. Mr. Boland frequents the Restaurant 4-5 times per week and testified that the Petitioner's operation is family-oriented. The Bolands have no objection to live music at the Restaurant.

Dorothy Reilly, 2809 3rd Street, Miller's Island, is located 2 blocks from the Restaurant. Ms. Reilly has observed loud music coming from The White Swann and The Islander. She reiterated that the Petitioner's restaurant is family oriented. She does not like loud music but would like to hear softer music while there.

In the Protestants' case in chief, Charles Wolinski, 9019 Cockhold Point Rd. testified that his home is adjacent to the Restaurant. Mr. Wolinski is a high school biology teacher at Sparrow's Point High School. He can see the Restaurant from his house. He has 4 children, ranging in age from 13 yrs. to 3 yrs. Mr. Wolinski described his family's life through the Thanner years as living through a "nightmare." He specifically described the problems with the loud music both indoor and outdoor which occurred every weekend. Disorderly patrons were loud while the music was playing and, after the music ended, the clapping and screaming was just as bad as the music itself.

These patrons would then spillover into the parking lot and would continue with loud, disruptive behavior.

Because of the loud noises made by patrons and the loud music, he can never open the windows in his home in the summer or winter. All the noise from the music and the patrons could still be heard inside the home; even in the shower with the fan running. This situation disrupted his family's sleep and the enjoyment of their home. Due to the configuration of the Restaurant's door leading to the outside, even the music played indoors by a live band can be heard in his home and it is disruptive. He explained that each time the outside door would open, the music and noise from inside the Restaurant would project outdoors. He further stated that the parking would overflow into the neighborhood streets. He described one incident where a Restaurant patron, who was blocked in by another car on the parking lot, drove across Mr. Wolinski's lawn in order to exit the parking lot. That incident forced Mr. Wolinski to incur the cost of erecting a fence. Mr. Wolinski was clear that Mr. Thanner never controlled the crowds that came with playing music at the Restaurant.

Mr. Wolinski is also familiar with Mr. Boone's operation of the Restaurant and explained that the physical layout of the Restaurant has not changed. He is very concerned that the same problems will reoccur whether the music is played inside or outdoors. Mark Allen is the same performer hired by Mr. Thanner. Mr. Allen's guitar is connected to an amplifier which Mr. Wolinski described as so loud that Mr. Allen was no longer permitted to play at Rowboat Willie's. Mr. Wolinski recalled that Mr. Thanner also hired steel drum bands. In his experience and from personal observation, the music from Rowboat Willie's does not impact him or his family. He indicated that The Islander only has karaoke music inside.

Mr. Wolinski stated that the litigation against Mr. Thanner's operation lasted seven (7) years through the various appeals in the Court system and that he and the other Protestants paid

substantial attorney's fees. Toward that end, he was surprised that the new owner could make the identical request for music when that request was previously denied in the various appeals.

Also testifying for the Protestants was Matthew Ciarpella, 2116 6th Street, Miller's Island where he has resided for 11 years. Mr. Ciarpella experienced first-hand Mr. Thanner's operation of the Restaurant and also endured seven (7) years of litigation. He opposes outdoor music at the Restaurant due the proximity of the Restaurant to his house. As such, even if the proposed music ends at 7:00 p.m., rather than 9:00 p.m., it would still be intrusive. His house, similar to others in the neighborhood is built on elevated foundations such that the sound travels upward. When wind blows from the north over the water, the sound travels. He could hear the music and loud patrons while inside his house with the windows closed. Each time the outside door opened, bursts of sound would travel. This problem occurred even with a 6' privacy fence and a wall of Leland Cypress trees.

Mr. Ciarella is convinced that the type of music will not be limited to acoustic or Reggae. He insists that the Petitioner will not repeatedly hire the same musical acts because, economically, the Restaurant will profit from hiring a variety of bands. Moreover, the more popular the band, the more revenue will be generated. Karaoke would not be a better option because a microphone will still be used. He is familiar with Mark Allen's guitar which is connected to an electric amplifier and/or microphone whether he is playing classic rock, 'oldies music' or Reggae.

Mr. Ciarpella added that when the popular rendition of a song was played, he would hear cheering, clapping and hooting for the music to continue. In contrast, this additional noise from cheering and clapping does not occur when a song is being played on a radio. At The Islander, he said that there is a DJ inside and that he cannot hear that from his house.

Mr. Ciarpella was familiar with the layout of Row Boat Willie's as he was involved with constructing the sound proofing of the pavilion where the live music plays. The pavilion consists

of a 32x30 square shape and is opened on north side. The pavilion also has table seating and an elevated deck.

In his view, the proposal presented here is the same one that was previously rejected by this Board and by the courts. He testified that there will be no regulation of decibel levels. During the Thanner years, the neighbors regulated the music levels by filing complaints with Code Enforcement. What he learned through the Thanner litigation is that there is no regulation of noise levels by Baltimore County; rather any nuisance is complaint driven. This puts a burden on the Protestants to seek enforcement against the Restaurant.

He further testified that along with bands comes the followers which he described as a 'different type of crowd' than would normally be expected with music that accompanies dinner. He also stated that the amount of traffic not only increased with the live music but the followers of those bands did not drive civilly.

Mr. Ciarpella anticipates that, if the Petitioner's request is granted, he and his neighbors will endure more litigation monitoring the Petitioner and again when the Restaurant is subsequently sold. Any live music played at this restaurant will negatively affect his property values.

Brad Metheny, 2704 6th Street, Miller's Island, testified that he too lived through the Thanner era. He recalled that the bands would play on Friday and Saturday nights until 1:30 a.m. He also heard all the music and noise while inside his house with the doors and windows closed, with the air conditioning running and the TV playing. He approximated that his home is located 180' from the Restaurant.

Mr. Metheny described the instant hearing as being the same that he heard when Mr. Thanner and his employees previously testified. Granting this request would open the door to the same problems he endured for the last 7 years. Since outside the Restaurant can accommodate 150 people, if outdoor music is combined with alcohol consumption by patrons and boaters who

dock outside the Restaurant, the situation becomes problematic. He does not want to suffer through the same 'constant battle and disruption.' Indeed, Mr. Metheny's son and his family were living at 2712 6th Street which Mr. Metheny also owns. Due to the noise problems, his son was forced to move with his 4 year old granddaughter to Bel Air.

Mr. Metheny's mother-in-law previously owned The Fisherman's Inn in the 1940s and 1950s. Mr. Metheny recalled that when the Restaurant was The Fisherman's Inn there were outdoor dining tables without any problems.

Following Mr. Metheny's testimony was his wife, Bonnie Metheny as well as a neighbor Wayne Waldmann of 9014 Cuckhold Point Road. Both of those neighbors also opposed any type of music at the Restaurant.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. In short, the Petitioner asks this Board to believe that the same problems will not result if live music is now permitted.

In our decision of June 4, 2008, which decision was affirmed by both the Circuit Court and the Court of Special Appeals, we made many findings of fact. We incorporate that Opinion in its entirety herein. We also refer to the facts and holding as set forth in the Court of Special Appeals Opinion dated July 9, 2010.

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In *Seminary Galleria v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not even hear the facts before determining whether the doctrine of *res judicata* applies. *Id* at 995 A.2d 1070. The Court also stated that *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett*, 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

This Board's Opinion of June 4, 2008 meets this test. (1) The Board was acting in a judicial capacity by conducting a hearing on the Petition for Special Hearing, where evidence was presented, and rulings were made on disputed factual and legal issues; (2) The issue of whether music should be permitted at this location was actually litigated; and (3) the Board's Opinion of June 4, 2008 was necessary for a resolution of the issue.

Under *Deleon v. Slear*, 328 Md. 569 (1992), the Court of Appeals made clear that in determining whether claims are the same for the purposes of *res judicata*, the Court has in the past applied "same evidence test." However, the *Deleon* Court acknowledged that the concept of "claim" is broad and that "claim" is defined as a "group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from the narrow concept of a 'cause of action.'" *Id.* at 589. The *Deleon* Court, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), emphasized that the most recent test for determining when two claims or causes of action are the same for purposes of *res judicata* is the "transaction" test as set forth in §24 of the Restatement (Second) of Judgments.

The Court of Appeals in *Bilbrough*, recited the transaction test as follows:

> The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 497-498; *Deleon* at 589.

Specifically, with respect to whether the claims are the same, the *Deleon* Court reviewed the facts to see whether they "are related in time, space, origin or motivation." *Id.* at 591. As applied to the instant case, the same parties, or their privy, are involved here as were involved in the Thanner litigation which led to our June 4, 2008 Opinion. We further find that, the same piece

of property has been involved as well as the same zoning issue with respect to whether a music should be permitted on the Property.

With regard to amending previous restrictions or conditions where an earlier application has been denied by a zoning board, the Court of Appeals in *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1936) appropriately explained that:

> The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions..... This rule seems to rest not strictly on the doctrine of res judicata, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.
>
> * * * *
>
> The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County (3) decreased opposition of neighbors and some support by them; and (4) additional conditions attached to the granting of the permit.

Applying the reasoning of *Whittle* here, we find that there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner on the Petition for Special Hearing or before this Board after a *de novo* hearing. The same neighbors who incurred attorney fees and endured the Thanner era of ownership are still protesting both indoor and outdoor music.

The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that, in order to be successful on this request, the changes needed

under *Whittle* must be more than a change in the Restaurant's ownership or management style of the new owner.

We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that it be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

The County Council has determined that 'nightclubs' can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in the BM zone. In contrast, this restaurant is located in a BL zone which is not permitted to have live music. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101. The facts presented by the Petitioner here have not changed that determination.

We also cite our previous holding in *The Belvedere Baptist Church of Baltimore*, Case No. 15-004-SPH, wherein we declined to approve a request to amend a restriction in a previous ALJ Order. In that case, we applied the doctrine of *res judicata* and found that there was no substantial change in circumstances or facts between the first case and the second case to warrant the requested relief. Specifically, we found that: "there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decision." (Board Opinion, p.8).

In the Board's desire to be consistent in its holdings, we find that the facts of this case fit squarely within the relief requested in the *Belevedere Baptist* case. Here, there has been no change in the Property, the Restaurant, the neighborhood, the neighbors or the zoning that might lead to a different result.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Benfred B. Alston

Jane M. Hanley was on the panel and agreed with the majority opinion. She was not reappointed to the Board and her last day with the Board of Appeals was June 30, 2016.

BOARD OF APPEALS OF BALTIMORE COUNTY
MINUTES OF DELIBERATION

IN THE MATTER OF: Boone Kondylas, LLC (aka Dock of the Bay) 16-003-SPH

DATE: June 14, 2016

BOARD/PANEL: Maureen E. Murphy, Chairman
Jane M. Hanley
Benfred B. Alston

RECORDED BY: Sunny Cannington/Administrator

PURPOSE: To deliberate the following:

1. Petition for Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044, and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music

PANEL MEMBERS DISCUSSED THE FOLLOWING:

STANDING

- The Board reviewed that this property has a history. The previous owner was cited for operating a nightclub. This matter requests to amend the restrictions to allow the current owner to play music. The previous cases were appealed to the Circuit Court and Court of Special Appeals.
- The Board stated that a Motion to Dismiss was made verbally by People's Counsel at the hearing. In other cases such as Galasso and Zinn, the new cases were clearly identical to previously requested relief. The Board decided at the hearing that they needed to hear the facts of this matter to determine if *res judicata* applied.
- The Board reviewed that in order for *res judicata* to not apply the Petitioners must show a substantial change in circumstances.
- In the previous case, the property owner operated a restaurant/night club which provided live and recorded music. It was determined that he was not allowed to do that on the property due to the zoning classification.
- The current owner purchased the property and is operating a restaurant. He wishes to provide live and recorded music. The Board was unable to find a substantial change. The property has not changed; the neighborhood has not changed; the only change they were able to find was in the ownership of the property.
- The Board understands that the competition is allowed to provide live and recorded music but the properties are zoned differently. The Board determined that the law requires that a substantial change must have already occurred.
- The Board finds that there have not been any substantial changes to the property or circumstances in this matter and therefore the request to allow limited accessory music on the subject property is barred by *res judicata.*

FINAL DECISION: After thorough review of the facts, testimony, and law in the matter, the Board unanimously agreed to DENY the requested Petition for Special Hearing relief and GRANTED the Motion to Dismiss.

NOTE: These minutes, which will become part of the case file, are intended to indicate for the record that a public deliberation took place on the above date regarding this matter. The Board's final decision and the facts and findings thereto will be set out in the written Opinion and Order to be issued by the Board.

Respectfully Submitted,

Sunny Cannington

Sunny Cannington

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

April 29, 2016

NOTICE OF PUBLIC DELIBERATION

IN THE MATTER OF: Boone Kondylas, LLC
9025 Cuckold Point Road
16-003-SPH 15th Election District; 7th Councilmanic District

Re: Petition for Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044, and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music

11/7/13 Opinion and Order issued by the Administrative Law Judge wherein the requested relief was DENIED.

This matter having been heard on February 17, 2016 and concluded on April 28, 2016, a public deliberation has been scheduled for the following:

DATE AND TIME: **TUESDAY, JUNE 14, 2016 at 9:30 a.m.**

LOCATION: Jefferson Building - Second Floor
Hearing Room #2 - Suite 206
105 W. Chesapeake Avenue

NOTE: Closing briefs are due on **Thursday, May 19, 2016 by 3:00 p.m.**
(Original and three [3] copies)

NOTE: PUBLIC DELIBERATIONS ARE OPEN WORK SESSIONS WHICH ALLOW THE PUBLIC TO WITNESS THE DECISION-MAKING PROCESS. ATTENDANCE IS NOT REQUIRED AND PARTICIPATION IS NOT ALLOWED. A WRITTEN OPINION AND/OR ORDER WILL BE ISSUED BY THE BOARD AND A COPY SENT TO ALL PARTIES.

For further information, including our inclement weather policy, please visit our website www.baltimorecountymd.gov/Agencies/appeals/index.html

Krysundra "Sunny" Cannington
Administrator

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c: Counsel for Petitioner/Appellant : Lawrence E. Schmidt, Esquire
Petitioner/Appellant : Boone Kondylas, LLC/Ken Boone

Counsel for Protestants : Francis X. Borgerding, Esquire
Protestants : Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella, and Tammy Waldmann

Office of People's Counsel
Arnold Jablon, Director/PAI
Nancy West, Assistant County Attorney

Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Michael Field, County Attorney, Office of Law

RECEIVED
MAY 19 2016
BALTIMORE COUNTY
BOARD OF APPEALS

IN THE MATTER OF: Boone Kondylas, LLC 9025 Cuckold Point Road	*	BEFORE THE BOARD OF APPEALS
	*	FOR
15th Election District 7th Councilmanic Districts	*	BALTIMORE COUNTY
	*	Case No. 2016-003-SPH

* * * * * * * * * * * * *

CLOSING MEMORANDUM IN LIEU OF ORAL ARGUMENT

Boone Kondylas LLC, Petitioner/Appellant, through Lawrence E. Schmidt and Smith, Gildea and Schmidt, LLC, its attorneys, submits this Closing Memorandum in Lieu of Oral Argument and respectfully states the following.

STATEMENT OF THE CASE

This matter comes before the Board of Appeals ("Board") as an appeal by Boone Kondylas, LLC (Property Owner) of the denial of a Petition for Special Hearing by the County Administrative Law Judge ("ALJ"). The Property Owner seeks an amendment of previous restrictions imposed in Cases 07-144-SPH, CBA-06-044, and CBA-07-134 so as to permit the use of the subject property as a restaurant with accessory music/entertainment. By written decision dated October 22, 2015, ALJ John E. Beverungen denied the Petitioner's Petition for Special Hearing, holding that consideration of the same was barred by the doctrine of res judicata. After considering testimony and evidence offered over two hearing days, the Board requested written memorandum in lieu of oral closing argument and this Memorandum follows.

STATEMENT OF FACTS

The subject property is a water front property adjacent to the Chesapeake Bay in the Millers' Island community of eastern Baltimore County. The property is zoned BL. The property is 55,594 square feet (1.276 acres) in area. The property is improved with a commercial building and associated parking area. The business located thereon is known as "The Dock of the Bay". The Dock of the Bay is a restaurant and serves meals seven days a week. There are seating areas both inside and outside of the building, as well as a pier for patrons who arrive by boat and an outdoor children's play area. The seating capacity of the restaurant is approximately 225 persons, including seating for 125 persons inside (including at the bar and tables) and 100 outside.

A restaurant has operated at this location since the 1950's. For years, the restaurant operated (without dispute or incident) as the Fisherman's Inn. Ironically, the Fisherman's Inn was owned and operated by the family of Bonnie Metheny, who appeared in opposition to the current and proposed use. As an accessory component to the restaurant operation, the Fisherman's Inn/Dock of the Bay has historically provided entertainment (in the form of music) to its dining patrons. The restaurant closed following extensive damage that was sustained as the result of Hurricane Isabel in 2003. The property/business was thereafter acquired and re-opened under the ownership and management of Fifth Street, LLC. Lawrence Thanner was the managing member of Fifth Street, LLC. He significantly changed the character of the business, in that he introduced live music, dancing and a party type atmosphere at the facility.

Due to the nature of Mr. Thanner's operation and the noise generated thereby, there was a disruption to the neighborhood which resulted in complaints to the Code Enforcement Division of Baltimore County's Department of Permits, Approvals and Inspections. Ultimately, multiple citations were issued to Fifth Street, LLC. There then followed a "legal nightmare" (as characterized by the Protestants and their counsel) during which lengthy legal proceedings were engaged between Mr. Thanner and many of his neighbors. The civil code violation cases were heard by the County Code Citation Hearing Officer and Fifth Street, LLC was found to be operating in violation of the Baltimore County Zoning Regulations ("BCZR"). Fines were imposed. The separate citation cases were appealed to the Board as case numbers CBA-06-044 and CBA-07-134. Concurrently, Fifth Street, LLC filed a Petition for Special Hearing with the Zoning Commissioner seeking approval for live entertainment on the Property. (Case No. 07-144-SPH). This Petition was denied by the Commissioner and also appealed to the Board. The Code Citation cases and the special hearing case were consolidated for hearing before the Board of Appeals.

Notwithstanding the representations of People's Counsel made in open hearing in the instant case, the issue of whether the Dock of the Bay's restaurant use could have accessory music was not addressed in the first case.[1] In a written decision issued by a 2-1 vote, the Board determined that Fifth Street's business was a "nightclub" and thus

[1] As a preliminary matter, People's Counsel moved to dismiss the instant case as barred by res judicata. During oral argument to the Board in support of the Motion; People's Counsel said that the Court of Special Appeals addressed the argument that music could be permitted as an accessory use to a restaurant. This statement is incorrect. A review of the Court's decision; as will be discussed hereinafter in further detail, discloses no such analysis by the Court. Thus, the issue presented in the instant matter was not considered in the previous case.

prohibited in the BL zone. The Board applied the definition within BCZR § 101 of "nightclub" to the operation as conducted and determined that the Dock of the Bay was a nightclub. Specifically, the Board analyzed certain factors which are incorporated in the definition of nightclub via the International Building Code. It was determined that Fifth Street, LLC's operation was a nightclub based upon the existence of these factors and the characteristics/operation of the business. Further, the Board noted that a nightclub was not a permitted use in the BL zone, which at all relevant times was/is the zoning of the property. In its order, the Board specifically stated that "as to whether the facility which provides music at this location is a 'nightclub' as defined in the BCZR Section 101, 102.1 and 230 is hereby answered in the affirmative and the playing of music by way of speaker system, live or recorded entertainment must be discontinued."[2]

The Board's determination was appealed to the Circuit Court (Petitioner's Exhibit 3), and then to the Court of Special Appeals (Petitioner's Exhibit 4). The decision was affirmed at all levels. Following the issuance of the decision by the Court of Special Appeals, Baltimore County instituted contempt proceedings in the Circuit Court for Baltimore County (Case No. 03-C-08-0099 96, Petitioner's Exhibit No. 5), alleging that Fifth Street, LLC and Mr. Thanner were operating the business as a night club and in violation of the prior decisions. The Circuit Court determined that Mr. Thanner had no personal responsibility and he was found not to be in contempt. However, Fifth Street,

[2] In his opening statement, counsel for the Protestants wrongly characterized the Board's prior order as prohibiting "live music". As specifically stated in its order, the Board prohibited both live and recorded "entertainment."

LLC was found to be in contempt. The Court enjoined the playing of music at the Property and proposed a fine if its order were violated. The Court stated that the Board made no distinction between outdoor and indoor music and thus any music was not allowed. In its Contempt Order, the Court stated that "any live or recorded entertainment" was prohibited for a period of one year. Being unable to operate in the manner which Mr. Thanner desired, the Dock of the Bay closed.

In August 2014, Boone Kondylas, LLC acquired the property and business. After a period of interior building renovation, Mr. Ken Boone (managing member of the LLC and manager of the restaurant) re-opened the business as a restaurant in October 2014. The business operates seven days a week serving lunch and dinner. It generally opens at 11:00 a.m. and closes when the last patron leaves, usually between 9:00 and 11:00 p.m. The closing time is not uniform and depends on volume of patrons, the season and night of the week. There is a brunch on Sundays. The clientele is mature and family oriented. The Dock of the Bay has a liquor license and sells alcohol but the main focus of the business is serving meals. In fact, Mr. Boone indicated more than 80% of his sales are food and the remaining are alcohol. The Dock of the Bay has operated since Mr. Boone reopened it without and complaints to Baltimore County.

In April 2015, the Dock of the Bay arranged for a solo guitar solo player, Mark Alan, to provide music one weekend night to enhance the patrons dining experience.[3]

[3] Mr. Boone also testified that he had contacted an Oompah Band to appear for an Octoberfest event and a Sinatra Impersonator to appear. However, these were both cancelled. Mr. Allen had also been contacted by Mr. Boone's former partner (Donna Kondylas) to appear on New Year's Eve in 2014. (See Petitioner's Exhibit 13). But this event was also cancelled.

Shortly thereafter, an inspector from the Department of Permits, Approvals and Inspections (Code Citation Division) appeared at the restaurant and advised the manager that the playing of any music was not allowed and that the County would "close the restaurant down" if any music was played. Like other restaurants/taverns on Miller's Island, and indeed many throughout Baltimore County, Mr. Boone would like to provide music/entertainment to enhance his patrons' "dining experience". He testified that any outside entertainment would conclude at dusk and inside music (on the weekends) would end by 11:00 p.m. The entertainment would be tailored to the typical tastes of his family oriented and mature clientele.

ARGUMENT

I. The instant Petition is not barred by res judicata.

The doctrine of *res judicata* bars the litigation of a cause of action after it has already been litigated to a final judgment. *Gertz v. Anne Arundel County,* 339 Md. 261, 269 (1995); *DeLeon v. Slear,* 328 Md. 569, 580 (1992). Furthermore, *res judicata* may be applicable in administrative (quasi judicial) proceedings. *Batson v. Shiflett,* 325 Md. 684 (1992). *Res judicata* also bars re-litigation of claims that were, or could have been litigated in an earlier proceeding between the parties. *Batson* 325 Md. 684 (1992). In order to successfully establish a claim for *res judicata,* the following elements must be satisfied: (1) The parties in the present litigation should be the same or in privity with the parties to the earlier case; (2) the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction. *DeLeon,* 328 Md. at 580.

Res judicata does not apply if the cause of action or claim is different from the first case to the second. The nature of the claim is determined by the relevant facts as presented in each case.

A leading case on the application of res judicata to administrative (zoning) decisions is *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n 192 Md. App. 719 (2010)*. This was a Baltimore County case, in which the Board of Appeals considered two separate cases involving a commercial property located in Lutherville. The operative facts were as follows:

The "Galleria" commercial property is a 211,635 square foot commercial center primarily leased for offices, with retail on the first floor located adjacent to the intersection of York Road and Seminary Avenue in Lutherville. In 2003, the Galleria petitioned for variance and special hearing relief, seeking the approval of an amendment to its zoning/subdivision plan which had been approved in 1983. The requested zoning relief related to the parking provided at the site, including 14 spaces that had been added by the Galleria shortly before the filing of the petitions and without County approval. The petitions requested approval of the property's parking layout, including the newly added spaces. Ultimately, after proceedings before the Zoning Commissioner; and then the Board and Circuit Court on appeal, the relief requested was denied. The final decision on this case (a/k/a as "Seminary Galleria I") was issued on September 19, 2005.

On February 23, 2006, the owner of the center instituted "Seminary Galleria II" by the filing of zoning petitions (variance and special hearing). Again, the petitions

related to parking. The owner contended that Seminary Galleria II was not barred by the doctrine of res judicata because the Galleria (in the second case) was identified as a "shopping center" under the BCZR and that the regulations governing parking which were applicable to shopping centers were different than those applicable to a non-shopping center (which it was the prior designated use of the property).

Seminary Galleria II wound its way through hearing before the Zoning Commissioner, the Board of Appeals, the Circuit Court and the Court of Special Appeals. In a reported decision, the Court of Special Appeals affirmed the decision of the Circuit Court and found Seminary Galleria II barred by res judicata. In its comprehensive written opinion, the Court concluded that neither the facts nor law had changed in the time between Seminary Galleria I and Seminary Galleria II and that the second case was thus barred. Citing a prior decision of the Court of Appeals (*Whittle v. Board of Zoning Appeals 211 Md. 36 (1956)*, the Court of Special Appeals opined that "where the facts are subject to changes which might reasonably lead to an opposite result from that arrived at in an earlier case, and if there have been substantial changes in fact and circumstances between the first case and the second, the doctrine of res judicata would not prevent" a subsequent zoning application. See *Seminary, 192 Md. App. at 737* (citing *Whittle v. Board of Zoning Appeals, 211 Md. 36, 45 (1956)*).

The Seminary galleria opinion also concluded that the changes to the operative facts must be substantial. Citing *Woodlawn Ass'n v. Board 241 Md. 187* the Court of Appeals has stated that "substantial changes in fact and circumstances must be, indeed, substantial." Pg. 197. Similarly, in *The Chatham Corp v. Beltram 243 Md. 138 (1966)* the

Court rejected a second suit because "the facts underlying the previous denial remained unchanged" (Cited in *Seminary at 738*). Thus, it is clear that a substantial change in the material facts from one case to a second will preclude the operation of res judicata in an administrative proceeding.

In considering the applicability of res judicata, the relevant facts in this case are not, as the Protestants suggest, that the building footprint is the same, that the Property has not been improved since the first case, that the zoning is the same, etc. What is relevant is if the facts upon which the previous determination was made that the Dock of the Bay was a nightclub still exist. As clearly demonstrated through the evidence presented, the facts were substantially different in the first case (Fifth Street, LLC) than they are in the second case (Boone Kondylas, LLC). Further, the facts which have changed are operative and material to the controversy. In the first case, the Board of Appeals determined that the Dock of the Bay was a nightclub based upon the facts presented at that time regarding the operation as then conducted by its then owner.

Specifically, the Board considered the factors identified in the International Building Code which distinguish a nightclub and made the following findings:

- Lower interior lighting levels were in place when bands were playing (BOA Opinion, Pg. 5)
- Bands were playing "quite loudly" creating noise louder than would normally be associated with a restaurant use (BOA Opinion Pg. 5)
- A stage outside the restaurant was installed for use by entertainers (bands) when they play outside during warmer months (BOA Opinion, pg. 5)

- The business was open until 2:00 a.m. (BOA Opinion pg. 5)
- There were ill defined aisles between tables, particularly when music was played (BOA Opinion pg. 5)
- Dancing took place while bands were playing on a makeshift dance floor (BOA Opinion pg. 5)
- The serving of alcoholic beverages and food (BOA Opinion pg. 5)
- A high occupant load density (i.e. a crowded facility) (BOA Opinion pg. 5)

In the instant case and in contrast to the prior findings, the evidence established the following:

- Lighting levels will not change when entertainment will be provided.
- The nature of the entertainment is markedly different. The owner anticipates "solo acts" of adult contemporary music geared towards a mature crowd and not multi-piece bands.
- There will be no stage or stage accessories.
- The restaurant typically stays open no later than midnight and closes earlier on weekdays. The restaurant operates year round.
- The tables and seating are laid out to create defined aisles.
- There is no dance floor or dancing.
- The primary focus of the business is to serve meals, not provide entertainment.
- The restaurant is typically not over crowded or even at capacity.

Based upon the nature of the prior operation (and specifically its findings as to the nature of the operation) the Board determined the prior operation to be a nightclub. But the different nature of the operation compels a different finding here. The operation of the Dock of the Bay by Fifth Street, LLC was a nightclub with accessory food and drink. The operation of the Dock of the Bay by Boone Kondylas, LLC is a restaurant with proposed accessory entertainment to enhance the dining experience. The material facts support this significant difference between these distinct uses of this property.

The pragmatic and appropriate application of the principles of res judicata to the facts here leads to the clear conclusion that the current case cannot be barred. It is further noted that, in addition to restaurants, other permitted uses in the BL (i.e. hotels, country clubs and theatres) frequently provide entertainment (e.g. wedding receptions) as an accessory component to those primary uses. Such an accessory component is appropriate and may be allowed. The Board, based upon the material facts which now apply (which are different than before), may determine that accessory entertainment at the Dock of the Bay is appropriate and warranted. It may further define and limit that entertainment. But, it is contended, the Board must consider this issue and cannot wrongly apply the doctrine of res judicata to prohibit the current owner from having his "day in court" in order to fairly and objectively consider the issue presented. The strict application of res judicata sought by the Protestants and People's Counsel would forever bar even the consideration of entertainment to any activity at 9025 Cuckold Point Road, no matter the circumstances. This is not what res judicata was intended to limit.

In sum, this is not a res judicata case. Res judicata is intended to prevent a litigant from getting a second bite of the apple. The circumstances here are different. Although there is privity between Fifth Street LLC and Boone Kondylas, the operation of the business existing at Cuckold Point Road is different. The question presented in the prior case turned on the narrow question of the nature of the operation as then conducted. The Board (and Court of Special Appeals) did not rule that entertainment/music was not allowed in restaurants/taverns. To the contrary, the Court noted that such entertainment in restaurants was common. The question there was whether the then operation became a night club when the music started. The factual differences and inquiry here preclude the application of res judicata.

A final comment is in order about People's Counsel's and Protestants' repeated claims that Mr. Boone "knew or should have known" about the prohibition on entertainment by the prior case. As he clearly testified, he was the investor when Boone Kondylas LLC was founded and anticipated that his partners (Kondylas) would run the operation. When that relationship ended, he became the restaurant manager. As he indicated, he thought that the prohibition was "a hurdle that could be navigated" and that it was a restriction related to the liquor license which would be undone when the license was transferred.

More importantly, there is no "self imposed hardship" consideration in a special hearing case. The instant matter is not a variance. What the Petitioner knew or should have known is of no consequence. What is significant is that, like the hundreds of restaurants in Baltimore County, Mr. Boone is entitled to his day in Court to consider

the extent of a necessary part of the business (entertainment) common to many restaurants.

II. Live and recorded music/entertainment should be permitted at the Dock of the Bay as accessory to the restaurant use.

In the prior case, the Court of Special Appeals determined that Mr. Thanner's Dock of the Bay business was a "dual use." (CSA Opinion pgs. 19-22) Within a footnote on page one of its opinion, the Court clearly states that the Dock of the Bay functions as a "restaurant". (CSA Opinion, Footnote 1, Page 1). Notwithstanding this finding, the Court then goes on to opine that the business morphs into a nightclub use when the primary focus of the activity is to provide entertainment. The Court explicitly rejected Thanner's contention that the use must be one (restaurant) *or* the other (nightclub), holding that dual uses are permitted under the BCZR. (CSA Opinion, Page 20).

However, in reaching this conclusion, it is clear that not every restaurant that provides entertainment/music automatically becomes a nightclub. Obviously, it depends upon the nature of the activity; to wit, is the providing of entertainment the main focus of the business; or is it merely (as Mr. Boone characterized his intentions) an "enhancement of the dining experience." That a restaurant may provide entertainment without becoming a nightclub is manifest. But, when this entertainment becomes the primary focus of the operation, the use is no longer a restaurant or tavern (as permitted in the BL zone) but a nightclub, which is not allowed in that zone.

A "restaurant, standard" is defined in BCZR Section 101 as a "facility or part of a facility used *primarily for serving meals and beverages to persons seated at tables on the*

premises of the establishment." (emphasis added) The BCZR then goes on to define "fast food", "carry out" and "fast food, drive through" as other types of restaurants . That the Dock of the Bay is a standard restaurant cannot be disputed. The primary purpose of the business is to serve meals and beverages to patrons who are seated at tables on the premises.

A "nightclub" is defined in BCZR Section 101 as a "tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County." This definition no where mentions the providing of meals and beverages as part of a nightclub's business. It is thus apparent that the primary focus of a restaurant is to provide meals/beverages; whereas the primary focus of a nightclub is to provide entertainment.

Moreover, the nightclub definition incorporates the provisions of Baltimore County's Building Code. Baltimore County has adopted the model International Building Code as its Building Code. Chapter 3 of the International Building Code establishes "use and occupancy classifications" (attached hereto as Exhibit A). Set forth in Chapter 3 are a variety of use classifications, including business uses, educational uses, factory uses, mercantile uses, etc. Within Section 303 of Chapter 3 are listed "Assembly Group A" uses. Assembly Group A uses include, among others, uses of a building "for the gathering of persons for purposes such as civic, social or religious functions; recreation, food or drink consumption or awaiting transportation." Assembly group A uses are further categorized into addition subgroups. Assembly Group A-2, list

uses "for both food and/or drink consumption." The Uses in Assembly Group A-2 include banquet halls, casinos, nightclubs, restaurants, taverns and bars. These uses are grouped together within the same category because they share many of the same characteristics. The primary purpose of the Building Code is to ensure that buildings are constructed (and uses conducted therein) in a manner that promotes the public safety. The uses in Assembly Group A-2 include activities where alcohol is consumed, where patrons may be distracted and where there is a higher likelihood of injury or death in the event of fire or other calamity. The characteristics referenced above (e.g. lighting levels, the presence of a stage, etc.) are listed in the Building Code as characteristics of all of the uses in Assembly Group A-2. That is, both restaurants and nightclubs fall within the same category and sub-category; and share many of the same characteristics.

However, consistent with the BCZR (which by definition, stresses that restaurants primarily serve food and drink and nightclubs primarily entertain) the Building Code provides a distinction between nightclubs and restaurants. Specifically, within the commentary, the Building Code notes that "Group A-2 includes occupancies in which people congregate in high densities for social entertainment, including drinking and dancing (e.g. nightclubs, banquet halls, cabarets) ***and*** food and drink consumption (e.g. restaurants). Thus, notwithstanding their many similarities, both the BCZR and the Building Code recognize the difference between nightclubs (entertainment) and restaurants (food and drink).

In that Dock of the Bay is a restaurant, the question is then presented, "when it provides entertainment; does it become a nightclub?" The answer is dependent on the nature and degree of the entertainment provided. Is the entertainment an enhancement of the dining experience; or does it become focus of why customers patronize the business? Under the Dock of the Bay's current operation, it is averred that the entertainment proposed will be exclusively accessory to the restaurant operation and not the focus of the business.

The BCZR defines an "accessory use or structure" as a "use or structure which: (a) is customarily incident and subordinate to and serves a principle use or structure; (b) is subordinate in area, extent or purpose to the principal use or structure; (c) is located on the same lot as the principal use or structured served; and (d)contributes to the comfort, convenience or necessity of occupants, business or industry in the principal use or structure served . . ." That entertainment in a restaurant can be an accessory use is obvious. It squarely meets each of the four components of the definition. As was acknowledged at the hearing, many of the restaurants in the neighborhood have music or entertainment. The Board members can utilize their own life experience. Undoubtedly all have dined in a restaurant where there is music. This does not make these businesses nightclubs when music is playing.

The question in this case is one of degree. This operation is not Mr. Thanner's, nor does Mr. Boone want or intend it to be. The question presented here is to what extent the playing of music/entertainment should be allowed. An evaluation of the property and neighborhood to consider the impact of entertainment at Dock of the Bay

is warranted. First, although appreciative of their prior nightmare with Mr. Thanner, the neighbors themselves have unclean hands. The closest neighbors (and those who object the loudest) live on BL zoned property. That classification promotes business use. Moreover, the neighbors all moved into the neighborhood long after the Dock of the Bay was existing and operating. The neighbors concerns remind one of individuals who move into a community zoned RC 2 and then complain about the sounds, sights and smells associated with neighboring agricultural uses. When one builds a house in and/or establishes residency in a business zone and/or next to an existing business, one can reasonably expect impacts from that business. Finally, there are commercial and similar uses in the immediate area which already impact the residences in the area. The Islander Inn, Bill's Boats and Rowboat Willie's are all in the immediate area. The neighbors' testimony that the outside music at the neighboring Rowboat Willie's tiki-bar is acceptable while objecting to music at Dock of the Bay is without credibility.

Moreover, a closer examination of exactly what the neighbors are objecting to is warranted. There was a different level of opposition presented at the hearing. Mr. Wolinski wants nothing (entertainment wise) at the Dock of the Bay. Matt Chiapella objects to "outdoor music" (apparently indoor music is acceptable to him). Some of the Protestants seem to object to the commercial activity of Dock of the Bay. They testified in opposition to hearing patrons in the parking lot, indoor patrons who talk loudly, etc. But these occurrences will take place whether there is music or not. As noted above, Mr. Boone wants nothing more than what his competitors and typical restaurants have. As previously stated, he proposes music outdoor no later than dusk and on weekends

indoor (Friday and Saturday) no later than 11:00 p.m. He appreciates his neighbors concerns and wants to be a good neighbor.

The Board may condition any approval that it grants to Dock of the Bay which allows entertainment. It is within the clear authority of the Board (as with any quasi-judicial body) to limit, modify or condition the orders that it issues (See also BCZR § 501.7.) The question presented here is what condition should be attached to any approval. Mr. Boone has already offered the parameters of possible conditions/restrictions on the playing of music when he offered to limit entertainment based upon: A.) whether it was inside or outside; and B.) when it was being provided. As noted above, he is agreeable to requiring outdoor entertainment/music to conclude at dusk and indoor music to end by 11:00 p.m. It is to be noted that Mr. Boone's proposed limitation is consistent with that offered by the Department of Planning in their Zoning Advisory Committee comment (attached hereto as Exhibit B). Obviously, the objective evaluation from that agency recognizes the character of the neighborhood and the nature of the restaurant business.

It should further be noted that the testimony was consistent that activity inside the restaurant could not be heard but for when patrons were entering/exiting and doors were open. Thus, entertainment inside of the building will certainly not be disruptive to the neighbors.

The Protestants also endeavored to introduce evidence about the amount of noise permitted under law. However, the evidence that they attempted to introduce to establishment noise levels permitted under law was inaccurate. Baltimore County's

regulations as to noise are in Article 17, Title 3 of the County Code. The County's regulation sets out no specific measurable requirement (i.e. decibel level) but merely states that a person may not create noise that "unreasonably disturbs the peace, quiet and comfort of the neighboring inhabitants." (See BCC § 17-3-103, attached hereto as Exhibit C.1.) Obviously, the degree of reasonableness is highly subjective.

State law regarding noise is found in the Annotated Code of Maryland. Therein, (Environmental Article § 3-401, attached hereto as Exhibit C.2.) requires that the Department of the Environment shall adopt noise standards. These standards shall be based upon (among other considerations) the zoning of the area and the residential, commercial or industrial nature of the area at issue. (See § 3-401 (c) (1)). The State's noise standards are codified in the Code of Maryland Regulation (COMAR) at 26.01.03.02, attached hereto as Exhibit C.3. Within that section, maximum decibel levels are established for "*receiving land use categories*" (emphasis added). For industrial categories, the maximum decibel levels are 75 during both the day and evening. For commercial categories, such as the BL zone assigned to the Dock of the Bay and many of the neighboring properties, the maximum decibels allowed are 67 during the day and 62 at night, and for the residential categories, the maximum decibel level is 55 at night and 65 during the day. It is to be noted that these restrictions are based upon the "receiving land"; thus, sound measurements are to be taken at the property line. The Protestants' claims that mere conversation exceeds permitted noise levels is disingenuous. The noise is not to be measured where individuals are conversing, but at the property line. Moreover, the standard relates to "land use *categories.*" Thus, it is

apparent that it is not the use of the adjacent land which drives the decibel threshold, but the land use category of the adjacent property. As noted above, the adjacent residentially used properties are largely zoned BL. Moreover, the limits established in COMAR can be waived through a variety of exemptions, including for sound created at public gatherings under permit or permission of the local jurisdiction. Thus, the Board of Appeals, as an entity of the local jurisdiction, may provide for an exemption to these requirements.

As Mr. Boone testified, he would be willing to monitor, if the Board directs, the level of decibels generated by the Dock of the Bay. As he indicated, a manager of the restaurant is on duty at all times and monitoring of noise could be among his/her assignments. As required in COMAR, the measurements are to be taken at the property or zoning line and the Board could establish those parameters within its order. Whether this is an appropriate (or unwieldy) restriction is a decision left to the proper discretion of the Board. Nonetheless, in addition to monitoring where and when the entertainment is provided, this is a further option for the Board.

III. The Board has the jurisdiction to make findings and offer conclusions in this case

Obviously, upon a finding that res judicata does not bar the instant petition, the Board may enter any findings and orders that are based upon the evidence taken and in accordance with the law. Protestants raised, as an objection to this matter going forward, a claim that the Board cannot consider this matter. Relying on language in the decision by ALJ Beverungen (Page 2) the Protestants assert that the Board cannot render

any decision which would overrule the decision of the appellate court. This argument misses the mark. Petitioner does not seek to revisit the prior case. Petitioner acknowledges that Fifth Street LLC operated a nightclub on the property when it provided entertainment. Petitioner does not endeavor to re-litigate Fifth Street's operation and the Board's findings (and Court's conclusions) regarding the same. But the instant case is not about Fifth Street LLC. Instead, it is about the Dock of the Bay operation as currently conducted by Boone Kondylas LLC. As noted above, this is a different operation. To adopt Protestants myopic approach to the issue presented would forever preclude the Board from ever considering a case about a property that had previously been the subject of a prior zoning hearing. Zoning cases where prior site plans/orders are amended are common. Such a result is clearly not consistent with the law.

CONCLUSION

Wherefore Boone Kondylas LLC respectfully requests:

1. That the Board of Appeals find that Dock of the Bay is a restaurant and may have accessory entertainment to enhance the dining experience of its patrons;
2. That the Board of Appeals set the limits and conditions in the providing of entertainment by the Dock of the Bay to ensure that the use is appropriate for the locale; and

3. For such other and further relief as the nature of its cause may require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2016 a copy of the foregoing document was mailed via first class mail, postage prepaid to:

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- International Building Code
  - [2012 (Second Printing)]
- Chapter 3 - Use and Occupancy Classification
  - SECTION 301 GENERAL
  - SECTION 302 CLASSIFICATION
  - SECTION 303 ASSEMBLY GROUP A
  - SECTION 304 BUSINESS GROUP B
  - SECTION 305 EDUCATIONAL GROUP E
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  - SECTION 307 HIGH-HAZARD GROUP H
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  - SECTION 309 MERCANTILE GROUP M
  - SECTION 310 RESIDENTIAL GROUP R
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303.1 Assembly Group A.
303.2 Assembly Group A-1.
303.3 Assembly Group A-2.
303.4 Assembly Group A-3.
303.5 Assembly Group A-4.
303.6 Assembly Group A-5.

303.1 Assembly Group A.
303.2 Assembly Group A-1.
303.3 Assembly Group A-2.
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SECTION 303 ASSEMBLY GROUP A

303.1 Assembly Group A.

Assembly Group A occupancy includes, among others, the use of a building or structure, or a portion thereof, for the gathering of persons for purposes such as civic,social or religious functions; recreation, food or drink consumption or awaiting transportation.

303.1.1 Small buildings and tenant spaces.

A building or tenant space used for assembly purposes with an *occupant load* of less than 50 persons shall be classified as a Group B occupancy.

303.1.2 Small assembly spaces.

EXHIBIT
tabbies
A

The following rooms and spaces shall not be classified as Assembly occupancies:

1. A room or space used for assembly purposes with an *occupant load* of less than 50 persons and accessory to another occupancy shall be classified as a Group B occupancy or as part of that occupancy.

2. A room or space used for assembly purposes that is less than 750 square feet (70 m^2) in area and accessory to another occupancy shall be classified as a Group B occupancy or as part of that occupancy.

303.1.3 Associated with Group E occupancies.
A room or space used for assembly purposes that is associated with a Group E occupancy is not considered a separate occupancy.

303.1.4 Accessory to places of religious worship.
Accessory religious educational rooms and religious auditoriums with *occupant loads* of less than 100 are not considered separate occupancies.

303.2 Assembly Group A-1.
Assembly uses, usually with fixed seating, intended for the production and viewing of the performing arts or motion pictures including, but not limited to:

Motion picture theaters
Symphony and concert halls
Television and radio studios admitting an audience
Theaters

303.3 Assembly Group A-2.
Assembly uses intended for food and/or drink consumption including, but not limited to:

Banquet halls
Casinos (gaming areas)
Nightclubs
Restaurants, cafeterias and similar dining facilities (including associated commercial kitchens)
Taverns and bars

303.4 Assembly Group A-3.
Assembly uses intended for worship, recreation or amusement and other assembly uses not classified elsewhere in Group A including, but not limited to:

Amusement arcades
Art galleries
Bowling alleys
Community halls
Courtrooms
Dance halls (not including food or drink consumption)
Exhibition halls
Funeral parlors

Gymnasiums (without spectator seating)
Indoor *swimming pools* (without spectator seating)
Indoor tennis courts (without spectator seating)
Lecture halls
Libraries
Museums
Places of religious worship
Pool and billiard parlors
Waiting areas in transportation terminals

303.5 Assembly Group A-4.
Assembly uses intended for viewing of indoor sporting events and activities with spectator seating including, but not limited to:

Arenas
Skating rinks
Swimming pools
Tennis courts

303.6 Assembly Group A-5.
Assembly uses intended for participation in or viewing outdoor activities including, but not limited to:

Amusement park structures
Bleachers
Grandstands
Stadiums
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to the public but used mostly by police officers. After reviewing the code, the official cannot find a specific reference to a shooting gallery in Sections 303 through 312 or in the associated tables. The building official asks the designer for additional information about the activities to be conducted in the building and is told that there will be a small sign-in booth, patron waiting/viewing area and the actual shooting area. Based on this information, the building official can determine that the most logical classification of the building is Group A-3, assembly. This classification is based on the fact that the building is used for the congregation of people for recreation. A shooting gallery is similar in many respects to a bowling center, which is classified as Group A-3 (see Figure 302.1).

SECTION 303
ASSEMBLY GROUP A

303.1 Assembly Group A. Assembly Group A occupancy includes, among others, the use of a building or structure, or a portion thereof, for the gathering of persons for purposes such as civic, social or religious functions; recreation, food or drink consumption or awaiting transportation.

❖ Because of the arrangement and density of the occupant load associated with occupancies classified in the Group A assembly category, the potential for multiple fatalities and injuries from fire is comparatively high. For example, no other use listed in Section 302.1 contemplates occupant loads as dense as 5 square feet (0.46 m^2) per person (see Table 1004.1.1). Darkened spaces in theaters, nightclubs and the like serve to increase hazards. In sudden emergencies, the congestion caused by large numbers of people rushing to exits can cause panic conditions. For these and many other reasons, there is a relatively high degree of hazard to life safety in assembly facilities. The relative hazards of assembly occupancies are reflected in the height and area limitations of Table 503 that are, in comparison, generally more restrictive than for buildings in other group classifications.

There are five specific assembly group classifications, Groups A-1 through A-5, described in this section. Where used in the code, the general term "Group A" is intended to include all five classifications.

The fundamental characteristics of all assembly occupancies are identified in this section. Structures that are designed or occupied for assembly purposes must be placed in one of the assembly group classifications. There are buildings and spaces which are used for assembly purposes, but are not classified as Assembly occupancies. The "exceptions" to this rule include small assembly buildings, tenant spaces and assembly spaces in mixed-use buildings. These exceptions to the Group A classification are addressed in Sections 303.1.1 through 303.1.4.

303.1.1 Small buildings and tenant spaces. A building or tenant space used for assembly purposes with an *occupant load* of less than 50 persons shall be classified as a Group B occupancy.

❖ There are often small establishments that typically serve food and have a few seats that technically meet the definition of an assembly Group A occupancy but due to the low occupant load pose a lower risk than a typical assembly occupancy. These types of buildings and tenant spaces are to be considered as Group B occupancies when the occupant load is determined to be less than 50 persons. Examples of this include small "fast food" establishments and small "mom-and-pop" cafes or coffee shops.

303.1.2 Small assembly spaces. The following rooms and spaces shall not be classified as Assembly occupancies:

1. A room or space used for assembly purposes with an *occupant load* of less than 50 persons and accessory to another occupancy shall be classified as a Group B occupancy or as part of that occupancy.
2. A room or space used for assembly purposes that is less than 750 square feet (70 m^2) in area and accessory to

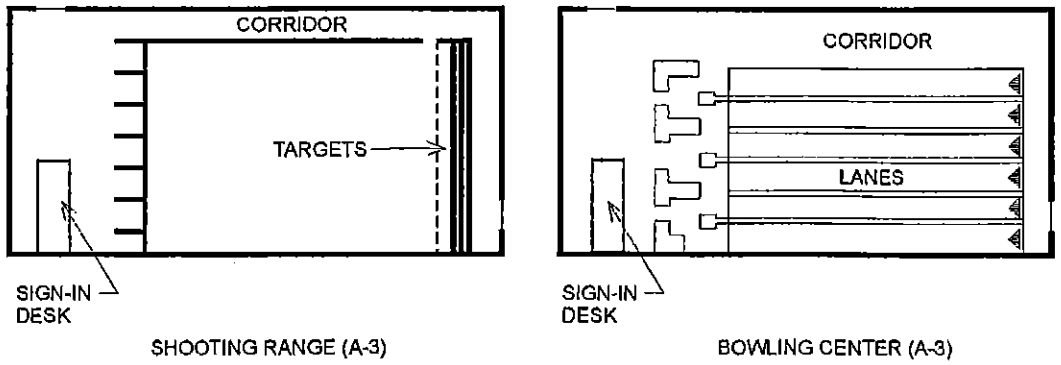


Figure 302.1
GROUP CLASSIFICATION

another occupancy shall be classified as a Group B occupancy or as part of that occupancy.

❖ Assembly rooms or spaces within larger buildings that house other uses may be classified as other than Group A depending on occupant load or the size of the space. Where the occupant load of the assembly space is less than 50, or where the floor area of the space used for assembly purposes is less than 750 square feet (65 m^2), a classification of other than Group A is permitted. In both cases, the purpose of the assembly space must be accessory to the principal occupancy of the structure (i.e., the activities in the assembly space are subordinate and secondary to the primary occupancy). If either the occupant load or floor area requirement is satisfied and the purpose of the assembly space is accessory to the principal occupancy, the space is permitted to either be classified as a Group B occupancy or as part of the principal occupancy. In either case, the assembly space is not required to be less than 10 percent of the area of the story on which it is located as is specified for accessory occupancies in Section 508.2 (IBC Interpretation No. 20-04).

The allowances given to assembly spaces in buildings containing multiple uses is a practical code consideration that permits a mixed-use condition to exist without requiring compliance with the provisions for mixed occupancies (see Section 508). Although the term "accessory" is used in describing the relationship of the uses, the intent of the term here is that the use of the space is related to, or part of, the main use of the space. These exceptions are not limited by the accessory use requirements found in Section 508.2.

Example 1: An office building, classified as a Group B occupancy, has a conference room used for staff meetings with an occupant load of 40 [see Figure 303.1.2(1)]. The occupancy classification of a conference room is generally considered a Group A-3. Since the occupant load of the conference room is less than 50 and its function is clearly accessory to the business area, the room is permitted to be classified the same as the main occupancy, Group B.

Example 2: A 749-square-foot (70 m^2) assembly area is located adjacent to a mercantile floor area of 5,000 square feet (465 m^2) [see Figure 303.1.2(2)]. Although the assembly use area occupies 15 percent of the 5,000-square foot (465 m^2) floor area, it does not exceed 750 square feet (70 m^2) and is not considered a Group A occupancy, but rather is classified as part of the Group M occupancy.

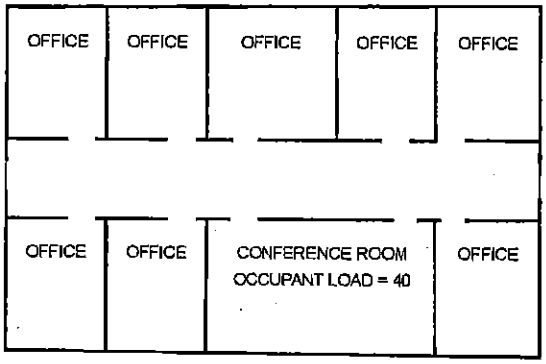
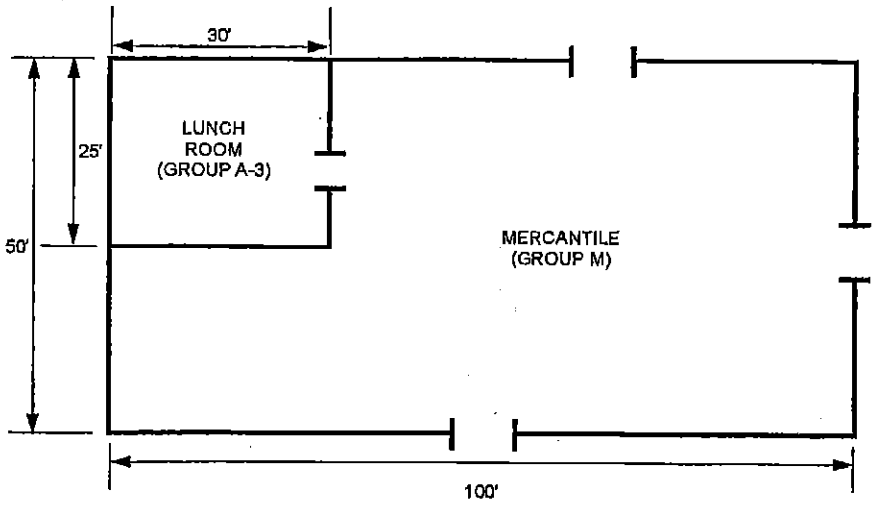


Figure 303.1.2(1)
ACCESSORY ASSEMBLY USE LIMITED BY OCCUPANT LOAD



For SI: 1 foot = 304.8 mm, 1 square foot = 0.0929 m^2.

Figure 303.1.2(2)
ACCESSORY ASSEMBLY USE GREATER THAN 10% OF FLOOR AREA BUT LESS THAN 750 SQ. FT.

303.1.3 Associated with Group E occupancies. A room or space used for assembly purposes that is associated with a Group E occupancy is not considered a separate occupancy.

❖ A typical educational facility for students in the 12th grade and below invariably contains many types of assembly spaces other than classrooms, including auditoriums, cafeterias, gymnasiums and libraries. These assembly spaces in a Group E building are not intended to be regulated as separate Group A occupancies, regardless of their floor area, but rather an extension of the Group E classification. It is worth mentioning, for these assembly functions to be considered part of the primary Group E occupancy, the assembly functions must be ancillary and supportive to the educational operation of the building. Otherwise, they would be classified into the appropriate Group A occupancy based upon their specific function. These assembly spaces, where classified as a portion of the Group E occupancy, are still considered as assembly in nature and must comply with assembly space requirements specified for accessibility and means of egress. However, often these school facilities are used for other functions such as a meeting of a community service organization or a community crafts fair. These types of uses fall outside of the intent of this section, and therefore such assembly spaces would need to be classified as a Group A.

303.1.4 Accessory to places of religious worship. Accessory religious educational rooms and religious auditoriums with *occupant loads* of less than 100 are not considered separate occupancies.

❖ Places of religious worship are listed as a Group A-3 occupancy. In addition to the worship hall, it is common for these facilities to contain smaller rooms used for educational activities. This provision allows such spaces to be considered as part of the Group A-3 classification rather than create a mixed-occupancy condition. For example, classrooms are normally classified as Group E if occupied by persons of ages through the 12th grade, or as Group B if the education is provided to adults. These types of classrooms could be considered as a part of the Group A-3 occupancy under the provisions of this section. It should be noted that this section does not modify the general provision requiring that assembly spaces are to be classified as Group A occupancies unless they have an occupant load of less than 50.

303.2 Assembly Group A-1. Assembly uses, usually with fixed seating, intended for the production and viewing of the performing arts or motion pictures including, but not limited to:

Motion picture theaters
Symphony and concert halls
Television and radio studios admitting an audience
Theaters

❖ Some of the characteristics of Group A-1 occupancies are large, concentrated occupant loads, low lighting levels, above-normal sound levels and a moderate fuel load.

Group A-1 is characterized by two basic types of activities. The first type is one in which the facility is occupied for the production and viewing of theatrical or operatic performances. Facilities of this type ordinarily have fixed seating; a permanent raised stage; a proscenium wall and curtain; fixed or portable scenery drops; lighting devices; dressing rooms; mechanical appliances or other theatrical accessories and equipment [see Figure 303.2(1)].

The second type is one in which the structure is primarily occupied for the viewing of motion pictures. Facilities of this type ordinarily have fixed seating, no stage, a viewing screen, motion picture projection booths and equipment [see Figure 303.2(2)].

Group A-1 presents a significant potential life safety hazard because of the large occupant loads and the concentration of people within confined spaces. The means of egress is an important factor in the design of such facilities. Theaters for the performing arts that require stages are considered particularly hazardous because of the amount of combustibles such as curtains, drops, scenery, construction materials and other accessories normally associated with stage operation. As such, special protection requirements applicable to stages and platforms are provided in Section 410 and Chapter 10.

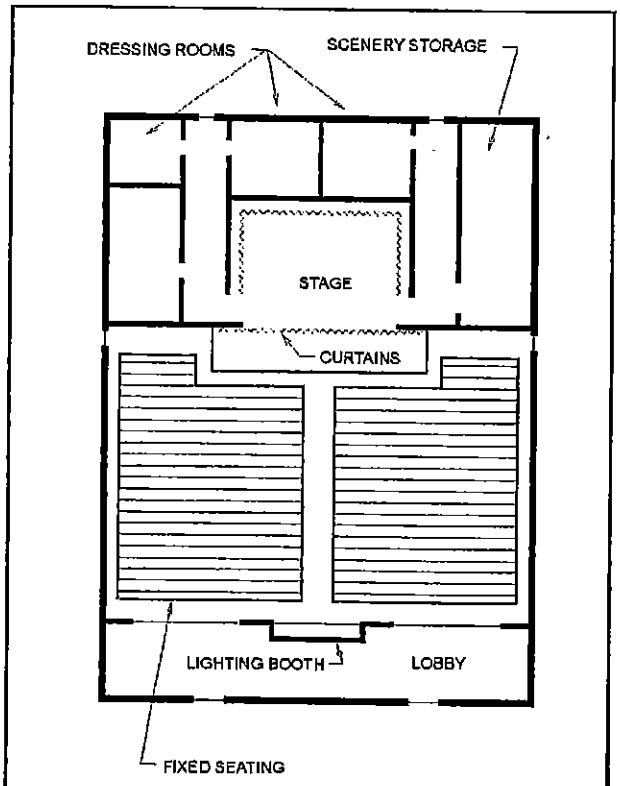


Figure 303.2(1)
GROUP A-1

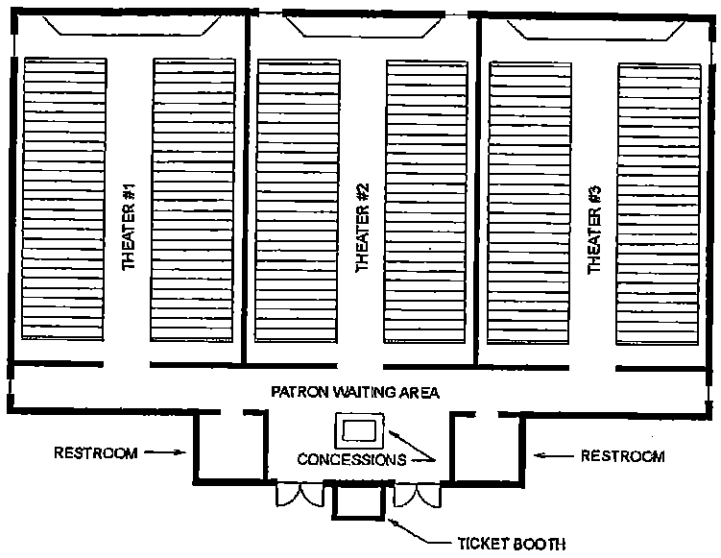


Figure 303.2(2)
GROUP A-1

303.3 Assembly Group A-2. Assembly uses intended for food and/or drink consumption including, but not limited to:

Banquet halls
Casinos (gaming areas)
Nightclubs
Restaurants, cafeterias and similar dining facilities (including associated commercial kitchens)
Taverns and bars

❖ Group A-2 includes occupancies in which people congregate in high densities for social entertainment, including drinking and dancing (e.g., nightclubs, banquet halls, cabarets) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:

- Low lighting levels;
- Entertainment by a live band or recorded music generating above-normal sound levels;
- No theatrical stage accessories;
- Later-than-average operating hours;
- Tables and seating arranged or positioned so as to create ill-defined aisles;
- A specific area designated for dancing;
- Service facilities for alcoholic beverages and food; and
- High occupant load density.

The fire records are very clear in identifying that the characteristics listed above often cause a delayed awareness of a fire situation and confuse occupants regarding the appropriate response, resulting in an increased egress time and sometimes panic. Together, these factors may result in extensive life and property losses. These characteristics are only advisory in determining whether Group A-2 is the appropriate classification. Often there are additional characteristics that are unique to a project, which also must be taken into consideration when a classification is made.

Not all restaurants have all of these characteristics. Most fast food restaurants will only have two or three of these, yet they are appropriately classified as Group A-2.

Example: The Downtown Club, a popular local nightclub/dance hall, features a different band every weekend [see Figure 303.3]. It is equipped with a bar

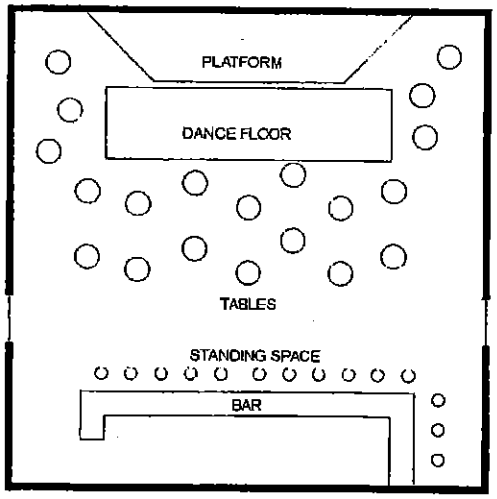


Figure 303.3
GROUP A-2

and basic kitchen facilities so that beverages and appetizers can be served. There is a platform for a band to perform, a dance floor in front of the platform and numerous cocktail tables and chairs. The tables and chairs are not fixed, resulting in a hazardous arrangement because there are no distinct aisles. When the band performs, the house lights are dimmed and spotlights are keyed in on the performers. The club is equipped with a sound system that is used at loud levels. The club is open until 3:00 a.m.—the latest time the local jurisdiction will allow.

From this description of the Downtown Club, one can readily see that the appropriate classification is Group A-2. Sometimes, however, it is not this easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the functions of the building and each area within the building.

Two of the specific uses listed as Group A-2 occupancies are typically not considered as facilities primarily used for food and/or drink consumption, however their classification as such has been deemed appropriate for varying reasons. The placement of casino gaming areas in the Group A-2 classification is because they share many hazard characteristics with nightclubs and, to some extent, the other uses in the category. The presence of distracting lights, sounds and decorations, along with the potential for alcohol consumption, create an assembly environment that is best addressed under the Group A-2 provisions. The classification is specific to the gaming areas of casino, therefore other related uses such as administrative, storage and lodging areas are to be individually classified based upon their specific use.

Commercial kitchens, when associated with a Group A-2 dining and drinking establishment, are also classified as Group A-2. Although commercial kitchens do not pose the same conditions and concerns as the other uses classified as Group A-2, their classification as such recognizes the relationship that exists between the dining and cooking areas. Providing a physical fire-resistive separation between the kitchen and the dining area that it serves is often found to be impractical. Assigning a single occupancy classification for both the commercial kitchen and its associated dining area eliminates any potential for an unnecessary mixed-occupancy condition. This single classification approach can also be applied where the occupant load of the dining area is below 50, allowing for a Group B classification. Under such circumstances, the kitchen would be considered an extension of the Group B dining facility. See also commercial kitchens in Group F-1.

303.4 Assembly Group A-3. Assembly uses intended for worship, recreation or amusement and other assembly uses not classified elsewhere in Group A including, but not limited to:

Amusement arcades
Art galleries
Bowling alleys
Community halls
Courtrooms
Dance halls (not including food or drink consumption)
Exhibition halls
Funeral parlors
Gymnasiums (without spectator seating)
Indoor *swimming pools* (without spectator seating)
Indoor tennis courts (without spectator seating)
Lecture halls
Libraries
Museums
Places of religious worship
Pool and billiard parlors
Waiting areas in transportation terminals

❖ Structures in which people assemble for the purpose of social activities (such as entertainment, recreation and amusement) that are neither classified in Group A-1 or A-2 nor appropriately classified in Group A-4 or A-5 are to be classified in Group A-3. Exhibition halls, libraries, dance halls (not including food and drink), places of religious worship, museums, gymnasiums, recreation centers, health clubs, fellowship halls, indoor shooting galleries, bowling centers and billiard halls are among the facilities often classified in Group A-3. Also, since they most nearly resemble this occupancy classification, public and private spaces used for assembly are often classified in Group A-3. These include large courtrooms, meeting rooms and conference centers. Similarly, lecture rooms located in colleges, universities or in schools for students above the 12th grade that have an occupant load of 50 or more are also classified in Group A-3, as well as structures in which people gather exclusively for worship and other religious purposes. Although such worship and religious purposes are without restriction to any particular sect or creed, the intent of the code is to limit Group A-3 classification to occupancies that are specifically related to worship services, devotions and religious rituals.

The fire hazard in terms of combustible contents (fuel load) in structures classified in Group A-3 is most often expected to be moderate to low. Since structures classified in Group A-3 vary widely as to the purpose for which they are used, the range of fuel load varies widely. For example, the fuel load in a library or an exhibition hall usually is considerably greater than that normally found in a gymnasium. While the code specifically addresses kitchens associated with Group A-2 restaurants and similar dining facilites, it is silent regarding accessory kitchens one might find associated with community centers or a fellowship hall of a place of religious worship. These kitchens should be considered carefully by the building official. Each facility and its use will be somehwat unique. The intensity and frequency of the use of the space for serving of food as well as the type of cooking equipment installed are important factors. The occasional use of the fellowship hall for a fundraising dinner where food is brought in and warmed is one end of the spectrum and may warrant keeping a Group A-3 classification. But when the same hall

becomes a daily charity "soup" kitchen, then Group A-2 classification is more appropriate.

303.5 Assembly Group A-4. Assembly uses intended for viewing of indoor sporting events and activities with spectator seating including, but not limited to:

Arenas
Skating rinks
Swimming pools
Tennis courts

❖ Structures provided with spectator seating in which people assemble to watch an indoor sporting event are to be classified as Group A-4. Arenas, skating rinks, swimming pools and tennis courts are among the facilities often classified as Group A-4. The distinguishing factor between Group A-4 and A-5 structures is whether the event is indoors or outdoors. Group A-4 facilities are limited to indoor structures only. The distinguishing factor between Group A-4 and Group A-3 facilities is the presence of a defined seating area. While Group A-3 facilities are indoors (i.e., tennis courts, swimming pools), they typically do not have a defined seating area in which to view the event. Only facilities that are both indoors and have a defined seating area are to be classified as Group A-4.

303.6 Assembly Group A-5. Assembly uses intended for participation in or viewing outdoor activities including, but not limited to:

Amusement park structures
Bleachers
Grandstands
Stadiums

❖ Structures classified in Group A-5 are outdoor facilities where people assemble to view or participate in social and recreational activities (e.g., stadiums, grandstands, bleachers, coliseums). In order to qualify as an outdoor facility, the structure must be one where the products of combustion are freely and rapidly vented to the atmosphere (i.e., a structure without enclosures that would prevent the free movement of smoke from the occupied area to the outside). Any recreation facility that has exterior walls that enclose the facility and a roof that fully covers the area would not be classified in Group A-5, but rather in Group A-3 or A-4 depending on whether a seating area has been provided. In the case of a structure with a retractable roof, the more stringent occupancy classification (i.e., Group A-4) would be required.

Since occupancies classified in Group A-5 are primarily viewing and sports participation areas, the fuel load associated with them is very low (i.e., the structure itself and seats). Since the fuel load present is relatively low and the expectation is that smoke will be quickly evacuated from the structure, the relative fire hazard of occupancies classified in Group A-5 is expected to be low. The life safety hazard from panic that might occur in an emergency, however, is a serious concern; hence, the capability of large crowds to exit the structure quickly and orderly during emergencies is an important design consideration (see Section 1028).

Both Group A-4 and A-5 occupancies will include a variety of uses that support the viewing of sports and similar activities. There will likely be luxury seating suites, locker rooms, toilet facilities and press boxes, which are clearly part of the overall uses of the facility. There will also be offices, food concession stands and merchandise stands which by their use are different occupancies, but are probably within the accessory occupancy limits established in Section 508.2. Because of the multitiered design of most Group A-4 and A-5 occupancies, the limit for accessory occupancies to account for less than 10 percent of the story will need to be creatively applied. There may be full-fledged restaurants that are in the same building, but may be open to guests not limited to those attending an event. A Group A-2 occupancy designation is likely the most appropriate classification and the mixed-occupancy conditions would most typically be addressed under the accessory occupancy provisions of Section 508.2.

SECTION 304
BUSINESS GROUP B

304.1 Business Group B. Business Group B occupancy includes, among others, the use of a building or structure, or a portion thereof, for office, professional or service-type transactions, including storage of records and accounts. Business occupancies shall include, but not be limited to, the following:

Airport traffic control towers
Ambulatory care facilities
Animal hospitals, kennels and pounds
Banks
Barber and beauty shops
Car wash
Civic administration
Clinic, outpatient
Dry cleaning and laundries: pick-up and delivery stations and self-service
Educational occupancies for students above the 12th grade
Electronic data processing
Laboratories: testing and research
Motor vehicle showrooms
Post offices
Print shops
Professional services (architects, attorneys, dentists, physicians, engineers, etc.)
Radio and television stations
Telephone exchanges
Training and skill development not within a school or academic program

❖ The risks to life safety in the business occupancy classification are relatively low. Exposure to the potential effects of fire is limited because business-type facilities most often have low fuel loads, are nor-

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon
Deputy Administrative Officer and
Director of Permits, Approvals and Inspections

DATE: August 4, 2015

FROM: Andrea Van Arsdale
Director, Department of Planning

SUBJECT: 9025 Cuckold Point Road

INFORMATION:

Item Number: 16-003

Petitioner: Ken Boone

Zoning: BL

Requested Action: Special Hearing

SUMMARY OF RECOMMENDATIONS:

The Department of Planning has reviewed the Petition for a Special Hearing to determine whether the Administrative Law Judge should approve amendments to previous restrictions imposed in Zoning Cases 07-144-SPH, CBA-06-044, CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music and other and further relief as may be required.

Testimony in the aforementioned cases established the fact of the prior use of the property as a "nightclub" which is not listed as an allowed use in the zone. Upon a site visit and discussions with the petitioner's counsel, the Department understands the future use of the property will be as a permitted restaurant that will have music, both live and reproduced, as an accessory component.

The Department has no objection to the granting of the petitioned zoning relief conditioned upon the following:

There shall be no dance floor, nor shall the restaurant become a "nightclub" as defined in the BCZR Section 101.1 and the Building Code of Baltimore County.

All accessory music shall be limited to reasonable sound levels so as not to disturb adjacent properties.

All accessory music shall be limited to the following hours or as may be otherwise established by the Administrative Law Judge:

a. No outdoor music after 10:00 p.m. Monday thru Saturday.
b. No indoor music after 12:00 a.m. (midnight) Monday thru Saturday.
c. No music after 8:00 p.m. on Sundays.

For further information concerning the matters stated herein, please contact Bill Skibinski at 410-887-3480.

Division Chief: Kathy Schlabach

AVA/KS

C: Bill Skibinski

EXHIBIT
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B

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Baltimore County Code

TITLE 3. NOISE

Section

17-3-101. Definitions

17-3-102. Legislative intent

17-3-103. Prohibited

17-3-104. Enforcement

17-3-105. Penalty

17-3-106. Responsibility of owner or landlord

§ 17-3-101. DEFINITIONS.

(a) *In general.* In this title the following words have the meanings indicated.

(b) *Domestic noise.*

(1) "Domestic noise" means noise related to human activity that is not created by machinery, tools, mechanical devices, or equipment used in connection with a business purpose.

(2) "Domestic noise" includes noises produced:

(i) Vocally;

(ii) With a radio receiving set, musical instrument, phonograph or any other device intended for the production or reproduction of sound; or

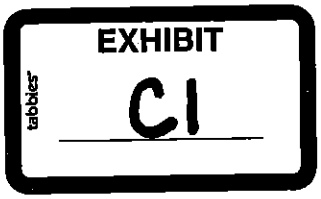
(iii) By a household tool or other equipment.

(c) *Landlord.* "Landlord" means the person who manages, leases, holds, or otherwise controls the property of an owner.

(d) *Owner.* "Owner" means the person listed on the tax records of the county as the property owner.

(1988 Code, § 20-45) (Bill No. 123-93, 1993, § 2; Bill No. 114-99, § 3, 7-1-2004; Bill No. 73-03, § 20, 7-1-2004)

§ 17-3-102. LEGISLATIVE INTENT.



The County Council intends to prohibit excessive domestic noise for the purpose of securing and promoting public health, comfort, convenience, safety, welfare, peace, and quiet in the county.

(1988 Code, § 20-46) (Bill No. 123-93, 1993, § 2; Bill No. 114-99, § 3, 7-1-2004)

§ 17-3-103. PROHIBITED.

A person may not create domestic noise or allow domestic noise to be created that unreasonably disturbs the peace, quiet, and comfort of the neighboring inhabitants.

(1988 Code, § 20-47) (Bill No. 123-93, 1993, § 2; Bill No. 114-99, § 3, 7-1-2004)

§ 17-3-104. ENFORCEMENT.

A police officer shall:

(1) Investigate complaints of alleged domestic noise violations occurring in the county; and

(2) File a written report if the investigation concludes that a violation of § 17-3-103 of this title has occurred.

(1988 Code, § 20-48) (Bill No. 123-93, 1993, § 2; Bill No. 114-99, § 3, 7-1-2004)

§ 17-3-105. PENALTY.

(a) *Criminal.* A person who violates § 17-3-103 of this title is guilty of a misdemeanor and on conviction is subject to:

(1) A fine not exceeding $500 or imprisonment not exceeding 90 days or both for a first offense; and

(2) A fine of not less than $500 or imprisonment not exceeding 90 days or both for any subsequent offense.

(b) *Civil.*

(1) (i) As an alternative to a criminal action, the police may issue a civil citation to a person who violates § 17-3-103 of this title.

(ii) The amount of the civil penalty may not exceed $500.

(2) The police may request that the county seek an injunction to prohibit the person from creating or allowing the creation of domestic noise.

(1988 Code, § 20-49) (Bill No. 123-93, 1993, § 2; Bill No. 114-99, § 3, 7-1-2004)

§ 17-3-106. RESPONSIBILITY OF OWNER OR LANDLORD.

(a) *Civil citation to owner or landlord.*

(1) A police officer may issue a civil citation to the owner or landlord of the building or premises from which domestic noise in violation of § 17-3-103 of this title emanates if more than three written reports have been filed under § 17-3-104 of this title, at one address, within a 60-day period.

(2) The police may issue additional civil citations for each subsequent report filed within 6 months after the initial report.

(b) *Notice.* Before issuing a citation, the Chief of Police or a designee shall send by certified mail or deliver written notice to the owner or landlord that three written reports have been filed under § 17-3-104 of this title within a 60 day period.

(c) *Penalty.* The amount of the civil penalty may not exceed:

(1) $500 for the first citation; and

(2) $750 for each additional citation issued within 6 months after the initial written report filed under § 17-3-104 of this title.

(1988 Code, § 20-50) (Bill No. 123-93, 1993, § 2; Bill No. 114-99, § 3, 7-1-2004)

WESTLAW

NOTES OF DECISIONS (7)

Validity
Private nuisance
Equitable relief
Target shooting
Review

West's Annotated Code of Maryland
Environment
Title 3. **Noise** Control
Subtitle 4. Rulemaking and Enforcement (Refs & Annos)

§ 3-401. Noise standards
West's Annotated Code of Maryland Environment Effective: March 14, 2016 (Approx. 4 pages)

Effective: March 14, 2016

MD Code, **Environment**, § 3-401

§ 3-401. **Noise** standards

Currentness

(a) Except as otherwise provided by law, the Department shall adopt **environmental noise** standards, sound level limits, and **noise** control rules and **regulations** as necessary to protect the public health, the general welfare, and property.

(b) In adopting **environmental noise** standards, the Department or a political subdivision that chooses to adopt **environmental noise** standards shall consider:

(1) Information published by the Administrator of the United States **Environmental** Protection Agency on the levels of **environmental noise** that must be attained and maintained in defined areas under various conditions to protect public health and welfare with an adequate margin of safety; and

(2) Scientific information about the volume, frequency, duration, and other characteristics of **noise** that may harm public health, safety, or general welfare, including:

(i) Temporary or permanent hearing loss;

(ii) Interference with sleep, speech communication, work, or other human activities;

(iii) Adverse physiological responses;

(iv) Psychological distress;

(v) Harm to animal life;

(vi) Devaluation of or damage to property; and

(vii) Unreasonable interference with the enjoyment of life or property.

(c)(1) In adopting sound level limits and **noise** control rules and **regulations**, the Department or the political subdivision shall consider, among other things:

(i) The residential, commercial, or industrial nature of the area affected;

(ii) Zoning;

(iii) The nature and source of various kinds of **noise**;

(iv) The degree of **noise** reduction that may be attained and maintained using the best available technology;

(v) Accepted scientific and professional methods for measurement of sound levels; and

(vi) The cost of compliance with the sound level limits.

(2) The sound level limits adopted under this subsection shall be consistent with the **environmental noise** standards adopted by the Department.

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(3) The sound level limits and **noise** control rules and **regulations** adopted under this subsection may not prohibit trapshooting or other target shooting on any range or other property in Frederick County that the Frederick County Department of Planning and Zoning has approved as a place for those sporting events.

(4) The sound level limits and **noise** control rules and **regulations** adopted under this subsection shall be as follows for residential heat pumps and air conditioning units:

(i) Residential heat pumps 75 dba; and

(ii) Residential air conditioning units 70 dba.

(5)(i) The sound level limits and **noise** control rules and **regulations** adopted under this subsection may not prohibit trapshooting, skeetshooting, or other target shooting between the hours of 9 a.m. and 10 p.m. on any range or other property of a shooting sports club that is chartered and in operation as of January 1, 2001.

(ii) This paragraph does not apply in Allegany County, Anne Arundel County, Baltimore City, Calvert County, Charles County, Garrett County, Howard County, Montgomery County, St. Mary's County, and Washington County.

(6)(i) Except as provided in subparagraph (ii) of this paragraph, the Department may not adopt sound level limits and **noise** control rules and **regulations** under this subsection that prohibit trapshooting, skeetshooting, or other target shooting between the hours of 9 a.m. and 10 p.m. in Allegany County, Anne Arundel County, Garrett County, or Washington County on any range or other property of a shooting sports club that is chartered and in operation as of January 1, 2005.

(ii) 1. Subject to the provisions of subsubparagraph 2 of this subparagraph, the Department may adopt sound level limits and **noise** control rules and **regulations** under this subsection that prohibit trapshooting, skeetshooting, or other target shooting between the hours of 9 a.m. and 10 p. m. in Allegany County, Anne Arundel County, Garrett County, or Washington County on any range or other property of a shooting club that the Department determines is not in compliance as of January 1, 2005 with **environmental noise** standards, sound level limits, or **noise** control rules and **regulations** adopted under this title.

2. A sound level limit or **noise** control rule or **regulation** adopted under this subsection shall allow trapshooting, skeetshooting, and other target shooting between the hours of 9 a.m. and 10 p.m. by a shooting sports club that the Department determines has become compliant with sound level limits and **noise** control rules and **regulations** adopted under this title.

(7)(i) Except as provided in subparagraph (ii) of this paragraph, in Howard County, the sound level limits and **noise** control rules and **regulations** adopted under this subsection may not prohibit the electronic amplification of sound at an outdoor concert venue with a capacity of over 15,000 individuals that:

1. Within the area that is included in a 0.25 mile radius of the venue, produces sound that is:

A. 95 dba or lower between 9:00 a.m. and 11:00 p.m.; and

B. 55 dba or lower between 11:00 p.m. and 11:30 p.m.; and

2. Within the area that is outside a 0.25 mile radius of the venue, produces sound that is:

A. 72.5 dba or lower between 9:00 a.m. and 11:00 p.m.; and

B. 55 dba or lower between 11:00 p.m. and 11:30 p.m.

(ii) 1. Except as provided in subsubparagraph 2 of this subparagraph, an outdoor concert venue with a capacity of over 15,000 individuals may not produce any electronic amplification of sound between 11:30 p.m. and 9:00 a.m.

2. The limitations concerning the electronic amplification of sound at an outdoor concert venue under subsubparagraph 1 of this subparagraph do not apply to an activity sponsored or authorized by the Howard County Public School System between 8:00 a.m. and 9:00 a.m.

(iii) Notwithstanding § 3-105(a)(1) and (2) of this title, the **noise** control ordinances, rules, or **regulations** adopted by Howard County and in effect on October 1, 2013, do not apply to the electronic amplification of sound at an outdoor concert venue in the county with a capacity of over 15,000 individuals.

(d)(1) This section does not authorize the Department to adopt **environmental noise** standards, sound level limits, or **noise** control rules and **regulations** that apply to **noise** from:

(i) Construction or repair work on public property;

(ii) Fire or rescue station alerting devices; or

(iii) In Frederick County or Frederick City:

1. A fair listed in the Maryland Agricultural Fairs and Shows Schedule that is maintained by the Maryland Agricultural Fair Board; or

2. Any other event held on the same grounds as a fair under item 1 of this item.

(2) **Noise** control rules and **regulations** that apply to Department of Transportation facilities shall be adopted by the Department of Transportation.

Credits

Acts 1982, c. 240, § 2; Acts 1982, c. 527; Acts 1983, c. 338; Acts 1987, c. 306, § 16; Acts 1988, c. 6, § 11; Acts 1997, c. 14, § 1, eff. April 8, 1997; Acts 2000, c. 425, § 1, eff. Oct. 1, 2000; Acts 2001, c. 628, § 1, eff. Oct. 1, 2001. Amended by Acts 2003, c. 239, § 1, eff. June 1, 2003; Acts 2005, c. 394, § 1, eff. July 1, 2005; Acts 2012, c. 360, § 1, eff. Oct. 1, 2012; Acts 2013, c. 421, § 1, eff. Oct. 1, 2013, Acts 2014, c. 45, § 1, eff. April 8, 2014; Acts 2016, c. 8, § 1, eff. March 14, 2016.

Formerly Art. 43, §§ 823, 824, 828, 830.

Editors' Notes

ADMINISTRATIVE CODE REFERENCES

Department of the **Environment**

- Occupational, industrial, and residential hazards, control of **noise** pollution, see COMAR 26.02.03.01 et seq.

LIBRARY REFERENCES

Health and **Environment** ⚭25.8.

C.J.S. Health and **Environment** §§ 61, 129, 137.

RESEARCH REFERENCES

Encyclopedias

Maryland Law Encyclopedia **Environmental Regulation**; Pollution Control § 11, Rights of Political Subdivisions.
Maryland Law Encyclopedia **Environmental Regulation**; Pollution Control § 62, **Noise** Standards.

Relevant Notes of Decisions (6) View all 7

Notes of Decisions listed below contain your search terms.

Validity

Statute that allowed Department of the **Environment** to continue imposing in some counties, but not in others, **noise** control **regulations** on shooting sports clubs, such as trapshooting club, that were not compliant with Department's existing **noise regulations** did not violate equal protection clause; the statute was rationally related to General Assembly's legitimate interest in promoting local preferences. Lonaconing Trap Club, Inc. v. Maryland Dept. of **Environment**, 2009, 978 A.2d 702, 410 Md. 326. Constitutional Law ⚭ 3723; **Environmental** Law ⚭ 316

Private nuisance

Evidence concerning gun fire **noise** generated by gun club was sufficient to establish that club was a private nuisance to its residential neighbors. Anne Arundel County Fish & Game Conservation Ass'n, Inc. v. Carlucci, 1990, 573 A.2d 847, 83 Md.App. 121, certiorari denied 580 A.2d 218, 320 Md. 800. Nuisance 33

Equitable relief

Even if gun club was exempt from Department of **Environment's noise regulations**, adjoining landowners were not precluded from seeking equitable relief from nuisance allegedly created by club's shooting activities. Code, **Environment**, § 3-101 et seq. Anne Arundel County Fish & Game Conservation Ass'n, Inc. v. Carlucci, 1990, 573 A.2d 847, 83 Md.App. 121, certiorari denied 580 A.2d 218, 320 Md. 800. Nuisance 21

Injunction issued by court to relieve adjoining landowners from nuisance created by **noise** emanating from gun club was not overbroad; court ordered that club design and implement **noise** abatement system for all of its facilities within six months. Anne Arundel County Fish & Game Conservation Ass'n, Inc. v. Carlucci, 1990, 573 A.2d 847, 83 Md.App. 121, certiorari denied 580 A.2d 218, 320 Md. 800. Nuisance 37

Target shooting

The 60 decibel sound limit required by Department of the **Environment regulation** prior to and on January 1, 2005, continued to apply to shooting sports clubs, such as trapshooting club, which were excluded from statutory exemption for existing clubs in applicable counties; amendment to statute giving Department authority to adopt **environmental noise** standards, which amendment stated that Department could adopt sound level limits prohibiting trapshooting, skeetshooting, and other target shooting between the hours of 9 a.m. and 10 p.m. in certain counties, did not abrogate Department's earlier **regulations** and did not require Department to reenact its **noise** control **regulations**. Lonaconing Trap Club, Inc. v. Maryland Dept. of **Environment**, 2009, 978 A.2d 702, 410 Md. 326. **Environmental Law** 327

Review

Trial court properly applied state **noise regulations** to gun club and adopted results of fast mode testing of **noise** levels from club's activities, in nuisance action arising from allegedly excessive **noise** emanating from club; expert related **noise** levels to existing statutory **regulation** to give trial court empirical standard by which to measure sound levels, and testified that fast mode method of testing would produce more accurate results. Anne Arundel County Fish & Game Conservation Ass'n, Inc. v. Carlucci, 1990, 573 A.2d 847, 83 Md.App. 121, certiorari denied 580 A.2d 218, 320 Md. 800. Nuisance 34

MD Code, **Environment**, § 3-401, MD ENVIR § 3-401
Current through Chapters 1 to 9, 16, 100, 103, 116 & 142 of the 2016 Regular Session of the General Assembly.

End of Document

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Code of Maryland Regulations
Title 26. Department of the Environment
Subtitle 02. Occupational, Industrial, and Residential Hazards
Chapter 03. Control of Noise Pollution (Refs & Annos)
.02. Environmental Noise Standards
MD ADC 26.02.03.02 Code of Maryland Regulations (Approx. 7 pages)

COMAR 26.02.03.02

.02. Environmental Noise Standards.

Currentness

A. Precepts.

(1) It is known that noise above certain levels is harmful to the health of humans. Although precise levels at which all adverse health effects occur have not definitely been ascertained, it is known that one's well-being can be affected by noise through loss of sleep, speech interference, hearing impairment, and a variety of other psychological and physiological factors. The establishment of ambient noise standards, or goals, must provide margins of safety in reaching conclusions based on available data which relate noise exposure to health and welfare effects, with due consideration to technical and economic factors.

(2) The environmental noise standards set forth here represent goals expressed in terms of equivalent A-weighted sound levels which are protective of the public health and welfare. The ambient noise levels shall be achieved through application, under provisions of laws or regulations or otherwise, of means for reducing noise levels including, but not limited to, isolation of noise producing equipment, dampening of sound waves by insulation, equipment modification and redesign, and land use management.

B. Standards for Environmental Noise - General.

(1) A person may not cause or permit noise levels which exceed those specified in this table except as provided in §B(2) or (3), or §C, of this regulation.

Table 1 Maximum Allowable Noise Levels (dBA)for Receiving Land Use Categories

Day/Night	Industrial	Commercial	Residential
Day	75	67	65
Night	75	62	55

(2) A person may not cause or permit noise levels emanating from construction or demolition site activities which exceed:

(a) 90 dBA during daytime hours;

(b) The levels specified in Table 1 during nighttime hours.

(3) A person may not cause or permit the emission of prominent discrete tones and periodic noises which exceed a level which is 5 dBA lower than the applicable level listed in Table 1.

(4) A person may not cause or permit, beyond the property line of a source, vibration of sufficient intensity to cause another person to be aware of the vibration by such direct means as sensation of touch or visual observation of moving objects. The observer shall be located at or within the property line of the receiving property when vibration determinations are made.

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(5) A person may not operate or permit to be operated an off-road internal combustion engine powered recreational vehicle, including, but not limited to, a dirt bike, an all terrain vehicle, a go cart, a snowmobile, or a similar vehicle, on private property closer than 300 feet to a neighboring residence or the associated curtilage, without the written permission of the affected resident, unless it can be demonstrated to the Department that the vehicle can be operated within the noise limits specified in Table 1 under §B(1) of this regulation.

C. Exemptions.

(1) The provisions of this regulation may not apply to devices used solely for the purpose of warning, protecting, or alerting the public, or some segment thereof, of the existence of an emergency or hazardous situation.

(2) The provisions of this regulation do not apply to the following:

(a) Household tools and portable appliances in normal usage during daytime hours;

(b) Lawn care and snow removal equipment (daytime only) when used and maintained in accordance with the manufacturer's specifications;

(c) Agricultural field machinery when used and maintained in accordance with manufacturer's specifications;

(d) Blasting operations for demolition, construction, and mining or quarrying (daytime only);

(e) Motor vehicles on public roads;

(f) Aircraft and related airport operations at airports licensed by the Maryland Aviation Administration;

(g) Boats on State waters or motor vehicles on State lands under the jurisdiction of the Department of Natural Resources;

(h) Emergency operations;

(i) Pile driving equipment during the daytime hours of 8 a.m. to 5 p.m.;

(j) Sound except those sounds that are electronically amplified, between 7 a.m. and midnight, created by:

(i) Sporting events (except trap shooting, skeet shooting, or other target shooting);

(ii) Entertainment events; and

(iii) Other public gatherings operating under permit or permission of the appropriate local jurisdiction;

(k) Rapid rail transit vehicles and railroads;

(l) Construction and repair work on public property;

(m) Air conditioning or heat pump equipment used to cool or heat housing on residential property; for this equipment, a person may not cause or permit noise levels which exceed 70 dBA for air conditioning equipment at receiving residential property and 75 dBA for heat pump equipment at receiving residential property;

(n) Household pets on residential property that are maintained in accordance with local zoning requirements;

(o) Except in Allegany, Anne Arundel, Baltimore City, Calvert, Charles, Garrett, Howard, Montgomery, St. Mary's, and Washington Counties, trap shooting, skeet shooting, or other target shooting between the hours of 9 a.m. and 10 p.m. on any range or other property of a shooting sports club that is chartered and in operation as of January 1, 2001;

(p) Trash collection operations between the hours of 7 a.m. and 10 p.m.

(q) Marina equipment used to move boats during the period from 7 am to 7 pm provided that the noise level does not exceed 80 dBA at 20 meters from the equipment.

(3) The events and gatherings under §B(2)(j) of this regulation include, but are not limited to, athletic contests, amusement parks, carnivals, fairs at fairgrounds, sanctioned auto racing facilities, parades, and public celebrations.

(4) In Frederick County or Frederick City, a fair listed in the Maryland agricultural fairs and shows schedule that is maintained by the Maryland Agricultural Fair Board, or any other event held on the same grounds and listed by the Agricultural Fair Board, is exempt from this chapter.

D. Measurement.

(1) The equipment and techniques employed in the measurement of noise levels may be those recommended by the Department, which may, but need not, refer to currently accepted standards or recognized organizations, including, but not limited to, the American National Standards Institute (ANSI), American Society for Testing and Materials (ASTM), Society of Automotive Engineers (SAE), International Electrotechnical Commission (IEC) and the United States Environmental Protection Agency (EPA).

(2) The measurement of noise levels shall be conducted at points on or within the property line of the receiving property or the boundary of a zoning district, and may be conducted at any point for the determination of identity in multiple source situations.

(3) Sound level meters used to determine compliance with Regulation .02 shall meet or exceed the specifications for Type II sound level meters.

Complete through Maryland Register Vol. 43, Issue 6, dated March 18, 2016.

COMAR 26.02.03.02, MD ADC 26.02.03.02

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BALTIMORE COUNTY
BOARD OF APPEALS

IN THE MATTER OF: Boone Kondylas, LLC
9025 Cuckold Point Road
15th Election District; 7th Councilmanic District

BEFORE THE BOARD OF APPEALS FOR BALTIMORE COUNTY

16-003-SPH

PROTESTANT'S MEMORANDUM

Protestants, Charlie Wolinsky, Brad Metheny, Bonnie Metheny, Matt Charpella, Wayne Waldman and Mike Kondylas, by and through their attorney, Francis X. Borgerding, Jr., files this Memorandum in Opposition to the Petitioner's proposed relief in the above-captioned case and states:

1. Res Judicata

The decision of the Law Judge for Baltimore County, John Beverungen, in his Opinion and Order (attached hereto for the Board's reference) with regard to the case found that the Petitioner's Petition for Special Hearing, pursuant to B.C.Z.R. 500.7 to amend previous restrictions imposed by case number 07-144-SPH-CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music be and is denied the requested relief under the Doctrine of Res Judicata. As Commissioner Beverungen stated, "I believe the Petition must also be denied based on res judicata. As discussed above, res judicata will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard." "But here I do not believe there have been significant changes, Petitioner is still proposing to operate a restaurant that would offer live or recorded music." Petitioner alleges that the use has changed. Pursuant to the factors stated in the International Building Code to determine that the property was indeed a nightclub. Petitioner alleges that under review of these characteristics, the use would be different than Fifth Street, LLC.

Per the Affidavit attached of Charles Wolinski, his contention is the use at this point is substantially the same although the Petitioner alleges that the music will be different it is still live or recorded music ... which the Court of Special Appeals found was prohibited from occurring on the site. Petitioner alleges that lighting levels do not change when entertainment will be provided. Pursuant to the Affidavit of Charles Wolinski, lighting levels are exactly the same Fifth Street, LLC operated.

2. Entertainment will be by live band or recorded music, there are no theatrical stage accessories, the hours of operation are limited, the tables and chairs are arranged exactly the same way, there are service facilities for alcoholic beverages and food. The Court of Special Appeals, on page one, dated July 9, 2010, in its decision the Court of Appeals stated at page three "A nightclub is defined as a tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is characterized as a nightclub by the Building Code of Baltimore County." The Building Code of Baltimore County relies on the factors listed above in the International Building Code to determine whether its use is a nightclub. Those factors apply to the Petitioner's proposed use as stated above. The Petitioner's proposed use seeks to provide live or recorded entertainment and thus qualifies as a nightclub under the Court of Special Appeals previous ruling. Petitioner's proposed use is, therefore, prohibited under the doctrine of res judicata.

Commissioner Beverungen also stated at page two of his October 22, 2015 Opinion and Order "As an initial matter, I do not believe the OAH has the authority to 'amend' restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the

Petition were appealed to the Board of Appeals, Circuit Court and then Court of Special Appeals. In an unreported opinion (No. 810, September Term 2009) the Appellant Court affirmed the Agency's findings, which necessarily included the conditions and restrictions found in those Orders. To amend those restrictions at this juncture would be akin to reversing the Appellate Court, which an administrative agency cannot do."

Under this logic, the Board is without authority to 'amend the restrictions found in the previous cases as Petitioner has requested.' The Petitioner is not actually asking for an amendment to the restrictions, the Petitioner is asking for reversal of the previous decision of the Court of Special Appeals. Accordingly, the Board is without authority to do so and the Petitioner's Petition should be denied.

Analyzing the elements of res judicata under the facts of the subject case, the Doctrine of Res Judicata applies. The Petitioner seeks to provide live or recorded music. That very music that was prohibited by the prior Court of Special Appeals ruling.

There was a final valid judgment on the merits by a court of competent jurisdiction in similar litigation. Therefore, the present case meets the definition of res judicata. *Deleon v. Slev*, 328 Md. 569 at 580. Commissioner Beverungen cited the *Seminary Galleria, LLC v. Dulaney Improvement Association*, 192 Md. App. 719 (2010).

This argument that the facts have changed does not have merit. See again Affidavit of Charles Wolinski and argument as indicated above.

TESTIMONY

Testifying on behalf of the Protestants were Charlie Wolinsky, Brad Metheny, Bonnie Metheny, Matt Charpella, Wayne Waldman and Mike Kondylas.

Charlie Wolinsky made the following points in his testimony.

My family and I have been going through this for seven years with Larry Thanner, now Ken Boone wants to do the same thing Larry was doing and call it something different.

It is the music that is the problem, not the restaurant. The last three years Larry ran the Dock of the Bay with no music there and there were no problems.

No way the Dock of the Bay can have music without disturbing the peace and tranquility of the neighbors.

The music negatively affects the quality of my family's life.

It is not just the sound from the music, it is everything that comes with it: large crowds, parking issues, and cheering after songs.

The Dock of the Bay is too close to homes to have live outdoor music.

The Liquor Board sets the decibel limit at 65 and the Dock of the Bay will be above that if they have live music.

The neighbors have a right to live in peace and quiet.

It does not matter how many people signed his Petition, you cannot allow the majority decide the rights of the minority.

Brad Metheny testified to the following points that this case has already been heard, appealed again and again and our position was supported throughout. He questioned whether the Dock of the Bay zoning was compatible for entertainment. Both Boone and Thanner owed a bar/restaurant with higher percentage of food sales yet neither can make it without live music.

Russ McClelland and Dorothea Reilly both testified on Boone's behalf. Both of their names are on the liquor license. McClelland even testified for Thanner in 2006 at the Liquor Board hearing.

Boone's name is NOT on the Dock of the Bay liquor license. Possibly not even a resident of Maryland. Not required to spend any hours at his business. He could operate as an absentee owner. Who is the responsible party. If he gets violations on his liquor license does he simply switch the people named on it?

Thanner started same way Boone wants to. Quiet and low key. Records would show that the complaints started slowly after and the process of dealing with it and getting the zoning enforced took approximately seven years. Something that no one wants to or should have to repeat.

Thanner moved his entertainment outside. The houses that were built were built next to a bar/restaurant. The Dock of the Bay only had outside dining. Thanner added the music. Starting on weekends. Then turned into longer hours, more frequent, louder, more people, then also on the inside from 9:30 until 1:30 a.m. Plus the large amount of loud people on the deck area, the pier and the parking lot.

Thanner moved a bar outside in the Spring of 2007. Now you also have people outside drinking because of the no smoking ban. And this all within from 75 feet to a couple hundred feet of people's homes.

All we as residents would have to look forward to from Spring until Fall are two bars side by side with live entertainment taking away all our rights to privacy and peace and quiet.

Bonnie Metheny made the following points in her testimony:

This issue has already been decided by the court. Asked the Board to uphold the order that is in place that if the Dock of Bay has live music in a B.L. zone, it becomes a nightclub not allowed in a B.L. zone.

This music issue has pitted neighbor against neighbor.

Boone allowed his Dock of the Bay Facebook followers to insult us and allowed our addresses to be published on the Dock of the Bay Facebook page making me feel very uncomfortable. By allowing this he is directly encouraging animosity with his patrons.

Boone, as a successful businessman and the president of two printing companies, did not do due diligence by checking the history/background before he bought the Dock of the Bay.

The police report from the Dock of the Bay during the time when Thanner had live music was given as an exhibit showcasing the number of 911 calls with noise being the loudest complaint.

I am against live inside/outside entertainment.

Mike Kondylas testified that Ken Boone was made aware prior to the time that he purchased the subject property that there were prior court rulings prohibiting music on the property.

3. **ARGUMENT**

Pursuant to the testimony of the Protestants above, the Protestants relayed to the Board what they went through during the seven years of operation of the Dock of the Bay by Larry Tanner. The Protestants indicate they are very apprehensive to have the issue arise again. The Protestants made clear that they feel that any outdoor live music will be disturbing to them. In addition, they indicated that indoor live music becomes a problem when the doors of the restaurant are open and the music level spikes at that point. The neighbors related the extensive disturbance the operation of music from the Dock of the Bay caused them. Wayne Waldman even alleged that he sustained a heart attack as a

result of the stress from the music emanating from the Dock of the Bay. In short, the Protestants do not want to revisit the disturbance which emanated from the Dock of the Bay in the past. The Protestants are fearful that even though the present Petitioner claims that music levels will not be disturbing to the neighbors that once you introduce music all of the problems that they had before will surface again.

As indicated above, the Protestants feel that the issue of live music from the property was thoroughly litigated seven years ago ending with a decision of the Court of Special Appeals which they feel should now be honored. Permitting live music from the subject property will only start the cycle of disturbance that they testified about all over again.

WHEREFORE, the Protestants pray that this Honorable Board:

A. Deny the Petitioners Petition to have live recorded music at the Dock of the Bay under the principal of Res Judicata;

B. That this Honorable Board deny Petitioner's requested relief; and

C. For such other and further relief as the nature of the cause may require.

FRANCIS X. BORGERDING, JR.
409 Washington Avenue, Suite 600
Towson, Maryland 21204
410-296-6820
ATTORNEY FOR PROTESTANTS

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 19th day of May, 2016, a copy of the foregoing was mailed, postage prepaid, to:

Larry Schmidt, Esquire
(via email)

Peter Max Zimmerman, Esquire
(via email)

FRANCIS X. BORGERDING, JR.

RE:	PETITION FOR SPECIAL HEARING 9025 Cuckold Point Road; SE/S Cuckold Point Road, 15' SW of c/line of 5th Avenue 15th Election & 7th Councilmanic Districts Legal Owner(s): Boone Kondylas, LLC By Ken Boone Petitioner(s)	*	BEFORE THE BOARD OF APPEALS FOR BALTIMORE COUNTY 2016-003-SPH

* * * * * * * * * * * * *

MEMORANDUM OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY

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* * * * * * * * * * * * *

MEMORANDUM OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY

Statement of the Case

On September 30, 2014, Boone-Kondylas, LLC ("B-K") acquired 9025 Cuckold Point Road from Fifth Street, LLC ("FSLLC"). On July 6, 2015, B-K filed this zoning petition for special hearing to try to legitimize music entertainment at the Dock of the Bay. The B.L. zone (Business-Local) does not permit nightclub use, as confirmed by the 2008 County Board of Appeals ("CBA") and 2010 final judicial orders. There has been no legislative change to the nightclub definition, area zoning, or area land use or characteristics. The County Council has thus accepted the nightclub prohibition.

B-K was about to restart this use, but a liquor inspector advised it is disallowed. Undeterred, B-K filed the present petition. We call this case "**DOB II**," and the previous 2006 litigation "**DOB I**." At administrative law judge (ALJ) John Beverungen's **DOB II** hearing, the same citizens protested as in **DOB I**. B-K labeled its music as an "accessory use;" just a request to "amend the restrictions." They wanted to avoid the **DOB I** CBA, Circuit Court, and Court of Special Appeals (CSA) decisions. These had concluded that musical entertainment is a prohibited nightclub use.

On October 22, 2015, ALJ Beverungen denied the petition. He found B-K could not avoid the preclusive *res judicata* doctrine. He wrote,

> "But here, I do not believe there have been significant changes. Petitioner is still proposing to operate a restaurant that would offer live music."

ALJ Beverungen also rejected B-K's claim that its music would be less disruptive,

> "The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played

during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010)."

B-K appealed. Based on testimony and exhibits presented to the CBA, the full record confirms our definitive conclusion that *res judicata* applies as a matter of law.

DOB I: The First Miller Island Conflict

"The past is never dead; it's not even past."
William Faulkner, Requiem for a Nun

In 2005, Matthew Ciarpella began to complain about the noisy music. CSA decision, page 7, fn 5. At that time, FSLLC (Lawrence Thanner, Thanner Enterprises, principals) owned and operated Dock of the Bay. Ciarpella's April 21, 2006 complaint led to enforcement citations in May, June, and August, 2006 and an August 23 hearing. FSLLC was found to be in violation.

Concurrently, on August 23, 2006, FSLLC filed a zoning petition for special hearing (as in the present case) to try to legitimize the use as a restaurant with accessory music, and thus not a nightclub. The Zoning Commissioner denied this petition.

FSLLC appealed both decisions to the CBA, where they were consolidated. In 2008, the CBA majority (Wescott, Grier) decided the entertainment use -- including indoor and outdoor music – constituted a nightclub under BCZR Sec. 101.1. This use is not permitted in the B.L. Zone. BCZR Sec. 230.1.A.1. Therefore, it is prohibited. BCZR Sec. 102.1; Kowalski v. Lamar 25 Md. App. 493 (1975). The CBA prohibited the music use and affirmed the enforcement order, still allowing the restaurant use.

The CBA unanimously (Stahl joining the majority) denied FSLLC's motion for reconsideration, which asked the CBA to explain the definitional criteria, to advise what sort of music they could play. The CBA declined to provide such advice, recognizing the intractability and difficulty of implementation or enforcement.

The Circuit Court (2009) and CSA (2010) both affirmed. See Fifth Street, LLC v. Ciarpella. CSA Judge Deborah Eyler delivered a brilliant opinion. She explained the nightclub use is a prohibited "dual use" and found ample evidence to support the CBA

decision. Judge Eyler also rejected FSLLC's belated argument that the county enforced the law unfairly and unconstitutionally here while other restaurants offered music. The CSA mandate ended the **DOB I** judicial review.

Unfortunately, FSLLC did not comply. This caused Baltimore County to file a complaint against Thanner Enterprises. This led the Circuit Court to issue the ensuing 2010 contempt order.

All the **DOB I** CBA, Circuit Court, and Court of Special Appeals decisions are in the current record as exhibits. Petitioner's Exh. 2A, 2b, 2C, 3, 4, 5.

The Boone-Kondylas Regime

"Double, double, toil and trouble.
Fire burn, and cauldron bubble."
W. Shakespeare, Macbeth

Boone-Kondylas, LLC ("B-K") was launched in 2014 to acquire Dock of the Bay. B-K has no track record. The principals were Kenneth Boone and Michael Kondylas. Boone lives near downtown Baltimore City. He had experience in business, but none with restaurants, taverns, music, or nightclubs. Kondylas resides on Millers Island, nearby on Millers Island Boulevard. He testified he knew Thanner and the DOB I litigation history. It seems likely he brought Thanner and Boone together.

On November 3, the Baltimore County Liquor Board approved the transfer of the Dock of the Bay's Class D (On-Sale) Beer, Wine, and Liquor License from Lawrence Thanner of Thanner Enterprises to Donna Lee Kondylas (Michael's wife) and Michelle Kondylas (Michael's daughter). There was thereafter dissension between Boone and Michael Kondylas. On March 2, 2015, the Liquor Board approved a change of corporate officers, from Donna and Michelle Kondylas to Russell McClelland and Dorothea Reilly. The liquor license allows operations until 2 A.M.

B-K's current corporate structure is unclear. Kenneth Boone presented as the controlling owner and officer. He made no mention of McClelland and Reilly's involvement. Nor was that revealed until Brad Metheny described the liquor license.

Boone testified he thought the prior history involved a "hurdle" which could be overcome, and that neither Thanner nor Kondylas told him the full story. But Kondylas

testified he told Boone the history. He also gave Boone the September 24, 2014 letter from Francis Borgerding, attorney for protestants, which described "long running court battles," and "that all previous zoning decisions still apply to the property." Separately, Denise Haas, President of the Millers Island Community Association, reports in her April 25, 2016 letter that, contrary to Boone's claim of previous ignorance, Boone called her in February, 2015 and was aware of the prior restrictions.

Whatever the state or degree of prior knowledge, B-K forged ahead with another zoning petition, initiating another round of litigation. B-K has since dedicated itself to circumventing the **DOB I** CBA and court orders. B-K has sought to distance itself from Thanner, who it portrays as the "bad owner."

B-K campaigned for support from customers, employees, and others. This is reflected in the petition drive. But this also stirred negative feelings toward affected neighbors, reflected in Bonita Metheny's testimony and Denise Haas' April, 2016 letter. The Dock of the Bay facebook page became a forum to identify and criticize the opposition. Ms. Haas did not wish to see a repeat of the community divisiveness and tension among neighbors and friends. Her letter reports facebook postings of the names, addresses, and phone numbers of those who oppose the B-K petition; and that she herself received a harassing message from a DOB employee.

The Dock of the Bay

"Looks like nothing's gonna change
Everything still remains the same
* * *
Sittin' on the dock of the bay.
Otis Redding, (Sittin' On) The Dock of the Bay

The place is the same as in the Thanner days. There is still the 2400 square feet interior, including restaurant, bar, and television sets. The capacity remains at 150-60. See CSA decision page 5. There are still the outdoor patio or "courtyard" and bar. There remain the transient boat slips for customer use. Ibid.

The hours are about the same. Like B-K, Thanner previously proposed to stop the music relatively early in the evening. The B-K website anyway has a closing time of 1 A.M. on weekends. The transferred liquor license allows operation until 2 A.M.

Oppression

"Get up, stand up, stand up for your rights,
Get up, stand up, don't give up the fight."
Bob Marley, Get Up, Stand Up

The adjacent citizens suffered through the **DOB I** years. Mr. Ciarpella, Charles Wolinski, Brad and Bonnie Metheny, and Patricia Waldmann all testified at the 2008 CBA hearing as "neighbors living approximately 100 to 250 feet from the Dock of the Bay." Page 6. These distances apparently relate to the location where music is played, not from the parking areas, which are immediately adjacent to most of their properties.

They came back to testify. Wayne Waldmann also testified. Suffice it to say they provided strong reasons not only to expose **DOB II** as more of the same, but also to convey the devastating impact on their lives and health. This begins with the inevitably loud music, "above normal sound levels." There is then the cheering and noise of patrons who drink alcoholic beverages. The crowd noise spills over to the parking lot at odd hours. The music comes from the courtyard and also from inside when the door is opened. The sound carries and magnifies depending on wind direction. The sound appears to reverberate into the houses and their yards. There are no significant obstructions to interrupt or mitigate the sound. It is credible that one of the citizens suffered a heart attack due in substantial part to stress from the persistent loud music.

There is also the serious adverse impact on property values. To illustrate, the Methenys own two lots at 2712, 2714 6th Street and their dwelling at 2704 6th Street, Brad testified that family members occupying 2712 had to move out because of the noise problems. The place is now rented. If B-K were allowed to restart musical entertainment, it would be very difficult for any residents to sell their dwellings.

This is a localized area with short distances from DOB to adjacent residences. Amplified music can even fill up a concert hall, sports arena, or stadium. It is not realistic or credible that B-K can provide music, especially live music, without recurrence of

major disturbances. Thanner had also tried to portray a soft, friendly operation in his **DOB I** testimony. He also begged the CBA to frame some sort of approval. The CBA did not buy it in 2008. There is less reason to buy into it now.

Res Judicata Overview: the Peace Process

"Cause out on the edge of darkness
There rides a peace train"
Cat Stevens, Peace Train

B-K's thrust is that its new ownership involves a substantial change in conditions compared to **DOB I**. But *res judicata* for zoning is based on the essential nature of the property, not on personality, style, or programmatic details. For a multitude of reasons, we shall show BK's assertion is delusive and without merit as a matter of law.

Res judicata applies to parties and privies in quasi-judicial administrative proceedings. Batson v. Shifflett 325 Md. 684, 701-04 (1992); Powell v. Breslin 430 Md. 52, 63-65 (2013); Fertitta v. Brown 252 Md. 594, 599-600 (1969); Seminary Galleria v. Dulaney Valley Imp. Ass'n 192 Md. App. 719, 736 (2010). A successor owner is in privity with a previous owner. 13 M.L.E. Judgments Sec. 123 (2016); Walzl v. King 113 Md. 550 (1910); cf. Kim v. Collington Center III 180 Md. App. 606, 615-20 (2008). This point is especially apt in zoning cases, where issues revolve around property use rather than the owner's identity or personality. City of Baltimore v. Poe 224 Md. 428 (1961).

The public policy underlying the doctrine is that it is unfair to put parties through repeat cases. It is also inimical and subversive to the efficient and proper administration of justice. In Batson, Judge Karwacki wrote, 325 Md. at 701-02

> In *United States v. Utah Constr. Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), the Court spoke particularly to the preclusive effect of administrative law rulings, stating that:
>
> > "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." [citations omitted].
>
> *Id.* at 422, 86 S.Ct. at 1560, 16 L.Ed.2d at 661. Thus, agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court."

The Supreme Court cited Utah Constr. Co. in Astoria Federal Savings & Loan Assoc. v. Solimino 501 U.S. 104, 107 (1991). Justice David Souter added,

> "Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. ... The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal ...."

The *res judicata* doctrine is accepted worldwide: *l'autorite de la chose juge* in French, *cosa juzgada* in Spanish. Indeed, it translates into virtually every legal language.

Here, we shall review the similarities between **DOB I** and **DOB II**. We cite the legislative support of the zoning legislation and map in place. We deconstruct B-K's zoning by plebiscite tactic. We dispel B-K's "accessory use" assertion. We then discuss the aggravating factor that nightclub use is a nuisance.

There will then follow a review of key Court of Appeals opinions. We dispose of B-K's fictitious claims of substantial change and other arguments. We conclude with recent Baltimore County *res judicata* cases.

Nightmare on 6th Street: The Second Miller Island Conflict
A Clinical Comparison of the Two Cases

"These are the years between
These are the years that were hard fought and won
Contracts torn at the edges, old signatures stained with tears
Seasons of war and peace, these should not be forgotten years
* * *
The hardest years, the darkest years, the roarin' years, the fallen years
These should not be forgotten years
* * *
We will remember, these should not be forgotten years"
Midnight Oil, Forgotten Years

The Miller Island citizens along 6th Street and adjacent to Dock of the Bay suffered through The First Miller Island Conflict. It was hard fought and won (2005-10), but not without adverse impact on health and welfare.

After a few years of relative peace and respite, B-K began the Second Miller Island Conflict. The conflict is reactivating the strife thought to be over and done, which should be over and done.

In our preliminary motion to dismiss, we reviewed the BCZR Sec. 101.1 nightclub definition's incorporated Baltimore County BOCA International Building Code criteria. We referred to the 2008 CBA majority's discussion, pages 7-13, the ensuing ruling on motion for reconsideration, and the CSA decision. We found no substantial change in circumstances. The full record just reinforces our conclusion. We elaborate,

(1) Low light levels. It is the custom and practice for any tavern to have low light levels. The evidence is that Dock of the Bay is operating as it did in Thanner's time, with low light levels in the late hours. Light levels only get lower when there is music entertainment. There are no glaring bright lights or spotlights. There is no basis to conclude any substantial change.

(2) Entertainment by a live band or recorded entertainment generating above-normal sound levels. Despite Thanner's assertion in **DOB I** that the music had been moderated to duos, steel bands, or island music, the CBA recognized the sound traveled to the adjacent dwellings and concluded its discussion on page 8,

> "There is no question that the bands do play at sound levels which extend beyond the four walls of the restaurant."

Stripped of its veneer, B-K's soft scenario of acoustic guitar music is no more convincing than Thanner's island music. Thanner could also have promoted acoustic guitar, and the result would have been the same. The **DOB I** CBA found that musical entertainment, especially live music, would generate above-normal sound levels. This is logical.

Indeed, we learned that acoustic guitar music is typically amplified; that B-K's first signing, Mark Alan, has a sound system; and that he could be heard from Rowboat Willie's as far away as Bay Drive. The technology for acoustic guitar and other music amplification just gets more powerful, as with technology in other areas of life.

B-K failed to mention there would be other eastside music groups. There inevitably would be other performers, from solo to bands, and other types of music.

Given B-K's relentless petition drive to mobilize popular support, there is no doubt that patrons would demand the excitement of loud music typical of late night entertainment. In this context, the "mature audience" scenario is fictitious.

Another factor is B-K's portrayal of the opposition as obstructionists. If music were allowed, and Pandora' Box opened, any complaints will be met with disdain.

Adjacent residents Wolinski, Metheny, and Ciarpella live right next to the Dock of the Bay parking lot and within 40-50 yards of the outdoor patio area. Even the Waldmanns could hear the music 100 yards away, the length of a football field. We reiterate that amplified music can fill up a hall, arena or stadium. There is also the cheering and crowd noise, and the spillover into the parking lot.

It would be delusive to find any substantial change in conditions to suggest moderate or normal sound levels. It would only be worse.

(3) No theatrical stage accessories. As in **DOB I**, there do not appear to be any significant stage accessories. The physical facility is the same.

(4) Later than average operating hours. In **DOB I**, the CBA found the typical tavern operating hours to be later than average. Thanner had said he was stopping the music early in the evening, but this did not matter. The CBA found Dock of the Bay is a tavern which maintains the Class D liquor license, allowing service until 2 A.M.

B-K, like Thanner, has suggested it would stop service some time before midnight. But it is delusive to believe that, if allowed, the music entertainment would end at an early hour. The B-K website lists a closing time of 1 A.M. on weekends.

The average restaurant which serves dinner, even with incidental liquor, closes by 9 P.M or 10 P.M. if not earlier. Facilities with significant bar business stay open later. Dock of the Bay is a tavern with such business. If accompanied by music, the late hours would only increase as crowds energize. Again, it would be delusive to find any substantial change in circumstances which would moderate the operating hours.

(5) Tables and seating arranged or positioned so as to create ill-defined aisles. The CBA found in **DOB I** that the tables and seating appeared mainly to be arranged in

normal defined aisles, so there was no issue there. It is unclear what will happen to the aisles if B-K is allowed to have music and attracts the large crowds which it anticipates.

(6) Specific area designated for dancing. The CBA found no designated area for dancing in **DOB I**. It is unclear whether B-K would clear an area for its crowds.

(7) Service facilities for alcoholic beverages and food. The CBA found this to be present in **DOB I**, and the same situation plainly exists for the current case.

(8) High occupancy load density. The CBA noted the **DOB I** seating capacity at 150-60, a high occupancy load density. There is still the same facility with the same capacity. With outdoor entertainment, it is likely that the capacity could be exceeded.

The motion for reconsideration. In **DOB I**, Fifth Street asked the CBA to provide guidance on the above criteria. The CBA declined to give an advisory opinion. To the extent B-K wants the CBA to give some conditional approval, it is similar to **DOB I**'s reconsideration request. It should similarly be denied.

The CBA found in **DOB I** that six of eight nightclub criteria were satisfied: 1, 2, 3, 4, 7, and 8, and that this was sufficient to define the nightclub use. Judge Eyler agreed.

The CBA thus definitively disallowed musical entertainment, including live music. The decision did not depend on personality, style, type of music, type of audience, programming, performance times, or other details. Like B-K, Thanner tried chameleon-like to put across a moderate image. But a leopard cannot change its spots. When you have a tavern with serious music entertainment, you have a nightclub.

There is simply no substantial change in circumstances. Indeed, B-K's relentless drive for approval suggests the nightclub use will be more intense. Once approved in any way, shape, or form, the conditional inch would become a mile. There is no practical way to exercise control. There is no effective way to enforce a conditional approval. It was difficult enough to deal with **DOB I**.

The Legislative Sound of Silence Post-DOB I

"The sound of silence ..." Simon and Garfunkel, The Sound of Silence

FSLLC's argued also that the nightclub definition is overbroad. But the CBA majority disagreed, observing that any such complaint could be taken up with the County Council.

The CBA wrote at page 13,

> "The Board is not unmindful that the definition of a nightclub, under BCZR, can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.L. zones, might be considered "nightclubs" under the present criteria of the BCZR. It is not for the Board to change the definition but for the County Council to consider."

At the CSA, Judge Eyler made the same point, at page 21,

> "Finally, FSLLC echoes the concerns expressed by both the majority and dissenting members of the Board that the definition of a nightclub under the Zoning Code is extremely broad. We agree with the Board majority that this is a matter for the Baltimore County Council to address if it is deemed necessary. "The 'wisdom or expediency' of the [zoning ordinance] in its current form is not a matter for judicial intervention." *Lonoconing Trap Club, Inc. v. Md. Dep't of the Env't*, 410 Md. 326, 349 (2009)(quoting *Salisbury Beauty Schools v. State Bd. Of Cosmetologists*, 268 Md. 32, 48 (1973))."

On appeal, FSLLC also argued it was unfair to enforce the law against Dock of the Bay, while other restaurants supposedly could play music without interference. They recast the issue as a violation of due process and unconstitutional discriminatory enforcement. Judge Eyler found the issue not preserved. CSA decision pages 22-23. She added that Fifth Street '... cites to no Maryland authority for its propositions." Page 23.

The Court of Appeals subsequently confirmed that Baltimore County enforcement authorities may exercise discretion in choosing which violations to pursue, Falls Road Comm. Ass'n v. Baltimore County 437 Md. 115, 141-45 (2014).

To repeat, the County Council has not changed the nightclub definition or the zoning map classifications for Dock of the Bay and the neighborhood. In Washington Suburban Sanitary Comm'n v. C.I. Mitchell and Best 303 Md. 544, 559 (1985), the Court upheld an administrative interpretation undisturbed by subsequent legislative activity.

> "This legislative acquiescence in the administrative construction gives rise to a presumption that the administrative interpretation is correct."

See, e.g. Sinai Hospital v. Dep't of Employment 309 Md. 28, 46 (1987). Where an administrative interpretation or ruling results from a contested adversary proceeding, is publicly established, and thus is well known to the legislature, it is entitled to great weight across the board. Magan v. Medical Mutual 331 Md. 535, 546 (1993).

The County Council could have changed the law or map to allow music at Dock of the Bay and/or other B.L. Zone locations. The Council did no such thing. The CBA decision applies across the board. It is conclusive as to Dock of the Bay.

Zoning by Plebiscite Redux

"One great object of the Constitution was to restrain majorities from oppressing minorities or encroaching upon their just rights."
James K. Polk, President

Thanner cited and drew on support of patrons and others. B-K produced its petitions. But zoning decisions are not subject to a plebiscite. A majority, no matter how large, may not disregard the rule of law or suppress minority rights.

We wrote in in Geddes/Riffin, Circuit Court Case No. 03-C-14-013332, defending the CBA decision which denied another "accessory use" petition,

> "The Riffins have sought solace in the support of Appellant Will Geddes and some others who did not attend the hearing but signed affidavits. Apart from the debatable status of absentee affidavits, this would not justify the petition.
>
> The Court of Appeals held long ago that zoning decisions are not subject to a plebiscite by neighbors. Benner v. Tribbitt 190 Md. 6, 20 (1948), citing, *inter alia,* Eubank v. City of Richmond 226 U.S. 137 (1912). While Benner addressed a situation where various neighbors opposed a building permit for a gas station, the principle applies equally to any neighborhood opinion, whether favorable or unfavorable. So, in Cabin John Limited Partnership v. Montgomery County Council 259 Md. 661, 674 (1970), the Court sustained the trial judge's exclusion of a market survey, on the ground that it was equivalent to a plebiscite. Judge Smith there cited and quoted Benner as the main case, with subsequent iterations in Smith v. Board of County Comm'rs 252 Md. 280, 285 (1969); Mayor & Council of Rockville v. Cotler 230 Md. 335, 340 (1963); and Montgomery County v. Scrimegour 211 Md. 306, 313 (1956)."

In Riffin, unlike here, there was actually no evidence that the activities were disturbing the neighbors. Even so, neighborhood support could not overtake the rule of law.

Circuit Judge Susan Souder agreed. She wrote, while affirming the CBA's denial,

> "This Court acknowledges that the Riffins obtained and introduced into evidence at the hearing before the ALJ letters from many neighbors who do not take issue with the Riffins' equipment or use of their property. It seems that Mr. Riffin is a good neighbor to some, plowing driveways and moving felled trees for certain neighbors. However, Mr. Riffin's neighborliness is not the issue before this Court. Also, it was apparently one or more complaints that triggered the Riffins' citations, which led to the Settlement Agreement between the Riffins and the County and the Riffins' Petition for Special Hearing. Transcript at 87:18-22; 115:23-24."

In contrast, there is a disturbance here, with a tense atmosphere. The Dock of the Bay facebook page functions as a forum to identify and criticize the opposition. If not for the rule of law, the 6th Street citizens would have no protection.

Accessory Use Redux

B-K has tried to rationalize its music as "accessory" to a permitted restaurant. Thanner tried this in **DOB I.** Judge Eyler disposed of this contention. CSA pages 19-21. She confirmed the impermissible nightclub use constituted a dual principal use. It could not be covered up as a mere "accessory use." ALJ Beverungen concurred here.

The Court of Appeals has rejected similar efforts to rebrand uses. St. Clair v. Colonial Pipeline 235 Md. 578, 582-83 (1964), prohibited storage of petroleum products may not be renamed as conditionally permitted public utility use in agricultural district; Smith v. Miller 249 Md. 390 (1968), prohibited sawmill may not be rebranded as conditional processing of farm products permitted in agricultural district; Arundel Supply Corp. v. Cason 265 Md. 371, 377-78 (1972), prohibited washing, screening and batching of materials trucked in from other places may not be rebranded as accessory to permitted excavation of gravel, especially where the use is listed as a principal special exception.

We dealt with another fictitious "accessory use" suggestion in Geddes/Riffin. 2014-094-SPH. We discussed the BCZR Sec. 101.1 definitional element: "(a) is customarily incident and subordinate to and serves a principal use..." We cited Dampman v. City of Baltimore 231 Md. 280 (1963) to clarify the meaning of "incidental" is "appertaining, subordinate, or casual thereto." 231 Md. at 286. As reflected by the intensity of the current litigation's intensity, there is nothing "incidental," or "appertaining, subordinate, or casual," about the music in controversy.

The CBA rejected the Geddes/Riffin accessory use claim in its November 7, 2014 opinion, pages 7-10. The Circuit Court affirmed on December 22, 2015, addressing accessory use on pages 8-9. The case is currently on appeal at the CSA.

An Aggravating Factor: the Nuisance Dimension

"The right thing in the wrong place." Euclid v. Ambler Realty Co.

The law of nuisance focuses on substantial interference with the enjoyment of property rights. It is one cornerstone of zoning law. The Supreme Court wrote in Village of Euclid v. Ambler Realty Co. 272 U.S. 365, 387-88 (1926),

> "The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim 'sic utere tuo ut alienum non laedas,' which lies at the foundation of so much of the common low of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. Sturgis v. Bridgeman, L. R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Radice v. New York*, 264 U.S. 292, 294, 44 S. Ct. 325, 68 L. Ed. 690."

Zoning law allocates and controls uses in different zones. Zoning can provide a margin of safety to prevent uses which tend to affect adjacent property owners adversely.

There are other purposes of zoning law. Based on planning, public works, fiscal and other public interest considerations, zoning may limit uses which are not necessarily nuisances. So, even if this Dock of the Bay nightclub use were not a nuisance in this locality, it would still be prohibited. Because it has been and is by its nature so disturbing, this is an aggravating factor. Of all the zoning cases involving *res judicata*, this use strikes the cruelest and unkindest cut of all.

Maryland Court of Appeals Decisions on Substantial Changes in Conditions

"Please don't bother trying to find her
She's not there."
The Zombies, She's Not There

In 1936, the Court of Appeals applied *res judicata* to zoning case for a proposed substation post office in a residential zone. Mayor & City Council v. Linthicum 170 Md. 245 (1936). The Court observed "... there had been no change in the proposal, either in the use planned, or in the neighborhood conditions; and there was none in the relevant ordinances." Citing Linthicum, the Court in Bensel v. Mayor and City Council 203 Md. 506 (1954), similarly implemented the doctrine to sustain dismissal of a complaint to allow a nonconforming business use. Four years previously, there had been a final court judgment sustaining the Zoning Commissioner's permit denial.

Whittle v. Board of Zoning Appeals of Baltimore County 211 Md. 36 (1956), attached, addressed the matter in depth. This involved a special permit for a funeral home on York Road, Towson. In 1949, there had been a prior application, based on need, population increase, and lack of proportionate increase in funeral homes. Area residents had opposed the project based on its effect on enjoyment of their homes and on traffic. Upon judicial review of the CBA approval, the Circuit Court had reversed.

Despite this final denial, the contract purchasers acquired the property. In 1954, they filed a second petition. They adduced testimony that the neighboring church supported the petition; experts said there would be no adverse impact on traffic and parking, and no decrease in area property values or adverse psychological impact; there was more neighborhood commercial activity; and there was greater increase in population than previously. 211 Md. at 40-41. The neighbors still opposed the application, finding no need, that the use would be commercial, and it would still affect property values. The BZA granted the second petition; and the Circuit Court affirmed.

The Court of Appeals reversed. Chief Judge Brune wrote, 211 Md. at 45,

> "The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions. See Bassett

on Zoning (2nd Ed., 1940), pp. 119-120; Yokely on Zoning Law and Practice (1953 Ed.), § 128; 168 A.L.R. 124; St. Patrick's Church Corporation v. Daniels, 113 Conn. 132, 154 A. 343; Burr v. Rago, 120 Conn. 287, 180 A. 444; Rommell v. Walsh, 127 Conn. 272, 16 A.2d 483; Rutland Parkway, Inc. v. Murdock, 241 App.Div. 762, 270 N.Y.S. 971. This rule seems to rest not strictly on the doctrine of *res judicata*, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.

In the instant case we have, of course, a prior court determination and the question of *res judicata* is directly involved.

Many zoning questions do not rest upon immutable facts, St. Patrick's Church Corp. v. Daniels, supra, and the application of the rules of *res judicata* is not always so easy and so clear cut as in the Linthicum and Bensel cases. It is our view that where the facts are subject to changes which might reasonably lead to an opposite result from that arrived at in an earlier case, and if there have been substantial changes in facts and circumstances between the first case and the second, the doctrine of *res judicata* would not prevent the granting of the special permit sought by the appellees. They contend that such changes have occurred, and we shall now proceed to examine the alleged differences.

The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County; (3) decreased opposition of neighbors and some support by them; (4) additional conditions attached to the granting of the permit."

The Court then explained in detail why petitioners' assertions of changed conditions were not sufficiently substantial to escape the previous denial. It is noteworthy that the alleged changed conditions in Whittle were factual, not speculative, and looked more serious than any purported changes B-K manufactures here. But they were still rejected.

Woodlawn Area Citizens Ass'n v. Board of County Comm'rs 241 Md. 187 (1966) involved a zoning reclassification from zoning for detached houses to a zone allowing garden apartments. In 1955, a previous request had been dismissed. A 1961 application had ended in dismissal by the District Council, judicially sustained in 1962. In 1963, the applicants renewed their effort with a third application. This time, they succeeded at the District Council. The Circuit Court affirmed, on the basis of changed conditions.

The Court of Appeals again reversed. Judge Hammond wrote, 241 Md. at 197,

"We think Whittle is dispositive of the case before us."

The alleged changes in conditions involved a proposed East-West highway, still speculative; the terrain and relative suitability for garden apartments, still the same; the

need for apartments and the increase in population, not considered a substantial change; eight zoning reclassification of other properties to garden apartment zones, but irrelevant because on the far side of busy highways; rezoning of a shopping center and two other commercial areas, found not to affect the residential neighborhood character; and that the definition of the requested zone had been altered, making it more like a floating zone, but the only change was a modest decrease in density, still allowing many apartments. 241 Md. at 197-201. Once again, the changes found insubstantial in Woodlawn Citizens were far greater in type and magnitude than those in the present case.

In the same year, the Court decided Alvey v. Hedin 243 Md. 334 (1966). Mrs. Alvey tried to avoid denial of her previous request to rezone property from agricultural to heavy commercial to operate a marina. She alleged her second application asked for a light commercial instead of heavy commercial zone; an adjacent property had been rezoned from agricultural to cottage residential; and there was need for more boating and mooring facilities. The Court rejected these changes as insubstantial. 243 Md. at 340-42. Again, the alleged changes in Alvey were greater than the imagined B-K changes. In the same year to the same effect is Chatham Corp. v. Beltram 243 Md. 138 (1966).

These cases show that a substantial change in conditions must be relevant, essential, and involve the property and neighborhood. They do not pertain to the applicant's personality. They do not pertain to stylistic, programmatic, marketing, or other details. B-K's alleged changes are even more cosmetic and delusive than the alleged changes deemed insubstantial in the foregoing Court of Appeals decisions.

Miller Island Mythology

> ***"A great deal of intelligence can be invested in ignorance when the need for illusion is deep."*** Saul Bellow, To Jerusalem and Back (1976)
>
> ***"Red Herring" "something intended to divert attention from the real problem or matter at hand; a misleading clue"... "anything that diverts attention from a topic or line of inquiry"*** **... earlier simply** ***"a false lead"*** Dictionary.com

It is challenging in a zoning case to keep one's eye on the ball. This calls here for identification and dissection of B-K's misleading and tangential arguments.

(1) The "acoustic guitar" myth: B-K testified there would be acoustic guitar music, suggesting it would be relatively quiet. Thanner had made a similar pitch in 2008 --- toning down to "mostly duos or steel bands" (CBA majority page 4), otherwise described as "island music" (CSA decision page 6).

B-K gave Mark Alan as the prospective first performer of soft acoustic music. But when Charles Wolinski testified, we learned Mark Alan uses an amplifier. Based on Alan's proffered website, he uses a Bose sound system, Shure microphone, and Crafter guitar. There were reports also that his performance at Rowboat Willie's disturbed residents as far as five blocks away on Bay Drive.

In the music world, there are many sorts of equipment available to amplify acoustic guitars. The CBA could take notice of this with a brief Google search. The so-called quiet "acoustic guitar" scenario is misleading.

Moreover, if B-K is allowed to have live music, it is inevitable there will be all sorts of musicians and bands besides Mark Alan. The citizens indicate a variety of acts play on the east side. There is no proof that any other acoustic guitar players perform in the area, so the situation is open-ended. To suggest that a tavern open potentially until 2 A.M. with a Class D liquor license will have soft music is misleading.

(2) The "mature audience" myth: B-K testified, and Mark Alan signed a statement, that DOB would attract "mature audiences." These would be in the 40 to 60 year old range. Putting aside the obvious initial observation that there will be patrons of various ages, with some musicians attracting a young crowd, the portrayal of the 40 to 60 year old generation as a "quiet music" generation is absurd.

As should be apparent, and as was confirmed in citizen testimony, the current 40 to 60 year old generation was born (1955-75) toward the latter part of the baby boom generation and beginning of Generation X. These are the generations which grew up with rock and roll, R & B, disco, MTV, VH1, and even punk rock and heavy metal. Their interest in the music they grew up with doesn't disappear when they reach the age of 40. The "mature music" pitch is delusive.

(3) The "moderate hours" myth: B-K suggested it might or would close early, despite its posted 1 AM website closing time. By "early," it might be 11 P.M. But this is the same kind of pitch made by Thanner. Indeed, he testified that he had discontinued all outside evening music, that is to say, even music until 9 P.M. CSA decision, page 6.

As a practical matter, if any live music is allowed in any way, shape, or form, then any supposed time limit will evaporate. It would be the musical opening of Pandora's Box. Any effort at enforcement would be ineffective and intractable. The music would continue as B-K would spin its way into a defensive posture.

(4) The "special order" (camel's nose) myth: B-K's strategy is to secure CBA approval to fit their promotion of a moderate operation based on type of music, target audience, and hours. This resembles the scaled back operation Thanner pitched, described in the 2008 CBA and 2010 CSA decisions. It resembles also Thanner's motion for reconsideration, which sought the advisory opinion.

The CBA in 2008 deemed it inappropriate and impractical to frame or implement some cosmetic conditional approval. There is a classic metaphor of the camel who gets his nose under the tent. The problem is that once the camel get his nose in the tent, it is not long before the camel is all in, displacing the tent dwellers. Given an inch, B-K could take the mile, and life along 6th Street would be miserable.

(5) The "other bars with music" myth. B-K brought up music at Rowboat Willie's and the Sail Inn. While the situations there are quite different, the main point is that this issue is another rerun from **DOB I.** We addressed this issue in our discussion of FSLLC's arguments that the nightclub definition is overbroad and enforced unfair.

Moreover, the claims of unfairness do not add up. The other situations are not comparable. Rowboat Willie's is in the B.M. (Business-Major) Zone, where nightclubs are permitted. BCZR Sec. 233.1.B. It does not border the residences on Sixth Street. Rowboat Willie's tavern area is a small part of the "Bill's Boats" boatyard. The outdoor music area is much smaller than the DOB patio/courtyard. While some of their music apparently generated complaints as far away as Bay Drive, these do not seem to have been persistent or as problematic as the DOB music.

Meanwhile, Sail Inn, albeit zoned B.L., is a much smaller facility. It does not have an outdoor music area. The music there is only indoors and has not posed a problem.

(6) The "Fisherman's Inn" myth. B-K cross-examined about the Fisherman's Inn, which operated in the twentieth century, before Hurricane Isabel. Fisherman's Inn is irrelevant. The history was available for review in **DOB I.** Moreover, such vague evidence as was elicited here suggested just occasional modest inside music. Fisherman's Inn never had the type, magnitude, duration, or problematic character of the music later associated with Dock of the Bay.

B-K seemed to imply that some residents who constructed dwellings around 2003 should not object to above-normal sounds of music because they knew or should have known of prior commercial use at the inn. This apples and oranges implication is absurd, demeaning, and disrespectful. Even Thanner did not make that pitch.

(7) The "protestants on 6th Street reside on B.L. Zone properties" myth: This is another delusive pitch. There has been no change in the area zoning since **DOB I**. A dwelling is a permitted use in any B.L. Zone which adjoins a residential zone, such as here. BCZR Sec. 230.1.A. The 6th Street residents do not forfeit their rights to quiet enjoyment or to complain about adjacent illegal activities by virtue of the B.L. Zone.

Seminary Galleria and other recent Baltimore County cases

"It's déjà vu all over again." Yogi Berra

The County Board of Appeals often remembers its own history. Here is an update.

(1) **Seminary Galleria, LLC v. Dulaney Valley Imp. Ass'n** 192 Md. App. 719 (2010). This involved business parking in the residential zone split at the Galleria shopping/office complex in Lutherville at York Road and Seminary Avenue. **SG** tried to overcome the initial final denial by arguing that facts and circumstances had changed: that it was required to have 1,000 parking spaces instead of the 728 originally thought based on a newly found tenant mix and "... characterization of the entire complex as a 'shopping center;'" that it had a new 'zoning verification letter;' and that there were specific aspects of the 14 parking spaces. 192 Md. App. at 731, 739-41. The CBA approved the second petition in 2008 (Stahl, Crizer). But their decision was reversed, on

judicial review as a matter of law. Judge Meredith reviewed the Court of Appeals cases in detail and essentially found no substantial change in conditions.

(2) **Back River, LLC v. Baltimore County:** CBA No. 2008-531-SPH (2013), Belt, Zerwitz, Wescott; CSA No. 2495, Sept. Term, 2013 (2014), Arthur, J. This involved side and rear yard setbacks for a cell phone tower at 810 Back River Neck Road, adjacent to residentially zoned property. **BRLLC** tried to overcome its previous variance denial by another claim of substantial change in circumstances: that the law had changed so as to allow the tower next to the adjacent vacant residentially zoned property; that a dwelling was no longer on an adjacent property; and that they filed a special hearing instead of a variance. The CBA rejected these arguments, and the CSA affirmed.

Judge Arthur dissected each of the arguments. He explained,

> The two petitions involve a single transaction: Sprint's attempt to secure permission from the local zoning bodies to retain a wireless telecommunications tower on the property." Pages 18-25.

He exposed **BRLLC's** suggestion of a change in the law as fallacious, "an unconvincing exercise in sophistry," Pages 25-33. Even if **BRLLC's** legal theory were correct, it could have argued the point in the first case and also adjusted the tower location to avoid the need for variances, Pages 33-36. Furthermore, **BRLLC'S** argument that it was precluded from asserting its new theory in the first case was specious, Pages 36-40.

(3) **In the Matter of Steven and Joanne Galasso,** CBA No. 13-029 (2013), Murphy, Thurston, Gioioso. This involved a request for map correction to secure a business zone in Lutherville on Falls Road. The CBA applied the "transaction" test to find the petition raised issues equivalent to those of previous cases. Pages 9-13. The Galassos appealed, but then voluntarily dismissed their appeal. Civil Action No. 03-C-14-000485 (2014).

(4) **In the Matter of Harlan Zinn**, CBA No. 13-295-SPH (2014), Murphy, Thurston, Gioioso. This involved a request to approve a dwelling on an undersized waterfront lot on Cold Spring Road in the Bowleys Quarters area. The petitioners in the first case (2003), Janice Oberst and Robert Long, had requested variances; in the second case (2004) Oberst and Zinn requested approval to build a dwelling on an undersized lot. These two cases resulted in denials.

In 2007, Zinn filed another request for variances, which the Zoning Commissioner and the CBA both dismissed based on *res judicata*. But Zinn filed yet another petition, which the CBA heard in 2013. Zinn's new argument for change was that the small lot table provisions do not apply. He also asserted the property was larger than originally thought. Citing Seminary Galleria and Powell v. Breslin, the CBA dismissed this petition. The CBA found it "incredulous' that Zinn would claim the small lot table does not apply after his repeated requests for relief from such restrictions. Page 10.

(5) In the Matter of Belvedere Baptist Church (Davenport Preschool) CBA No. 15-004-SPH (2015), Thurston, Alston, Rosen. Here, the preschool on Cheverly Road requested relief from a condition imposed in the final 2013 grant of their special exception. They wanted a maximum of 150 children, instead of the 120 maximum set in the earlier case, which had been contested by area residents. In setting the limit, the ALJ had recognized the residents' traffic congestion concerns.

The preschool argued that conditions had changed. They argued that the actual operation of the school showed how safe it was, that there had been no accidents, and that parents were required to sign a statement regarding safe driving. They also cited the growth of the student population and the need to accommodate them. The CBA rejected these arguments, indicating that the traffic issues and the needs of the school were there in the first case and had been resolved there. If the preschool was unhappy with the condition in the earlier case, they should have filed an appeal.

(6) In the Matter of Andrew and Stephanie Mattes, CBA No. 11-051-SPH (2012), Wescott, Belt, Crizer. This involved a petition by area citizens to obtain a determination that fishing and crabbing operation on Island View Road had exceeded the scope of its 1978 use permit approval. Zoning Commissioner Wiseman had previously denied their petition to determine that the permit itself was illegal; but in his opinion, he advised that they could file another petition to seek review of their additional concern that the expansion or intensification was excessive and illegal.

The owners/operators of the commercial fishing operation asserted *res judicata*. Our office argued that the expansion issue was sufficiently different from the validity of

the original permit to be separate. We stressed that ZC Wiseman had explicitly advised concerned residents to file a new petition. It would therefore be extraordinarily unfair to apply *res judicata* in this unique circumstance. Nevertheless, the CBA held that *res judicata* was applicable, and dismissed the petition.

Mattes reflects just how strongly the CBA upholds the law. It sends another strong message that repeat litigation is not acceptable. There are not even equitable excuses.

Conclusion: Whoah

> ***"He just says***
> ***Whoah -- oh***
> ***Don't wanna see you back here again."***
> Midnight Oil, Whoah

> ***"And worse I may be yet. The worst is not***
> ***So long as we can say 'This is the worst.'"***
> W. Shakespeare, King Lear

Res judicata fits this case and precludes the latest petition. A change in ownership does not translate to a substantial change in conditions. **DOB I** concluded definitively that musical entertainment is prohibited. There is even more to say.

Compared with the key Court of Appeals cases, the land use involved in this litigation poses the most aggravating, direct, immediate, and intense adverse effect on the health and welfare of the affected citizens. The same can be said compared with the cases to come before the CBA in the last decade. There is no more fitting case to put to rest, for the reasons given by Justice David Souter, previously quoted,

> "Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. ...

As a matter of law, the County Board of Appeals should and must deny this petition.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May, 2016, a copy of the foregoing Memorandum of People's Counsel for Baltimore County was mailed to Francis Borgerding, Jr, 409 Washington Avenue, Suite 600, Towson, Maryland 21204, attorney for Protestants and Lawrence Schmidt, Esquire, 600 Washington Avenue, Suite 200, Towson, Maryland 21204, Attorney for Petitioner(s).

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

211 Md. 36
Court of Appeals of Maryland.

James L. WHITTLE et al.
v.
BOARD OF ZONING APPEALS OF BALTIMORE COUNTY, and J. Liston Wiedefeld et al.

No. 210.
|
Aug. 20, 1956.

Certiorari proceeding to review decision of Board of Zoning Appeals granting special permit to use building in residential area for funeral home. The Circuit Court, Baltimore County, Lester L. Barrett, J., entered its order affirming board's order and protestants appealed. The Court of Appeals, Brune, C. J., held that where essentially same facts appeared in 1949 hearing on petition for special permit to use building for funeral home as appeared or could have been shown in hearing on present petition and where Circuit Court had entered judgment denying 1949 petition, petitioners were barred by res judicata.

Reversed and remanded with directions.

West Headnotes (9)

[1] **Judgment**
Courts or Other Tribunals Rendering Judgment

Fact that decision on 1949 petition to obtain special permit to use building in residential area for funeral home was that of a Circuit Court did not prevent operation of rule of res judicata.

1 Cases that cite this headnote

[2] **Zoning and Planning**
Successive applications

Provisions of zoning ordinance prohibiting board of zoning appeals until after lapse of 18 months from considering and acting upon new application for special permit previously denied does not dispense with rule of res judicata.

3 Cases that cite this headnote

[3] **Zoning and Planning**
Successive applications

General rule is that after lapse of such time as may be specified by ordinance, a zoning appeals board may consider and act upon new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions because it would be arbitrary for board to arrive at opposite conclusions on substantially same state of facts and same law.

8 Cases that cite this headnote

[4] **Judgment**
Effect of change in law or facts

Where facts are subject to change which might reasonably lead to opposite result from that arrived at in earlier case and if there have been substantial changes in facts and circumstances between first and second case, the doctrine of res judicata does not prevent granting of special permit to use building as funeral home in residential area.

13 Cases that cite this headnote

[5] **Judgment**
Effect of change in law or facts

Where court's determination in 1949 denied petition for special permit to use building on property in residential area for funeral home, construction of new stone church to replace wooden church adjacent to property and addition of one new filling station in neighborhood and in area containing two such stations was not sufficient change or increase in commercialization to make doctrine of res judicata inapplicable to 1954 petition to obtain permit for same use.

3 Cases that cite this headnote

[6] **Judgment**
Effect of change in law or facts

On hearing on 1954 petition for special permit, previously denied by court's determination in 1949, to use building in residential area for funeral home, testimony of increased population in area and need for funeral home did not show materially different situation from that prevailing in 1949 and evidence of less opposition in neighborhood did not show such change in circumstances as to make doctrine of res judicata inapplicable.

5 Cases that cite this headnote

[7] **Judgment**
Effect of change in law or facts

Where court's determination in 1949 denied petition for special permit to use building on property in residential area for funeral home, additional conditions which were attached to granting petition for same permit in 1954 and which restricted area covered, required more extensive planting of shrubbery, and changed proposed lighting and sign amounted to only slight distinction and did not render doctrine of res judicata inapplicable.

3 Cases that cite this headnote

[8] **Judgment**
Scope of Adjudication

Application of rule of res judicata does not depend upon whether or not the case was as comprehensively or persuasively presented at first trial as at second.

3 Cases that cite this headnote

[9] **Judgment**
Identity of Subject-Matter

Where essentially same facts appeared in 1949 hearing on petition for special permit to use building in residential area for funeral home as appeared or could have been shown in hearing on 1954 petition and where Circuit Court had entered judgment denying 1949 petition, petitioners on 1954 petition were barred by res judicata.

Cases that cite this headnote

Attorneys and Law Firms

*38 **42 Kenneth C. Proctor, Towson, for appellants.

George W. McManus, Jr., Baltimore and W. Albert Menchine, Towson (O'Conor & McManus, Baltimore, on the brief), for appellee.

Before BRUNE, C. J., and DELAPLAINE, COLLINS, HENDERSON and HAMMOND, JJ.

Opinion

BRUNE, Chief Judge.

This is an appeal from an order of the Circuit Court for Baltimore County affirming an order of the Board of Zoning Appeals of Baltimore County which had granted a special permit to the individual appellees (hereinafter usually referred to as 'the appellees') to use the building located at 7400 York Road as a funeral home. The Board of Zoning Appeals had reversed the Zoning Commissioner who had denied the request for a special permit.

The first and principal controversy is whether or not a prior adverse ruling by the Circuit Court for Baltimore County on an application for a special permit for a funeral home on the same premises is *res judicata* as to the present case.

The earlier petition was filed on November 23, 1949, by Lucretia G. Leonard, as owner, and the appellees, as contract purchasers, to obtain a special permit to use the same property as a funeral home. This petition was denied by the Zoning Commissioner, but was granted by the Board of Zoning Appeals *39 which reversed the Zoning Commissioner on appeal by the petitioners. The only witnesses produced by the petitioners at the hearing before the Board were J. Liston Wiedefeld, one of the petitioners, and Charles D. DeLosier, who was the secretary of the Maryland State Funeral Association. Mr. Wiedefeld testified that the property in question had been used as a Medical Research Laboratory from 1934 to 1943 and that it had not been used as a residence during that time. He testified further that there was a great need for a funeral home in the neighborhood because of the great increase in the population of Baltimore County and the lack of increase in a proportionate number of funeral establishments. He also testified that at that time he owned a

funeral home in Baltimore and did not intend to move it to the proposed new location but intended to operate two separate funeral establishments. Mr. DeLosier testified that there was a definite need for a funeral home in the neighborhood because of the large population. Eight witnesses testified in opposition to the petition to the effect that they had lived in a highly residential area with fine homes and that their homes either abutted on or were in close proximity to the property in dispute and that the issuance of the special permit would adversely **43 affect the value and enjoyment of their homes and would increase the traffic along York Road. The Board of Zoning Appeals stated in its opinion reversing the Zoning Commissioner that it felt that the granting of the special permit for a funeral home 'will not create congestion and increase the traffic hazard, will not affect the health, safety or the general welfare of the people of the community, neither does the Board feel that the granting of this special permit will depreciate the value of adjacent property.' The Board attached as a condition to the granting of the permit 'the planting of additional shrubbery on the north side of the property.'

The neighboring property owners then filed a petition for a writ of certiorari in the Circuit Court for Baltimore County to review the decision and order of the Board of Zoning Appeals. Judge John B. Gontrum, in reversing the Board of Zoning Appeals, found that the petitioners had offered no testimony that would justify the granting of the permit and *40 that the granting of the permit would have an adverse effect on the value of the real estate in the vicinity.

Thereafter, following a motion for reargument, Judge Gontrum adhered to his original decision and filed an opinion in which he reviewed the testimony before the Board of Zoning Appeals, and relied principally upon Heath v. Mayor and City Council of Baltimore, 187 Md. 296, at page 304, 49 A.2d 799, and Jack Lewis, Inc. v. Mayor & City Council of Baltimore, 164 Md. 146, 164 A. 220. He added to what Judge Offutt wrote in the Jack Lewis, Inc., case about the depressing effect of a funeral home in a residential area, some quotations on the subject of death from Bacon and Shakespeare and some comments of his own on the different manner in which death is regarded by different peoples of the in different places. In speaking of the attitude of many persons in this section of the country, he observed that 'The solace of religion and the consolations of philosophy are not sufficient to change the fundamentally pessimistic attitude of most persons toward death and the grave.' He also pointed out that the term, 'funeral home,' is a euphemism and that such an enterprise is commercial, not residential.

At the time of the decision of the first case by the Circuit Court for Baltimore County, there was no provision for a further appeal in a Baltimore County zoning case to the Court of Appeals, so that the decision of the Circuit Court was final.

The Wiedefeld's contract to purchase the property at 7400 York Road was conditioned upon the special permit for a funeral home being granted. In spite of the fact that the permit was denied, they proceeded to purchase the property. Thereafter, on April 27, 1954, the appellees, now the owners of the property, filed and second petition which gives rise to the present case for a special permit to use the same property for a funeral home. Upon denial of this petition by the Zoning Commissioner, they appealed to the Board of Zoning Appeals, which reversed the Commissioner and granted the special permit.

At the hearing before the Board, the appellees called twelve witnesses. Among them were the pastor of a church which adjoins the subject property on the south and which has over *41 200 members, and also several neighbors, all of whom said that they had no objection to a funeral home being on the property, and some of whom testified that they thought the establishment of a funeral home on the property would be beneficial to the neighborhood. There was also testimony that a funeral home would have no adverse effect on York Road traffic and parking because there would be sufficient off-street parking furnished on the ample grounds of the home itself. There was further testimony by real estate experts that a funeral home at this location would not decrease the value of residential property in the neighborhood. There was also testimony that it would **44 cause no psychological ill-effects on the neighbors; and there was some testimony relating to commercial activity in the neighborhood which was claimed to have changed its basic characteristics. Finally there was testimony that the population of Baltimore County had increased tremendously since 1949, the date of the first application, and that there was now even a greater need for more funeral homes in the county.

Six witnesses testified on behalf of the appellants objecting to the issuance of the special permit. Their testimony was to the general effect (1) that there was no need for a funeral home in the area, (2) that the granting of the permit would make the place commercial and (3) that it would adversely affect the value of neighboring properties.

After the decision of the Board of Zoning Appeals, the protestants filed a petition for a writ of certiorari in the Circuit Court for Baltimore County to review its decision and Order.

The appellees were granted leave to intervene as parties defendant. Judge Lester L. Barrett upheld the decision of the Board of Zoning Appeals, holding that the Board had acted in the exercise of its discretion in granting the special permit. In rejecting the contention that the previous decision by Judge Gontrum made the matter *res judicata*, he stated that 'there is reason to believe, from the record, that since the ruling of Judge Gontrum, at least one additional commercial usage, that of a filling station has been granted in the immediate location, and, in addition, Judge Gontrum based his ruling *42 on an entirely different record than the one that is now before this Court.'

The appellants raise two questions:

1. Is the decision of the Circuit Court for Baltimore County in the first case *res judicata* in the second case?

2. Are the sections of the Zoning Regulations for Baltimore County which provide for the issuance of a special permit or exceptions for a funeral establishment in a residential zone invalid because they authorize unlawful 'spot zoning?'

We find it necessary to consider only the first of these questions.

The appellants contend that under the doctrine of *res judicata* and the decision of the Circuit Court in the 1949 case, the petition in the present case should have been denied. They rely particularly upon Mayor and City Council of Baltimore v. Linthicum, 170 Md. 245, 183 A. 531, and Bensel v. Mayor and City Council of Baltimore, 203 Md. 506, 101 A.2d 826, in support of this contention.

In Mayor and City Council of Baltimore v. Linthicum, the petitioner in January, 1933 and again in October, 1933, filed petitions to use a piece of property in a residential area as a post office sub-station. Both of these petitions were rejected because the proposed use would be a business use. The petitioner appealed to the Baltimore City Court from the denial of his second petition, and that Court affirmed the Board. No appeal from the City Court to this Court in such a case was then allowed. The owner then instituted mandamus proceedings, but such proceedings were held inappropriate and no appeal was taken. After the passage of Chapter 448 of the Acts of 1935, which allowed an appeal to this Court from orders of the Baltimore City Court in zoning cases, the owner filed a third petition for a special permit to use the same property as a post office sub-station. This was denied by the Board of Zoning Appeals, the case was appealed to the Baltimore City Court and on this occasion the City Court reversed the Board and held that the permit should have been granted. On appeal to this Court, the judgment of the Baltimore City Court was reversed, and the Court of Appeals held that the petitioners *43 were bound by the first decision. The proposed use was still a business use and the first decision was *res judicata* of that question.

**45 In Bensel v. Mayor and City Council of Baltimore, 203 Md. 506, 101 A.2d 826, the appellant had filed an application, based upon an alleged non-conforming use, to continue using his place of residence as a place of business. It was held by the Baltimore City Court on appeal from the Board that there was not enough evidence to show a non-conforming use, and no appeal was taken from that judgment. Four years later the appellant filed an amended bill of complaint in the Circuit Court of Baltimore City alleging essentially the same facts as in the first case and asking for a declaratory decree declaring that he had a non-conforming use in the property. The Circuit Court held that the first case had adjudicated the question whether there was or was not a non-conforming use and was therefore conclusive of the rights of the parties, and this Court affirmed this holding. The fact that there was not a non-conforming use on a certain date was a fixed and stable fact and could not be changed by anything that happened thereafter.

The Linthicum and Bensel cases differ from the present case in that the facts which had been adjudicated in the first litigation were not, and could not be, affected by any change in facts or circumstances or conditions which might have occurred in the interim between the two suits. In the Linthicum case, a business use continued to be a business use; in the Bensel case, the existence or non-existence of a non-conforming use on a past date could not be affected by any subsequent event. (There had been no amendment of the law in either of those cases, nor is any amendment of the law involved in the instant case.)

The Linthicum and Bensel cases do not hold that the denial of a special permit which has once been sustained (or ordered) by a court of competent jurisdiction can never be reopened or reconsidered, and we do not understand the appellants' contention as going so far as to assert such a doctrine. They seem to concede that a change in circumstances might warrant reconsideration and a different result in an application for a special permit in such a case as the present, but they *44 deny that a showing of any substantial change in facts or circumstances has been made. The correctness of this contention is the key to the case.

[1] [2] Before going further, we may take note of several points. First, the fact that the decision on the 1949 petition was that of a Circuit Court does not prevent the operation of the rule of *res judicata*. Mayor and City Council of Baltimore v. Linthicum, Bensel v. Mayor and City Council of Baltimore, both cited above. Second, the doctrine of *res judicata* has been held not to be applicable where the earlier decision was made not by a court of record, but by a board of zoning appeals, an administrative agency. Knox v. Mayor and City Council of Baltimore, 180 Md. 88, 23 A.2d 15. Third, provisions of a zoning ordinance such as the Baltimore County ordinance, under which, until after the lapse of a period of six months [now eighteen months in Baltimore County] a board of zoning appeals may not consider and act upon a new application for a special permit previously denied does not dispense with the rule of *res judicata*. Mayor and City Council of Baltimore v. Linthicum, supra. As was said in that case in speaking of a similar provision in the Baltimore City ordinance (170 Md. at page 249, 183 A. at page 533):

> 'For the decision of this case we need not determine exactly what was within the contemplation of the clause in its reference to subsequent submission of substantially the sme application to the board of zoning appeals. We do not interpret it to dispense with the rule, so as to provide that after an owner has submitted to the courts on appeal the questions of the character and classification of his use, and the correctness of its exclusion, and has obtained a decision that it is a business use, rightly excluded from the particular **46 neighborhood, he can continue asking every six months for judicial decisions on exactly the same questions. If that were the meaning, this court, under the act of 1935, as well as the trial court, would be required to examine and decide the case as often as the owner might wish to bring it up, allowing six months' intervals in his activities. The *45 words seem to us to require no such interpretation, and we think it would be unreasonable to attribute that purpose to the Legislature.'

[3] The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions. See Bassett on Zoning (2nd Ed., 1940), pp. 119-120; Yokely on Zoning Law and Practice (1953 Ed.), § 128; 168 A.L.R. 124; St. Patrick's Church Corporation v. Daniels, 113 Conn. 132, 154 A. 343; Burr v. Rago, 120 Conn. 287, 180 A. 444; Rommell v. Walsh, 127 Conn. 272, 16 A.2d 483; Rutland Parkway, Inc. v. Murdock, 241 App.Div. 762, 270 N.Y.S. 971. This rule seems to rest not strictly on the doctrine of *res judicata*, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.

In the instant case we have, of course, a prior court determination and the question of *res judicata* is directly involved.

[4] Many zoning questions do not rest upon immutable facts, St. Patrick's Church Corp. v. Daniels, supra, and the application of the rules of *res judicata* is not always so easy and so clear cut as in the Linthicum and Bensel cases. It is our view that where the facts are subject to changes which might reasonably lead to an opposite result from that arrived at in an earlier case, and if there have been substantial changes in facts and circumstances between the first case and the second, the doctrine of *res judicata* would not prevent the granting of the special permit sought by the appellees. They contend that such changes have occurred, and we shall now proceed to examine the alleged differences.

The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County; (3) decreased opposition of neighbors and some support by them; (4) additional conditions attached to the granting of the permit.

[5] *46 Only two changes in the immediate neighborhood are shown. One is the construction of a new stone church building to replace a wooden one on the property just south of the appellees' land. That involves no commercialization. The other is the addition of one filling station in an area already commercial and already containing two such stations. Its distance from the Wiedefeld property is not clearly shown, but it would seem to be about 400 feet to the south on the York Road.

There have been considerable commercial developments on the York Road both north and south of the appellees' property. The road itself is a heavily traveled north-south highway to the north of the City of Baltimore. La Paix Avenue runs west from the York Road a little to the north of the Wiedefeld land and a number of lots fronting on the south side of La Paix Avenue back on the Wiedefeld tract. Both to the west of No. 7400 York Road and along La Paix Avenue the area is residential. Apart from the new filling station, none of the new commercial developments along the York Road, so far as we are informed, have had any effect upon the residential character of the neighborhood where the protestants live. That one new filling station, some 400 feet to the south on a busy highway, at or near an intersection already having two filling stations does not, in our judgment, show any substantial **47 change or increase in commercialization between 1949 and 1954.

[6] Increased population of the county and an asserted need for a new funeral home in the Towson area to meet the needs of an increased population added no new element to the case. They were among the items relied upon by the appellees in their first effort to secure a special permit. In the second case, they offered testimony to show a further increase in population and hence a greater need for a new funeral home. Testimony on this phase of the case was more detailed in the second case than in the first, but the issue was the same and the testimony in the present case does not, in our estimation, show a materially different situation from that prevailing in 1949.

*47 With regard to the attitude of the neighbors, there was undoubtedly less opposition to the appellees' second application for a permit than to their first, and some neighbors supported the second application. The Board attached a good deal of weight to these facts. This Court had on several occasions expressed disapproval of zoning and kindred actions being based upon a 'plebiscite of neighbors.' Benner v. Tribbitt, 190 Md. 6, 57 A.2d 346, 353; Northwest Merchants Terminal, Inc., v. O'Rourke, 191 Md. 171, 60 A.2d 743; Kahl v. Consolidated Gas, Electric Light & Power Co., 191 Md. 249, 60 A.2d 754. The latter case and Board of County Com'rs of Anne Arundel Co. v. Snyder, 186 Md. 342, 46 A.2d 689, indicate that the wishes of residents of a neighborhood may be considered by the legislative body in enacting a restrictive regulation; but, as was said in the Kahl case [191 Md. 249, 60 A.2d 757], 'A restrictive act may not be passed or a permit refused merely because the community wants it.' These cases dealt with the imposition of restrictions, not their waiver, but the guiding principle would seem to be the same as to either the benefit of the community at large. The opinion in the Kahl case shows this to be the basis for the rule, for in the sentence following the above quotation, the majority opinion states: 'But even if the community wants it, that does not invalidate the action of the authorities, if such action is beneficial to the community at large, and prevents the erection of structures inimical to the public health, welfare or safety.' 191 Md. at page 256, 60 A.2d at page 757. There does not seem to have been any difference between the majority and minority opinions on this point. Judge Henderson's dissenting opinion, in which Judge Delaplaine joined, states, at page 264 of 191 Md., at page 761 of 60 A.2d: 'It is quite true that zoning looks to the future, and has as one of its principal objects the preservation of property values in residential districts by prohibiting or restricting the establishment of new commercial or industrial enterprises in particular areas.'

The opinion of the neighbors is doubtless of some weight in appraising the probable effect upon land values in a community of a proposed change in the use of some of the land in the neighborhood; and it is true that Judge Gontrum attached *48 some importance to the widespread neighborhood opposition to the appellees' first petition. However, the extent of the actual change shown in the attitude of neighbors does not seem impressive. Those most directly affected remain opposed to the appellees' petition. It is not shown how many of the members of the nearby church lived in the immediate vicinity-other than the minister-and it appears that a considerable part of the congregation lived at some little distance from the church and the proposed funeral home. One newcomer to the neighborhood who lived on the other side of the York Road favored the petition, another witness who resided 500 feet away, also on the other side of the York Road and in the neighborhood of the filling stations, favored it. Still another, a personal friend of Mr. Wiedefeld, who lived a block or so away, and who was doubtful whether he could see the Wiedefeld property from his home, but thought he might possibly be able to see it from the second floor, was **48 favorable to the granting of the permit. He admitted that his feelings might be different if the funeral home was to be alongside of his home.

None of these witnesses, so far as we are informed, testified to any facts upon which his opinion was based which had not been presented, or available for presentation, in the first case.

In our view, such change in neighborhood sentiment as may be shown by the record, including any inference which may be drawn from the absence of organized neighborhood association opposition in the second case, does not show such a change in circumstances as to make the doctrine of *res judicata* inapplicable.

[7] The additional conditions attached to the granting of the permit in the second case seem to amount to only slight distinctions.

Restricting the area covered by the permit to a depth of 400 feet west of the York Road made no substantial practical difference at least with regard to the immediate use of the property. That 400 foot depth included, as the Board stated, all of the area which the petitioners proposed *49 to use for the funeral home according to a plat submitted to the Board. This plat also showed some plans with regard to shrubbery, parking areas and driveways, and was incorporated by reference in the Board's opinion and order. Its provisions with regard to the planting of shrubbery were somewhat more extensive than what was required by the Board's order in the first case. There were also some changes in proposed lighting and in the sign to be placed at the entrance, but they were of little moment.

In general, we think that the petitioners presented a more thorough and persuasive case on their second application than on their first. This was notably true of the evidence with regard to the probable effect of the establishment of a funeral home upon land values in the neighborhood, even though the trial Judge declined to accept the appraisers' views based upon comparable properties in another suburban area at their full face value, because they did not take sufficiently into account the general rise in land values.

[8] But the application of the rule of *res judicata* does not depend upon whether or not the case was as comprehensively or persuasively presented at the first trial as at the second. As was stated in Sterling v. Local 438, etc., 207 Md. 132, 113 A.2d 389, 393, certiorari denied 350 U.S. 875, 76 S.Ct. 119, 100 LEd. 773, rehearing denied 350 U.S. 898, 76 S.Ct. 151, 100 L.Ed. 789, motions for leave to file petitions for rehearing denied 350 U.S. 943, 76 S.Ct. 298, 100 L.Ed. 823, 'If the second suit is between the same parties and is upon the same cause of action, a judgment in the earlier case on the merits is an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which could have been litigated.' The first rezoning case was litigated and all the information which could have been produced should have been produced and the second case cannot be decided on testimony whih might have been introduced in the first case.

[9] Because essentially the same facts appeared in the second case as appeared or as could have been shown in the first case, the appellees are barred by *res judicata*, the their petition *50 should have been denied. The order of the Circuit Court will accordingly be reversed and the case remanded.

Order reversed, with costs, and the case remanded to the Circuit Court for Baltimore County for the passage of an order in accordance with the opinion of this Court.

All Citations

211 Md. 36, 125 A.2d 41, 71 A.L.R.2d 1353

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Board of Appeals of Baltimore County

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TOWSON, MARYLAND, 21204
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March 8, 2016

NOTICE OF REASSIGNMENT

IN THE MATTER OF: Boone Kondylas, LLC
9025 Cuckold Point Road
16-003-SPH 15th Election District; 7th Councilmanic District

Re: Petition for Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044, and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music

11/7/13 Opinion and Order issued by the Administrative Law Judge wherein the requested relief was DENIED.

REASSIGNED FOR: **THURSDAY, APRIL 28, 2016, AT 10:00 A.M. – Day 2**

LOCATION: Hearing Room #2, Second Floor, Suite 206
Jefferson Building, 105 W. Chesapeake Avenue, Towson

NOTICE: This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.

Please refer to the Board's Rules of Practice & Procedure, Appendix B, Baltimore County Code.

IMPORTANT: No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

If you have a disability requiring special accommodations, please contact this office at least one week prior to hearing date.

For further information, including our inclement weather policy, please visit our website www.baltimorecountymd.gov/Agencies/appeals/index.html

Krysundra "Sunny" Cannington
Administrator

---

c: Counsel for Petitioner/Appellant : Lawrence E. Schmidt, Esquire
Petitioner/Appellant : Boone Kondylas, LLC/Ken Boone

Counsel for Protestants : Francis X. Borgerding, Esquire
Protestants : Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella, and Tammy Waldmann

Office of People's Counsel
Arnold Jablon, Director/PAI
Nancy West, Assistant County Attorney

Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Michael Field, County Attorney, Office of Law

Krysundra Cannington

From: Krysundra Cannington
Sent: Tuesday, March 01, 2016 10:12 AM
To: 'Francis X. Borgerding, Jr.'
Subject: RE: Boone Kondylas 16-003-SPH aka Dock of the Bay

Mr. Borgerding,

Did you hear back from your clients regarding their availability?

Sunny

-----Original Message-----
From: Francis X. Borgerding, Jr. [mailto:borgerdinglaw@aol.com]
Sent: Wednesday, February 24, 2016 4:26 PM
To: Krysundra Cannington <kcannington@baltimorecountymd.gov>; 'Lawrence Schmidt, Esquire' <lschmidt@sgs-law.com>; Peoples Counsel <peoplescounsel@baltimorecountymd.gov>
Cc: 'Alyssa Fiore' <afiore@sgs-law.com>
Subject: RE: Boone Kondylas 16-003-SPH aka Dock of the Bay

Krysundra,
I forgot to check with my clients as to their availability. I will do so and get back to you. Thanks Frank

-----Original Message-----
From: Krysundra Cannington [mailto:kcannington@baltimorecountymd.gov]
Sent: Wednesday, February 24, 2016 3:04 PM
To: Lawrence Schmidt, Esquire; Francis X. Borgerding, Jr. (borgerdinglaw@aol.com); Peoples Counsel
Cc: Alyssa Fiore
Subject: Boone Kondylas 16-003-SPH aka Dock of the Bay

Good afternoon Counsel,

In order to schedule a hearing before the Board of Appeals, without conflict, I am providing the following dates which are open for assignment on the Board's docket:

Wednesday, April 6, 2016
Monday, April 11, 2016
Thursday, April 14, 2016
Monday, April 25, 2016
Wednesday, April 27, 2016
Thursday, April 28, 2016

Unless otherwise agreed by the parties, our hearings begin at 10:00 a.m.

Please contact me to confirm availability. The Notice of Assignment will be issued to all parties at the time an agreeable date is established.

Thank you,

Sunny

Krysundra "Sunny" Cannington
Administrator
Board of Appeals of Baltimore County
The Jefferson Building, Suite 203
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Towson, MD 21204
Phone: 410-887-3180
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<https://www.linkedin.com/company/baltimore-county-government>

www.baltimorecountymd.gov<http://www.baltimorecountymd.gov>

Krysundra Cannington

From: Alyssa Fiore <afiore@sgs-law.com>
Sent: Thursday, February 25, 2016 8:57 AM
To: Krysundra Cannington; Lawrence Schmidt; Francis X. Borgerding, Jr. (borgerdinglaw@aol.com); Peoples Counsel
Subject: RE: Boone Kondylas 16-003-SPH aka Dock of the Bay

Sunny,

Larry and our client are available for all of the dates provided, **except for** April 27th.

Thanks.

Alyssa M. Fiore
Paralegal
SMITH, GILDEA & SCHMIDT, LLC
600 Washington Avenue
Suite 200
Towson, MD 21204
(410) 821-0070
(410) 821-0071 - fax
afiore@sgs-law.com

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From: Krysundra Cannington [mailto:kcannington@baltimorecountymd.gov]
Sent: Wednesday, February 24, 2016 3:04 PM
To: Lawrence Schmidt; Francis X. Borgerding, Jr. (borgerdinglaw@aol.com); Peoples Counsel
Cc: Alyssa Fiore
Subject: Boone Kondylas 16-003-SPH aka Dock of the Bay

Good afternoon Counsel,

In order to schedule a hearing before the Board of Appeals, without conflict, I am providing the following dates which are open for assignment on the Board's docket:

Wednesday, April 6, 2016
Monday, April 11, 2016
Thursday, April 14, 2016
Monday, April 25, 2016
Wednesday, April 27, 2016
Thursday, April 28, 2016

Unless otherwise agreed by the parties, our hearings begin at 10:00 a.m.

Please contact me to confirm availability. The Notice of Assignment will be issued to all parties at the time an agreeable date is established.

Thank you,

Sunny

Krysundra "Sunny" Cannington
Administrator
Board of Appeals of Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, MD 21204
Phone: 410-887-3180
Fax: 410-887-3182

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Krysundra Cannington

From: Francis X. Borgerding, Jr. <borgerdinglaw@aol.com>
Sent: Wednesday, February 24, 2016 4:26 PM
To: Krysundra Cannington; 'Lawrence Schmidt, Esquire'; Peoples Counsel
Cc: 'Alyssa Fiore'
Subject: RE: Boone Kondylas 16-003-SPH aka Dock of the Bay

Krysundra,
I forgot to check with my clients as to their availability. I will do so and get back to you. Thanks Frank

-----Original Message-----
From: Krysundra Cannington [mailto:kcannington@baltimorecountymd.gov]
Sent: Wednesday, February 24, 2016 3:04 PM
To: Lawrence Schmidt, Esquire; Francis X. Borgerding, Jr.
(borgerdinglaw@aol.com); Peoples Counsel
Cc: Alyssa Fiore
Subject: Boone Kondylas 16-003-SPH aka Dock of the Bay

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Krysundra Cannington

From: Francis X. Borgerding, Jr. <borgerdinglaw@aol.com>
Sent: Wednesday, February 24, 2016 4:10 PM
To: Krysundra Cannington; 'Lawrence Schmidt, Esquire'; Peoples Counsel
Cc: 'Alyssa Fiore'
Subject: RE: Boone Kondylas 16-003-SPH aka Dock of the Bay

Krysundra,
I can do all dates except April 14th. Thanks Frank

-----Original Message-----
From: Krysundra Cannington [mailto:kcannington@baltimorecountymd.gov]
Sent: Wednesday, February 24, 2016 3:04 PM
To: Lawrence Schmidt, Esquire; Francis X. Borgerding, Jr.
(borgerdinglaw@aol.com); Peoples Counsel
Cc: Alyssa Fiore
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Sunny

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Krysundra Cannington

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Krysundra Cannington

From: Lawrence Schmidt <lschmidt@sgs-law.com>
Sent: Friday, February 19, 2016 3:23 PM
To: Peoples Counsel; Krysundra Cannington
Cc: borgerdinglaw@aol.com; Alyssa Fiore; Ken Boone (kboone@tidewaterdirect.com)
Subject: RE: Dock of the Bay

I have no objection to Mr. Borgerding and/or Mr. Zimmerman calling as many witnesses who live in the neighborhood and have an interest in this matter as they want. Whether that is one, two or ten does not matter, I certainly agree that they have the right to be heard. But if Mr. Zimmerman and Mr. Borgerding want to use the first day of hearings as "discovery", to then figure out who they might want to call to testify, then I object. If anyone other than residents (which were the people in the room who couldn't be reached) is to testify (particularly some expert witness) then I only think it fair that they be disclosed in advance so that if I require rebuttal, I can have the individual present and ready to testify on that day. I don't want to be placed in the unfair position where I need a continuance to produce a rebuttal witness. And therefore drag this matter out unnecessarily.

I only ask that the People's Counsel and Mr. Borgerding provide me the courtesy of notifying me reasonably in advance as to who they may produce; assuming that it is not a resident. Again, there was no one other than residents who were present when we concluded the hearing. I assume that both sides were ready to try their respective cases on Wednesday. Had we not started late (and finished early) this case would be done. Respectfully, my client has a business to run and is entitled to have this matter resolved in a reasonably timely manner.

Larry Schmidt

Lawrence E. Schmidt
SMITH, GILDEA & SCHMIDT, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
(410) 821-0071 - fax
lschmidt@sgs-law.com

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-----Original Message-----
From: Peoples Counsel [mailto:peoplescounsel@baltimorecountymd.gov]
Sent: Friday, February 19, 2016 3:09 PM
To: Lawrence Schmidt; Krysundra Cannington
Cc: Peoples Counsel; borgerdinglaw@aol.com; Alyssa Fiore; Ken Boone (kboone@tidewaterdirect.com)
Subject: RE: Dock of the Bay

Dear Ms. Cannington,

As always, our office will cooperate as best we can on scheduling.
It is possible, based on what happened the first day, there might be additional witnesses, which would be different from my initial impression or thought, so there should be no assumption about limitation on witnesses.

Peter Zimmerman

-----Original Message-----
From: Lawrence Schmidt [mailto:lschmidt@sgs-law.com]
Sent: Friday, February 19, 2016 2:32 PM
To: Krysundra Cannington <kcannington@baltimorecountymd.gov>
Cc: Peoples Counsel <peoplescounsel@baltimorecountymd.gov>; borgerdinglaw@aol.com; Alyssa Fiore <afiore@sgs-law.com>; Ken Boone (kboone@tidewaterdirect.com) <kboone@tidewaterdirect.com>
Subject: RE: Dock of the Bay

Thanks Sunny. We will wait to hear from you.

Lawrence E. Schmidt
SMITH, GILDEA & SCHMIDT, LLC
600 Washington Avenue, Suite 200
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-----Original Message-----
From: Krysundra Cannington [mailto:kcannington@baltimorecountymd.gov]
Sent: Friday, February 19, 2016 2:31 PM
To: Lawrence Schmidt
Cc: Peoples Counsel; borgerdinglaw@aol.com; Alyssa Fiore
Subject: RE: Dock of the Bay

Hi Larry,

Thank you for your email. I am working with the panel to find dates that work for day 2 and I will email everyone once I have some dates to offer.

Thank you again,

Sunny

Krysundra "Sunny" Cannington
Administrator
Board of Appeals of Baltimore County
The Jefferson Building, Suite 203

105 W. Chesapeake Avenue
Towson, MD 21204
Phone: 410-887-3180
Fax: 410-887-3182

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-----Original Message-----
From: Lawrence Schmidt [mailto:lschmidt@sgs-law.com]
Sent: Friday, February 19, 2016 2:16 PM
To: Krysundra Cannington <kcannington@baltimorecountymd.gov>
Cc: Peoples Counsel <peoplescounsel@baltimorecountymd.gov>; borgerdinglaw@aol.com; Alyssa Fiore <afiore@sgs-law.com>; Ken Boone (kboone@tidewaterdirect.com) <kboone@tidewaterdirect.com>
Subject: Dock of the Bay

Hi Sunny: As you are aware, we did not complete the Dock of the Bay hearing on Wednesday. The Petitioner's case (mine) was completed and Mr. Borgerding was able to call and complete the testimony of one of his clients/witnesses. He indicated that he had two more witnesses. Mr. Zimmerman indicated that he did not have any witnesses.

I certainly believe that the case can be completed in one day and may well be finished in something less (maybe a morning or afternoon). I offer that thought only to the extent that it might be easier for you to schedule this panel if you know how much longer we need. Again, unless things change we probably will have only two more witnesses.

Finally, my client would like to have the matter decided as soon as practical as it impacts his ongoing business operation. He ahs requested an expedited hearing date if possible.

Please contact Alyssa or I whenever you are rescheduling so that we can cooperate on a new date. We are happy to take the lead and coordinate with Messrs. Borgerding and Zimmerman.

Lawrence E. Schmidt
SMITH, GILDEA & SCHMIDT, LLC
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To: Krysundra Cannington <kcannington@baltimorecountymd.gov>
Cc: Peoples Counsel <peoplescounsel@baltimorecountymd.gov>; borgerdinglaw@aol.com; Alyssa Fiore <afiore@sgs-law.com>; Ken Boone (kboone@tidewaterdirect.com) <kboone@tidewaterdirect.com>
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IN RE:

PETITION FOR SPECIAL HEARING
SE CORNER CUCKOLD POINT ROAD
AND FIFTH STREET (9025 Cuckold Point Road)
15TH ELECTION DISTRICT
7TH COUNCILMANIC DISTRICT

BOONE KONDYLAS, LLC,
KEN BOONE

Petitioner

* * * * * * * * * * * * *

BEFORE THE
ADMINISTRATIVE LAW JUDGE
FOR BALTIMORE COUNTY

CASE NO.: 2016-003-SPH

RECEIVED
FEB 16 2016
BALTIMORE COUNTY
BOARD OF APPEALS

PROTESTANT'S RESPONSE TO PETITIONER'S TRIAL MEMORANDUM

Charles Wolinski, et al., by their attorney, Francis X. Borgerding, Jr. respond to the Petitioner's Trial Memorandum and respectfully states the following:

1. Res Judicata

The decision of the Law Judge for Baltimore County, John Beverungen, in his Opinion and Order (attached hereto for the Board's reference) with regard to the case found that the Petitioner's Petition for Special Hearing, pursuant to B.C.Z.R. 500.7 to amend previous restrictions imposed by case number 07-144-SPH-CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music be and is denied the requested relief under the Doctrine of Res Judicata. As Commissioner Beverungen stated, "I believe the Petition must also be denied based on res judicata. As discussed above, res judicata will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard." "But here I do not believe there have been significant changes, Petitioner is still proposing to operate a restaurant that would offer live or recorded music." Petitioner alleges that the use has changed. Pursuant to the factors stated in the International

Building Code to determine that the property was indeed a nightclub. Petitioner alleges that under review of these characteristics, the use would be different than Fifth Street, LLC. Per the Affidavit attached of Charles Wolinski, his contention is the use at this point is substantially the same although the Petitioner alleges that the music will be different it is still live or recorded music ... which the Court of Special Appeals found was prohibited from occurring on the site. Petitioner alleges that lighting levels do not change when entertainment will be provided. Pursuant to the Affidavit of Charles Wolinski, lighting levels are exactly the same Fifth Street, LLC operated.

2. Entertainment will be by live band or recorded music, there are no theatrical stage accessories, the hours of operation are limited, the tables and chairs are arranged exactly the same way, there are service facilities for alcoholic beverages and food. The Court of Special Appeals, on page one, dated July 9, 2010, in its decision the Court of Appeals stated at page three "A nightclub is defined as a tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is characterized as a nightclub by the Building Code of Baltimore County." The Building Code of Baltimore County relies on the factors listed above in the International Building Code to determine whether its use is a nightclub. Those factors apply to the Petitioner's proposed use as stated above. The Petitioner's proposed use seeks to provide live or recorded entertainment and thus qualifies as a nightclub under the Court of Special Appeals previous ruling. Petitioner's proposed use is, therefore, prohibited under the doctrine of res judicata.

Commissioner Beverungen also stated at page two of his October 22, 2015 Opinion and Order "As an initial matter, I do not believe the OAH has the authority to 'amend'

restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the Board of Appeals, Circuit Court and then Court of Special Appeals. In an unreported opinion (No. 810, September Term 2009) the Appellant Court affirmed the Agency's findings, which necessarily included the conditions and restrictions found in those Orders. To amend those restrictions at this juncture would be akin to reversing the Appellate Court, which an administrative agency cannot do."

Under this logic, the Board is without authority to 'amend the restrictions found in the previous cases as Petitioner has requested.' The Petitioner is not actually asking for an amendment to the restrictions, the Petitioner is asking for reversal of the previous decision of the Court of Special Appeals. Accordingly, the Board is without authority to do so and the Petitioner's Petition should be denied.

Analyzing the elements of res judicata under the facts of the subject case, the Doctrine of Res Judicata applies. The Petitioner seeks to provide live or recorded music. That very music that was prohibited by the prior Court of Special Appeals ruling.

There was a final valid judgment on the merits by a court of competent jurisdiction in similar litigation. Therefore, the present case meets the definition of res judicata. *Deleon v. Slev*, 328 Md. 569 at 580. Commissioner Beverungen cited the *Seminary Galleria, LLC v. Dulaney Improvement Association*, 192 Md. App. 719 (2010).

This argument that the facts have changed does not have merit. See again Affidavit of Charles Wolinski and argument as indicated above.

FRANCIS X. BORGERDING, JR.
409 Washington Avenue, Suite 600
Towson, Maryland 21204
410-296-6820

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 16th day of February, 2016, a copy of the foregoing was emailed (Schmidt) and hand-delivered to (Zimmerman)

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County
Jefferson Building
105 West Chesapeake Avenue, Room 204
Towson, Maryland 21204

FRANCIS X. BORGERDING, JR.

IN THE MATTER OF: THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER LEGAL OWNER and LAWRENCE THANNER, INDIVIDUALLY, SPECIAL HEARING ON PROPERTY LOCATED ON THE S/E CORNER OF CUCKOLD POINT ROAD AND FIFTH ST. (9025 CUCKOLD POINT ROAD)	*	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY JEFFERSON BUILDING 105 WEST CHESAPEAKE AVE., SUITE 203 TOWSON, MD 21204	*	Case No.: 03-C-08-009996
15th Election District 7th Councilmanic District CBA CASE NOS. 07-144-SPH; CBA-06-044 & CBA-07-134	*	

* * * * * * * * * * * * *

AFFIDAVIT

1. I, Charles Wolinski, am over eighteen years of age and competent to testify to the facts in the Response to the Trial Memorandum.

2. I was in the Dock of the Bay numerous times when it was operated by the previous owner, Fifth Street, LLC. Additionally, I have been in the Dock of the Bay on several occasions since the property has been operated by Boone Kondylas, LLC.

3. I hereby attest that the Petitioner, Boone Kondylas, LLC, use of the property at 9025 Cuckold Point Road in Baltimore County is substantially similar to the previous use of the property by Fifth Street, LLC in relation to the factors of low level lighting, the operation is proposing music which is live or recorded, there are no theatrical stage accessories, hours of operation are similar, the tables and seating are arranged similarly,

and service facilities for alcoholic beverages and food a

I solemnly affirm under the penalties of perjury that the aforegoing facts are true to the best of my knowledge, information and belief.

CHARLES WOLINSKI

16-003-SPH

RECEIVED
FEB 12 2016
BALTIMORE COUNTY
BOARD OF APPEALS

Peter Max Zimmerman

From: Peter Max Zimmerman
Sent: Friday, February 12, 2016 11:15 AM
To: Appeals Board
Cc: 'Lawrence Schmidt'; 'borgerdinglaw@aol.com'
Subject: Petition of Boone Kondylas, LLC, 9025 Cuckold Point Road, Case No. 2016-003-SPH
Attachments: Mattes 11-051-SPH 6-7-12 FINAL Opinion.pdf; Back River LLC 08-531-SPH CBA Opinion.pdf; Back River LLC II 08-531-SPH CSA Opinion.pdf; zinn Harlan 2013-295-SPH CBA Opinion.pdf; Belvedere Baptist Church 2015-004-SPH CBA Opinion.pdf; Fifth Street CBA Majority Opinion.pdf; Fifith Street CBA Dissenting Opinion.pdf; Fifth Street CBA Ruling on Motion Recon.pdf; Fifth Street CSA Decision.pdf

To the Appeals Board,

In lieu of a pre-hearing memorandum, our office submits for preliminary background four County Board of Appeals decisions involving the *res judicata* doctrine. These occurred subsequent to the reported opinion in Seminary Galleria v. Dulaney Valley Imp. Ass'n 192 Md. App. 719 (2010), a case in which our office participated and argued fruitfully at the Court of Special Appeals. The later cases are, in chronological CBA order:

1. In the Matter of Andrew Mattes, Island View Road, Case 11-051-SPH, June 7, 2012 (Wescott, Belt, Crizer).

2. In the Matter of Back River, LLC (Sprint PCS), 810 Back River Neck Road, Case 08-531-SPHX, April 19, 2013 (Belt, Zerwitz, Westcott), affirmed in Circuit and in attached Court of Special Appeals opinion, Back River, LLC v. Baltimore County, No. 2495, Sept. Term, 2013 (Arthur, J.), certiorari petition denied.

3. In the Matter of Harlan Zinn, 809 Cold Spring Road, Case 13-295—SPH, February 19, 2014, (Murphy, Thurston, Gioioso)

4. In the Matter of Belvedere Baptist Church of Baltimore (Davenport Preschool), 1301 Cheverly Road, Case 15-004-SPH, February 27, 2015 (Thurston, Alston, Rosen).

It is interesting that each of these cases involved special hearings in which the County Board of Appeals dismissed or denied the petitions based on *res judicata*, with the Back River, LLC affirmed all the way to the Court of Special Appeals, and certiorari petition denied.

It is also interesting that the *res judicata* doctrine is recognized in other parts of the world. In France, it L'Autorite de la Chose Juge. In the Spanish world, it is Cosa Juzgada.

We expect to focus on the issue at the hearing, and if necessary and appropriate, in a post-hearing memorandum. Preliminarily, it appears extremely improbable, as a matter of law, that a change in ownership could overcome this Board's attached majority decision in Cases No. CBA-06-044 and CBA 07-134, June 4, 2008 (Wescott, Grier in majority; Stahl dissenting), reconsideration unanimously denied September 12, 2008; affirmed, Fifth Street v. Ciarpella, CSA No. 810, Sept. Term, 2009,

While this is a *de novo* appeal, it is no surprise that ALJ John Beverungen denied the petition in his October 22, 2015 decision.

We are sending this e-mail to the attorney for petitioner, Lawrence Schmidt, and the attorney for neighboring protestants, Francis Borgerding.

We are also filing a hard copy with the County Board of Appeals, including each attachment.

Sincerely, Peter Max Zimmerman, People's Counsel for Baltimore County, 410 887-2188

Peter Max Zimmerman
2/18/16

IN THE MATTER OF ANDREW AND STEPHANIE MATTES – LEGAL OWNERS OF THE PROPERTY Located on the NW/S of Island View Road, 208' NW of c/line of Barrison Point Road (2534 Island View Road) 15th Election District, 6th Councilmanic District	*	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY
Theresa Guckert, David Donovan, and James Brown – Petitioners	*	Case No.: 11-051-SPH

* * * * * * * * * * * * *

OPINION

This matter is before the Board on a Motion to Dismiss filed by Lawrence E. Schmidt, Esquire and Smith, Gildea and Schmidt, LLC. Counsel for Andrew J. Mattes and Stephanie Mattes. It arises from a Petition for Special Hearing filed by Theresa Guckert, David Donovan, and James Brown (Petitioners) who were represented by Douglas N. Silber, Esquire. Deputy People's Counsel, Carole Demilio, also appeared before the Board. The hearing on the Motion to Dismiss was held on May 8, 2012. Briefs had been filed prior to the May 8th, 2012 hearing. A public deliberation was held on May 24, 2012.

Background

Petitioners filed a Petition for Special Hearing in case number 2010-0220-SPH requesting the Zoning Commissioner to "invalidate a fishing and shell fishing facility for nonconforming use or otherwise. Other reasons to be presented at the hearing." After a full hearing, Zoning Commissioner William J. Wiseman issued his Memorandum and Order dated April 19, 2010. In the order he denied the Petition and confirmed the validity of the existing use permit issued in 1978 for the property in question. Petitioners timely filed a Motion for Partial Reconsideration seeking a finding that the fishing, shell fishing, and crabbing operation at the subject site was operating at an intensity that was above that which was permitted in the 1978 use permit. That Motion was denied by Commissioner Wiseman in a ruling dated June 1, 2010. In that ruling,

Wiseman "instructed" Petitioners that he believed they could raise the issue of intensification by way of a new and separate Petition for Special Hearing. The Petitioners did not file an appeal to Commissioner Wiseman's Ruling of April 19, 2010 nor his denial of the subsequent Motion for Partial Reconsideration. Petitioners then filed the present case, asking Commissioner Wiseman to determine whether the scope and intensification of the fishing, shell fishing and crabbing business permitted by the use permit had been intensified. Respondents then filed a Motion to Dismiss the new Petition for Special Hearing arguing that the new Petition was barred by res judicata.

A hearing was held and by his order of December 20, 2010, Commissioner Wiseman denied the Motion and further found that his ruling constituted a "final order" thereby making it amenable to the filing of an immediate appeal to the Baltimore County Board of Appeals (the Board). The Board heard argument on the validity of the Motion to Dismiss and issued an Opinion and Remand Order dated August 2, 2011 finding that the appeal of the denial of the Motion to Dismiss was premature until the case was fully completed and all testimony heard. It returned the case to the Zoning Commissioner for further hearing and adjudication on the matter.[1] After conducting a full hearing, Administrative Law Judge, Lawrence M. Stahl, indicated he would hold his decision on the Motion to Dismiss sub curia until he heard the entire case.

Judge Stahl issued his decision on January 3, 2012. He denied the Motion to Dismiss on the basis of res judicata then ruled against the Petitioners on the merits of the case, with respect to the intensification issue.

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1. In the meantime, the Office of Administrative Hearings of Baltimore County replaced and absorbed the hearing responsibilities of the Office of the Zoning Commissioner of Baltimore County by act of the County Council effective January 16, 2011.

Petitioners filed a timely appeal of ALJ Stahl's order to the Board of Appeals. Subsequently, Respondent filed a Motion to Dismiss the appeal again claiming that res judicata barred the filing of the second Petition before the Administrative Law Judge. This brought us to the present situation.

Decision

The Board finds that the Motion to Dismiss should be granted.

The doctrine of res judicata provides that a judgment on the merits in a previous suit between the same parties precludes a second suit predicated upon the same cause of action.

As set forth above, the present Petition for Special Hearing before the Board reads as follows " to invalidate a fishing and shell fishing facility for nonconforming use or otherwise. Other reasons to be presented at the hearing." This is the same language in the Petition for Special Hearing filed by Petitioners in 2010

In the initial decision dated April 19, 2010, Zoning Commissioner Wiseman cites two bills passed by the County Council. One bill, Bill No. 30-78 dated April 3, 1978 was "an ordinance to allow shoreline fishing and shell fishing facilities by Special Exception in DR zones in addition to permitting the continuation of existing shoreline fishing and shell fishing facilities in such zones..." The second is Bill No. 139-83 passed on October 17, 1983 by the Council, which states "for the purpose of ratifying and approving certain use permits issued under the authority of Bill No. 98-75 regarding fishing, crabbing and shell fishing operations; ratifying all actions taken by certain officials in the approval of such permits; and requiring compliance with all applicable zoning regulations with respect to any extension of such operations."

Bill No 30-78 section 3 which inserted a new paragraph, 7A, into the section 1B01.1c of the Baltimore County Zoning Regulations had four subparagraphs and stated:

> 7A. fishing and shell fishing facilities, shoreline class I or II except that a facility existing on July 1, 1977 may continue without a Special Exception if the use permit has been granted for it provided:
>
> * * * * * * * * *
>
> d) that no increase in the amount of floor or site area or in the number of boats devoted to the use nor another other change in the site plan is made.

Council Bill No. 139-83 contained section 3 which stated:

> And be it further enacted that nothing contained herein shall be construed to authorize the extension, expansion or intensification of any commercial fishing, crabbing and shell fishing operations, primary or secondary, or fishing and shell fishing facilities, shoreline, class I and class II, beyond that indicated in the plans accompanying the application for use permit unless and until the applicant shall have complied with all applicable Zoning Regulations, including but not limited to the Petitioning for the grant of a Special Exception for any extension or intensification of use, and that failure to comply with such Zoning Regulations shall subject the property to all applicable penalties, including a civil penalty.

It is clear that the issue of intensification was set forth in Bill 30-78 effective April 3, 1978 and Bill 139-83, effective October 17, 1983 and could have been argued by Petitioners in their Petition for Special Hearing filed in this matter in 2010.

The statement of Ms. Guckert submitted to the Board as Petitioner's Exhibit number 2, would indicate that she contends that the operation has been expanded by some of the statements set forth in that statement. She contends that on June 8, 2009, Mr. Mattes brought in two loads of tar and chip to make a road from Island View Road to the bulkhead on Brown's Creek (page 5 of Guckert's Statement). She also contends that Mr. Mattes was bringing in loads of dirt to fill in the water front property in back of his bulkhead (see page 6 of Guckert's Statement).

The Board is persuaded that the Motion to Dismiss should be granted on the basis of several cases cited by the Respondents in this matter. In Whittle v. Board of Zoning Appeals, 211 Md 36, 125 A.2d 41 (1956) the Court stated:

> If the second suit is between the same parties and is upon the same cause of action a judgment in the earlier case on the merits is an absolute bar not only to all matters which were litigated in the earlier case, but as to all matters which could have been litigated." Id 49, 125 A.2d 41.

A similar summary of this point appears in Alvey v. Alvey 225 Md 386, 390, 171 A.2d 92 (1961):

> The doctrine of res judicata is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action and is conclusive not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit, where the court had jurisdiction, proceedings were regular and his omission was due to his own negligence.

See also the decision of Board in case No 06-651-SPHA where the Board ruled on the issue of res judicata after a remand from the Circuit Court for Baltimore County in case no: 03-C-08-004351.

ORDER

THEREFORE, IT IS THIS 7th day of June, 2012 by the Board of Appeals of Baltimore County

ORDERED that the Motion to Dismiss the Petition for Special Hearing, on the basis of res judicata, is hereby GRANTED; and it is furthered

ORDERED that the Petition for Special Hearing to determined whether the scope and intensification of fishing and shell fishing allowed by the use permit has been exceeded, is

hereby **DENIED** on the basis that it has already been decided in case no 2010-0220-SPH by the Zoning Commissioner of Baltimore County, which decision was never appealed.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chair

Andrew M. Belt

Edward W. Crizer, Jr.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2495

September Term, 2013

BACK RIVER, LLC, ET AL.

v.

BALTIMORE COUNTY, MARYLAND, ET AL.

Zarnoch,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: December 30, 2014

This appeal is the second appeal before this Court concerning the retention of a wireless telecommunications tower in Baltimore County.

In 2002, landowner Back River LLC and its tenant Sprint PCS (hereinafter collectively referred to as "Sprint")[1] constructed a cell tower on a commercially-zoned property. In an administrative proceeding before the County Board of Appeals, Sprint requested variances to permit noncompliance with a local zoning ordinance that required the tower to be "set back at least 200 feet from any other owner's residential property line." Baltimore County Zoning Regulations § 426.6.A.1. The Board rejected that request, a circuit court affirmed the decision, and this Court ultimately affirmed the judgment in an unreported opinion: *Sprint PCS v. Baltimore County*, No. 47, Sept. Term 2004 (filed Aug. 3, 2005).

In 2012, Sprint filed a petition for special hearing, asserting a new legal theory under which the existing tower was actually in compliance with the setback regulations. An administrative law judge ruled otherwise and also held that the new petition was barred under the doctrine of res judicata. Sprint appealed to the Board of Appeals, which dismissed the appeal on res judicata grounds. The circuit court affirmed that decision. Because the Board's determination was legally correct, we also affirm.

---

[1] During the course of this series of zoning cases, Sprint merged with Nextel Communications in 2005 to form Sprint Nextel Corporation. *See, e.g., In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1256 (D. Kan. 2006).

FACTUAL AND PROCEDURAL BACKGROUND

A. The 1998 Zoning Regulations

In 1998, the County Council of Baltimore County enacted Bill 30-1998 ("An Act concerning Zoning – Wireless Telecommunications Towers and Antennas"). The act amended the Baltimore County Zoning Regulations ("BCZR") by establishing guidelines for the regulation of certain towers and antennas. Part of the express intent of the County Council was to ensure that any new wireless telecommunications towers would be located in commercial zones and would be "[l]ocated and designed to minimize [] visibility from residential and transitional zones." BCZR § 426.2.B.

To accomplish that purpose, the regulations imposed certain "setback" requirements[2] that restricted the placement of wireless telecommunications towers:

> **§ 426.6 Requirements for wireless communications towers.**
>
> A. Setbacks
>
> 1. If a tower is located in a residential zone, the tower shall be set back at least 200 feet from any other owner's residential property line.
>
> 2. If a tower is located in a transitional zone, the tower shall be set back at least 200 feet from any residential zone.
>
> 3. If a tower is located in a medium or high intensity commercial zone the tower shall be set back from an adjoining property line a distance equal to the setback required for other structures in the zone. However, if the property adjoins a residential zone, the tower shall be set back at least 200 feet from the residential zone line.
>
> 4. A structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line.

[2] As used in the BCZR, the term "setback" is defined as the "required minimum horizontal distance between the building line . . . and the related front, side or rear property line." BCZR § 101.1.

The Act also authorized the Zoning Commissioner or the County Board of Appeals to "grant a variance to a height or area requirement, including any setback, for a tower or structure housing equipment for a tower[,]" in accordance with the overall standards for the granting of variances. BCZR § 426.11. The Commissioner and the Board are empowered to grant variances "only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship." BCZR § 307.1.

B. Sprint's Petition for Variances

As of 2001, the property known as 810 Back River Neck Road in eastern Baltimore County was owned by Back River LLC. The surrounding area is heavily wooded. The property is located in close proximity to tributaries of the Chesapeake Bay. Most of the neighborhood falls within the Chesapeake Bay Critical Area and, accordingly is subject to significant restrictions from environmental regulations. *See generally* Md. Code (2000, 2012 Repl. Vol.), Natural Resources Art., §§ 8-1801 *et seq.*; Code of Maryland Regulations ("COMAR") 27.01; Baltimore County Code §§ 33-2-101 *et seq.*

In 2001, the parcel covered roughly 4.3 acres, in the shape of a rectangle about 223 feet in width and about 768 feet in length. A one-story commercial building stood at the east end of the property, with a retail storefront facing Back River Neck Road. The area behind that building was used for storage and other commercial purposes. The property was zoned as "Manufacturing, Light" or "M.L.," a medium-intensity, commercial classification that permits certain industrial, retail, transportation, storage, and other related uses. *See* BCZR § 253.1. Operating a wireless telecommunications tower on M.L. property is permitted by right, subject to the setback requirements. *See* BCZR §§ 253.1.B.23, 426.5.D.

Back River LLC leased part of the property to Sprint PCS, a telecommunications provider. Sprint PCS had selected the property as a potential location for a cell tower to fill a gap in its cellular coverage network. The two companies planned to construct a 115-foot tower near the west end of the property. The three adjoining properties to the north, west, and south, were each zoned under a residential zoning classification "R.C. 20," meaning "Resource Conservation – Critical Area." *See* BCZR § 1A05.[3]

In October 2001, Back River LLC and Sprint PCS (collectively "Sprint") filed a petition seeking a number of variances to accommodate construction of the proposed tower. Specifically, Sprint sought relief from BCZR § 426.6.A.3, to permit setbacks for the

[3] In general, permitted uses of R.C. 20 property include residential uses as well as natural resources, agricultural, recreational, institutional, and other public or quasi-public uses. *See* BCZR § 1A05.2. A special exception is required to use R.C. 20 property for a wireless telecommunications tower. *See* BCZR §§ 1A05.2.C.8, 426.5.D.

proposed tower of 148 feet from the northern property line, 75 feet from the western property line, and 75 feet from the southern property line, each in lieu of the required 200 feet "from the residential zone line." In addition, Sprint requested variances to permit setbacks for equipment cabinets supporting the proposed tower, of 40 feet each from the west and south property lines, in lieu of the 125 feet for those structures required by BCZR § 426.6.A.4.

After a hearing, the Zoning Commissioner for Baltimore County granted the requested variances. The Commissioner reasoned that compliance with the zoning regulations would not be possible on the site. In his January 4, 2002, order granting the variances, he wrote: "Although the property contains in excess of 4.0 acres in area, it is but 223 feet wide. Section 426.6 of the B.C.Z.R. requires a 200-foot setback from the nearest property line to the tower. In view of the width of the property, this setback cannot be maintained." Nonetheless, the Commissioner reasoned that the narrowness of the property made compliance uniquely difficult, and thus he concluded that variances from the setback requirements were appropriate.

The Office of People's Counsel filed a timely appeal from that decision.

C. **The 2002 Amendment to the Zoning Regulations**

In March 2002, while the appeal of the variance decision was pending, the County Council enacted Bill 17-2002 ("An Act concerning Wireless Telecommunications Towers – Setbacks"). The stated purpose of the act was to "revis[e] the setback requirements for wireless telecommunications towers" by repealing and reenacting § 426.6.A of the BCZR.

As amended, the regulation provided:

> **§ 426.6 Setback requirements for wireless telecommunications towers.**
>
> A. Setbacks
>
> 1. A tower shall be set back at least 200 feet from any other owner's residential property line.
>
> 2. A structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line.

The amendment took effect on May 5, 2002. In effect, the amendment simplified the setback requirements by combining subsections (1) through (3) into a single subsection. Those previous subsections had drawn distinctions between towers that were located in residential zones, towers that were located in transitional zones, and towers that were located in medium or high-intensity commercial zones. In each instance, however, the previous subsections permitted the tower if it were set back at least 200 feet from either a "residential property line" (in the case of a tower in a residential zone) or a "residential zone line" (in the case of a tower outside of a residential zone). Perhaps because the laborious distinctions were largely immaterial, the 2002 amendment replaced the three subsections with a single, new subsection that required towers, wherever they were located, to be set back at least 200 feet from a "residential property line."

On May 7, 2002, two days after the adoption of the amended setback requirements, the Baltimore County Department of Environmental Protection and Resource Management requested that Sprint change its site plan to minimize its environmental impact on nearby

bodies of water. Subsequently, Sprint revised its site plan, by relocating the proposed tower 60 feet to the east. Sprint submitted a revised variance request to the Board of Appeals, referring to the new setback regulations as they had been amended and renumbered by Bill 17-2002. With the administrative appeal still pending, Sprint then constructed the tower at its own risk.

D. Reversal of Order Granting Variances ("*Back River I*")

The Baltimore County Board of Appeals conducted a de novo hearing on Sprint's variance petition on September 25, 2002, and January 21, 2003. The Board issued an opinion on May 14, 2003, denying the requested variances. The Board rejected Sprint's arguments that "special circumstances or conditions exist[ed] that [were] peculiar to the land" (BCZR § 307.1) and that the property's shape made it "unique" under the meaning established by *Cromwell v. Ward*, 102 Md. App. 691 (1995). The Board specified that it was "not denying Sprint the right to erect a telecommunications tower in the . . . area," but "only saying that there may be a more appropriate piece of property where the tower could be erected and not require the variances that would be necessary on the instant property."

Subsequently, Sprint petitioned for judicial review of the Board's decision in the Circuit Court for Baltimore County. The circuit court affirmed the decision on February 5, 2004. Sprint appealed to the Court of Special Appeals, and this Court affirmed that judgment in an unreported opinion: *Sprint PCS v. Baltimore County*, No. 47, Sept. Term 2004 (filed Aug. 3, 2005).

Both the circuit court and this Court held that the Board's conclusion – namely, that the property possessed no "unique" characteristics that would justify variance relief – was supported by substantial evidence. Judge Adkins explained: "[I]f we were to hold that a variance must be granted, simply because a property cannot accommodate one otherwise permitted use without an area variance, we would be permitting 'the exception to swallow the rule.'" *Sprint PCS*, slip op. at 30-31.

D. Subsequent Developments

Despite the denial of Sprint's request for a variance, the tower remained on the property over the years that followed while the owners attempted to cure the setback deficiencies by acquiring land from the adjacent properties. In February 2008, Back River LLC purchased portions of the properties to the north and to west of the tower. With the additional acreage (approximately 0.6 additional acres), the tower is now located more than 200 feet from the northern property line and more than 200 feet from the western property line. However, Back River LLC was unable to purchase any of the land to the south of the tower. The tower continues to stand approximately 75 feet from the southern property line.

In May 2008, Sprint filed a petition for special hearing to permit a transfer of the portions of the property zoned R.C. 20 (*i.e.*, the property that had been purchased from the two adjacent parcels) into the property zoned M.L.; the transfer, if approved, would have had the effect of incorporating the newly-acquired property into the commercially-zoned property, thereby moving the "residential property line" farther away from the tower. Sprint

also filed a petition for special exception to increase the height of the existing tower from 115 feet to 125 feet. At the parties' request, consideration of those petitions was postponed, and a hearing was never rescheduled.

In November 2008, the Baltimore County Department of Permits and Development Management issued a citation to Back River LLC "for violations under [BCZR] § 426.6.A.1, failure to provide and maintain [a] 200 ft. set back from another's residential property line[.]" In January 2009, the County's Code Enforcement Hearing Officer issued a civil penalty of $9,200.00 for the zoning violation, which Sprint paid.[4]

E. Sprint's Amended Petition for Special Hearing ("*Back River II*")

In May 2012, Sprint filed an amended petition for special hearing, in which Sprint requested additional relief: "To confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations[.]"[5] Both the Office of People's Counsel and Baltimore County opposed the petition.

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[4] Findings of fact from the Code Enforcement Hearing Officer indicate that Back River LLC had reached an "agreement with family members [who owned the property to the south] to purchase [the] final piece of real estate needed to meet [the] set back requirement," but that the sale had not been finalized. The record here includes no indication that the sale and transfer were ever completed.

[5] Beginning with the 2012 amended petition and continuing through this appeal, Sprint has been represented by Lawrence E. Schmidt. Mr. Schmidt was the Zoning Commissioner whose ruling was reversed by the Board of Appeals in the 2002 decision that both the circuit court and this Court later upheld.

The hearing was conducted before the Office of Administrative Hearings for Baltimore County.[6] Sprint advanced the new theory that the location of the tower complied with BCZR § 426.6, as it had been amended in 2002 to require that a tower be "set back at least 200 feet from any other owner's residential property line." Sprint presented testimony that no residence was currently located on the residentially-zoned property 75 feet south of the tower. A witness for Sprint purported to opine that the zoning regulations require a 200-foot setback from an adjacent property line only if that property has actually been improved with a dwelling and is currently used as a residence.

In an opinion issued on August 2, 2012, the Administrative Law Judge denied Sprint's petition. The ALJ determined that the placement of the tower did not comply with the zoning regulations and also that the doctrine of res judicata barred Sprint from obtaining special hearing relief after the prior denial of its variance petition.

Sprint appealed the denial of its petition to the Board of Appeals. Baltimore County and the Office of People's Counsel jointly moved to dismiss the appeal on the grounds of res judicata. The Board of Appeals did not hear testimony, but instead accepted memoranda and considered oral arguments from the parties at a hearing on December 4, 2012. The Board

[6] In 2010, the County Council established the Office of Administrative Hearings, and authorized the administrative law judges of that Office to conduct zoning hearings and to exercise the powers formerly vested in the Zoning Commissioner. *See* Baltimore County Code §§ 3-12-101 *et seq.*

considered exhibits, including copies of the 2002 legislation and this Court's opinion in the prior variance case.

Sprint argued that it was not precluded from raising its claim, because (Sprint contended) it was advancing a legal theory (regarding the 2002 amendments) that had somehow not been available at the time of the administrative and judicial appeals from its variance petition from 2002 through 2005. Sprint's primary contention was that, in the prior proceedings, "neither the Board of Appeals, the Circuit Court, nor the Court of Special Appeals considered the impact of [the] change in law" that occurred while the prior administrative appeal was pending in 2002.

In an opinion and order dated April 19, 2013, the Board of Appeals concluded that res judicata barred Sprint's petition from bringing its petition for special hearing after the denial of the variance petition, because "the end result being [] sought as well as the underlying facts which are contained in both avenues of relief are the same[.]"[7] The Board further rejected Sprint's argument that a change of circumstances after the initial litigation justified an exception to the rule of res judicata.

After examining the 2002 amendment, the Board expressly rejected Sprint's argument that the current version of the law "bears little resemblance" to the law in effect at the time of the initial variance proceeding before the Zoning Commissioner. Although the 2002

[7] Although the Board's opinion noted that Back River LLC had received a code enforcement citation for violating the setback requirements of BCZR § 426.6.A.1, the Board's analysis focused only on the preclusive effect of the variance decisions.

amendment changed the setback requirement from 200 feet from the "residential zone line" in former § 426.6.A(3) to 200 feet from the "residential property line" in amended § 426.6.A(1), the Board reasoned that the change made no substantive difference:

> The terms 'property line' and 'zoning line' do refer to different things, but here the distinction is not relevant because the tower is not set back 200' from either the RC 20 "zone line" or the "property line" of the adjacent parcel. . . . [E]ven if the new version of the law were deemed slightly changed, its current terminology still bars [Sprint] from its present request for relief no matter what label that request for relief has taken on.

Accordingly, the Board granted the County's motion to dismiss Sprint's appeal.

Sprint petitioned for judicial review of the Board's decision in the Circuit Court for Baltimore County. After another hearing, the circuit court issued an order on January 10, 2014, denying the petition for judicial review and affirming the decision of the Board of Appeals. Finally, Sprint filed a timely appeal of that judgment to this Court.

SCOPE OF REVIEW

Sprint has submitted four questions for our review, which we now quote verbatim:

I. Did the Board properly apply the current setback requirements to the property at issue?

II. Did the Board err in dismissing Sprint's petition for special hearing as barred by res judicata, considering that the Board refused to hear evidence necessary to analyze whether Back River I and Back River II present different causes of action?

III. Does the Board's failure to conduct a de novo hearing and fully explain its reasons for its decision constitute reversible error?

IV. Is the circuit court's failure to issue a written decision reversible error pursuant to the Land Use Article of the Annotated Code Section 4-405?

The fourth question concerns an isolated procedural issue; the first three questions are closely interconnected.

The scope of our review of an agency's decision is defined by the record. "[I]n examining the record made below, we do not engage in an independent analysis of the evidence, . . . and we proceed from the premise that an agency's decision is prima facie correct and presumed valid[.]" *Montgomery Cnty. v. Butler*, 417 Md. 271, 284 (2010) (citations and quotation marks omitted). Ordinarily, "[o]ur role in reviewing the final decision of an administrative agency, such as the Board of Appeals, is 'limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Critical Area Comm'n for Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111, 122-23 (2011) (quoting *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005)). "When reviewing the decision of a local zoning body, such as the Board, we evaluate directly the agency decision, and, in doing so, we apply the same standards of review as the circuit court[.]" *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore Cnty.*, 407 Md. 53, 77 (2008).

Judicial review of an agency action typically concerns the narrow question of whether or not the agency order can be sustained on the agency's findings and for the reasons stated by the agency. *See Armstrong v. Mayor & City Council of Baltimore*, 410 Md. 426, 443,

461-62 (2009) (quoting *Trinity Assembly*, 407 Md. at 77-78). In general, it is improper for the reviewing court to search the record for alternative grounds to sustain the agency's decision other than those reasons relied upon by the agency. *See Anselmo v. Mayor & City Council of Rockville*, 196 Md. App. 115, 128 (2010).

The Board summarized its conclusion as follows: "As this Board is not swayed by the Petitioners' argument that this case involves an exception to the doctrine of res judicata, and somehow involves the application of new law that would change the outcome of prior decisions in this matter, the Motion to Dismiss filed by Baltimore County and joined by People's Counsel is GRANTED." By its own terms, the decision currently under review is not a denial of special hearing relief, but a dismissal of Sprint's appeal on the grounds of res judicata.[8] When the Board interpreted BCZR § 426.6, it did so within the narrow context of rejecting Sprint's argument that a significant "change in law" had occurred after the original litigation. Accordingly, it would be inappropriate for this Court to conduct an unbridled examination of the zoning regulations outside of the res judicata issue.

In *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719 (2010), this Court considered the question of "[w]hether an administrative agency's determination of the applicability of the doctrine of *res judicata* should be assessed pursuant

[8] Sprint's brief evidently concedes as much, by correctly stating: "Although the Board analyzed the amendment of BCZR § 426.6 in its written opinion, its[] decision granting Baltimore County's Motion to Dismiss was based upon the application of the doctrine of *res judicata*." Appellants' Br. at 17.

to the substantial evidence standard of review[.]" *Id.* at 722. The *Seminary* case concerned the preclusive effect of the denial of a petition for special hearing (and alternatively for variances) on a subsequent petition to legitimize the same use on the same property. The appellant contended that an administrative ruling on res judicata was "a mixed question of law and fact" that required review for reasonableness under the substantial evidence test. *Id.* at 734.

Our opinion recognized that the default standard of review of an administrative agency's decision is narrow and highly deferential. *Id.* at 733. Nevertheless, we held that the issue of whether res judicata barred the second special hearing petition was a question of law and that it was appropriate to conduct a plenary, de novo review of the Board's legal conclusion on that issue. *Id.* at 734. In doing so, we also "reject[ed] the appellant's implied assertion that the agency was required to resolve any disputed factual issue in th[e] case in order to determine whether the doctrine of *res judicata* was applicable." *Id.* at 722-23.

Accordingly, we will consider de novo the following questions, which we consolidate and restate in this form:

I. Did the Board err in dismissing Sprint's appeal from the denial of Sprint's petition for special hearing as barred by res judicata?

II. Is the circuit court's failure to issue a written decision reversible error pursuant to Md. Code (2012), § 4-405 of the Land Use Article?

As explained below, the answer to both questions is, no. Because we determine that the Board's legal conclusion was correct and also that the circuit court was not required to

issue a written opinion, it is unnecessary to remand to either body to receive additional evidence or to provide more detailed reasoning.

DISCUSSION

I.

A. The Doctrine of Res Judicata

"[I]t is crystal clear that a final judgment of a circuit court affirming a decision of an administrative agency . . . is entitled to full preclusive effect." *Esslinger v. Baltimore City*, 95 Md. App. 607, 621 (1993); *see also Stavely v. State Farm Mut. Auto. Ins. Co.*, 376 Md. 108, 116 (2003) (holding that, under principles of res judicata, earlier agency determination that is affirmed by Court of Special Appeals binds agency in later controversy between same parties).

A long and uninterrupted line of Maryland cases has established that a circuit court judgment affirming a decision by a local zoning body will bar a subsequent attempt to relitigate the matter, where there is only a slight distinction in the form of the second action. *See Fertitta v. Brown*, 252 Md. 594, 599 (1969) (prior determination that particular use of property violated zoning ordinance barred later action seeking declaratory relief to legitimize same use even if prior determination is unsound); *Alvey v. Hedin*, 243 Md. 334, 340 (1966) (appellants barred from second attempt to allege mistake in original zoning of land even though appellants were "attempting to get a different type of commercial classification than in the first case"); *Whittle v. Bd. of Zoning Appeals of Baltimore Cnty.*, 211 Md. 36, 48-49

(1956) (prior adverse ruling on permit application barred later permit application that attached additional conditions); *Bensel v. Mayor & City Council of Baltimore*, 203 Md. 506, 508-17 (1954) (denial of permit for nonconforming use barred subsequent action seeking to enjoin City from interfering with nonconforming use); *Mayor & City Council of Baltimore v. Linthicum*, 170 Md. 245, 249-50 (1936) (denial of prior application to allow proposed use of lot disposed of questions in subsequent application based on different theory); *see also Century I Condo. Ass'n, Inc. v. Plaza Condo. Joint Venture*, 64 Md. App. 107, 113-14 (1985) (earlier decision governing use exceptions acted as res judicata in later case involving building permit for same structure).

Generally, the doctrine of res judicata precludes a party from raising a claim in a second litigation "'if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation.'" *Cochran v. Griffith Energy Servs., Inc.*, 426 Md. 134, 140 (2012) (quoting *R & D 2001, LLC v. Rice*, 402 Md. 648, 663 (2008)). Res judicata, or claim preclusion, "ensures that courts do not waste time adjudicating matters which have been decided or *could have been* decided fully and fairly." *Anne Arundel Cnty. Bd. of Educ. v. Norville*, 390 Md. 93, 107 (2005) (emphasis in original). For this reason, the final judgment in a prior litigation will bind the parties even if a ruling in the original litigation is found later to be in error. *Powell v. Breslin*, 430 Md. 52, 64-65 (2013).

As the Court of Appeals has summarized, the doctrine of res judicata embodies three elements:

> (1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the current action is identical to that determined or that which could have been raised and determined in the prior litigation; and (3) there was a final judgment on the merits in the prior litigation.

Rice, 402 Md. at 663.

In this case, Sprint concedes that the first and third elements are present: the parties to its special hearing petition are substantially identical to the parties to the original action, which concluded in a final judgment on the merits. Sprint argues only that the claim presented in its current action could not have been raised and determined in the prior litigation.

B. Identity of Claims

To determine whether a case involves the same claims that were or could have been decided in earlier litigation, Maryland has adopted the "transaction test," set forth in § 24 of the Restatement (Second) of Judgments. *See Kent Cnty. Bd. of Educ. v. Bilbrough*, 309 Md. 487, 499-500 (1987). "Under the transaction test, what factual grouping constitutes a 'transaction' and what groupings constitute a series of connected 'transactions' are to be determined 'pragmatically, giving weight to such considerations as whether facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or

usage.'" *Boyd v. Bowen*, 145 Md. App. 635, 656 (2002) (quoting *Bilbrough*, 309 Md. at 498). Under this approach, "if the two claims or theories are based upon the same set of facts and one would expect them to be tried together ordinarily, then a party must bring them simultaneously." *Norville*, 390 Md. at 109. The modern view is that the dimensions of a claim are measured in factual terms, "'regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the [litigant]; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights.'" *Bilbrough*, 309 Md. at 497-98 (quoting Restatement (Second) of Judgments § 24, cmt. a).

Under that approach, we must conclude that the claim raised in Sprint's 2012 petition for special hearing ("[t]o confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations") is substantially identical to a claim that could have been raised and determined in the earlier litigation. When Sprint came before the Board in 2002, Sprint sought variances from the same setback regulations to permit retention of the same cell tower in the same location. The two petitions involve a single transaction: Sprint's attempt to secure permission from the local zoning bodies to retain a wireless telecommunications tower on the property.

Appellees in this case have pointed to no Maryland authority specifically holding that a property owner's petition seeking to confirm compliance with zoning regulations involves the "same claim," for res judicata purposes, as an earlier petition seeking variances from the

same zoning regulations. Nonetheless, that holding is compelled by the reasoning under comparable circumstances in three cases: *Jack v. Foster Branch Homeowners Ass'n No. 1, Inc.*, 53 Md. App. 325, 334 (1982), which reasoned that, under the transaction approach, a request for modification, reduction, or waiver of zoning regulations presents the same cause of action as an earlier petition for variance from the same zoning regulations; *Esslinger*, 95 Md. App. at 618, which adopted the transaction approach and held that claims for declaratory relief to allow a nonconforming use on a property presented the same claim as earlier zoning action seeking a permit for the same use; and *Seminary Galleria*, 192 Md. App. at 741-42, which held that even though a property owner's second special hearing petition involved a different zoning regulation from the regulation involved in the first, both petitions involved the same claim for approval of the same use.

In *Jack*, this Court considered the preclusive effect of a prior denial of a variance petition. The property owner in that case, Dr. Joseph Jack, operated a professional office at his residence, but did not furnish the off-street parking spaces required by a local zoning ordinance. *Jack*, 53 Md. App. at 327. Jack's application for variances was ultimately denied in a judgment of a circuit court. *Id.* at 330. A year later, Jack attempted to legitimize the use of his property through a different provision of the local zoning ordinance, by applying for a modification, reduction, or waiver of the parking requirements. *Id.*

On review of a circuit court's denial of the second application on grounds of res judicata, this Court reasoned:

> [I]f the transactional analysis espoused by the American Law Institute is applied, *Restatements (Second) of Judgments*, § 24 (1982), the appellees would prevail. Here, the "transactions" would be attempts to secure permission to operate with less than eight off-street parking spaces, and would be the same in each proceeding.

Jack, 53 Md. App. at 334. Nevertheless, we noted that the rule for determining the identity of claims was, at that time, the "same evidence" test. *Id.* (citing *MPC, Inc. v. Kenny*, 279 Md. 29 (1977)). Because this Court reasoned that the evidence necessary to sustain the variance action was not identical to the evidence necessary to support the second action, we held that res judicata did not bar Jack's claims. *Id.* at 334-36.

A few years later, however, the Court of Appeals endorsed the transactional approach when it decided *Bilbrough*. In adopting § 24 of the Restatement (Second) of Judgments, the Court expressed concern that "sole reliance on the same evidence or required evidence analysis to determine if the same claim is involved in two actions may improperly narrow the scope of a 'claim' in the preclusion context." *Id.* at 494.

Accordingly, the analysis evolved when this Court decided *Esslinger*. The property owner in that case, Donald Esslinger installed a free-standing satellite dish on his property. *Esslinger*, 95 Md. App. at 610. The City's Zoning Board denied three separate applications for a special exception to permit him to erect or retain the satellite dish. The denial of the first application was ultimately affirmed by a circuit court, and the denial of the last application was ultimately affirmed by this Court. *Id.* at 610-12. Later, Esslinger instituted an action pursuant to 42 U.S.C. § 1983, in which he alleged that the City's refusal to allow

him to erect and maintain a satellite receiving dish violated various constitutional rights. *Id.* at 613-14.

Much like the property owner in *Jack*, Esslinger argued that res judicata did not apply to the second action under the "same evidence" test. On review, however, we rejected that position, because the Court of Appeals had since approved of the transactional approach. *See Esslinger*, 95 Md. App. at 617 (citing *Bilbrough*, 309 Md. at 494, 498). We explained:

> Under the "transaction" approach, it is clear that the claim in the 1987 zoning case is identical to the present claim. Indeed, it is undisputed that both arise from precisely the same transaction, *i.e.*, Esslinger's attempt to place a free-standing satellite dish on his property. The facts of the two actions are thus related in "space, origin and motivation." Both involve Esslinger's request for and the Zoning Board's denial of a conditional use permit to allow the same satellite dish on the same property. The only difference between the 1987 zoning action and the 1992 civil rights action is that the latter protests a 1989 Zoning Board decision not to grant Esslinger a conditional use permit so that he could *erect* the dish and the former involved a 1986 Zoning Board decision not to grant Esslinger a conditional use permit so that he could *retain* the same dish. Maryland courts have long recognized that such small differences in the posture of the zoning request do not prevent application of *res judicata*.

Esslinger, 95 Md. App. at 618-19 (footnote omitted).

Accordingly, we held that res judicata barred Esslinger's claims for declaratory and injunctive relief, because he could have asserted those claims as the basis for overturning the original zoning decision. *Id.* at 620-24.

This Court further explained that "[b]oth § 24 of the Restatement and the Court of Appeals in approving the transactional test . . . make it clear that '[e]quating claim with

transaction' is 'justified only when the parties have ample procedural means for fully developing the entire transaction in the one action going to the merits to which the plaintiff is ordinarily confined.'" *Id.* at 619 (quoting *Bilbrough*, 309 Md. at 499). We reasoned that Esslinger could have obtained declaratory and injunctive relief from the circuit court in the earlier litigation, but that he could not have joined a claim for monetary damages to a petition for judicial review of the original zoning actions. *Esslinger*, 95 Md. App. at 623-24. "Accordingly, although Esslinger's claims for injunctive and declaratory relief [were] barred by *res judicata*, his claims for damages [were] not barred by *res judicata* since the latter could not have been asserted in the circuit court action reviewing the initial zoning case." *Id.* at 624.

In the instant case, the claim raised in Sprint's petition is not a claim for monetary relief, but one for relief of a declaratory nature. *See Antwerpen v. Baltimore Cnty.*, 163 Md. App. 194, 200 (2005) ("[a] request for special hearing is, in legal effect, a request for a declaratory judgment"). Under the reasoning of *Esslinger*, Sprint possessed sufficient procedural means to pursue a declaratory remedy when the circuit court reviewed the earlier zoning decision. Thus, res judicata bars the attempt to seek declaratory relief upon the same legal theory that a party could have asserted during a circuit court's review of a prior zoning case. *See Esslinger*, 95 Md. App. at 624.

This Court's more recent opinion in *Seminary Galleria* fortifies the conclusion that the claims raised in Sprint's two petitions are identical for the purposes of res judicata. In

that case, the property owner, Seminary, created 14 new parking spaces in a residentially-zoned portion of its property, without obtaining a permit. *Seminary Galleria*, 192 Md. App. at 723. Seminary then sought retroactive approval of the construction of the parking spaces, by filing a petition for special hearing and alternatively for a variance. *Id.* at 724. The Board of Appeals entered a final order denying the first request, and then Seminary filed a slightly different petition. *Id.* at 726-27. Seminary attempted to differentiate the new petition by introducing a new legal theory: that another section of the BCZR actually required Seminary to furnish the additional parking and that Seminary should be allowed to meet those minimum parking requirements to the extent possible. *Id.* at 727. The Board of Appeals held that Seminary was not precluded from bringing the second petition, and then it approved the parking plan. *Id.* at 729-30.

On review, this Court disagreed with that decision and held that Seminary was precluded from raising the claim in its second petition. We first concluded that the Board's final order in the first petition was entitled to preclusive effect, noting that "[t]he issue of whether the 14 parking spaces could remain was actually litigated" in the first litigation, and "[t]he ruling was necessary to – indeed, the essence of – the Board's decision" in the first case. *Id.* at 736. Despite the slight distinctions in Seminary's two requests, we reasoned that, "[i]n both cases, Seminary's request for relief was the retroactive approval of the same 14 spaces it had constructed in the [residential] zone." *Id.* at 741. The dispositive issue was that, "[w]ith reasonable diligence, Seminary could have discovered and asserted in support

of the original [] filing" the same evidence and legal theory that it raised in its later filing. *Id.* at 741-42. In other words, "Seminary's failure to accurately and contemporaneously survey the Galleria in connection with its first application to approve the additional spaces [was] not a reason to consider a second application seeking the same relief." *Id.* at 742.[9]

Sprint nonetheless contends that res judicata is inapplicable here. In support of that position, Sprint advances a number of overlapping arguments that fall into two general categories: (1) that, as a factual matter, the 2002 amendment to the applicable zoning regulations *was not* considered at the time of the earlier variance proceedings; and (2) that, as a legal matter, Sprint *could not* have asserted its current theory to obtain relief at the earlier proceedings. Sprint's first argument involves an erroneous characterization of the record; the second argument involves an erroneous interpretation of the law.

C. Prior Consideration of the Amended Regulation

During Sprint's original variance action, the Zoning Commissioner, the Baltimore County Board of Appeals, the Circuit Court for Baltimore County, and the Court of Special Appeals (in addition to each of the parties, including Sprint) all independently agreed that

[9] The *Seminary* Court did not expressly apply either the "same evidence" test or the transactional approach. *See Seminary Galleria*, 192 Md. App. at 741. Instead, the Court focused on the availability of the evidence and legal theory during the earlier litigation. The Court reasoned that the result was controlled by prior case law that precludes successive zoning applications as a general matter in the absence of any substantial change in circumstances. *See id.* at 740 (citing *Alvey v. Hedin*, 243 Md. 334 (1966); *Chatham Corp. v. Beltram*, 243 Md. 138 (1966); *Woodlawn Area Citizens Ass'n v. Bd. of Cnty. Comm'rs for Prince George's Cnty.*, 241 Md. 187 (1966)).

the placement of the tower violated the existing zoning regulations. Each of these prior decisions "hinged on the presumption" (Appellants' Br. at 5) that the BCZR required that the tower be set back 200 feet from each of the three property lines to the north, west, and south. Sprint now posits that, under its new interpretation of the 2002 amendment, this presumption must have been mistaken.

The foundation of Sprint's position is Sprint's contention that "it is apparent that the Board of Appeals, the Circuit Court, and the Court of Special Appeals each failed to consider the impact of th[e] change in the law" that allegedly resulted from the 2002 amendment. Appellants' Br. at 9-10. Sprint suggests that those prior administrative and judicial determinations were reviewed under the language of the earlier, 1998 regulation that predated the 2002 amendment: "Given the absence of any specific language stating, 'the law has been amended since this case was instituted' or 'Bill 17-02 has been enacted'; it is apparent that this amendment to the law (and most importantly, its impact on this case) was never considered by any of the administrative and judicial bodies that considered Sprint's variance petition in *Back River I*." Appellants' Br. at 10.

This theory of the record is fundamental to Sprint's appeal. It is also incorrect.

To illustrate how and why Sprint's theory is incorrect, some facts bear repeating. At the 2001 hearing before the Zoning Commissioner, Sprint originally requested variances under the zoning regulations that had been enacted by the 1998 bill. In particular, Sprint requested variances from § 426.6.A.3, which had required that, "if the [commercially-zoned]

property adjoins a residential zone, the tower shall be set back at least 200 feet from the residential zone line"; and a variance from § 426.6.A.4, which had required "a structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line."

While an appeal was pending before the Board of Appeals, Baltimore County amended § 426.6.A.4. The amendment, which took effect on May 5, 2002, re-codified former subsections A.1, A.2., and A.3 into a single standard in a new subsection A.1: "A tower shall be set back at least 200 feet from any other owner's residential property line." The amendment also renumbered former subsection A.4 (concerning setbacks from the equipment structures supporting a tower) as current subsection A.2.

After the effective date of the 2002 amendment, Sprint relocated the proposed tower site an additional 60 feet from the western property line. Subsequently, Sprint submitted a memorandum to the Board of Appeals that included its revised variance requests. The very first page of Sprint's 2002 memorandum explained: "the Baltimore County Council adopted Bill 17-2002 which revised BCZR § 426 such that the references within BCZR § 426.6.A for setbacks, which are the subject of Sprint's Petition for Variance, have been re-numbered." In the same memorandum, Sprint notified the Board of its requested variances from sub-sections A.1 and A.2, for reduced setbacks to the neighboring property lines, "in light of the revisions to BCZR § 426 pursuant to Bill 17-2002[.]" In other words, in Sprint's

memorandum to the Board of Appeals, Sprint presumed that the 2002 amendments governed the appeal.

On September 25, 2002, more than four months after the effective date of the 2002 amendment, the Board of Appeals conducted a hearing to consider Sprint's revised variance requests. During the administrative appeal, the Board was required to apply the updated regulations. *See Scrimgeour v. Fox Harbor, LLC*, 410 Md. 230, 240-41 (2009); *Layton v. Howard Cnty. Bd. of Appeals*, 399 Md. 36, 38 (2007) (re-affirming that, under the rule established by *Yorktown Corp. v. Powell*, 237 Md. 121 (1964), a "legislated change of pertinent law, which occurr[ed] during the ongoing litigation of a land use or zoning case, generally, shall be retrospectively applied").[10]

The text of the Board's 2003 opinion, in which the Board rejected Sprint's variance request, confirms that the Board considered the setback regulation as it had been amended and renumbered in 2002. The Board specifically noted that Sprint had originally requested variances under subsections A.3 and A.4, but that Sprint itself later revised its plan and requested variances under the renumbered subsections A.1 and A.2. The Board's opinion includes no references to the term "residential zone line," from the 1998 version of the regulation. Instead, employing the language of the 2002 amendment, the Board referred only

[10] The *Yorkdale* rule, which "provides for the retrospective application of changes to statutes that impact land use issues made during the course of litigation in land use and zoning cases" (*see Layton*, 399 Md. at 51), affects not only the Board of Appeals, but also the circuit court and the appellate courts. *See id.* at 69.

to the required 200-foot setbacks from each "property line" to the north, west, and south. In short, the Board did exactly what it was required to do in 2002: it evaluated Sprint's revised variance requests with reference to the setback requirements of the zoning regulation in effect at the time – the 2002 amendments.[11]

In Sprint's 2003 petition for judicial review, Sprint also informed the circuit court of the 2002 amendment, and Sprint quoted in full the updated sub-sections 426.6.A.1 and A.2, under the heading "Applicable Zoning Regulations." Similarly, in Sprint's 2004 appellate brief in its unsuccessful appeal to the Court of Special Appeals, Sprint again stated its requests for variances from subsections A.1 and A.2 "in light of the revisions of BCZR § 426 pursuant to Bill 17-2002[.]" The appendix to Sprint's brief even included the full text of the regulation, expressly as amended by "Bill No. 17-2002."

This Court's unreported opinion, authored by Judge Adkins, accurately cited the number of the subsection at issue. *Sprint PCS*, slip op. at 8 (citing "BCZR 426.6.A.1," and explaining that, in contrast to the factors considered for standard setbacks under the BCZR, "a wireless telecommunications tower on such a site must satisfy a greater setback – at least

[11] In an unconvincing exercise in sophistry, Sprint now contends that the Board's use of the phrase "property line" reveals that the Board actually must have been considering the location of the "residential zone line" under the pre-2002 legislation. Sprint theorizes that Zoning Commissioner had (imprecisely) referred to a "property line" in describing the setback required from the "residential zoning line" under the pre-2002 requirements. Sprint then theorizes that, in referring to the "property line," the Board of Appeals was not employing the language of the 2002 amendment (which refers to the "residential property line"), but was replicating the Zoning Commissioner's erroneous formulation of the pre-2002 legislation. We reject Sprint's convoluted argument.

200 feet from any residential boundary"). Later, the opinion even quoted the amended language: "The ML zone permits cellular towers by right, subject to a 200 foot setback requirement 'from any other owner's residential property line.' BCZR § 426.6(A)(1)." *Sprint PCS*, slip op. at 31.[12]

Contrary to Sprint's contentions, the reality is that, during the *Back River I* proceedings from 2002 through 2005, the Board and the reviewing courts considered *only* the setback requirements of the amended regulation. The term "residential zoning line" from the repealed version of BCZR § 426.6.A.3 was absolutely inconsequential in the variance review proceedings from 2002 to 2005. The obvious reason why the Board and the courts found it unnecessary to extensively discuss "the impact of this change in law" (Appellants' Br. at 9-10) was that the law did not change during the course of those proceedings. There was no mistake or oversight here (at least none by the reviewing bodies).

Sprint unsuccessfully attempts to draw an analogy between this case and *Gertz v. Anne Arundel County*, 339 Md. 261 (1995). In that case, the Court of Appeals held that an adverse

[12] In its memorandum to the Board of Appeals in *Back River II*, Sprint incorrectly asserted that this Court failed to cite the language of the 2002 regulation. In the same memorandum, Sprint argued that this Court "mistakenly described the setback requirements as they existed under the law then in effect." Sprint now admits that this Court's opinion quoted the correct regulation. Nonetheless, Sprint goes on to misquote this Court's earlier opinion, altering and re-ordering the Court's words in a thoroughly unpersuasive effort to establish that this Court was actually applying the pre-2002 requirements. Appellants' Br. at 10 n.6. Anyone with an elementary ability to read the English language could determine that this Court's earlier opinion proceeded on the supposition that the 2002 amendments, and not the earlier the legislation, governed the outcome of the case.

judgment against Anne Arundel County in an earlier contempt action involving the County and a property owner did not bar the County from proceeding in a later injunctive action against the property owner, where the second action was based on an emergency ordinance passed after the first case. *Id.* at 270. The Court explained that the rule of res judicata did not apply: "When the contempt action was litigated, the County had no right to proceed against Gertz under the Ordinance because it had not yet been enacted." *Id.* In the instant case, by contrast, Sprint had every right to raise claims based on the regulation that took effect several months before the de novo hearing. More precisely, from 2002 through 2005, Sprint did in fact bring a claim based on the amended regulation.

In sum, Sprint alleges that each of the administrative and judicial bodies that denied its variance petition in 2003, 2004, and 2005 erroneously "applied the old law when analyzing the variance issue." Appellants' Br. at 11. Sprint stakes out that position even though Sprint had revised its variance request to reflect the current law, even though Sprint informed each reviewing body of the 2002 amendment while contending that variances were needed, even though none of the written opinions applied the repealed subsection 426.6.A.3, even though none of those opinions used the term "residential zone line" or other language from that repealed sub-section, even though the Board and this Court both cited the amended subsection 426.6.A.1, and even though the Board and this Court employed the language of the 2002 amendment in referring to the required 200-foot setbacks from the three adjacent "property lines." Sprint's argument is, unarguably, incorrect.

In the midst of making its res judicata determination in this case, the Board of Appeals accepted at face value Sprint's suggestion that the applicable regulation had changed after the 2002 proceedings. Nonetheless, the Board expressly rejected Sprint's argument that the 2002 amendment significantly changed the setback requirements as applied to the property. The Board concluded that the distinction between the two versions of the regulation was "not relevant because the tower is not set back 200' from either the RC 20 'zone line' or the 'property line' of the adjacent parcel." The Board added: "even if the new version of the law were to be deemed slightly changed, its current terminology still bars [Sprint] from its present request for relief[.]"

Ordinarily, a degree of deference should be accorded to an administrative agency's interpretation and application of the statute that it is tasked with administering. *See Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 68-69 (1999). Specifically, the Court of Appeals has recognized that the Baltimore County Board of Appeals has considerable expertise in interpreting the BCZR. *Marzullo v. Kahl*, 366 Md. 158, 173 & n.11 (2001); *see id.* at 173-74 (holding that Court of Special Appeals erred by failing to give proper deference to Board's presumed expertise in construing the BCZR). For this reason, the Office of People's Counsel argues that this Court should uphold the Board's decision by deferring to the Board's interpretation of the BCZR amendment. On the other hand, Sprint asserts that the Board's interpretation of the regulations deserves no deference and, in any event, that a

remand is needed to allow the Board to re-analyze "the question of whether the phrase 'residential property line' amounts to a material change" in law. Appellants' Br. at 31.

The answer to both parties is that there was no change in the applicable law between the 2002 review proceedings and the current action. It was unnecessary for the Board to analyze the difference between the 1998 language and the 2002 language, because the 1998 language was never an issue in the prior administrative and judicial appeals. Accordingly, there is no reason to defer to the Board's answer to a legal question that should not have been considered, nor any reason to remand to allow the Board to provide a more detailed explanation on this inconsequential issue.

D. Availability of Sprint's New Legal Theory at Earlier Proceedings

The applicable law has not changed since the Board of Appeals reviewed Sprint's revised variance requests in 2002. Some time in the past decade, however, Sprint retained a new attorney and developed a new theory of that regulation. Sprint now contends that it could not have presented this argument to the Board in *Back River I*. Before analyzing whether Sprint could have asserted this claim in the earlier proceeding, it is necessary to describe, briefly, Sprint's current theory.

In 2002, the proposed site of the tower was within 200 feet of each of the property lines to the north, west, and south. These three property lines coincided with the zoning lines, which divided the commercially-zoned (M.L.) land from the adjoining residentially-zoned (R.C. 20) land. The 2002 amendment revised the language of the applicable setback

requirements from "the tower shall be set back at least 200 feet from the residential zone line" (former BCZR § 426.6.A.3), to "[a] tower shall be set back at least 200 feet from any other owner's residential property line." BCZR § 426.6.A.1.

Sprint contends that BCZR § 426.6.A.1, under its plain meaning, incorporates a "residential use requirement." Sprint argues: "The clear purpose of the amended regulation was to keep cell towers away from dwellings. A 200 foot setback is required only when property within 200 feet of a tower is owned by another *and has a dwelling thereon.*" Appellants' Br. at 14. Under this interpretation, the regulation does not require that a tower be set back any distance from an adjoining residentially-zoned property, as long as no one currently resides in a dwelling on that property.[13]

Sprint further asserts that, at the time of the review of its variance petition, the neighboring R.C. 20 properties to the north and west were vacant, but the property to the south was improved with a dwelling. In addition, Sprint proffered to the Board of Appeals in *Back River II* that, if it had been permitted to adduce evidence, its witnesses would have testified that the dwelling no longer stands on the property to the south. The Board took no testimony and made no factual findings on this disputed fact. Because the Board purported

[13] Sprint has drawn our attention to a pair of administrative decisions issued by the Deputy Zoning Commissioner for Baltimore County, which Sprint argues support its interpretation of BCZR § 426.6.A.1. One decision was expressly limited to the facts of the subject property, while the other decision involved split-zoned property. Even if these decisions were indistinguishable, we would see no reason why the Board of Appeals, let alone this Court, would be bound to follow them.

to dismiss an appeal after considering only legal issues, we shall assume, *arguendo*, that Sprint made accurate representations to the Board about the existence of the house on the southern property. *See Antwerpen*, 163 Md. App. at 203 (explaining that, where Board of Appeals ruled only on motion to dismiss and did not take evidence, this Court would assume that appellant's proffer to Board was correct).

Moreover, we shall take no position here on the correctness or incorrectness of Sprint's interpretation of BCZR § 426.6.A.1. The only relevant issue for our analysis is whether Sprint could have made the legal argument during the earlier proceeding. Under Sprint's theory, there was only one adjacent "residential property line" in 2002, the property line south of the tower. No setbacks would have been required from the property lines of the unimproved, residentially-zoned properties to the north and west of the tower. Thus, through only an ordinary degree of diligence (indeed, simply by examining the regulation and the site plan), Sprint could have realized that, under what Sprint now calls the "plain meaning" of the regulation, two of the requested variances would no longer be needed. Because the property itself was approximately 223 feet wide, Sprint could have revised its proposal by relocating the tower more than 200 feet north of the southern residential property line. Finally, Sprint could have argued before the Board that, as an alternative to variance relief, the Board should determine that no setbacks were required from the adjacent, vacant, residentially-zoned properties.

These two procedural means (revising the variance requests in light of the amended regulations and asking the Board to determine that variances were not legally necessary under the regulations) were not only available to Sprint. Sprint actually employed both mechanisms after the effective date of the amendment. When Sprint submitted its 2002 memorandum to the Board, Sprint revised its variance requests "in light of the revisions to BCZR § 426 pursuant to Bill 17-2002." At the same time, Sprint also argued that "setback variances for the equipment cabinets [were] not legally necessary since they [did] not qualify as 'structures' . . . as that term is defined by the BCZR." There is no merit to Sprint's contention that "treating the facts as separate trial units would not [sic] conform to the party's expectations because [Sprint's] rights under the new law could not have been litigated in the initial action." Appellants' Br. at 24.

Sprint argues here that it did not possess the procedural means to change its theory in the context of a de novo review of the variance petition. Sprint submits: "Although the Board's hearing was a *de novo* proceeding, the new theory (special hearing) could not have been considered because of the relief sought (variance) in the case then at issue." Appellants' Br. at 22. Sprint further argues that the transaction approach cannot be applied to this case, because (Sprint claims) it lacked the means to obtain relief during review of the variance petition. Appellants' Br. at 18-19.

In making these arguments, Sprint conflates the relief requested with a particular process to obtain that relief. The specific remedy requested in Sprint's 2012 petition was not

the hearing itself, but official confirmation that certain setbacks were not required from adjacent, unimproved properties. If Sprint believed that the language of the 2002 amendment somehow eliminated some of the setback requirements from adjacent properties, Sprint could have and should have presented those arguments in the earlier proceeding so that the Board could have resolved all issues in a single piece of litigation.[14]

Sprint attempts to place the issue under a technical lens rather than a pragmatic one, by contending: "Petitioners could not have been permitted to introduce a new petition for special hearing when only a petition for variance was under consideration during the appellate proceedings at the Board." Appellants' Br. at 22-23. Sprint attempts to distinguish *Cassidy v. Cnty. Bd. of Appeals of Baltimore Cnty.*, 218 Md. 418 (1958). In *Cassidy*, the Court of Appeals rejected an appellant's argument that the County Board of Appeals lacked jurisdiction to grant a special exception to a property owner because the public notice had mentioned only reclassification of the property. *Id.* at 421-25. The Court reasoned that, despite different standards of proof in the two petitions, the actual notice to the public substantially complied with the requirements, because the method of notice for both types

[14] There are many possible reasons why Sprint did not make such an argument. Perhaps the interpretation did not occur to Sprint's attorneys at the time, or perhaps the attorneys considered that interpretation to be untenable. Perhaps they saw no benefit in moving back the boundaries of the unoccupied residential properties on the north and the west, because Sprint had already constructed the tower, at its own risk, 75 feet from the (then-occupied) residential property to the south. Whatever Sprint's reasons for declining to present this theory at the time, those restrictions were self-created, and not imposed by the agencies or the courts.

of petition was identical, and because the notice clearly apprised the public of the character of the proposed action. *Id.* at 424-25.[15]

Sprint argues that *Cassidy* should be distinguished. Sprint contends that the only way to confirm whether or not the BCZR required setbacks from unimproved properties was through a petition for special hearing, but that additional public notice would have been required before granting that relief. But even assuming that additional notice would have been required for Sprint to introduce its theory, such an obstacle was purely temporary. Given the four months that elapsed between the effective date of the amendment in May 2002 and the Board's de novo hearing, Sprint had ample time to cure any defective notice. At most, the Board would have been required to post additional notice on the property and to publish notice in two newspapers of general circulation for 15 days before hearing the matter. *See* BCZR § 500.7.

Neither the Baltimore County Zoning Regulations nor the Rules of Practice and Procedure issued by the Baltimore County Board of Appeals outline a specific procedure for amending a petition at the Board level. If Sprint had argued that the 2002 zoning amendment drastically changed the nature of the setback requirements at issue in the case, then the Board

[15] Although Sprint mentioned the issue of public notice in a single page of its appellate brief, almost all of the substance of Sprint's argument on this issue was first presented in a 12-page section of a reply brief. This Court has no obligation to address the additional arguments that were not presented in the original brief. *See, e.g., Chang v. Brethren Mut. Ins. Co.*, 168 Md. App. 534, 550 n.7 (2006); *see also May v. Air & Liquid Systems Corp.*, 219 Md. App. 424, 440 & n.12 (2014).

could have selected an appropriate course of action: dismissing the case without prejudice to allow a new petition to be filed, remanding the case back to the Zoning Commissioner, staying the appeal to allow the Zoning Commissioner to conduct a special hearing before consolidating the appeal, or simply issuing notice and resolving the matter at the de novo hearing. We do not speculate as to which procedure would have been most appropriate. At most, a few additional steps would have been required before the exact remedy could be granted.[16]

In sum, the time to present Sprint's theory that the BCZR required no setbacks from the vacant, adjacent properties was during the 2002 litigation, not in the separate, multi-year litigation that Sprint commenced in 2012. It cannot be disputed that both of Sprint's claims seeking approval for the cell tower were so closely related in space, origin, and motivation that the claims formed a convenient trial unit. *See Esslinger*, 95 Md. App. at 618. Therefore, Sprint is precluded from bringing substantially the same claim that the Board and the reviewing courts could have resolved in the earlier litigation, if only Sprint had presented its argument at that time. *See Seminary Galleria*, 192 Md. App. at 741-42 (holding that res judicata barred special hearing petition, because "[w]ith reasonable diligence, [petitioner]

[16] As explained previously, in *Esslinger*, 95 Md. App. at 623-24, this Court held that res judicata bars a litigant from raising claims for declaratory relief based upon legal theories that he or she could have asserted in a prior judicial review of an administrative decision. *Esslinger* focused on the circuit court's power to grant that particular remedy, rather than the Board's power. Thus, even if the Board in 2002 could not have granted special hearing relief, the circuit court could have granted equivalent declaratory relief in 2003.

could have discovered and asserted in support of the original [] filing its current argument"); *see also Alvey*, 243 Md. at 340 (res judicata barred second rezoning application "because any of the testimony relied upon in the [second] case as to this question could and should have been presented in the first case"); *Whittle*, 211 Md. at 49 (res judicata barred second rezoning application because "all the information which could have been produced should have been produced [in the first case] and the second case cannot be decided on testimony whi[c]h might have been introduced in the first case"); *Linthicum*, 170 Md. at 249 (holding that prior judgment regarding proposed use of property "dispose[d] of all questions [] presented [in second case], for they were all involved in the general question of exclusion of use, whether they were actually raised or not").

II.

A. Issuance of Written Opinion by Circuit Court

Sprint's final contention is that the circuit court erred when it affirmed the decision of the Board of Appeals without issuing a written opinion. Sprint directs our attention to § 4-405(a) of the Land Use Article, which mandates that a circuit court must "file a written order and opinion embodying the reasons for its decision" after conducting judicial review of certain zoning decisions by a board of appeals. Sprint further argues that the circuit court's order failed to include its reasons, and thus that the case should be remanded with instructions that the circuit court issue a separate opinion.

These contentions are misguided. As the Office of People's Counsel correctly points out, the provision cited by Sprint is inapplicable to this case. Baltimore County is a charter county that has adopted home rule under Article XI-A of the Maryland Constitution. *See, e.g., Hope v. Baltimore Cnty.*, 288 Md. 656, 659-60 (1980); *see also Falls Rd. Cmty. Ass'n, Inc. v. Baltimore Cnty.*, 437 Md. 115, 136, 141 n.28 (2014). Section 4-405(a) of the Land Use Article is codified within a division that expressly does not apply to zoning matters in charter counties. *See* Md. Code (2012), § 1-401(a) of the Land Use Article.[17]

Judicial review over zoning cases in a charter county is governed by the Express Powers Act, currently codified in Title 10 of the Local Government Article. Under that Act, each charter county is authorized to establish a board of appeals with jurisdiction over zoning exception cases and other matters. *See* Md. Code (2013 Repl. Vol.), Local Government Art., § 10-305(a)-(b). In such cases, the county board of appeals is required to file an opinion that must include factual findings and the grounds for the decision. *Id.* § 10-305(c). There is no corresponding requirement that the circuit court issue its own separate opinion when reviewing a decision by a board of appeals. *See id.* § 10-305(d).

In addition, § 10-324(a) of the Local Government Article empowers a charter county to enact local laws providing for the right to seek review in the circuit court of any other

[17] Section 1-401 of the Land Use Article is titled "Charter counties; limited application of division." Subsection (a) reads: "General limited application. Except as provided in this section, this division does not apply to charter counties." Subsection (b) lists a number of exceptions (*i.e.* certain provisions that do apply to charter counties), but that list does not include § 4-405.

matter arising under local zoning laws. Section 604 of the Baltimore County Charter grants parties a right to obtain judicial review of decisions of the board of appeals by appealing to the circuit court. These provisions include no requirement that the circuit court file a separate opinion when reviewing zoning cases.

Sprint commenced the instant case by filing a petition for special exception and special hearing in 2008. The administrative law judge ultimately considered only the petition for special hearing, and then Sprint appealed to the county board of appeals and to the circuit court. Neither § 10-305 nor § 10-324 of the Local Government Article requires that the circuit court must embody its reasons in a written opinion. Thus, the circuit court's order affirming the decision of the board of appeals was not deficient. Sprint's request for a remand to the circuit court has no statutory basis.

CONCLUSION

For the reasons stated in this opinion, we affirm the judgment of the circuit court, which affirmed the decision of the Board of Appeals. Our ruling is based upon a de novo legal conclusion that, even if Sprint's factual proffers to the Board were accurate and even if Sprint's interpretation of the zoning regulations were correct, res judicata would still bar Sprint's present claim. Accordingly, there is no reason to remand for further proceedings to resolve any remaining factual or legal dispute. *See Seminary Galleria*, 192 Md. App. at 723, 742 (affirming circuit court's judgment reversing Board's zoning decision on grounds of res judicata, without remand); *Antwerpen*, 163 Md. App. at 203-04, 210 (affirming circuit court's judgment affirming Board's decision on purely legal grounds, without remand).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

IN THE MATTER OF HARLAN ZINN –Petitioner/Legal Owner 809 Cold Spring Road Middle River, MD 21220	*	BEFORE THE BOARD OF APPEALS OF
RE: Petition for Special Hearing to Approve Building Permit for Undersized Lot	*	BALTIMORE COUNTY
	*	Case No. CBA- 13-295-SPH

* * * * * * * * * * *

OPINION

This case comes to the Board on appeal of the denial by the Administrative Law Judge of a Petition for Special Hearing filed by Harlan Zinn, Petitioner, pursuant to Baltimore County Zoning Regulations §500.7 ("B.C.Z.R.") to approve a building permit for an undersized lot located at 809 Cold Spring Lane, Middle River, MD 21220 (the "Property).

A public hearing was held on November 13, 2013. The Petitioner was represented by Michael McCann, Esquire. Deputy People's Counsel for Baltimore County, Carole DeMilio, participated in the hearing. Edward C. Covahey, Jr., Esquire represented Danan Holding Corporation, Daniel and Nancy Hubers, Richard and Amelia Pitz, Edward Bardroff, Sr. and Mitium Lee O'Hare, Protestants.

MOTION TO DISMISS

At the beginning of the Board hearing, Deputy People's Counsel made a oral motion to dismiss the case on the basis of *res judicata*. Mr. Covahey joined in the Motion. Mr. McCann opposed the Motion contending that the instant case was different than the previous cases filed by the Petitioner or his predecessor in title.

PRIOR ZONING LITIGATION

In this appeal, Mr. Zinn seeks a building permit to construct a residence on the Property. The hurdle he faces is that BCZR §1B02 (a/k/a the "small lot table") requires that property zoned D.R. 3.5. be at least 10,000 sq. ft. with a front and rear yard setback of 30 feet each. Because this Property measures less than 10,000 sq. ft., it is 'undersized'. Mr. Zinn argues that the small lot table setbacks restrictions do not apply based on BCZR §1B02.3.A.5.

By way of background, the Property was platted in 1914 as Lot 304, Part of Plan C of Long Beach Estates on Galloway Creek. Other than a shed, the Property has remained unimproved, having been used as a place to dock and launch boats. In 1976, the Property was zoned D.R. 5.5 and the minimum lot size was 6,000 sq. ft. In 1992, the Property was rezoned D.R. 3.5 and the minimum lot size was increased to 10,000 sq. ft.

In considering the Motion to Dismiss, the Board reviewed the zoning history of the Property which is extensive and summarized from prior Orders as follows:

(1) 2003 – Petition for Variance; Zoning Commissioner, Case No.: 03-500-A. Janice Oberst, the predecessor in title, along with a contract purchaser, Robert Long, filed a Petition for relief from BCZR §303.1 and from the setback restrictions in small lot table in BCZR, §1B02.3.C.1. Specifically, she requested a front yard setback of 11 feet in lieu of the required 55 ft. and a rear yard setback of 2 ft. in lieu of the required 30 ft. In addition, she requested that the Property be approved as an undersized lot.

Ms. Oberst and her family had owned the Property since 1954. They lived in the house located at 810 Cold Spring Road. During the 50 years that Ms. Oberst's family had owned the Property, they kept a small sailboat there, and her father operated a charter business out of the

Property. A storage shed was also on the Property as well as a pier and bulkhead. In 2004, the Oberst family sold the home at 810 Cold Spring Road to Robert Kroll.

The Petition filed by Ms. Oberst was opposed by Richard Pitz, a neighboring property owner who is also opposed to the instant Petition. In 2005, the Zoning Commissioner denied the relief finding that the lot was too small to build a house, that to do so would be inconsistent with the neighborhood and further, that the requested relief failed to meet the uniqueness test set forth in *Cromwell v. Ward*, 102 Md. App. 691 (1995). Ms. Oberst did not appeal the Commissioner's decision.

(2) 2004 – Petition for Variance – Deputy Zoning Commissioner; Case No.: 04-522-A.

In 2004, Mr. Zinn, as the contract purchaser, along with Ms. Oberst, sought relief to allow construction of a dwelling on the Property. In requesting that relief, Mr. Zinn argued that the Property was an undersized lot, that the front yard setback be 23 ft. in lieu of the required 30 ft. and the rear yard setback be 2 ft. in lieu of the required 30 ft.

The Deputy Zoning Commissioner denied the relief sought and agreed with the prior decision of the Zoning Commissioner. That decision was appealed to this Board.

(3) 2005. Petition for Variance - Board of Appeals; Case No.: 04-522-A.

In the hearing on appeal, Mr. Zinn amended the Site Plan and argued that the size of the Property was larger at 7,504 sq. ft. because the property lines included a portion of the 40-foot right of way known as Cold Spring Road as well as a 900 sq. ft. road end parcel purchased by Ms. Oberst from Bowley's Quarters Improvement Association in 1992.

Protestant, Mr. Pitz, testified in opposition to that request, pointing out that his home and others in the area were built on double and triple lots. In addition, Robert Kroll, the purchaser of 810 Cold Spring Rd. also opposed Mr. Zinn's request.

In that case, this Board considered whether the case should be barred under *res judicata* and collateral estoppel. At that time, we allowed the case to go forward but ultimately denied the requested relief. We held that the Property could not be used as an undersized lot upon which a home could be built, without variances being granted for setbacks. In considering the variance requested, the Board found that the Property was not unique. We said that the fact that the Property was wider than it is long was not sufficient to make it unique for zoning purposes. We held that the Property was too small for a home to be built.

In making that decision, the Board found that the Property was not 7,504 sq. ft. as Mr. Zinn contended but rather the original 5,396 sq. ft. The Board did not find credible the argument that the property lines included the 40 foot right of way or the 900 sq. ft. purchased by Ms. Oberst. We held that the extent of the property lines must be determined by the Circuit Court.

Mr. Zinn did not appeal the decision of this Board.

(4) 2007 –Petition for Special Hearing under BCZR, §500.7, Zoning Commissioner, Case No.: 07-236-SPH.

In 2007, Mr. Zinn filed for special hearing relief under BCZR, §500.7 to request that a storage shed be constructed for kayaks, boating equipment and gardening equipment. The shed was intended to supplement the use of the pier. The Deputy Zoning Commissioner granted that relief subject to restrictions to ensure that the shed would not be converted to a dwelling. There was no opposition to the requested relief. There was no appeal filed.

(5) 2007 –Petition for Variance, Zoning Commissioner, Case No.: 07-545-A.

Five months after the Order granting the storage shed, Mr. Zinn filed a Petition for Variance from the setback restrictions contained in the small lot table. In that case, Mr. Zinn argued that the Property measured 7,342 sq. ft. and he wanted variances from the 10,000 sq. ft.

minimum lot size and from the 25 ft. front and rear setbacks in lieu of the required 30 foot setbacks.

The Zoning Commissioner dismissed the case on the basis of *res judicata* indicating that Mr. Zinn was bound by this Board's 2005 decision and could not relitigate the same matter. Mr. Zinn appealed that decision to this Board.

(6) 2008 – Board of Appeals, Petition for Variance, Case No.: 07-545-A.

This Board heard the appeal of the Zoning Commissioner's dismissal. In our decision, we summarized the previous cases and Opinions concerning the Property. Mr. Zinn alleged that the size of the Property at that time was 7,342 sq. ft. We held that res judicata barred that appeal and said that the matter was fully litigated. We noted that *res judicata* is intended to prevent endless re-litigation of issues that have already been legally determined. Mr. Zinn did not appeal our 2008 decision.

Baltimore County Zoning Regulations

§ 1B02.3. Special regulations for certain existing or proposed developments or subdivisions and for small lots or tracts in D.R. Zones.

> A. In D.R. Zones, contrary provisions of this article notwithstanding, the provisions of or pursuant to this subsection shall apply to the use, occupancy and development of; alteration or expansion of structures upon; and administrative procedures with respect to:
>
> * * * *
>
> 5. Any lot or tract of lots in single ownership which is in a duly recorded subdivision plat not approved by the Baltimore County Planning Board or Planning Commission.

C. Development standards for small lots or tracts.

1. Any dwelling hereafter constructed on a lot or tract described in Subsection A.3 or A.4 shall comply with the requirements of the following table:

Zoning Classification	Minimum Net Lot Area per Dwelling Unit (square feet)	Minimum Lot Width (feet)	Minimum Front Yard Depth (feet)	Minimum Width of Individual Side Yard (feet)	Minimum Sum of Side Yard Widths (feet)	Minimum Rear Yard Depth (feet)
D.R.1	40,000	150	50	20	50	50
D.R.2	20,000	100	40	15	40	40
D.R.3.5	10,000	70	30	10	25	30
D.R.5.5	6,000	55	25	10	—	30
D.R.10.5	3,000	20	10	10	—	50.
D.R.16	2,500	20	10	25	—	30

Decision

Over the past 10 years, 4 cases have been heard and decided by the Zoning Commissioner's office and 2 appeals have been heard and decided by this Board in regard to the Property. The issue before us is whether the instant appeal should be dismissed on the basis of *res judicata*. Having heard argument of counsel on the Motion to Dismiss at the hearing, having reviewed the prior decisions of the Zoning Commissioner's office and of this Board, and having deliberated the Motion at the hearing on the record (with consent of all Parties) we grant the Motion to Dismiss the case, on the basis of *res judicata*.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not hear the facts of a case before determining whether the doctrine of *res judicata* applies. *Id.* at 995 A.2d 1070.

The Court also stated that the doctrine of *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett*, 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

The doctrine of *res judicata* bars litigation of the same matter with respect not only to the legal claims or issues decided in the case but also as to all matters which could have been litigated in the first suit. In *Powell v. Breslin*, 430 Md. 52 (2013), the Court of Appeals reaffirmed its holding in *Alvey v. Alvey*, 225 Md. 386, 390 (1961):

> The doctrine of *res judicata* is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters which with propriety could have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit,....

The doctrine of *res judicata* applies in zoning cases where the issue revolves around property use rather than the owner's identity. *City of Baltimore v. Pre*, 224 Md. 428 (1961).

The Court of Appeals in *Deleon, et ux. v. Slear, et al.*, 328 Md. 569, 589 (1992) citing its holding in *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487 (1987), explained that the test for determining whether claims are the same for the purposes of *res judicata* is the 'transaction' test as set forth in §24 of the Restatement (Second) of Judgments. The Court said that regardless of the number of substantive legal theories or forms of relief that may be available to a petitioner,

and notwithstanding the number of rights that may have been invaded, or the variations in evidence needed to support the theories or rights, the transaction test analyzes the facts of each claim to determine whether they are coterminous.

The concept of 'claim' is distinguished from the narrow concept of 'cause of action' in that a claim is defined as "a group or aggregate of operative facts giving ground or occasion for judicial action..." *Deleon* at 589. Specifically, the holdings in *Bilbrough* and *Deleon* narrow our focus to whether the facts of each case "are related in time, space, origin or motivation." *Deleon* at 591.

Applying the holdings in *Deleon* and *Alvey* here, this case involves the same property, the same parties, and the same request for a building permit on a lot that has repeatedly been adjudicated as 'too small' for a residence. The facts of this case are related in time, space, origin and motivation. Mr. Zinn created this zoning history himself, without filing for all forms of available relief back in 2004, under whatever legal theories could have been brought, including the instant one. Rather, his approach over the years has been to file cases in piece-meal fashion, arguing that the size of this property has changed, or by changing the dimensions of his proposed residence. His failure to appeal and have our previous findings of fact overturned, binds him to the facts previously adjudicated.

The way we see it, without even considering the other 5 zoning decisions, the 2003 Zoning Commissioner's decision alone is enough to deny Mr. Zinn relief here. This is true under *Seminary Galleria* even if he was not a party in 2003 because as a successor owner, he is in privy. His predecessor in title, Ms. Oberst admitted that the small lot table applied by filing for relief from it and by requesting approval of the Property as an undersized lot. In this case, Mr. Zinn's latest theory is that the small lot table does not apply. He is bound by not only Ms.

Oberst' admission but by the Zoning Commission's decision to deny the relief and his finding of fact that the "lot is too small" for a house. When the decision was not appealed, it became final. Moreover, under holdings in *Powell, supra*, and *Alvey, supra*, the issue of whether the small lot table even applied should have been raised as alternative relief in the 2003 case. Since it was not, it is barred from being raised 10 years later.

Notwithstanding the 2003 decision, the very next year, Mr. Zinn, as a contract purchaser of the Property, files for virtually the same relief as Ms. Oberst - that he needed relief from the small lot table. The only appreciable difference is that he reduced the amount of the setback variance needed. After a hearing on the merits, the Deputy Zoning Commissioner in 2004 denied the relief for the same reason set forth in the 2003 decision. Any claim by Mr. Zinn that the Property was not subject to the small lot table restrictions should have been raised as an alternative form of relief in that case.

Thereafter, this Board permitted the appeal of the 2004 decision to be heard on the merits in a *de novo* hearing in which Mr. Zinn was represented by counsel. In that appeal, Mr. Zinn rearranged his argument and claimed that the lot size had increased by including the 40' right of way and the 900 sq. ft. of unbuildable land purchased by Ms. Oberst. After a hearing on the merits, we rejected this argument and specifically found that the Property was still the original 5,396 sq. ft. Mr. Zinn did not appeal our decision and is bound by our findings as to the Property size.

He waited another 3 years before filing for relief again with the Zoning Commissioner's office. At that time, in 2007, Mr. Zinn filed a Petition for Special Hearing. While his request for relief was for a storage shed to supplement his use of the pier where he docked a houseboat, the Deputy Zoning Commissioner granted the storage shed request but placed restrictions in the

Order to prohibit the use of the shed as a residence. The 2007 case and the instant one both involve a Petition for Special Hearing, Mr. Zinn could have raised his latest legal theory in 2007 but failed to do so. He did not appeal the Deputy Zoning Commissioner's decision.

After the 2007 decision, he only waited 5 months to file another request for variance relief from the restrictions in the small lot table so he could build a house. In June of 2007, Mr. Zinn attempted at that time to increase the square footage of the lot to 7, 342 sq. ft. He made this argument in 2007 despite this Board's previous decision and factual finding that the Property size was 5,396 sq. ft. In 2007, he also asked for a larger front and rear yard setbacks than he did back in 2004 notwithstanding our previous denial of the smaller setbacks. When we heard the Zoning Commissioner's 2007 decision, we agreed that the case should be dismissed on the basis of *res judicata*. Mr. Zinn did not appeal our decision and it became final.

Applying the standard set forth in *Seminary Galleria*, our previous decisions in Case No. CBA - 04-522-A and CBA 07-545-A meet this test: (1) this Board was acting in a judicial capacity by conducting hearings in both cases, where evidence was presented, and rulings were made on disputed legal issues; (2) the issue of whether the lot was large enough to construct a residence and the size of the Property was actually litigated; and (3) this Board's rulings and that of the Zoning Commissioner's office were necessary for a resolution of the requests for relief from the setback restrictions in the small lot table as well as variance relief.

The Board finds it to be incredulous that Mr. Zinn has repeatedly requested relief from the small lot table restrictions over the years and now wants to claim that such restrictions do not apply. Under the applicable case law, BCZR §1B02.3.A.5 provides no refuge for Mr. Zinn. As the foregoing sequence of decisions and factual history indicate, the instant case fits squarely within the doctrine of *res judicata* and should be dismissed.

ORDER

THEREFORE, IT IS THIS 19th day of February, 2014, by the Board of Appeals of Baltimore County

ORDERED that the Motion to Dismiss the Petition for Special Hearing relief is hereby GRANTED for the reasons set forth herein and the case shall be dismissed; and it is further,

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen Murphy/KC
Maureen E. Murphy, Panel Chairman

David L. Thurston

Wayne R. Giotoso, Jr.

RE: PETITION FOR SPECIAL HEARING
810 Back River Neck Road

15th Election & 6th Councilmanic Districts
Legal Owner: Back River LLC
Petitioner(s)

* BEFORE THE

* BOARD OF APPEALS

* FOR

* BALTIMORE COUNTY

* Case No.: 2008-0531-SPH

OPINION

This case comes before the Baltimore County Board of Appeals as a de novo hearing on an appeal of the decision of the Administrative Law Judge denying a Petition for Special Hearing filed by the Petitioners for the property located at 810 Back river Neck Road in Eastern Baltimore County. The Petitioner has requested the following relief: 1. To determine that an existing cell tower is compliant with the current setback regulations; 2. To approve a non-density transfer of land into the subject property from the north and west. The Baltimore County Office of Law and Office of People's Counsel has moved for dismissal of the Petitioner's appeal on the grounds *of res judicata*. Memorandum were submitted by all parties and oral arguments were heard by this Board on December 4, 2012. Lawrence E. Schmidt of Smith, Gildea & Schmidt LLC appeared on behalf of the Petitioners, Adam Rosenblatt, of the Baltimore County Office of Law appeared for Baltimore County, and Carole S. Demilio appeared on behalf of People's Counsel. The Motion to Dismiss was publicly deliberated on January 16, 2013.

BACKGROUND

The dispute at issue dates back to January 4, 2002, when former Zoning Commissioner Lawrence E. Schmidt issued a written Order granting the Petitioner a variance from BCZR § 426 to construct a cell tower in the location where it is still presently situated. (Baltimore County, Ex. 1) The case was appealed to the Board of Appeals, which reversed the decision and

denied the variances and the Circuit Court and Court of Special Appeals, both of which affirmed the Board of Appeals. (Baltimore County, Ex. 2, 4) In 2009, the Baltimore County Code Enforcement Hearing Officer issued an Order finding the Petitioner in violation of BCZR § 426.6.A.1 for failing to maintain a 200 foot setback "from another owner's residential property line" and issued a civil penalty which was not appealed. (Baltimore County Ex. 5) In the proceeding before this Board, the Petitioner contends that the cell tower, is in compliance with the BCZR and never actually required a setback variance. The County as well as People's Counsel contends that the Petitioner's current argument is barred by *res judicata*, thus resulting in their filing of the Motion to Dismiss presently before the Board.

FACTS

The facts involved in the matter are derived from related past legal decisions on the issue and a change in the wording of BCZR § 426.6A, which governs the setback requirements for Wireless Communications Towers in Baltimore County. Prior to May 5, 2002, of BCZR § 426.6A read as follows:

> 1. If a tower is located in a residential zone, the tower shall be set back at least 200 feet from any other owner's residential property line.
>
> 2. If a tower is located in a transitional zone, the tower shall be set back at least 200 feet from any residential zone.
>
> 3. If a tower is located in a medium or high intensity commercial zone, the tower shall be set back from an adjoining property line a distance equal to the setback required for other structures in the zone. However, if the property adjoins a residential zone, the tower shall be set back at least 200 feet from the residential zone.

In 2002, Bill 17-20 amended the law governing these setbacks to require that a "tower shall be setback at least 200 feet from any other owner's residential property line." BCZR § 426.6A(1) (emphasis added). (People's Counsel Ex. 1) This Bill became effective on May 5,

2002, and presently governs the setbacks for Wireless Communication Towers today. It is this change in of BCZR § 426.6A which the Petitioner basis its argument in the instant petition.

Bill 17-20 became effective four (4) months after Petitioner's original request for variance was granted, thus the pre-May 5, 2002 version of of BCZR § 426.6A was controlling at that time. The change occurred before the Board of Appeals conducted *de novo* hearings and denied the variances on May 14, 2003, and before the Court of Special Appeals affirmed the Board on August 3, 2005.

ARGUMENT

The doctrine of *res judicata* provides that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc,* 192 Md.App. 719, 734-737 (2010). Res judicata acts as "an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which *could have been* litigated." Id. (*citing Whittle v. Bd. of Zoning Appeals,* 211 Md. 36, 49 (1956) (emphasis in original)). In *Whittle,* the Court of Appeals stressed that successive litigation of zoning petitions is discouraged because it "would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law." 211 Md. at 45. The doctrine applies to the administrative decisions reached by the County Board of Appeals *Batson v. Shiflett,* 325 Md. 684, 705 (1992).

It is clear from the record of the prior proceeding involving this matter, it was not until the recent hearing before Baltimore County A.L.J. John E. Beverungen, that the Petitioners' raised the argument that in light of the 2002 statutory change to BCZR § 426.6A(1) a variance was not required to keep the cell tower at issue in its current location. The Petitioners, while

acknowledging the basic tenets of *res judicata,* opine that the request for relief now set before the Board, falls into an exception to the general prohibitions of *res judicata.*

Petitioners first contend that *res judicata* should not apply due to the fact that the manner of relief now being sought is A Request For Special Hearing and not a Request for Variance. As the end result being and sought as well as the underlying facts which are contained in both avenues of relief are the same, the Board is not convinced that changing the name of the proceeding circumvents the constraints of *res judicata.*

Additionally, Petitioners contend that *res judicata* should not apply to the instant petition due to the fact that the law "changed" after the original request for variance went before the Zoning Commissioner. Petitioners state that "the version of the regulation under consideration in the instant matter bears little resemblance to the law in effect when the earlier matter was filed and considered by the Commissioner." This Board does not agree with this assertion. Petitioners' primary argument is that the regulation at issue was amended in 2002 (Bill 17-02) to provide that a "cell tower" shall be set back at least 200' from any other owner's residential property line." (emphasis added). The former regulation provided that the set back was 200' from an adjoining "residential zone line." (emphasis added). Petitioners contend that "residential zone" is a defined term in BCZR § 101, while the newer phrasing – which became effective after the Zoning Commissioner's decision in the original variance case, 02-159-A, of a "residential property line" is different. Petitioners opine that a "residential property line" exists only when the property in question is improved with a dwelling.

For the Petitioners argument to prevail this Board must be convinced that the language used in Bill 17-02 possesses a different meaning than the language found in the law prior to 2002. Thus, the prior use of the terms "residential zone line" must differ from the meaning

intended in the terms "residential property line" found in the current law. As pointed out by ALJ Beverungen in his review of the matter, A "zone line" is a boundary that separates land into different zoning classifications. These lines are drawn by governmental authorities, who have the "power to alter zone lines from time to time" when in the public's interest. *Offutt v. Baltimore County*, 204 Md. 551, 557 (1954). Zone lines are not required to be divided along a "property line." In actuality "split-zoned" properties, are often encountered in zoning matters. A "property line" is a boundary establishing the limits of land owned by any particular person. Neither of these terms is defined in Webster's Dictionary (*See* BCZR § 101.1) or Black's Law Dictionary, for that matter. When a term is not defined in a statute, or dictionary, principles of statutory construction dictate that it be given its "ordinarily understood" meaning. *Comptroller v. JJPort, Inc.*, 184 Md. App. 608, 632 (2009).

The terms "property line" and "zoning line" do refer to different things, but here the distinction is not relevant because the tower is not set back 200' from either the RC 20 "zone line" or the "property line" of the adjacent parcel. Consequently, the Board finds that the present version of the law enacted by Bill 17-02 in 2002 is unambiguous on its face and requires no further interpretation beyond it plain meaning. Additionally, the Board finds that even if the new version of the law were to be deemed slightly changed, its current terminology still bars the Petitioner from its present request for relief no matter what label that request for relief has taken on.

CONCLUSION

As this Board is not swayed by the Petitioners' argument that this case involves an exception to the doctrine of res judicata, and somehow involves the application of new law that

would change the outcome of prior decisions in this matter, the Motion to Dismiss filed by Baltimore County and joined by People's Counsel is GRANTED.

ORDER

IT IS THEREFORE, this 19th day of April, 2013 by the Board of Appeals for Baltimore County,

ORDERED, that the Motion to Dismiss Appeal filed by Baltimore County's Department of Permits, Approvals and Inspections in Case No.: 08-531-SPHX be and is hereby GRANTED; and it is further

ORDERED, that the appeal in Case No.: 08-531-SPHX, be and is hereby DISMISSED WITH PREJUDICE.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Andrew M. Belt, Chairman

Wendy A. Zerwitz

Lawrence S. Wescott

RE:	PETITION FOR SPECIAL HEARING 1301 CHEVERLY ROAD 9th Election & 3rd Councilmanic Districts	*	BEFORE THE
		*	BOARD OF APPEALS
	Legal Owner: The Belvedere Baptist Church of Baltimore	*	FOR
	Lessee: Davenport Preschool LLC, Petitioners	*	BALTIMORE COUNTY
		*	Case No.: 15-004-SPH

OPINION

This case comes before the Baltimore County Board of Appeals on an appeal of Administrative Law Judge John Beverungen's decision denying a Petition for a Special Hearing to approve an amendment to Restriction No. 2 in Zoning Case No. 2013-0166-X for the property located at 1301 Cheverly Road in Eastern Baltimore County. People's Counsel for Baltimore County has moved for dismissal of Petitioners' appeal on the grounds of *res judicata*. Petitioner Davenport Preschool, LLC ("Davenport") [1] and People's Counsel submitted Memoranda, and the Board heard oral arguments on January 27, 2015. Matthew T. Vocci of Ober Kaler Grimes & Shriver appeared on behalf of Davenport, J. Carroll Holzer appeared on behalf of the Protestants, and Peter M. Zimmerman appeared on behalf of People's Counsel. The Board publicly deliberated the Motion to Dismiss on January 27, 2015.

BACKGROUND

The dispute at issue dates back to March 28, 2013, when Administrative Law Judge ("ALJ") Beverungen of the Office of Administrative Hearings issued a written order granting, with certain conditions, the Petition for a Special Exception filed by The Belvedere Baptist Church of

[1] Counsel for Davenport has indicated the proper name of the Lessee is 'Davenport Education, LLC.'

Baltimore, Legal Owner ("Belvedere") and Davenport, the Lessee. (Belvedere and Davenport are collectively referenced herein as "Petitioners"). Petitioners had sought the special exception pursuant to §424.5.A of the Baltimore County Zoning Regulations ("BCZR") to permit a Class B Group Child Care Center with more than 40 children in an existing church on the subject property. (Case No. 2013-166-X). After a contested hearing involving testimony and evidence from Davenport and several members of the community, the ALJ granted the Petition, subject to three conditions. The pertinent condition is No. 2, which states as follows:

> 2. The Petitioner shall have no more than 120 children in the facility at any one time, unless state regulations or fire and life safety regulations provide a lower number which would prevail.

(March 28, 2013 ALJ Opinion and Order at 7). Petitioners did not file an appeal of this Order. Certain community members ("Protestants") did file a timely appeal to the Board of Appeals from the ALJ's decision but subsequently withdrew their appeal. By Order dated June 27, 2013, the Board of Appeals dismissed Protestant's appeal with prejudice. (The 2013 hearing and appeal process shall be referred to as "Davenport I").

More than a year later, on July 8, 2014 and pursuant to § 500.7 of the BCZR, Petitioners filed for a Special Hearing, seeking amendment of Condition No. 2. Specifically, Petitioners wanted the ALJ to amend that condition to allow a maximum of 150 rather than 120 children in the child care facility. A public hearing was held and both sides again presented testimony and evidence. By Order dated September 12, 2014, ALJ Beverungen denied the Petition. Petitioners filed a timely appeal to this Board of Appeals. (The 2014 hearing and appeal process shall be referred to as "Davenport II"). People's Counsel has filed a Motion to Dismiss Petition for Special Hearing, based on the doctrine of *res judicata*. Petitioner Davenport opposes the Motion.

FACTS

In Davenport I, Petitioner Davenport sought a special exception in order to operate a childcare facility for more than forty children. Davenport intended to lease space in the existing Belvedere Baptist Church to house the facility. The Church is situated on a 12.711 acre property in a rural residential neighborhood consisting of approximately 160 homes and zoned DR 1. See Davenport I ALJ Opinion at 2,4. Under the DR 1 classification the Petitioners would be permitted to operate a class B Group Child Care Center with up to forty children as a matter of right. See BCZR §1B01.1.A.12. The Regulations require a Special Exception to operate a facility with more than forty children. See BCZR §424.5.A.

During the hearing in Davenport I, the Davenport representative indicated that applicable child care regulations would limit the number of child in the facility as planned to approximately 135. Davenport stated further that its goal was to enroll 150 children, resulting in approximately 120 children attending the center on any given day.[2] See Davenport I ALJ Opinion at 5-6. Neighborhood residents who spoke at the hearing identified potential traffic problems as their primary concern. Id. at 4. There was some divergent testimony as to the estimated number of vehicle trips through the neighborhood 150 enrolled children would generate. ALJ Beverungen stated that each such estimate represented "a lot of traffic" for the rural residential neighborhood and may well disturb the peace and quiet of the neighborhood. He stated further, however, that a large child care center with 100+ children would generate a large volume of traffic in any DR zone, not just this particular location. Id. at 4. According to ALJ Beverungen, the increase in traffic was "inherent" in the proposed use and "is exactly the type of inherent adverse effect that the legislature

[2] Given that some of the younger children would attend on a part-time basis, Davenport counted two such part-time children as one full-time enrollment.

was presumed to have anticipated when it allowed the use by a special exception." Id. He concluded he was compelled to grant the Petition because the Protestants failed to show that the proposed use at the particular location would have non-inherent adverse effects. Id. at 5.

Although he granted the Petition, ALJ Beverungen also conditioned the relief in an attempt "to mitigate the impacts on the community." Id. The "most significant condition" concerned the number of children at the facility. Considering both the expected traffic problems, and Davenport's testimony regarding the anticipated number of students and classrooms, the ALJ concluded 120 children was an appropriate figure. Id. He thus granted the special exception subject to the condition that Davenport would have "no more than 120 children in the facility at any one time. . . ." Id. at 7. Petitioners did not appeal this decision. Protestants did file but later withdrew an appeal. Therefore, on June 27, 2013, this Board dismissed the appeal with prejudice.

In July 2014 Petitioners reemerged and filed a Petition for a Special Zoning Hearing. The Petition sought amendment of Condition No. 2 in the March 2013 Order, such that Davenport would be permitted to increase the number of children in the facility to 150, rather than 120. Petitioners also wanted to build an additional classroom on the property to accommodate more children. ALJ Beverungen again heard testimony from witnesses for the Petitioner and Protestants and received exhibits regarding the proposed changes. In an Opinion dated September 12, 2014, ALJ Beverungen denied the Petition for Special Hearing. He emphasized that Petitioners had failed to indicate why the original restriction should not remain in place, that Davenport had not yet reached the maximum number of students permitted in condition No. 2,[3] and that Petitioners failed to demonstrate some change in circumstances that would justify a different restriction. See

[3] The Davenport representative indicated the then-current class had 109 children and that she wanted to build another classroom to house 16 more students. See Davenport II ALJ Opinion at 2.

Davenport II ALJ Opinion at 2-3. On October 10, 2014 Davenport filed a Notice of Appeal. People's Counsel filed a Motion to Dismiss the Petition for Special Hearing and Petitioner's appeal from the decision in Davenport II on the ground of *res judicata*. Davenport responded and on January 27, 2015 all parties presented arguments before the Board of Appeals.

DISCUSSION

I. Res Judicata

Under the doctrine of *res judicata,* a judgment on the merits in a previous suit between the same parties or their privies is entitled to full preclusive effect and bars a second suit predicated upon the same cause of action. Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc., 192 Md. App. 719, 734 (2010)(citations omitted). Res judicata acts as "an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which could have been litigated." Whittle v. Bd. of Zoning Appeals, 211 Md. 36, 49 (1956). See Garrett Park v. Montgomery County Council, 257 Md. 250, 257 (1970) (*res judicata* applies to every matter that was or might have been presented in the prior case).

Although some older cases held that *res judicata* did not apply to rulings of administrative agencies, it is now well-established that "when an administrative agency is performing a quasi-judicial function, the principles of *res judicata* are applicable." Seminary Galleria, 192 Md. App. at 735. This determination is guided by a three-part test: 1) whether the agency was acting in a judicial capacity; 2) whether the issue presented to the tribunal was actually litigated before the agency; and 3) whether the issue's resolution was necessary to the agency's decision. Id. at 736. See Batson v. Shiflett, 325 Md. 684, 705-08 (1992).

In acting upon the Petitions filed herein, the Office of Administrative Hearings acted in a judicial capacity, conducting a hearing and allowing the parties to present evidence. The parties

were precisely the same in both Davenport I and II. The issues regarding the maximum number of children presented in Davenport II were previously addressed, litigated and resolved in Davenport I. That resolution was key to the original decision. According to these criteria, the resulting conditioned decision rendered by ALJ Beverungen in Davenport I should preclude maintenance of a second action to amend that same condition.

Petitioners argue the decision is not entitled to a preclusive effect because it was based on an error of law. However, just as a final decision in a prior litigation, even if incorrect, will bind the parties to the litigation, a decision by an administrative agency acting in a judicial capacity is equally binding whether or not the decision was made in error. See Powell v. Breslin, 430 Md. 52, 64-65 (2013)(an incorrect ruling in a prior action does not deprive the ruling of *res judicata* effect). This should particularly apply when the party striving for that proverbial second bite at the apple failed to appeal the first determination. Even if this were not the case, the decision in Davenport I was not in error. Petitioners argue that Schultz v. Pritts, 291 Md. 1 (1981) and its progeny such as Montgomery County v. Butler, 417 Md. 271 (2010) should be considered in analyzing the matter. However, that is exactly the path ALJ Beverungen followed. Citing Schultz and Butler, the ALJ concluded that insofar as the community's traffic concerns are an inherent effect of a large child-care center in any DR zone, he was bound to, and therefore he did grant the Petition. See Davenport I ALJ Opinion at 3-4.

The fact that the ALJ also imposed certain conditions in an attempt to alleviate the traffic burden and protect the neighborhood does not in any way undermine the validity of his decision. To the contrary, the applicable zoning regulations specifically permit such conditional grants. According to BCZR §502.2, "[i]n granting any special exception, the Zoning Commissioner . . . shall impose such conditions, restrictions or regulations as may be deemed necessary or

advisable for the protection of surrounding and neighboring properties." See Halle Companies v. Crofton Civic Ass'n, 339 Md. 131, 140 (1995) (agency may impose reasonable conditions and restrictions in connection with a special exception order to mitigate the effect upon neighboring property and the community at large.); Baylis v. City Council of Baltimore, 219 Md. 164, 168 (1959). The ALJ permitted Petitioners to operate their business on a scale larger than that permitted as of right while concomitantly imposing certain restrictions intended to protect the neighborhood and its residents. This compromise was an appropriate use of his discretionary powers.

II. Substantial Change in Circumstances

Res judicata operates on the premise that faced with the same information, there is no reason to expend judicial resources and force opposing parties to rehash the same case in an ongoing effort to reach a different result. Thus, if a party *does* provide evidence of substantial changes in circumstances and fact between the first case and the second, res judicata may not necessarily prevent a second hearing on a previously decided matter. This issue arises fairly often in the zoning arena. According to the Court of Appeals, "[t]his rule seems to rest not strictly on the doctrine of *res judicata* but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law." Whittle, 211 Md. at 45. See Seminary, 192 Md. App. at 737("The Court of Appeals has emphasized that before a party can apply to a zoning agency for relief previously denied by the agency, 'substantial changes in fact and circumstances' must be, indeed, substantial.") (citations omitted); Jack v. Foster Branch Homeowner's Ass'n No. 1, Inc., 53 Md. App. 325, 333 (1982) (*res judicata* doctrine may not preclude a second case where there has been a material change in circumstances since the first decision); Chatham Corp. v. Beltram, 243 Md. 138, 151-52 (1966)

(barring a second attempt to re-raise a previously decided issue where the underlying facts remained unchanged).

Davenport contends that the actual operation of the school is a significant change in circumstances. They point to a document all school parents are required to sign regarding safe driving through the neighborhood and note that there have not been any traffic accidents. They further indicate that the growth of the student population and current space restrictions may require them in the future to refuse admittance to a few families. (Davenport's Response Memorandum at 7-8). These are not significant material changes that would warrant a rehearing or amendment of Condition No. 2. These same items were raised in Davenport I. The school's operation and the consequences thereof was a fact that was anticipated and discussed at the prior hearing. Condition No. 2 was imposed precisely to mitigate contemplated traffic problems resulting from the student population; the current absence of accidents argues more for the continuation of the condition rather than its amendment and a larger student body.[4] As to the school's parents now signing an agreement regarding safety and neighborhood issues, that is not a change warranting a rehearing; one would have assumed that school parents would obey traffic laws and exercise caution when driving through the neighborhood irrespective of the agreement. [5] In short, there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decisions.

[4] Moreover, while Davenport may desire more available student slots, the school has yet to reach the maximum number of students allowed under the existing condition.

[5] The "Community Respect Agreement" signed by the Davenport parents includes such statements as "I will come to a complete stop at every stop sign" and "I will not speed through the neighborhood . . . ."

CONCLUSION

In Davenport I, the ALJ struck a valid compromise between each party's concerns in light of the governing law. If Petitioners took issue with Condition No. 2 in the ALJ's decision they could have and should have filed a timely appeal with the Board. They failed to do so. The Protestants filed an appeal but withdrew that appeal in the apparent belief that Petitioners would be adhering to the conditions set forth in Davenport I. The community's good faith in withdrawing its appeal should not mean they are now required to fight the same battle every new school year. The parties in both Davenport I and II are identical, there are no material changes of fact or law, and the issues now presented either were addressed or could have been addressed in Davenport I. Petitioners have not presented any compelling reason permitting them, contrary to the doctrine of *res judicata*, to go back to the well and re-litigate the same issue in the hope of achieving a different result.

ORDER

IT IS THEREFORE, this 27th day of February, 2015 by the Board of Appeals for Baltimore County,

ORDERED, that the Motion to Dismiss Petition for Special Hearing filed by Baltimore County's People's Counsel be and is hereby GRANTED; and it is further

ORDERED, that the appeal in Case No. 2015-0004-SPH be and is hereby DISMISSED WITH PREJUDICE.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

David L. Thurston, Chairman

Benfred B. Alston

Meryl W. Rosen

16-003-SPH

Peter Max Zimmerman

To: Appeals Board
Cc: Lawrence Schmidt; borgerdinglaw@aol.com
Subject: Supplement, to include previous Court of Special Appeals decision on 9025 Cuckold Point Road (Dock of the Bay)
Attachments: Fifth Street CSA Decision.pdf

To the Appeals Board,

The Court of Special Appeals decision in Fifth Street v. Ciarpella (Dock of the Bay) is attached. It was inadvertently omitted from the e-mail sent earlier this morning. The opinion is dated July 9, 2010, the same year as Seminary Galleria v. Dulaney Improvement Association. Judge Deborah Eyler authored the excellent opinion.

Sincerely, Peter Max Zimmerman, People's Counsel, 410 887-2188

Peter Max Zimmerman
2/12/16

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 810

September Term, 2009

FIFTH STREET, LLC., ET AL.

v.

MATTHEW CIARPELLA, ET AL.

Eyler, Deborah S.,
Woodward,
Kehoe,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 9, 2010

Fifth Street, LLC, and its managing member, Lawrence J. Thanner, Jr. (collectively "FSLLC"), the appellants, own the Dock of the Bay, a restaurant and bar located at 9025 Cuckold Point Road in Baltimore County.[1] They appeal from the judgment of the Circuit Court for Baltimore County affirming a decision of the Baltimore County Board of Appeals ("Board"), finding them in violation of the Baltimore County Zoning Code ("Zoning Code") for operating a nightclub in a B.L. (Business Local) zone. The appellees are People's Counsel for Baltimore County ("the County") and Matthew Ciarpella, who resides near the restaurant. The FSLLC presents four questions for our review, which we have consolidated and rephrased as follows:

I. Did the Board err in concluding that the Dock of the Bay operates as a nightclub, as defined in the Zoning Code?

II. Is the definition of a "night club" in the Zoning Code so arbitrary and confusing as to deprive the appellants of their due process rights?

III. Did the Code Enforcement Division hearing officer err in concluding that the appellants violated the Zoning Code by erecting a tent without a permit?[2]

---

[1]We will refer to the Dock of the Bay as a restaurant, as all parties seem to agree that it performs this function, but we do not intend this description to be in any way determinative of the central issue in this case.

[2]As framed by FSLLC, the question presented are:

1. In Special Hearing Case No.: CBA-07-144-SPH, the County Board of Appeals erred as a matter of law in determining that the Dock of the Bay restaurant was a night club under the Baltimore County Zoning Regulations definition.

2. In Zoning Violation Case No.: 06-044, the finding of violation was in error as a matter of law.

(continued...)

For the reasons that follow, we shall affirm the judgment of the circuit court.

ZONING REGULATIONS

The Zoning Code establishes three types of business zones: B.L. (Business Local), B.R. (Business Roadside), and B.M. (Business Major). Zoning Code § 100.1.A.2. As noted above, the Dock of the Bay is located in the B.L. zone. The B.L. zone is the most restrictive of the three business zones.

Zoning Code section 230.1.A sets forth the permitted uses in the B.L. zone, which include the operation of a "standard restaurant" and a "tavern." Combinations of permitted uses also are allowed. Zoning Code § 230.1.A.10. A "nightclub" is not among the permitted uses in the B.L. zone, nor is it permitted by special exception. Zoning Code § 230.3.[3]

A "standard restaurant" is defined in the Zoning Code as follows:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

Id. at § 100.1. A "tavern" is defined as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." *Id.* Lastly, a "nightclub" is defined as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County." *Id.*

In 2005, the Baltimore County Council passed Bill No. 1-05, adopting the ICC International Building Code, 2003 Edition ("IBC"),[4] with some modifications, as the Building Code of Baltimore County. Chapter 3 of the IBC governs "Use and Occupancy Classification." IBC at 23. IBC section 303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." *Id.* at 24. Subgroup A-2 includes:

> Assembly uses intended for food and/or drink consumption including, but not limited to:
>
> Banquet halls
> Night clubs

[2](...continued)

3. If the Dock of the Bay is a restaurant, Civil Citation in Case No.: 07-134 and Case No.: 06-044 must be reversed.

4. County's arbitrary and confusing definition of night club violates Appellants' due process rights, violates standards for discretionary enforcement; leaves enforcement to the arbitrary discretion of County officials and constitutes undue favoritism by the County as established in the testimony before the Board of Appeals. Further, that the County's classification of night club must be reasonable and the evidence before the Board and the Board's conclusions established that the use of I.B.C. Group A-2 to define night club is unusable, arbitrary and capricious.

[3]A nightclub is a permitted use in the B.M. zone. Zoning Code § 233.1.

[4]International Code Council, *International Building Code* (2003).

Restaurants
Taverns and bars

Id.

The commentary to the IBC explains, "[b]ecause of the arrangement and density of the occupant load associated with occupancies classified in the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high." ICC, *IBC Commentary - Vol. 1*, at 3-16 (2003) ("IBC Commentary"). It then provides a description of each subgroup classification. Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - Low lighting levels;
> - Entertainment by a live band or recorded music generating above-normal sound levels;
> - No theatrical stage accessories;
> - Later-than-average operating hours;
> - Tables and seating arranged or positioned so as to create ill-defined aisles;
> - A specific area designated for dancing;
> - Service facilities for alcoholic beverages and food; and
> - High occupant load density.

Id. at 3-17 - 3-18. The IBC Commentary explains that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. *Id.* at 3-18. Finally, it notes that the characteristics listed above "are only advisory in determining whether Group A-2 is the appropriate classification." *Id.*

FACTS AND PROCEEDINGS

The underlying facts are largely undisputed. The Dock of the Bay has been in operation since approximately 1955. It is situated on the Miller's Island peninsula between the Back River, to the west, and the Chesapeake Bay, to the east. To the south are residences that, like the Dock of the Bay, are zoned B.L. To the north and west of the property is a marina with attendant parking facilities. These properties are zoned B.M.

In September 2003, the Dock of the Bay was destroyed by Hurricane Isabel. One month later, FSLLC purchased the restaurant. Thanner then spent five months rebuilding the restaurant before reopening it in March 2004.

The interior of the restaurant is about 2,400 square feet. The first floor consists of a rectangular bar at one end and tables and chairs in most of the remaining open space. The second floor is used only for storage and office space. The business is licenced as a restaurant and is authorized to serve approximately 150-160 people. It also holds a Class-D liquor license.

Outside the restaurant is a patio area with more tables and chairs and an outside bar. Adjacent to the patio is a children's play area with a wooden pirate ship. The patio overlooks the Chesapeake Bay. FSLLC also owns a dock with 14 "transient" boatslips for customer use.

The restaurant is open daily from 11:00 a.m. until 2:00 a.m., although it frequently closes earlier on week nights, especially in the wintertime. It serves a full lunch and dinner

menu, with an emphasis on seafood. It also serves alcohol. Food service ends at 11:00 p.m. Approximately 70% of its sales are food, 28% beverages, including alcohol, and 2% T-shirts and cookbooks.

There are ten television sets inside the restaurant and another two at the outside bar. A house music system, connected to speakers inside and outside, plays satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered.

Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.

On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

Although there is no dance floor, during live performances patrons often dance in between the tables.

On April 21, 2006, a little over two years after the Dock of the Bay reopened under FSLLC's management, the Code Enforcement Division ("CED") of the Baltimore County Department of Permits and Development Management ("DPDM") received a letter of

complaint from Matthew Ciarpella, through counsel, regarding live music at the restaurant.[5] The letter alleged that the Dock of the Bay was operating as a nightclub, which is not a permitted use in the B.L. Zone.

In May, June, and August of 2006, the Dock of the Bay was cited for operating a nightclub in a B.L. zone, erecting a tent without a permit, and failing to cease nightclub operations and to remove the tent.[6]

On August 18, 2006, FSLLC filed a "Petition for Special Hearing," presenting two questions:

> 1. Whether the use of the property at 9025 Cuckold Point Rd., Millers Island 21219 is in violation of the [Zoning Code ?]
> 2. Is the use by Fifth Street, LLC, a restaurant, at 9025 Cuckold Point Rd., which provides music during the day, . . . a "night club" as defined in the [Zoning Code]?

On August 23, 2006, before the petition for special hearing was ruled upon, the case came before a CED Hearing Officer at the DPDM. The hearing officer heard testimony from Thanner, Ciarpella, and another nearby resident, Wayne Walkman, Jr. Evidence consisting of advertisements highlighting the music offered at the Dock of the Bay also were introduced. The hearing officer issued "Findings of Fact and Conclusion[s] of Law." He found that the Dock of the Bay offered live and recorded music, both inside and outside. He

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[5]This was not the first complaint about the property. In the summer of 2005, Ciarpella and other nearby residents made numerous noise complaints.

[6]After the first of the citations, Thanner wrote to the inspector to request clarification as to the nature of his violation. He received no response to his letter.

then referenced the IBC and the IBC Commentary, concluding that the property "exhibits some of the listed characteristics" in the IBC Commentary for Subgroup A-2. He ruled that the Dock of the Bay was "being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use." He imposed a civil penalty of $5,000 and ordered FSLLC to "dismantle the outside speaker system and cease live and/or recorded entertainment immediately." He further concluded that the tent was erected without a permit in violation of IBC sections 3102.1, 3103.1 and 3103.1.1 and ordered it removed.

A two-day, public special hearing was held before the Zoning Commissioner ("Commissioner") to determine if the Dock of the Bay, "which provides music [] during the day, [is] a 'nightclub' as defined in [the Zoning Code]." Thanner testified at the hearing. Three past and present residents of Millers Island testified in support of FSLLC. Twenty-two nearby residents testified as protestants about the loud music, parking overflow, and noisy patrons leaving the property late at night. Finally, the CED officer who had cited the property and James H. Thompson, CED Supervisor, testified.

On May 30, 2007, the Commissioner issued his opinion. After reciting the "relatively simple" facts, the Commissioner addressed the question whether the Dock of the Bay is a "nightclub or simply a restaurant where ancillary entertainment is provided." He looked to the definition of "nightclub" in the Zoning Code and to the IBC and IBC Commentary. He concluded that, under the plain language of the Zoning Code definition, any establishment

that "provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub" under the IBC is an impermissible use in a B.L. zone. He further concluded that the use of the term "categorized" means only that the establishment necessarily falls under the IBC "Use and Occupancy Classification" category that includes "nightclubs." The Commissioner ruled that the Dock of the Bay is a "nightclub" under the Zoning Code and ordered "that the playing of outdoor music either by way of an outside speaker system, live/or recorded entertainment, must be discontinued."

After the special hearing, FSLLC was cited for continuing nightclub and tent violations. A second hearing before a hearing officer was held and the Dock of the Bay again was found in violation.

FSLLC appealed to the Board from the decision of the Commissioner, as well as from the decisions of the hearing officers. The cases were consolidated before the Board.

On January 15, 2008, a three-member panel of the Board took testimony and heard argument.[7] FSLLC called Thanner and also called Thompson, as an adverse witness. In addition to the facts already adduced concerning the nature of his business, Thanner testified that live entertainment was a significant draw for the Dock of the Bay, especially during the

[7]Pursuant to Zoning Code section 501.6, appeals from the Zoning Commissioner are heard "*de novo*." Accordingly, the Board took testimony on the issues presented at the special hearing. The appeal of the code enforcement rulings, however, were reviewed on the record before the hearing officer pursuant to section 3-6-303 of the Baltimore County Code (2003).

slower winter months, and that he would likely have to close down if forced to discontinue it.

Thompson testified that the CED operates on a "complaint basis only," meaning that it investigates alleged code violations only after receiving a complaint about a property or business. It does not undertake investigations of potential violations on its own initiative. He also testified that, in his opinion, based on his experience enforcing the Zoning Code, a property could operate as a "dual use," meaning that it could fit into multiple categories of use simultaneously. He explained that it was the practice of the CED to treat live music, but not recorded entertainment, as a code violation in the B.L. zone.

Numerous residents also testified. For the most part, their testimony was not relevant to the issues on appeal.[8] There was testimony that music played at the dock of the Bay was loud enough to be heard inside residents' houses.

At the conclusion of testimony and arguments, the Board allowed the parties to submit briefs. On June 4, 2008, a two-member majority of the Board issued an opinion concluding that the Dock of the Bay was operating as a nightclub and affirming the hearing officer's

[8]FSLLC filed a motion to limit testimony with respect to expected resident testimony concerning noise at the restaurant and related complaints about the establishment. The Board granted the motion, opining that this type of testimony generally was not relevant to the legal issue whether the business was a nightclub under the Zoning Code, the only issue under *de novo* review. Despite that ruling, many residents testified. Their testimony was cut short by relevance objections, however.

An employee of the Liquor Board also testified and counsel for Ciarpella attempted to introduce into evidence records related to prior noise complaints from 2005. The Board granted FSLLC's hearsay objections to this testimony and evidence, however.

rulings. The Board reduced the $5,000 fine imposed for operating as a nightclub to $1,000 and upheld a $1,000 fine imposed by the hearing officer for the tent violation. FSLLC was ordered to discontinue the "playing of music by way of speaker system" and "live or recorded entertainment."

In its opinion, after reciting the facts, the Board majority looked to the definition of "nightclub" in the Zoning Code. Having noted already that the Dock of the Bay offered "live or recorded entertainment," it turned to the IBC and the IBC Commentary to determine if the business was "categorized as a nightclub." Like the Commissioner, it considered whether the eight non-exclusive characteristics of Subgroup A-2 applied to the Dock of the Bay. It found that six of the eight factors were met: low light levels, entertainment by a live band or recorded music generating above normal sound levels, no theatrical stage accessories, later than average operating hours, service facilities for alcoholic beverages and food, and high occupant load density. It found that two factors – tables and seating arranged or positioned so as to create ill-defined aisles and a specific area for dancing – did not apply.

Based on its finding that the Dock of the Bay exhibited six of the eight characteristics of Subgroup A-2, the Board majority concluded that the restaurant was operating as a nightclub. Its decision closed as follows:

> The Board is not unmindful that the definition of a nightclub, under the [Zoning Code], can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.[L.] zones, might be considered "nightclubs" under the present criteria of the [Zoning Code]. It is not for the Board to change the definition but for the County Council to consider.

One of the three Board panel members issued a dissenting opinion. He emphasized the undisputed facts that characterized the Dock of the Bay as a family restaurant, such as the full-service menu, table seating for 150-160 persons, a pirate ship play area, no cover charge, and the vast majority of sales being food related. He described the "nightclub" definition in the Zoning Code as "exceedingly unclear and circuitous" and characterized the IBC as a "'one size fits all'" building code that fails to reflect the "particular realities and common sense observations of this jurisdiction." In particular, the dissenter took issue with the IBC's practice of grouping restaurants together with such "disparate uses" as banquet halls and nightclubs. He noted that the IBC Commentary even distinguishes between buildings in which people congregate for "*drinking and dancing* (e.g., nightclubs, dancehalls, banquet halls, cabarets, etc.)" and buildings in which people congregate for "food and drink consumption (e.g., restaurants)." (Emphasized in dissenting opinion.)

Finally, the dissenter stated that, even if it were appropriate to apply the Subgroup A-2 criteria, the evidence did not support the Board majority's findings with respect to several of the criteria. Specifically, he found from the testimony that the lighting only was dimmed occasionally, for ambiance; that the business never had been cited for allowing the music to generate above-normal sound levels; that there was no evidence that the business hours from 11:00 p.m. to 2:00 a.m. were "later than average operating hours"; and that "high-occupant load density" is too ambiguous a characteristic to be applied.

The dissenter closed by observing that the Board majority was turning "a blind eye to common sense," when, as here, the facts were clear that the Dock of the Bay was a restaurant offering some musical entertainment on the side. He also noted that "selective enforcement" of the Zoning Code, as testified to by Thompson, seem "contrary to the spirit and intent of any well-written regulation, [] arbitrary and capricious, and possibly an 'Equal Protection under the laws' violation."

FSLLC moved for reconsideration of the Board decision, asking the Board to clarify how many of the IBC Commentary criteria must be satisfied before a business is considered a nightclub; to amend its order to direct the Dock of the Bay to "discontinue its nightclub operation" as opposed to discontinuing all music and live or recorded entertainment;[9] to reconsider the imposition of any fine for the nightclub violation, given the difficulty the Board itself had in determining whether a violation had occurred; and to reconsider the finding of a tent violation. FSLLC also argued that testimony of a number of nearby residents should not have been allowed. The motion was denied in its entirety.

[9]FSLLC suggested certain changes it could make, short of discontinuing all live and recorded music, to reduce the number of Subgroup A-2 characteristics applicable to it. It stated that it would keep lighting levels at medium, use theatrical accessories, not remain open later than average, keep defined aisles, not have a dance area, close the kitchen during live entertainment so that there would not be "service facilities for food and drink," and not exceed the occupant load limit as set forth by the fire department.

FSLLC petitioned the circuit court for judicial review. Oral argument was heard,[10] and the circuit court issued a ruling on the record affirming the Board's decision. FSLLC timely appealed the judgment of the circuit court.

We shall include additional facts in our discussion of the issues.

STANDARD OF REVIEW

The Court of Appeals has described our circumscribed role in reviewing an agency decision as follows:

> A court's role in reviewing an administrative agency adjudicatory decision is narrow, *United Parcel v. People's Counsel*, 336 Md. 569, 576, 650 A.2d 226, 230 (1994); it "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel*, 336 Md. at 577, 650 A.2d at 230. *See also* [Md.] Code (1984, 1995 Repl. Vol.), § 10-222(h) of the State Government Article; *District Council v. Brandywine*, 350 Md. 339, 349, 711 A.2d 1346, 1350-1351 (1998); *Catonsville Nursing v. Loveman*, 349 Md. 560, 568-569, 709 A.2d 749, 753 (1998).
>
> In applying the substantial evidence test, a reviewing court decides """whether a reasoning mind reasonably could have reached the factual conclusion the agency reached."""" *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978). *See Anderson v. Dep't of Public Safety*, 330 Md. 187, 213, 623 A.2d 198, 210 (1993). A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. *CBS v. Comptroller*, 319 Md. 687, 698, 575 A.2d 324, 329 (1990). A reviewing court "'must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence' and to draw inferences from that evidence." *CBS v. Comptroller, supra*, 319 Md. at 698, 575 A.2d at 329, quoting *Ramsay, Scarlett & Co. v. Comptroller*, 302 Md. 825, 834-835, 490 A.2d 1296, 1301 (1985). *See Catonsville Nursing v. Loveman, supra*, 349 Md. at 569, 709 A.2d at 753 (final agency decisions "are *prima facie* correct and carry with them the presumption of validity").
>
> Despite some unfortunate language that has crept into a few of our opinions, a "court's task on review is *not* to ""substitute its judgment for the expertise of those persons who constitute the administrative agency,""" *United Parcel v. People's Counsel, supra*, 336 Md. at 576-577, 650 A.2d at 230, quoting *Bulluck v. Pelham Wood Apts., supra*, 283 Md. at 513, 390 A.2d at 1124. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. *Lussier v. Md. Racing Commission*, 343 Md. 681, 696-697, 684 A.2d 804, 811-812 (1996), and cases there cited; *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881, 886 (1989) ("The interpretation of a statute by those officials charged with administering the statute is . . . entitled to weight"). Furthermore, the expertise of the agency in its own field should be respected. *Fogle v. H & G Restaurant*, 337 Md. 441, 455, 654 A.2d 449, 456 (1995); *Christ v. Department of Natural Resources*, 335 Md. 427, 445, 644 A.2d 34, 42 (1994) (legislative delegations of authority to administrative agencies will often include the authority to make "significant discretionary policy determinations"); *Bd. of Ed. For Dorchester Co. v. Hubbard*, 305 Md. 774, 792, 506 A.2d 625, 634 (1986) ("application of the State Board of Education's expertise would clearly be desirable before a court attempts to resolve the" legal issues).

Bd. of Physician Quality Assurance v. Banks, 354 Md. 59, 67-69 (1999) (footnotes omitted).

In *Marzullo v. Kahl*, 366 Md. 158 (2001), the Court reaffirmed the principle that agencies are owed due deference in their interpretation of the zoning regulations they are tasked with enforcing. In that case, like the instant case, the agency was the Board and the regulations at issue were part of the Baltimore County Zoning Code. The Court opined that the Board's "expertise should be taken into consideration and its decision should be afforded

[10]The judge indicated to the parties that his main concern was "with the 14th Amendment to the United States Constitution that guarantees every citizen the right of due process."

appropriate deference in our analysis of whether it was 'premised upon an erroneous conclusion of law.'" *Id.* at 173 (quoting *Banks, supra*, 354 Md. at 68) (footnote omitted).

DISCUSSION

I.

FSLLC challenges the legal foundation for the Board's decision and the factual findings supporting it. We begin with the legal contentions. The Zoning Code's definition of "nightclub" is comprised of three elements: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor" and 3) "categorized as a nightclub by the Building Code of Baltimore County." It is undisputed that the Dock of the Bay is a "tavern or other commercial establishment" that offers both live and recorded entertainment in the form of bands, karaoke, DJs, satellite radio, and television. Thus, the central focus of FSLLC's legal argument is that the Board erred in concluding that the Dock of the Bay is "categorized as a nightclub by the Building Code of Baltimore County."

FSLLC points out that the IBC does not define "nightclub." Rather, it groups certain structures, including nightclubs and restaurants, as fitting in Assembly Subgroup A-2. Therefore, according to FSLLC, a finding that the Dock of the Bay meets characteristics of Subgroup A-2 is of no moment because it does not answer the ultimate question: is the Dock of the Bay a nightclub?

Before we address this contention, some history is helpful. Since at least 1956, the Baltimore County Building Code ("BCBC") has adopted the standards of a model building code. *See Metius v. Julio*, 27 Md. App. 491, 497 n.3 (1975). Baltimore County is not unique in this practice. Since the early part of the 20th century, at both the municipal and state levels, building codes around the country have been based on model codes. Three regional model code groups promulgated the codes -- the International Conference of Building Officials ("ICBO"), the Building Officials Code Administrators International ("BOCA") and the Southern Building Code Conference International ("SBCCI"). *See* www.iccsafe.org/ABOUTICC/Pages/default.aspx. BOCA, a code designed for the east coast and the midwest, previously had been adopted by the Baltimore County Council. *See Swinson v. Lords Landing Village Condo.*, 360 Md. 462, 479 (2000) (noting that, since at least 1981, most counties in Maryland have had building codes patterned on the BOCA model code); *Metius, supra*, 27 Md. App. at 497 n.3 (noting that Baltimore County adopted the BOCA standards beginning in 1956).

In 1994, these three regional groups consolidated to form the ICC. The first version of the IBC was published in 2000.[11] The IBC does not differ substantially from the BOCA code that it replaced. As relevant to the instant case, however, the category in which a "restaurant" was placed changed. Under the BOCA code, a restaurant was categorized in

[11]Pursuant to Md. Code (2003, 2009 Supp.), section 12-503 of the Public Safety Article, the Maryland Department of Housing and Community Development is required to adopt the IBC as its model building code, subject to some permitted modifications.

Assembly Subgroup A-3.[12] *See* Building Officials Code Administrators, *The BOCA National Building Code/1999* 18 (14th ed. 1999). As discussed, *supra*, under the IBC, restaurants are categorized in Subgroup A-2. Under both BOCA and IBC, nightclubs are categorized in Subgroup A-2. The IBC Commentary, discussed *supra*, setting forth the eight non-exclusive characteristics of Subgroup A-2, appears to have been lifted verbatim from the BOCA Commentary that preceded it. *See In the Matter of the Application of Rampart Partnership (Club 101)*, Case No. 96-60-XA at 18-19 (Aug. 28, 1998) ("*Club 101*") (quoting from the Commentary to the BOCA Code with respect to Subgroup A-2).

Returning to FSLLC's argument, we agree that the IBC does not define a nightclub. The Zoning Code definition of "nightclub" merely requires that the IBC "categorize" an establishment as a "nightclub." The IBC (and the BOCA Code before it) do exactly that. They categorize structures for purposes of numerous safety regulations. That a restaurant and a nightclub fall into the same sub-category under the IBC "Use and Occupancy Classifications" does not affect the analysis under the Zoning Code, however. The Board correctly looked to the IBC and the characteristics of structures that fall within Subgroup A-2 to determine if the Dock of the Bay property is categorized in that grouping. If it is, then it met the Zoning Code definition of "nightclub."

Moreover, as mentioned above, we accord the Board "a degree of deference . . . in its application of the law." *Banks*, *supra*, 354 Md. at 69. In the instant case, the Board's

[12]Interestingly, that subgroup included "restaurants other than nightclubs."

decision was informed by its experience applying these characteristics, as evidenced by its *Club 101* decision.[13] In *Club 101*, the Board considered whether, under the Zoning Code, a club was operating as a nightclub or an after-hours club. It applied the eight non-exclusive criteria in the commentary to the then applicable BOCA code in analyzing the issue and determined that the club was operating as an after-hours club, in violation of the Zoning Code.[14] The decision reveals, as discussed *supra*, that the eight criteria applied in the instant case were developed at a time when restaurants were not included in Subgroup A-2, thus adding further support to the Board's conclusion that these factors are relevant to the determination whether a structure is "categorized as a nightclub" under the IBC.

FSLLC also maintains that the Dock of the Bay must be *either* a "nightclub" or a "standard restaurant" as those terms are defined under the Zoning Code. FSLLC focuses on the use of the word "primarily" in the definition of "standard restaurant," arguing that, if the Dock of the Bay is "primarily" engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant. We disagree. Several types of restaurants are defined in the Zoning Code, including "carry-out," "fast-food," and "fast-food, drive-through only." *See* Zoning Code § 101. We read the

[13]The *Club 101* decision was cited by FSLLC both on appeal and before the Board in support of its argument that the Dock of the Bay must be either a "nightclub" or a "restaurant." We will discuss this argument further, *infra*.

[14]In that case, the property owner actively advocated for a finding that the property met the eight characteristics because a "night club" was a permitted use in the zone in question.

phrase "primarily for serving meals and beverages to persons seated at tables on the premises of the establishment" as being intended to distinguish a "standard restaurant" from the other types of restaurants defined in the Zoning Code. This conclusion is buttressed further by the fact that the definition specifically permits a standard restaurant to "offer a carry-out service, provided that such service is accessory to the principal restaurant operations." *Id.*

We also find support in the Zoning Code for the proposition that a property can operate as a "dual use." Section 230.1.A of the Zoning Code sets forth the permissible uses in a B.L. zone. Section 230.1.A.10 lists as a permissible use "combinations of the above uses." It is implicit in this section that properties may operate with dual permissible uses. It follows that a property also could be operating as a dual use with one use being permissible and one use being impermissible. Thompson also testified to this effect before the Board based on his experience in the CED.

Moreover, the only legal authority FSLLC cites for the proposition that a property cannot operate as a dual use actually supports the opposite position. In *Club 101*, the Board explicitly stated that the club could not be both a "night club" and an "after hours club." The then existing definition of an "after hours club" provided, however, that "[a]n after hours club is not a nightclub as defined in the zoning regulations or the building code of Baltimore

County." No such limitation appears in the definition of a "standard restaurant" in the Zoning Code.[15]

FSLLC also challenges the Board's factual finding that six of the eight characteristics of Subgroup A-2 were met. As discussed, *supra*, we review these findings under the deferential substantial evidence standard. We have reviewed the transcript and the record and are satisfied that there was substantial evidence in the record to support these findings.[16]

Finally, FSLLC echoes the concerns expressed by both the majority and dissenting members of the Board that the definition of a nightclub under the Zoning Code is extremely broad. We agree with the Board majority that this is a matter for the Baltimore County Council to address if it is deemed necessary. "The 'wisdom or expediency' of the [zoning ordinance] in its current form is not a matter for judicial intervention." *Lonaconing Trap*

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[15]Moreover, the Board found that, while Club 101 exhibited most of the eight characteristics in the BOCA Commentary, it nonetheless was an after hours club because of other characteristics that distinguished its operation. This is similar to the finding in this case that, while the Dock of the Bay may have met the definition of a restaurant, it nonetheless was operating as a nightclub because of distinguishing characteristics. We perceive no error in this conclusion.

[16]For example, the FSLLC challenges the finding of "low level lights." Thanner himself testified, however, that the lights were dimmed "every evening" for live entertainment; that they were turned down "for dinners as well"; and that they also were turned down "[o]n nights when we are open and do not have live entertainment."

Similarly, FSLLC challenges the finding of "above-normal sound levels" on the basis that there was no evidence in the agency record of prior noise violations. There was evidence, however, that the music that was being played at the Dock of the Bay was loud enough to be heard inside the homes of nearby residents. That evidence plainly supported a finding of "above-normal sound levels."

Club, Inc. v. Md. Dep't of the Env't, 410 Md. 326, 349 (2009) (quoting *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 48 (1973)).

II.

FSLLC contends the definition of "nightclub" under the Zoning Code is "arbitrary, unreasonable and confusing" and therefore the application of that definition is a violation of its due process rights. It also maintains that the County's practice of "discretionary enforcement" of the Zoning Code is unconstitutional.

FSLLC raises these arguments for the first time on appeal. Accordingly, they are not preserved for review.[17] *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *see also Heft v. Maryland Racing Comm'n*, 323 Md. 257, 273-74 (1991) (party may not obtain judicial review of an issue not raised before administrative agency); *Gonzales v. Ghinger*, 218 Md. 132, 135 (1958) (attack on validity of a section of the Baltimore City Code raised for the first time on appeal would not be

[17]As discussed, *supra*, the dissenting member of the Board suggested the possibility of a due process violation in his opinion. The circuit court judge presiding over this case on judicial review also commented on this issue during oral argument, but ultimately affirmed the Board's decision. FSLLC did not raise this issue in its appeal to the Board in its motion for reconsideration or in its petition for judicial review, however.

heard). Moreover, FSLLC cites to no Maryland authority for its propositions.[18] We decline to consider these arguments on appeal.

III.

Finally, FSLLC contends it was error for the CED to charge it with a violation of IBC section 3103 for erecting a tent without a permit. It follows that it was error for the hearing officer to find the violation and for the Board to affirm the finding. This contention is based on the letter of complaint to the CED from Ciarpella's counsel stating that FSLLC had "constructed a 40 X 60 foot reception tent . . . which has been on the property for approximately eight months." According to FSLLC, section 3103 of the IBC is inapplicable to structures in place for more than 180 days.

FSLLC received two citations related to the tent. On August 14, 2006, it was charged with violating section 3103 and ordered to "remove tent or obtain permit." A hearing before a hearing officer was held nine days later and a violation was found. On July 5, 2007, it was again charged with violating section 3103 for having a "tent erected without permit," in addition to continuing nightclub violations. A little over a month later, a hearing was held and a violation was found. In the first case, FSLLC was fined $5,000 both for the nightclub violation and the tent violation. As discussed, *supra*, the Board reduced this fine to $1,000.

[18]FSLLC instead relies upon section 18:11 of *The Law of Municipal Corporations* pertaining to the standards for discretionary enforcement. Eugene McQuillin, *The Law of Municipal Corporations* (3d ed. 2004). Our research reveals that this section has never been cited in a reported opinion of this Court or the Court of Appeals.

In the second case, a fine of $1,000 was imposed, again without distinction between the tent and nightclub violations.

FSLLC does not point us to any place in the record where it made the argument raised on appeal before the hearing officer.[19] It was raised before the Board, but the Board only reviewed the issue on the record before the hearing officer and found that the hearing officer's decision was supported by substantial evidence and was not premised on an erroneous conclusion of law.

Even if preserved, we find no error in this decision. IBC section 3103 governs "Temporary Structures." Section 3103.1 explains the applicability of this section as follows:

> The provisions of this section shall apply to structures erected for a period of less than 180 days. Tents and other membrane structures erected for a period of less than 180 days shall comply with the *International Fire Code*. Those erected for a longer period of time shall comply with applicable sections of this code.
>
> **Exception:** Provisions of the *International Fire Code* shall apply to tents and membrane structures erected for a period of less than 180 days.
>
> **3103.1.1 Permit Required.** Temporary structures that cover an area in excess of 120 square feet (11.16 m^2), including connecting areas or spaces with a common means of egress or entrance which are used or intended to be used for the gathering together of 10 or more persons, shall not be erected, operated or maintained for any purpose without obtaining a permit from the building official.

(Underlined emphasis added.)

[19]No transcript of those proceedings is provided in the record extract.

This provision states that tents erected for less than 180 days must comply with the *International Fire Code*, whereas tents erected for "longer periods of time" must comply with the "applicable sections of this code." In other words, contrary to FSLLC's argument, an exception is carved out of section 3103 for tents erected for less than 180 days, but a tent erected for longer must comply with the permit requirement found either in that section or in section 105.1. Accordingly, we find no merit in FSLLC's contention that it was charged under the wrong section of the IBC.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-07-134

* * * * * * *

MAJORITY OPINION

These cases come to the Board on appeal from two decisions of the Code Enforcement Hearing Officer and a decision of the Zoning Commissioner. The two decisions of the Code Enforcement Hearing Officer found the Petitioner, Fifth Street, LLC, guilty of violations of the County Code and levied fines of $5,000.00 and $1,000.00. The appeal from the decision of the Zoning Commissioner found that the Dock of the Bay, operated by Fifth Street, LLC, was classified as a nightclub under the Baltimore County Zoning Regulations (BCZR) and was in violation of the BCZR for operating a nightclub within a Business Limited (B.L.) zone.

Since the cases basically involved an interpretation of the County zoning regulations and the same sets of circumstances, the Board consolidated the cases for hearing. A hearing on the merits was held on January 15, 2008. Testimony was taken in Case No. 07-144-SPH, and oral

argument was conducted in Cases No. CBA-06-044 and No. CBA-07-134. Petitioner, Fifth Street, LLC, and Lawrence Thanner, Legal Owner, was represented by J. Carroll Holzer, Esquire. Protestants, Matthew J. and Nancy Jean Ciarpella, Phil and Kay Sessa, Charlie and Darrell Wolinski, Michael and Robert Poleski, David and Vena Sheck, Ken Schoyl and Tammy Novak, Doug W. Waldmann, et al, Louis Petrovia, Robert Haas, David Znamirowski, David McWilliams, and Terri Poleski, were represented by Francis X. Borgerding, Jr., Esquire. Baltimore County was represented by Nancy C. West, Assistant County Attorney. The parties were given the opportunity to file briefs on February 19, 2008. A public deliberation was held on March 13, 2008.

Background

Fifth Street, LLC, and Lawrence J. Thanner, its Resident Agent, operates the Dock of the Bay restaurant offering dining facilities and services at its location at 9025 Cuckold Point Road, Millers Island, in Baltimore County, Maryland. On August 8, 2006, the Dock of the Bay was cited for a Code violation, with a proposed penalty of $5,000.00, for operating a nightclub in a B.L. zone. In addition, Fifth Street, LLC, was cited for erecting a tent on the premises without obtaining the required permit from the County. A hearing was held before the Code Enforcement Hearing Officer on August 23, 2006, and a decision was rendered on August 25, 2006, ordering the Respondent to remove the tent and finding that the property "is being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use and continued unabated despite receiving notice of violation on May 12, 2006. A restaurant with dancing and/or live or recorded entertainment is not a permitted use in a B.L. zone."

After that hearing, Fifth Street, LLC, filed a Petition for Special Hearing in Case No. 07-144-SPH. This Petition requested the Zoning Commissioner to interpret the zoning regulations for Baltimore County with respect to the operation of a nightclub.

The decision of the Zoning Commissioner finding that Fifth Street, LLC, and the Dock of the Bay was a restaurant providing music during the day and was a "nightclub" as defined in BCZR § 101, 102.1, and 230, was dated May 30, 2007. Subsequent to that date, Fifth Street, LLC, was again cited for violation of the *Baltimore County Code* (BCC) for failure to obtain a permit for a tent and also for violation of BCZR § 101, 102.1, 230, and 500.6 for failure to cease operation of a nightclub in a B.L. zone. A second hearing was held before the Code Enforcement Hearing Officer and, by decision dated August 16, 2007, the Code Enforcement Hearing Officer again found Dock of the Bay in violation of BCZR for operating a nightclub in a B.L. zone and erecting a tent without obtaining the required permit. The Hearing Officer imposed a $1,000.00 fine in that case.

Testimony and Evidence

Petitioner presented Lawrence J. Thanner, Managing Member of Fifth Street, LLC, as their principal witness. Mr. Thanner stated that the Dock of the Bay has been a restaurant since 1955 and, to his knowledge, always had music and on many occasions, providing live bands. Mr. Thanner opened the new Dock of the Bay restaurant in March of 2004 after refurbishing the building from the effects of Hurricane Isabel. Everything was completely refurbished and new equipment was installed in the restaurant.

Thanner stated that the restaurant has a 2,400 square foot rectangular bar at one end and has tables and chairs on the main floor to accommodate diners. He stated that the restaurant could seat about 150 to 160 patrons inside. In the summertime, he has an outside patio with an outside bar and tables with umbrellas and chairs for patrons to utilize. The restaurant has 14 boat

slips for transient boat customers. The restaurant also has a playground for children, with a wooden pirate ship to allow children to play on the playground. The restaurant opens every day at 11:00 a.m. and closes at 2:00 a.m. In the winter, the restaurant will close early when customers are gone. Thanner testified that the restaurant kitchen closes at 11:00 p.m., but that the bar will stay open until 2:00 a.m. He stated that the restaurant has a full commercial kitchen and provides a full menu of seafood, steaks, sandwiches, etc. He has licenses from the Baltimore County Health Department, which states that he is a restaurant, and a basic license from the State of Maryland, which also states that it is a restaurant.

The restaurant has ten television sets inside and two out on the patio. There is a house music system that plays radio and satellite radio inside and outside. There are outside speakers. The television sets are on all the time except when they have live entertainment.

Mr. Thanner stated that he does have live entertainment at the restaurant with a D.J. playing for karaoke participants and live bands on Friday and Saturday nights. On those occasions, the entertainment goes from 9:00 p.m. to 1:00 a.m. During the previous summer, he stated that he had live music on Saturday afternoon and Sunday afternoon from 4:00 p.m. to 8:00 p.m.

Mr. Thanner stated that he had stopped the music after 8:00 p.m. after the Liquor Board had told him to cease the music. He stated that he had full-scale bands in 2004 with no complaints, but in 2005, a Liquor Board inspector told him to "pipe down" and he still had the bands, but mostly duos or steel bands. He received complaints in May of 2006 from the outside music and wrote a letter to the County asking for clarification on May 14, 2006. This letter was sent to C. Raynor, inspector in the Baltimore County Department of Code Inspections and Enforcement. The letter listed a number of activities, which Mr. Thanner proposed to conduct at the Dock of the Bay and requested clarification as to how these items qualified as a nightclub

under the citation that he had received. This letter was presented as Petitioner's Exhibit #2 to the Board. Thanner stated that he received no response to his letter.

After he sent the letter, he contacted Attorney Carroll Holzer to file for a special hearing. Mr. Thanner stated that 70 percent of the sales at his restaurant were in food and 30 percent are beverages. He indicated that he does not charge for the live entertainment and is open until 2:00 a.m. when the live music is played. Mr. Thanner also stated that, when he has live entertainment, he does lower the lighting level in the restaurant. He stated that the live bands play quite loudly but that he has never been cited for having a noise level about 65 decibels at the property line. He also stated that he does not have any stage accessories for the bands except in the summertime when there is a small stage erected outside on the patio. His operating hours are 11:00 a.m. to 2:00 a.m., which he considered to be normal, but under State law, you cannot sell alcohol past 2:00 a.m. With respect to defined aisles for the tables and chairs, he stated that tables and chairs are set in certain ways to form aisles. He did admit that some time when the bands are playing inside people would move the tables and chairs and dance between the tables. He does have facilities for serving alcoholic beverages and, as previously stated, the restaurant will accommodate 150 to 160 patrons.

Mr. Thanner argued that his operation should not be considered a nightclub based upon the criteria set forth in the International Building Code which has been adopted by the County. It was Mr. Thanner's position that he could not survive in the wintertime without the live music because the restaurant would not pay for itself based solely on food and drinks served during normal times without the music being available.

Mr. James H. Thompson, Supervisor of Code Enforcement, was called by Protestants as a witness and testified that he has worked in Zoning for 31 years, 13 of which as Supervisor of Code Enforcement, and that his office cited Mr. Thanner for being a nightclub operating in a

B.L. zone. Mr. Thompson stated that his office operates on a complaint basis only. He stated that they had had no complaints about the restaurant property before Mr. Thanner took over the property. It was his testimony that his office only reviews a situation based upon a complaint and, if the operation being considered provides live entertainment in a B.L. zone, it would be considered a nightclub and would not be allowed to operate. This would include karaoke, a person playing a piano, and strolling minstrels.

The Protestants presented Matthew Ciarpella, who has resided on Sixth Street adjacent to the Dock of the Bay for 3 years. Mr. Ciarpella complained of hearing the music even though the band was inside and it was wintertime. He stated that Monday through Thursday there were no problems since no music was played, and that when the music was played, it was loud enough for him to hear in his house even though it was not played outside.

Kay Sessa also testified stating that she lived at Sixth Street, which is about 650 feet from the Dock of the Bay. She stated that she heard the karaoke being played and that, although the previous restaurant had live bands, they stopped playing in 1970. She stated that she has been bothered by the live bands of the Dock of the Bay since 2004.

Patricia Waldmann, Charles Wolinski, and Brad Metheny and Bonnie Metheny all testified that they were neighbors living approximately 100 to 250 feet from the Dock of the Bay and that the music played on Friday and Saturday nights was so loud that they could not enjoy a peaceful night's sleep. Wolinski testified that he had gone into the Dock of the Bay and had witnessed that the tables were moved when the bands were playing and that there were not always aisles for the tables.

Finally, George Abendschoen, the Administrator of the Baltimore County Liquor Board, testified that there had been a file opened by his office on the Dock of the Bay. Based upon complaints that were received by the Liquor Board concerning the music that was played, an

inspector, Dan Crockett, had gone to the Dock of the Bay to investigate the matter. There was no determination by the Liquor Board. The report by the inspector, Dan Crockett, was received for identification only but was not admitted as part of the evidence in this matter.

Cases No. CBA-06-044 and No. CBA-07-134

Subsequent to the evidence presented in the special hearing case, the parties argued with respect to the civil citations and the decisions of the Hearing Officer in the above matters. Mr. Holzer contended that, under § 500.6 and 7 of the BCZR, the Hearing Officer had no authority or jurisdiction to interpret the *Baltimore County Zoning Regulations* with respect to whether or not the Dock of the Bay fell under the definition of nightclub. He stated that that was restricted solely to the authority of the Zoning Commissioner. These cases should be determined on the basis of the decision that this Board makes with respect to finding as to whether or not the Dock of the Bay is a nightclub under the BCZR. Mr. Holzer argued that Mr. Thanner had, in good faith, sought clarification in the Baltimore County Department of Code Inspection and Enforcement and received no clarification from that office. He also stated that § 3103 of the *International Building Code*, which has been adopted by the County, applies to structures erected for less than 180 days. He stated that Counsel for the Protestants in his letter claims that, in addition to live music, the tent was up for over 8 months. If that is the case, he felt that his client was cited under the wrong citation. He stated that it was not clear what the fine of $5,000.00 covered and requested a reduction in the fine if the Board finds that the operation is a nightclub. There was no indication as to whether or not there was any evidence presented to the Code Enforcement Hearing Officer with respect to how long the tent was erected at the Dock of the Bay operation.

With respect to the second citation, Mr. Holzer indicated that the second charge should have been given the same file number, even though the first charge was on appeal to the Board.

He stated that the Code Enforcement Hearing Officer in Case No. CBA-07-134 found that the Zoning Commissioner had determined that the playing of outdoor music must be discontinued but did not address the playing of indoor music. The Code Enforcement Hearing Officer found the Dock of the Bay to be a nightclub and therefore in violation of the BCZR. Mr. Holzer wanted further clarification of the fine levied in the second hearing.

In addition, Mr. Holzer indicated that the Zoning Commissioner had received an inquiry from the Liquor Board with respect to his decision. Evidently, the Zoning Commissioner replied to the inquiry, stating that he had determined that the music being played inside and outside the building was prohibited. Mr. Holzer felt that he had to appeal this letter because it was his position that the Zoning Commissioner had not taken any position with respect to the inside music.

Counsel for the Protestants argued to affirm the decision of the Code Enforcement Hearing Officer. He argued that both decisions were affirmed by the decision of the Zoning Commissioner in which he found that the operation was a nightclub. There was no prejudice or reversible error committed and that the Hearing Officer should be affirmed on his findings with respect to the nightclub definition. With respect to the tent, he argued that the tent had been put up on two separate occasions and that the Hearing Officer was correct in finding a violation on both occasions.

Ms. West argued solely with respect to the jurisdictional aspect and it was her position that, under the Code, Article 3, § 6-101, the Hearing Officer had the authority to hear the two cases for finding and was correct in finding the violations.

Decision

There is no question that the Dock of the Bay restaurant is located in a B.L. zone. The B.L. zone uses permitted, as of right, include under § 230.4 a standard restaurant, tea room,

convenience store, and dairy barn. Section 101 of the BCZR defines a standard restaurant as "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment."

The definition of "nightclub" is found in BCZR § 101, List of Definitions, and states:

> A tavern or other establishment which permits live or recorded entertainment with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County.

Section 101 also defines a tavern as:

> An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of a nightclub, as defined in these regulations, shall be considered a nightclub.

A tavern and standard restaurant are allowed in a B.L. zone; a nightclub is not allowed.

The International Building Code, adopted in Bill No. 1-05 by the County Council, includes, in § 303.1:

> 303.1 Assembly Group A:
>
> Assembly Group A occupancy includes, among others, the use of a building or structure or a portion thereof, for the gathering together of persons for purposes such as civic, social, or religious functions, recreation, food or drink consumption, or awaiting transportation....

Following the major assembly group are the five sub-assembly groups. A-2 is the primary group with which we are concerned in this matter.

> A-2. Assembly uses intended for food and/or drink consumption, including but not limited to:
>
> banquet halls
> nightclubs
> restaurants
> taverns and bars

In a discussion of the various groups, the Code states:

> ...In the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high....Darkened spaces in theaters, nightclubs, and the like serve to increase hazards. In emergencies, the congestion caused by large numbers of people rushing to exits can cause panic conditions.

The characteristics for sub-assembly group A2 state:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - low light levels;
> - entertainment by a live band or recorded music generating above-normal sound levels;
> - no theatrical stage accessories;
> - later than average operating hours;
> - tables and seating arranged or positioned so as to create ill-defined aisles;
> - a specific area designated for dancing;
> - service facilities for alcoholic beverages and food; and
> - high occupant load density.

There follows an example which states:

> Example: The Downtown Club, a popular local nightclub /dance hall, features a different band every weekend [See figure 303.1(5)]. It is equipped with a bar and basic kitchen facilities so that beverages and appetizers can be served. There is a platform for a band to perform on, a dance floor in front of the platform, and numerous cocktail tables and chairs. The tables and chairs are not fixed, resulting in a haphazard arrangement such that there are no distinct aisles. When the band performs, the houselights are dimmed and spotlights are keyed in on the performers. The club is equipped with a sound system that is used at loud levels. The club is open until 3:00 a.m. – the latest time the local jurisdiction will allow.
>
> From this descript of The Downtown Club, one can readily see that the appropriate classification is Group A-2. Sometimes, however, it is not this easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building.

The Board recognizes that this decision could have far-reaching effects in the County. The definition of "nightclub" in the BCZR is certainly far from being crystal clear. As testified to by the Building Inspector, the inspection department operates solely on a complaint basis. Their criteria for finding a nightclub would be any restaurant, tavern or bar which provides live

entertainment. This could be anything from a piano player playing background music, a strolling minstrel, or a 12-piece orchestra.

In reviewing the characteristics for the group of facilities classified as A-2 in the Building Code, the Board finds as follows:

1. Low light levels.

Mr. Thanner testified that normally the restaurant is lit at what one would consider a normal level. However, when the band is playing, he did admit that the lights were turned down.

2. Entertainment by a live band or recorded music generating above-normal sound levels.

Mr. Thanner indicated that on Fridays, Saturdays, and Sundays, he has live entertainment, be it karaoke, a D.J., or a small band. In fact, this is a major part of his business and he feels that, without the music, the Dock of the Bay cannot survive during the winter months. The question of whether or not the band and the music is played above normal sound levels is one that would probably be determined by the persons listening to it. Certainly, the neighbors surrounding the Dock of the Bay feel that the sound level of the music is above normal, even during the winter months when music is played inside. There has been no indication that the restaurant has been declared to be in violation of noise levels under the Maryland Occupational Safety and Health Act. However, there is no question that the bands do play at sound levels which extend beyond the four walls of the restaurant.

3. No theatrical stage accessories.

Mr. Thanner testified that there are no theatrical stage accessories, particularly during the winter months. He did state that on weekends during the summer time there is a small stage for the bands that play outside until 8:00 p.m.

4. Later than average operating hours.

Mr. Thanner testified that normal operating hours of the restaurant are 11:00 a.m. to 2:00 p.m. He stated that during the winter the restaurant would close early if there were no patrons. He also indicated that his kitchen closes at 11:00 p.m.; however, the facility will stay open until 2:00 a.m., which is the normal closing hour required by the County for facilities serving liquor.

5. Tables and seating arranged or positioned so as to create ill-defined aisles.

Mr. Thanner again testified that the tables and chairs in the restaurant are generally fixed according to aisles for serving. However, he did state that when a band plays it is normal for individuals to move chairs and tables to allow for the band and also to allow people to dance in between the tables.

6. Specific area designated for dancing.

Mr. Thanner testified that there is no specific dance area. However, once again he did indicate that when the bands are playing people would move the tables and dance in the aisles among the tables.

7. Service facilities for alcoholic beverages and food.

There is no question that the Dock of the Bay serves alcohol and food. Mr. Thanner was quite emphatic that 70 percent of his business comes from the food operation and probably 28 to 30 percent from the alcoholic beverages.

8. High occupant load density.

There is no definition of what a high occupant load density is. Mr. Thanner testified that the restaurant would seat 150 to 160 individuals. On nights when there are bands playing, there appears to be a large crowd coming into the restaurant and one would probably find that it is filled to capacity.

The Board finds that the Dock of the Bay meets at least six of the criteria set forth in Group A-2. This would be criteria 1, 2, 3, 4, 7 and 8.

While our dissenting Member would find that there is no violation when the music is played inside the facility, he would find that it is a nightclub when music is played outside. The Majority finds that the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR. The second criterion does not differentiate between inside and outside noise. The fact that the Dock of the Bay does not provide music Monday through Thursday is not controlling in the opinion of this Board. Playing loud music on Friday through Sunday that can be heard by the neighbors makes the operation a nightclub under the present definition of the BCZR.

The Board is not unmindful that the definition of a nightclub, under the BCZR, can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.M. zones, might be considered "nightclubs" under the present criteria of the BCZR. It is not for the Board to change the definition but for the County Council to consider.

Cases No. CBA-06-044 and No. CBA-07-134

The Board has considered the arguments and evidence presented to the Board and the Code Enforcement Hearing Officer in the above matters.

The Board finds that the Code Enforcement Hearing Officer is authorized to interpret the definition of a nightclub under his duties to hold hearings and issue final orders under § 3-6-206 of the BCZR. In any event, the Zoning Commissioner had found the Dock of the Bay to be a nightclub prior to the holding of the second Code Enforcement hearing. Therefore, the Code Enforcement Hearing Officer could rely on that decision to uphold his findings.

The Board will affirm the decision of the Hearing Officer in both matters but will reduce the penalty to a $1,000.00 fine for operating as a nightclub in a B.L. zone and a $1,000.00 for failure to obtain a permit to erect a tent on a temporary basis at the Dock of the Bay restaurant.

ORDER

IT IS THEREFORE this 4th day of June, 2008, by the Board of Appeals for Baltimore County,

ORDERED that the Petition for Special Hearing pursuant to § 500.6 and 500.7 of the Baltimore County Zoning Regulations requesting a determination as to whether the use of the B.L. zoned property at 9025 Cuckold Point Road is in violation of the zoning regulations, and, specifically, as to whether the facility which provides music at this location is a "nightclub" as defined in the BCZR §§ 101, 102.1 and 230 is hereby answered in the affirmative and the playing of music by way of speaker system, live or recorded entertainment must be discontinued; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-06-044 be and is hereby **AFFIRMED;** and further that the fine is reduced to $1,000.00 for operating a nightclub in a B.L. zone; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-07-134 for operating a nightclub in a B.L. zone and for erecting a temporary tent without a permit be and is hereby **AFFIRMED**; and further that the fine of $1,000.00 for the erection of the tent is **AFFIRMED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules.*

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Wendell H. Grier

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-06-044
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DISSENTING OPINION

I respectfully disagree with the opinion of the Majority.

In support thereof, I draw attention to the very arguments and content of the Majority Opinion. Based upon the testimony presented and summarized in the Majority Opinion, we are faced with a commercial enterprise described as follows:

- 150 to 160 seated patrons at tables and chairs with defined aisles
- a playground for children on the premises, including a wooden pirate ship
- operating hours of a commercial kitchen of 11 a.m. to 11 p.m. with a full menu of steaks, seafood, sandwiches, etc.

- Health Department and State of Maryland licenses as a restaurant
- 70% of total receipts related to food service, while only 30% is related to alcohol
- no cover charge or other entrance fee
- no stage accessories inside the premises

On its face, absent further imposed factors, the above would appear to be a common sense discussion of a restaurant.

In this particular care there is no question that there is live and musical entertainment provided on a limited basis at the location. There are TV sets in the premises, and there is karaoke and DJ music on two nights of the week. The definition of a restaurant in § 101 of the Baltimore County Zoning Regulations (BCZR) is a clear statement that "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment." However, the definition of "nightclub" is exceedingly unclear and circuitous. It is quoted on page nine of the Majority Opinion and is based upon the essential definition of a "tavern" which permits music and is further "characterized" as a nightclub by the Building Code.

Unfortunately, this is a situation of law in which Baltimore County has seen fit to adopt a "one size fits all" International Building Code (IBC) as opposed to creating or evolving a Building Code that reflects the particular realities and common sense observations of this jurisdiction. Once again, the Majority has appropriately quoted the salient portions of the adopted International Building Code in an effort to determine whether the subject site is indeed a nightclub. Group A2 is the subgroup of the IBC which is applicable to this discussion. Group A2, while providing a general description of "uses intended for food and/or drink consumption,"

includes such disparate uses as banquet halls, nightclubs, restaurants, taverns, and bars. Common sense cannot but reach the inalterable observation that there are significant differences (or should, in reality, be) between these different uses, notwithstanding the fact that the authors of the "one size fits all" IBC determined to lump them together. In a discussion of the characteristics for the sub-assembly Group A2, the Majority, on page ten of its Opinion, quotes the Code as follows:

> ...Group A2 includes occupancies in which people congregate in high densities for social entertainment such as drinking and dancing (e.g., nightclubs, dancehalls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). **[Emphasis added.]**

Clearly, even the generalists who produced the IBC recognized that facilities utilized for purely social gathering were different than those used primarily for food and drink.

There follows a list of characteristics in which "some or all" would be relevant to a determination of the actual identity of a particular site use. This writer disagrees with the evaluation of the Majority as to these characteristics and would note those disagreements:

1. Low light levels – There is no question that the vast majority of the time the subject site lighting is at a normal level for a restaurant. That the lighting is sometimes reduced as part of its ambience should not negate the general lighting scheme on most occasions.
2. Entertainment by a live band or recorded music generating above-normal sound levels – There is no question that there is live or recorded music both inside and outside the subject business on occasion. There is absolutely no testimony that the owners have ever been cited for allowing music or live entertainment to generate above-normal sound levels either inside or outside the premises of the restaurant. The Majority properly notes that there is no

indication "that the restaurant has been found to be in violation of noise levels under the Maryland Occupation Safety and Health Act." There is anecdotal testimony of neighbors, many of whom came into the area after the activities at this location had continued for many years, that there were levels of music and other sound that adversely affected their enjoyment of their property. None testified to filing complaints with the police, nor was there any information developed that the restaurant had been cited for violation of noise statutes. With all due respect to the neighbors, their determination is subjective to the extreme; nor does the record reflect any action taken regarding the restaurant by governmental enforcement agencies akin to that which has occurred over many years to limit and modulate above-normal generated sound levels at house parties, college fraternity events, and other occasions when the police were summoned for above-normal noise levels. On such occasions, there are recognized decibel levels that are acceptable, the violation of which will result in governmental action immediately. No such evidence of governmental action regarding this restaurant exists here.

3. There are no theatrical stage accessories in the subject premises.
4. Later than average operating hours – There is no testimony of any sort that there are any but normal restaurant and bar hours for this location. The restaurant's commercial kitchen is open 12 hours a day. As noted, the restaurant provides 70 percent of the income at the location. Clearly these activities are the primary purposes of the establishment.

5. Tables and seating arranged or positioned so as to create ill-defined aisles – There is no testimony that there is a special setup of tables or chairs (other then that appropriate to a restaurant) for the purpose of providing entertainment. In fact, it is simply a habit of some patrons to move their chairs and seating arrangements to fit the moment. One might also be able to say that there would probably be any number of occasions when music is played and no one determines to move chairs or tables. There is simply no on-going structural plan by the owner of the establishment to do so.
6. Specific area designated for dancing – There is no specific area designated by the owner for dancing. That occasionally action by customers to do so unofficially does not officially create such an area. Therefore, the absence of that clearly defined plan should indicate just the opposite conclusion.
7. Service facility for alcoholic beverages and food – As noted above, the vast majority of the income derived at the location is as the result of food service to patrons, including families.
8. High-occupant load density – Once again, the "one size fits all" Code gives us no indication as to what "high" means. There is undisputed testimony that the restaurant seats 150 to 160 individuals and that on occasion that maximum is reached. The seating limitation is for restaurant use and is another indicator of Baltimore County's "real life" views of the nature of the business.

It is the opinion of this writer that the criteria applied in the IBC does not clearly indicate that this location in any significant way meets the definition and requirements under the law to be termed a "nightclub." In fact, as is characteristic of most generalized and non-specific

criteria, the IBC itself (as quoted by the Majority on page ten of the Opinion) states that "sometimes however it is not easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building." It essentially tells us that the criteria is so broad and determinedly subjective discussion and conclusion that it should not be utilized in a vacuum. The actual facts of the use and description of the site being addressed must be utilized in order to reach any viable conclusion as to the sites' status under the law. These additional factors and inquiries do not appear to have been utilized by the enforcement authorities or the Zoning Commissioner in their respective determined by in this case.

Baltimore County (as well as most jurisdictions in Maryland) has a history of primarily restaurant and other food related establishments utilizing various music and entertainment accoutrements to enhance both the ambience and experience of the patrons. Whether those accoutrements are physical (such as a playground for children at this location) or television sets or music or piano player, a strolling minstrel, a singing waiter, or a roving "in character" presentation by staff, these activities do not render such an establishment a nightclub but rather a restaurant with some additional entertainment provided. The position of the majority however, would result in a finding of "Nightclub" for any restaurant establishment utilizing these activities. Such a result turns a blind eye to common sense.

This writer believes that the result reached by the Majority, with its admitted, far-reaching effects, is the classic "untended consequences" situation. I believe that the Code Enforcement authorities should at the least have utilized the instruction in the IBC language that other factors, such as those existing here, should have been utilized and therefore the decision by

the Majority, that this is a nightclub as opposed to a restaurant, is incorrect; and, moreover, does not reflect the actual reality of the situation.

As a final note, Mr. Thompson, of the Enforcement agency for the County, testified that their actions in this matter and as to other establishments under this section and scenario would be generated on a "complaint only" basis. While I will not dwell on the point, such selective enforcement appears to me to be contrary to the spirit and intent of any well-written regulation, is arbitrary and capricious, and possibly an "Equal Protection under the laws" violation. I believe that the appellate court should revisit this particular situation in order to confirm that the subject site in this case is indeed a restaurant and not a nightclub, and further, that the criteria for such determinations must include factors in addition to the bare generalities of the IBC. Additionally, I believe that the County Council should, as quickly as possible, revisit the issue and adjust the County Code sections as they relate to the use of entertainment in restaurants and negate now and avoid in the future a result such as this, which is not in the best interests of the citizens or economy of Baltimore County.

For all of the above, I dissent in the Opinion of the Majority.

Lawrence M. Stahl, Board Member

DATE: 6-04-2008

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-07-134

* * * * * * *

RULING ON MOTION
FOR RECONSIDERATION AND CLARIFICATION

On June 4, 2008, the Board issued its decision in the above cases, finding that the Respondent was in violation of the Baltimore County Code (BCC) and levying a fine of $1,000.00 in lieu of the $3,500.00 that was levied by the Hearing Officer. A timely Motion for Reconsideration was filed by Counsel for the Respondent. The Motion raises five questions or issues.

Question 1 – How many of the criteria set forth in the Building Code can an establishment have before it is considered to be operating a nightclub?

Question 2 – Will the Board amend its Order to state that the Dock of the Bay Restaurant must discontinue its nightclub operations?

Question 3 – Should the Petitioners be held liable for not adhering to a law which no one except the Board of Appeals in a split decision could define?

Question 4 – How can the Petitioner be fined for erecting a tent without a permit when the Petitioner was never charged with that violation?

Question 5 – Was the testimony given by neighbors of Dock of the Bay proper testimony?

Decision

The Board held a public deliberation on the Motion on August 12, 2008. The Board finds that the issues raised in questions 1 and 2 request an advisory opinion, which the Board does not render.

With respect to question #3 concerning the $1,000.00 fine, the Board finds that the fine was appropriate and it will stand. The question of whether or not there was a split decision makes no difference with respect to the assessment of the $1,000.00 fine.

As to question #4, the Board finds that the Respondent was charged with failure to obtain a permit for the tent that it erected on the property. The Code Enforcement notice of May 20, 2006, states that the Respondent should obtain a tent permit or remove the structure. The notice of June 7, 2006, states a failure to obtain a permit for the tent. The notice of August 14, 2006, has an amendment, "Remove the tent or obtain permit." The Board finds that the Respondent had adequate notice that it was being charged with respect to failure to obtain a permit for the tent.

In regard to question #5, the Board considers that the testimony which it received from the neighbors was appropriate testimony and it will not grant any review with respect to that testimony. Should the Respondent feel that the testimony is improper, it may contest that in the Circuit Court for Baltimore County.

Therefore, the Board, having considered all of the questions raised by the Respondent, will deny the Motion for Reconsideration. The Board's Opinion and Order issued on June 4, 2008, remains this Board's final decision in this matter.

IT IS THEREFORE ORDERED THIS 12th day of September 2008 that the Motion for Reconsideration filed in this matter is **DENIED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Wendell H. Grier

Lawrence M. Stahl

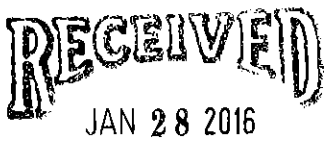
SMITH, GILDEA & SCHMIDT LLC

MICHAEL PAUL SMITH
DAVID K. GILDEA
LAWRENCE E. SCHMIDT
MICHAEL G. DEHAVEN
JASON T. VETTORI
DAVID W. TERRY*
*Admitted in MD, MO, IL, AR

LAUREN DODRILL BENJAMIN
CHRISTOPHER W. COREY
MARIELA C. D'ALESSIO**
ELYANA TARLOW
SARAH A. ZADROZNY
of counsel:
JAMES T. SMITH, JR.
EUGENE A. ARBAUGH, JR.
DAVID T. LAMPTON
**Admitted in MD, FL, PA

January 28, 2016

Sent Via Hand Delivery
Krysundra L. Cannington
Administrator
Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204



Re: In the Matter of Boone Kondylas, LLC
9025 Cuckold Point Road
Case No. 2016-003-SPH

Dear Ms. Cannington:

Enclosed please find for filing a Trial Memorandum for the above captioned matter. As you are aware, this matter is scheduled before the Board for hearing on February 17, 2016.

The Petition for Special Hearing that is the subject of this case was denied below by Order of Administrative Law Judge John E. Beverungen. Administrative Judge Beverungen did not deny the petition on the basis of the merits of the issue presented (i.e. whether the existing restaurant should be able to provide music/entertainment to its' patrons) but rather on a preliminary issue involving the application of res judicata. It is anticipated that the Protestants will raise this defense as a preliminary issue at the Board's hearing and, under those circumstances, the enclosed is offered to set forth the Petitioner's viewpoint of the relevant facts and applicable law.

The Petitioner will be prepared to present facts and argument regarding the merits of the case at the hearing and also will be prepared to address the res judicata issue. I would appreciate if the panel assigned to this case is provided a copy of the enclosed prior to the hearing so that they may review the same in advance. In this regard, I have enclosed an original and three copies of the Memorandum.

As always, thank you for your cooperation in this regard and past courtesies. Please contact me should you have any questions regarding this matter.

Very truly yours,

Lawrence E. Schmidt

LES/amf
Enclosures
cc: Francis Borgerding, Esquire
Peter Max Zimmerman, Esquire, People's Council for Baltimore County
Carole DeMilio, Esquire, People's Council for Baltimore County
Ken Boone, Boone Kondylas, LLC

RECEIVED
JAN 28 2016
BALTIMORE COUNTY
BOARD OF APPEALS

IN THE MATTER OF: Boone Kondylas, LLC 9025 Cuckold Point Road	*	BEFORE THE BOARD OF APPEALS
	*	FOR
15th Election District 7th Councilmanic Districts	*	BALTIMORE COUNTY
	*	Case No. 2016-003-SPH

* * * * * * * * * * * * *

TRIAL MEMORANDUM

Boone Kondylas LLC, Petitioner/Appellant, through Lawrence E. Schmidt and Smith, Gildea and Schmidt, its attorneys, submits this Trial Memorandum and respectfully states the following.

Facts

This matter comes before the Board of Appeals ("Board") as an appeal by Boone Kondylas, LLC (property owner) of the denial of a Petition For Special Hearing by the County Administrative Law Judge ("ALJ"). By written decision dated October 22, 2015 ALJ John E. Beverungen denied the Petitioner's Petition for Special Hearing, holding that consideration of the same was barred by the doctrine of res judicata. Petitioner avers that such decision is erroneous and offers the following in support of its contention.

The relevant facts related to this case are largely not in dispute. The subject property is a water front property in the Millers' Island community of eastern Baltimore County. The property is zoned BL. The property is 55,594 square feet (1.276 acres) in area. The property is improved with a commercial building and associated parking

area. The business located thereon is known as "The Dock of the Bay". The Dock of the Bay has operated at this location since the 1950's. For years, the business operated (without dispute or incident) as a traditional restaurant. As an accessory component to the restaurant operation, the Dock of the Bay provided entertainment to its dining patrons. The restaurant closed following extensive damage that was sustained as the result of Hurricane Isabel in 2003. The property/business was thereafter acquired and re-opened under the ownership and management of Fifth Street, LLC. Lawrence Thanner was the managing member of Fifth Street, LLC. He changed the operation of the business, in that he introduced live music, dancing and a party type atmosphere at the facility. As specifically determined by the Board of Appeals in a prior case, the Board found (as a matter of fact) that Fifth Street, LLC's operation had the following characteristics:

- Lower interior lighting levels were in place when bands were playing (BOA Opinion, Pg. 5)
- Bands were playing "quite loudly" creating noise louder than would normally be associate with a restaurant use (BOA Opinion Pg. 5)
- A stage outside the restaurant was installed for use by entertainers (bands) when they play outside during warmer months (BOA Opinion, pg. 5)
- The business was open until 2:00 a.m. (BOA Opinion pg. 5)
- There were ill defined aisles between tables, particularly when music was played (BOA Opinion pg. 5)

- Dancing took place while bands were playing on a makeshift dance floor (BOA Opinion pg. 5)
- The serving of alcoholic beverages and food (BOA Opinion pg. 5)
- A high occupant load density (i.e. a crowded facility) (BOA Opinion pg. 5)

Due to these characteristics and the noise generated by the operation, there was a disruption to the neighborhood which resulted in complaints to the Code Enforcement Division of the Department of Permits, Approvals and Inspections. Ultimately, multiple citations were issued to Fifth Street, LLC. These civil code violation cases were heard by the County Code Citation Hearing Officer and Fifth Street, LLC was found to be operating in violation of the Baltimore County Zoning Regulations ("BCZR"). Fines were imposed. The citation cases were appealed to the Board to case numbers CBA-06-044 and CBA-07-134. Concurrently, Fifth Street, LLC filed a Petition for Special Hearing with the Zoning Commissioner seeking approval of live entertainment (as then conducted) on the Property. (Case No. 07-144-SPH). This Petition was denied by the Commissioner and also appealed to the Board. The two Code Citation cases and the special hearing case were consolidated for hearing before the Board of Appeals. By written decision issued through a 2-1 vote, the Board determined that Fifth Street's business was a "nightclub" and thus prohibited in the BL zone. The Board applied the definitions within BCZR" § 101 of "nightclub" and "restaurant" to the operation as conducted and determined that the Dock of the Bay was a nightclub.[1] Specifically, the Board analyzed the eight factors in the bullet points set forth above and determined that

[1] Several different types of restaurants are defined in BCZR § 101.1.

Fifth Street, LLC's operation was a nightclub based upon the definition of the same in the BCZR and also the characteristics of the operation as set out in the International Building Code. Further, the Board noted that a nightclub was not a permitted use in the BL zone, which at all relevant times was/is the zoning of the property.

The Board's determination was appealed to the Circuit Court, and then to the Court of Special Appeals. The decision was affirmed at all levels. Following the issuance of the decision by the Court of Special Appeals, Baltimore County instituted contempt proceedings in the Circuit Court for Baltimore County, alleging that Fifth Street, LLC and Mr. Thanner were operating the business as a night club and in violation of the prior decisions. The Circuit Court determined that Mr. Thanner had no personal responsibility and he was found not to be in contempt. However, Fifth Street, LLC was found to be in contempt. The court enjoined the playing of music at the Property and proposed a fine if its order were violated. The Court also indicated that its order banning "entertainment" at the Property "will remain for a period of one year." Being unable to operate in the manner Mr. Thanner desired, the Dock of the Bay closed.

In August 2014, Boone Kondylas, LLC acquired the property and business. After a period of interior building renovation, Mr. Boone (owner and manager) re-opened the business as a restaurant in October 2014. The business operates seven days a week serving lunch and dinner. There is a brunch on Sundays. Typically the restaurant closes by midnight on weekends (earlier during the week) as the clientele is mature and family oriented. The Dock of the Bay has a liquor license and sells alcohol but the main focus of the business is serving meals. The Dock of the Bay has operated for the past year

without incident. The primary focus of the business is to serve meals to its patrons. Indeed, more than three quarters of the restaurant's revenue is derived from food sales, the rest from sales of alcohol.

It is proffered that the current operation of the restaurant is different from Fifth Street's operation, including but not limited insofar as to the following characteristics:

- Lighting levels do not change when entertainment will be provided.
- The nature of the entertainment is markedly different. The owner anticipates "solo acts" of adult contemporary music geared towards a mature crowd and not live rock and roll bands.
- There will be no stage or stage accessories.
- The restaurant typically stays open until midnight and closes earlier on weekdays. The restaurant operates year round.
- The tables and seating are laid out to create defined aisles.
- There is no dance floor or dancing.
- The primary focus of the business is to serve meals, not provide entertainment.
- The restaurant is typically not over crowded or even at capacity.

In April 2015, the operator of the Dock of the Bay arranged for a solo acoustic guitar solo player to provide music one weekend night to enhance the patrons dining experience. Shortly thereafter, an inspector from the Department of Permits, Approvals and Inspections (Code Citation Division) appeared at the restaurant and advised the manager that the playing of any music was not allowed and that "you'll be shut down"

if any music was played. The Dock of the Bay retained undersigned counsel and filed a Petition for Special Hearing. That Petition contended that the Dock of the Bay was no longer a nightclub, was now a restaurant and, that under the BCZR, restaurants may have (as a legitimate accessory use) music/entertainment. The Petition sought a ruling from the ALJ as to how much/when and under what circumstances accessory entertainment might be allowed. By order dated October 22, 2015, the ALJ dismissed the claim, holding that the petition was barred by res judicata. This timely appeal followed.

Res Judicata: An Overview.

The doctrine of *res judicata* bars the litigation of a cause of action after it has already been litigated to a final judgment. *Gertz v. Anne Arundel County,* 339 Md. 261, 269 (1995); *DeLeon v. Slear,* 328 Md. 569, 580 (1992). Furthermore, *res judicata* may be applicable in administrative (quasi judicial) proceedings. *Batson v. Shiflett,* 325 Md. 684 (1992). *Res judicata* also bars re-litigation of claims that were, or could have been litigated in an earlier proceeding between the parties. *Batson* 325 Md. 684 (1992). In order to successfully establish a claim for *res judicata,* the following elements must be satisfied: (1) The parties in the present litigation should be the same or in privity with the parties to the earlier case; (2) the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction. *DeLeon,* 328 Md. at 580. It is the first and second elements of res judicata that are not present here.

Argument: Res Judicata does not apply because there is a change in the material facts.

Res judicata does not apply if the cause of action or claim is different from the first case to the second. The nature of the claim is determined by the relevant facts as presented in each case.

A leading case on the application of res judicata to administrative (zoning) decisions is *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n 192 Md. App. 719 (2010)*. This was a Baltimore County case, in which the Board of Appeals considered two separate cases involving a commercial property located in Lutherville. The operative facts were as follows:

The "Galleria" commercial property is a 211,635 square foot commercial center primarily leased for offices, with retail on the first floor located adjacent to the intersection of York Road and Seminary Avenue in Lutherville. In 2003, the Galleria petitioned for variance and special hearing relief, seeking the approval of an amendment to its zoning/subdivision plan which had been approved in 1983. The requested zoning relief related to the parking provided at the site, including 14 spaces that had been added by the Galleria shortly before the filing of the petitions and without County approval. The petitions requested approval of the property's parking layout, including the newly added spaces. Ultimately, after proceedings before the Zoning Commissioner; and then the Board and Circuit Court on appeal, the relief requested was denied. The final decision on this case (a/k/a as "Seminary Galleria I") was issued on September 19, 2005.

On February 23, 2006, the owner of the center instituted "Seminary Galleria II" by the filing of zoning petitions (variance and special hearing). Again, the petitions related to parking. The owner contended that Seminary Galleria II was not barred by the doctrine of res judicata because the Galleria (in the second case) was identified as a "shopping center" under the BCZR and that the regulations governing parking which were applicable to shopping centers were different than those applicable to a non-shopping center (which it was the prior designated use of the property).

Seminary Galleria II wound its way through hearing before the Zoning Commissioner, the Board of Appeals, the Circuit Court and the Court of Special Appeals. In a reported decision, the Court of Special Appeals affirmed the decision of the Circuit Court and found Seminary Galleria II barred by res judicata. In its comprehensive written opinion, the Court concluded that neither the facts nor law had changed in the time between Seminary Galleria I and Seminary Galleria II and that the second case was thus barred. Citing a prior decision of the Court of Appeals (*Whittle v. Board of Zoning Appeals 211 Md. 36 (1956)*, the Court of Special Appeals opined that "where the facts are subject to changes which might reasonably lead to an opposite result from that arrived at in an earlier case, and if there have been substantial changes in fact and circumstances between the first case and the second, the doctrine of res judicata would not prevent" a subsequent zoning application. See *Seminary, 192 Md. App. at 737* (citing *Whittle v. Board of Zoning Appeals, 211 Md. 36, 45 (1956)*).

The Seminary galleria opinion also concluded that the changes to the operative facts must be substantial. Citing *Woodlawn Ass'n v. Board 241 Md. 187* the Court of

Appeals has stated that "substantial changes in fact and circumstances must be, indeed, substantial." Pg. 197. Similarly, in *The Chatham Corp v. Beltram 243 Md. 138 (1966)* the Court rejected a second suit because "the facts underlying the previous denial remained unchanged" (Cited in *Seminary at 738*). Thus, it is clear that a substantial change in the material facts from one case to a second will preclude the operation of res judicata in an administrative proceeding.

The facts are substantially different in the first case (Fifth Street, LLC) than the second case (Boone Kondylas, LLC). Further, the facts which have changed are operative and material to the controversy. In the first case, the Board of Appeals determined that the Dock of the Bay was a nightclub based upon the facts presented at that time regarding the operation as then conducted by its then owner. The Board specifically considered the eight enumerated factors identified in the International Building Code as referenced herein above. Based upon the nature of the prior operation (and specifically its findings as to these eight enumerated factors) the Board determined the prior operation to be a nightclub. As noted above, the Boone Kondylas, LLC operation of the Dock of the Bay is substantially different than the Fifth Street, LLC operation. The current operation has no dancing or dance floor, no changes in the lighting when entertainment is provided, no proposed rock and roll bands, no stage, and does have a defined dining area, etc. The operation of the Dock of the Bay by Fifth Street, LLC was a nightclub with accessory food and drink. The operation of the Dock of the Bay by Boone Kondylas, LLC is a restaurant with proposed accessory

entertainment to enhance the dining experience. The material facts support this significant difference between the distinct uses of this property.

Given this clear and unmistakable difference between the facts in these two cases, res judicata cannot apply. The prior ruling did not say that entertainment could never be provided at business at this Property. Indeed, in addition to restaurants, hotels, country clubs and theatres are all uses permitted by right in the BL zone. These uses frequently provide entertainment (e.g. wedding receptions) as an accessory component to their primary use. Such accessory component is appropriate and may be allowed. If, based upon the material facts which now apply (which are different than before) the Board may determine that accessory entertainment at the Dock of the Bay is appropriate and warranted. It may further define and even limit that entertainment. But, it is contended, the Board must consider this issue and cannot wrongly apply the doctrine of res judicata to prohibit the current owner from having his "day in court" to fairly and objectively consider the issue presented.

CONCLUSION

Wherefore Boone Kondylas LLC respectfully requests:

1. That the Board of Appeals schedule this matter for public hearing whereat it might receive testimony confirming the differences in operation (material facts) between Dock of the Bay's operation under Fifth Street LLC and its current operation by Boone Kondylas, LLC;
2. That the Board of Appeals find that Dock of the Bay is a restaurant and may have accessory entertainment to enhance the dining experience of its patrons;

3. That the Board of Appeals set the limits and conditions in the providing of entertainment by the Dock of the Bay to ensure that the use is appropriate for the locale; and

4. For such other and further relief as the nature of its cause may require.

Respectfully submitted,



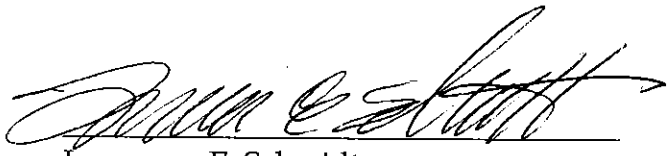
Lawrence E. Schmidt
Smith, Gildea & Schmidt, LLC
600 Washington Ave., Suite 200
Towson, MD 21204
410-821-0070
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2016 a copy of the foregoing document was mailed via first class mail, postage prepaid to:

Francis X. Borgerding, Jr., Esquire
Law Offices of Francis X. Borgerding, Jr.
409 Washington Avenue, Suite 600
Towson, MD 21204

Peter Max Zimmerman, Esquire
Carole DeMilio, Esquire
People's Counsel for Baltimore County
The Jefferson Building105 West
Chesapeake Avenue, Room 204
Towson, MD 21204



Lawrence E. Schmidt

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

November 24, 2015

NOTICE OF ASSIGNMENT

IN THE MATTER OF: Boone Kondylas, LLC
9025 Cuckold Point Road
16-003-SPH 15th Election District; 7th Councilmanic District

Re: Petition for Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044, and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music

11/7/13 Opinion and Order issued by the Administrative Law Judge wherein the requested relief was DENIED.

ASSIGNED FOR: WEDNESDAY, FEBRUARY 17, 2016, AT 10:00 A.M.

LOCATION: Hearing Room #2, Second Floor, Suite 206
Jefferson Building, 105 W. Chesapeake Avenue, Towson

NOTICE: This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.

Please refer to the Board's Rules of Practice & Procedure, Appendix B, Baltimore County Code.

IMPORTANT: No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

If you have a disability requiring special accommodations, please contact this office at least one week prior to hearing date.

For further information, including our inclement weather policy, please visit our website www.baltimorecountymd.gov/Agencies/appeals/index.html

Krysundra "Sunny" Cannington
Administrator

---

c: Counsel for Petitioner/Appellant : Lawrence E. Schmidt, Esquire
Petitioner/Appellant : Boone Kondylas, LLC/Ken Boone

Counsel for Protestants : Francis X. Borgerding, Esquire
Protestants : Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella, and Tammy Waldmann

Office of People's Counsel
Arnold Jablon, Director/PAI
Nancy West, Assistant County Attorney

Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Michael Field, County Attorney, Office of Law

KEVIN KAMENETZ
County Executive

LAWRENCE M. STAHL
Managing Administrative Law Judge
JOHN E. BEVERUNGEN
Administrative Law Judge

November 16, 2014

Lawrence E. Schmidt, Esq.
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

Francis X. Borgerding, Jr., Esq.
409 Washington Avenue, Suite 600
Towson, Maryland 21204

RECEIVED
NOV 16 2015
BALTIMORE COUNTY
BOARD OF APPEALS

RE: **APPEAL TO BOARD OF APPEALS**
Case No. 2016- 0003-SPH
Location: 9025 Cuckold Point Road

Dear Counsel:

Please be advised that an appeal of the above-referenced case was filed in this Office on November 13, 2015. All materials relative to the case have been forwarded to the Baltimore County Board of Appeals ("Board").

If you are the person or party taking the appeal, you should notify other similarly interested parties or persons known to you of the appeal. If you are an attorney of record, it is your responsibility to notify your client.

If you have any questions concerning this matter, please do not hesitate to contact the Board at 410-887-3180.

Sincerely,

LAWRENCE M. STAHL
Managing Administrative Law Judge
for Baltimore County

LMS/sln

c: Baltimore County Board of Appeals
People's Counsel for Baltimore County

APPEAL

Petition for Special Hearing
9025 Cuckold Point Road
15th Election District – 7th Councilmanic District
Legal Owner: Boone Kondylas, LLC
Case No.: 2016-0003-SPH

Petition for Special Hearing (July 6, 2015)

Zoning Description of Property

Notice of Zoning Hearing (August 3, 2015)

Certification of Publication – (September 8, 2015)

Certification of Posting (Linda O'Keefe – September 6, 2015)

Entry of Appearance by People's Counsel – (July 23, 2015)

Petitioner(s) Sign-In Sheet – (1 Page)

Citizens(s) Sign-In Sheet – (1 Page)

Zoning Advisory Committee (ZAC) Comments

Petitioner's Exhibits:
1 – Site Plan
2 – 2"A"-2"O" color photos
3- 3A-3C Aerial Photos

Protestants Exhibits:
1- CBA Opinion-07-144 et al
2- Circuit Court Order 03-C-08-9996
3- Unreported CSA Opinion No. 810
4- Photos

Miscellaneous: Not Marked as Exhibits

Cover Letter and Administrative Law Judge's Opinion and Order –
(DENIED – October 22, 2015)

Notice of Appeal received on November 13, 2015 filed by Lawrence E. Schmidt, Esq.

NOV 16 2015
BALTIMORE COUNTY
BOARD OF APPEALS

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET AND FINANCE
MISCELLANEOUS CASH RECEIPT

No. 138630

Date: 11/13/15

Fund	Dept	Unit	Sub Unit	Rev Source/ Obj	Sub Rev/ Sub Obj	Dept Obj	BS Acct	Amount
331	8010	0777		1650				265.00

Total: 265.00

Rec From: [illegible]

For: H 2011-0003-SPH

9625 Chickadee Point Rd

CKE 11/9/15

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER GOLD - ACCOUNTING
PLEASE PRESS HARD!!!!

PAID RECEIPT
[illegible] ACCOUNT TIME PERIOD
11/13/2015 11/13/2015 14:58:09 2
[illegible]
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Rcpt Tot 265.00
[illegible] CK 265.00
Baltimore County, Maryland

CASHIER'S VALIDATION

SMITH, GILDEA & SCHMIDT LLC

MICHAEL PAUL SMITH
DAVID K. GILDEA
LAWRENCE E. SCHMIDT
MICHAEL G. DEHAVEN
JASON T. VETTORI
DAVID W. TERRY*
*Admitted in MD, MO, IL, AR

RECEIVED
NOV 13 2015
OFFICE OF ADMINISTRATIVE HEARINGS

NOV 13 2015

LAUREN DODRILL BENJAMIN
CHRISTOPHER W. COREY
MARIELA C. D'ALESSIO**
ELYANA TARLOW
SARAH A. ZADROZNY
of counsel:
JAMES T. SMITH, JR.
EUGENE A. ARBAUGH, JR.
DAVID T. LAMPTON
**Admitted in MD, FL, PA

November 13, 2015

Via Hand Delivery
Arnold Jablon, Esquire
Director
Baltimore County Department of Permits, Approvals and Inspections
111 West Chesapeake Ave, Suite 105
Towson, MD 21204

Re: Notice of Appeal
Property: 9025 Cuckold Point Road
Case No. 2016-0003-SPH

Dear Mr. Jablon,

Enclosed herewith please find an original and four (4) copies of the Notice of Appeal on behalf of Appellant, Boone Kondylas, LLC, to be filed in the above referenced matter. Please date stamp the copies and return the same to our courier. Also enclosed, please find a check in the amount of $265.00 to cover the filing fee for such appeal.

Please contact me should you have any questions.

Very truly yours,

Lawrence E. Schmidt

LES/amf
Enclosures
cc: Administrative Law Judge John E. Beverungen
Francis X. Borgerding, Jr., Esquire
Peter Max Zimmerman, Esquire
Krysundra Cannington, Board of Appeals
Boone Kondylas, LLC

IN RE: **PETITION FOR SPECIAL HEARING** **9025 Cuckold Point Road**	*	BEFORE THE
	*	COUNTY BOARD OF APPEALS
15th Election District 7th Councilmanic District	*	OF
	*	BALTIMORE COUNTY
Boone Kondylas, LLC, *Legal Owner* Appellant	*	
	*	**Case No.: 2016-0003-SPH**
	*	

* *

NOTICE OF APPEAL

The Appellant, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea, and Schmidt, LLC, feeling aggrieved by the decision of the Administrative Law Judge for Baltimore County from the Opinion and Order dated October 22, 2015, in the above-captioned matter, hereby note this appeal to the County Board of Appeals for Baltimore County in accordance with Baltimore County Code §32-3-401 by filing this Notice of Appeal with the Director of the Baltimore County Department of Permits, Approvals & Inspections.

Respectfully submitted,

LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of **November, 2015,** a copy of the foregoing Notice of Appeal was mailed first-class pre-paid postage to:

Francis X. Borgerding, Jr., Esquire
Law Offices of Francis X. Borgerding, Jr.
409 Washington Avenue, Suite 600
Towson, MD 21204

John E. Beverungen, Esquire
Administrative Law Judge for Baltimore County
Office of Administrative Hearings
105 West Chesapeake Avenue, Suite 103
Towson, MD 21204

Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County
The Jefferson Building
105 West Chesapeake Avenue, Room 204
Towson, MD 21204

LAWRENCE E. SCHMIDT

SMITH, GILDEA & SCHMIDT LLC

MICHAEL PAUL SMITH
DAVID K. GILDEA
LAWRENCE E. SCHMIDT
MICHAEL G. DEHAVEN
JASON T. VETTORI
DAVID W. TERRY*
*Admitted in MD, MO, IL, AR

LAUREN DODRILL BENJAMIN
CHRISTOPHER W. COREY
MARIELA C. D'ALESSIO**
ELYANA TARLOW
SARAH A. ZADROZNY
of counsel:
JAMES T. SMITH, JR.
EUGENE A. ARBAUGH, JR.
DAVID T. LAMPTON
**Admitted in MD, FL, PA

November 13, 2015

Via Hand Delivery
Arnold Jablon, Esquire
Director
Baltimore County Department of Permits, Approvals and Inspections
111 West Chesapeake Ave, Suite 105
Towson, MD 21204

Re: Notice of Appeal
Property: 9025 Cuckold Point Road
Case No. 2016-0003-SPH

Dear Mr. Jablon,

Enclosed herewith please find an original and four (4) copies of the Notice of Appeal on behalf of Appellant, Boone Kondylas, LLC, to be filed in the above referenced matter. Please date stamp the copies and return the same to our courier. Also enclosed, please find a check in the amount of $265.00 to cover the filing fee for such appeal.

Please contact me should you have any questions.

Very truly yours,

Lawrence E. Schmidt

LES/amf
Enclosures
cc: Administrative Law Judge John E. Beverungen
Francis X. Borgerding, Jr., Esquire
Peter Max Zimmerman, Esquire
Krysundra Cannington, Board of Appeals
Boone Kondylas, LLC

RECEIVED
NOV 16 2015
BALTIMORE COUNTY
BOARD OF APPEALS

IN RE: **PETITION FOR SPECIAL HEARING** **9025 Cuckold Point Road**	*	BEFORE THE
	*	COUNTY BOARD OF APPEALS
15th Election District 7th Councilmanic District	*	OF
	*	BALTIMORE COUNTY
Boone Kondylas, LLC, *Legal Owner* Appellant	*	
	*	**Case No.: 2016-0003-SPH**
	*	

* *

NOTICE OF APPEAL

The Appellant, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea, and Schmidt, LLC, feeling aggrieved by the decision of the Administrative Law Judge for Baltimore County from the Opinion and Order dated October 22, 2015, in the above-captioned matter, hereby note this appeal to the County Board of Appeals for Baltimore County in accordance with Baltimore County Code §32-3-401 by filing this Notice of Appeal with the Director of the Baltimore County Department of Permits, Approvals & Inspections.

Respectfully submitted,

RECEIVED
NOV 16 2015
BALTIMORE COUNTY
BOARD OF APPEALS

LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of **November, 2015,** a copy of the foregoing Notice of Appeal was mailed first-class pre-paid postage to:

Francis X. Borgerding, Jr., Esquire
Law Offices of Francis X. Borgerding, Jr.
409 Washington Avenue, Suite 600
Towson, MD 21204

John E. Beverungen, Esquire
Administrative Law Judge for Baltimore County
Office of Administrative Hearings
105 West Chesapeake Avenue, Suite 103
Towson, MD 21204

Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County
The Jefferson Building
105 West Chesapeake Avenue, Room 204
Towson, MD 21204

LAWRENCE E. SCHMIDT

KEVIN KAMENETZ
County Executive

LAWRENCE M. STAHL
Managing Administrative Law Judge
JOHN E. BEVERUNGEN
Administrative Law Judge

October 22, 2015

Lawrence E. Schmidt, Esq.
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

Francis X. Borgerding, Jr., Esq.
409 Washington Avenue, Suite 600
Towson, Maryland 21204

RE: Petition for Special Hearing
Property: 9025 Cuckold Point Road
Case No.: 2016-0003-SPH

Dear Counsel:

Enclosed please find a copy of the decision rendered in the above-captioned matter.

In the event any party finds the decision rendered is unfavorable, any party may file an appeal to the Baltimore County Board of Appeals within thirty (30) days of the date of this Order. For further information on filing an appeal, please contact the Baltimore County Office of Administrative Hearings at 410-887-3868.

Sincerely,

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln
Enclosure

IN RE: **PETITION FOR SPECIAL HEARING** **(9025 Cuckold Point Road)** 15th Election District 7th Council District Boone Kondylas, LLC *Legal Owner* Petitioner	*	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS FOR BALTIMORE COUNTY **Case No. 2016-0003-SPH**

* * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Boone Kondylas, LLC, legal owner. The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

Ken Boone appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioner. Several neighbors, represented by Francis Borgerding, Esq., attended and opposed the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Bureau of Development Plans Review (DPR). Neither agency opposed the request, but suggested certain conditions be imposed if relief is granted.

The subject property is 1.27 acres and zoned B.L. The property is improved with a restaurant known as "Dock of the Bay." The restaurant has new ownership, which proposes to offer limited music and live entertainment as an "accessory" use to the food and beverage service. This property and business have been the subject of protracted litigation concerning loud music and unruly patrons which disturbed the neighborhood. The operation was found by the court of

ORDER RECEIVED FOR FILING
Date 10/22/15
By DLD

special appeals to constitute a "nightclub," a use prohibited in the B.L. zone. Protestants contend the petition is barred by *res judicata,* while Petitioner argues that unlike the former operation the current business is first and foremost a restaurant, with music offered to compliment the dining experience.

Under Maryland law, an agency determination affirmed on appeal is entitled to preclusive effect. Esslinger v. Balto. City, 95 Md. App. 607, 621 (1993). This is the case, and *res judicata* will apply, unless there is a significant change in circumstances between the earlier and subsequent action. *See, e.g.*, Alvey v. Hedin, 243 Md. 334, 340 (1966). In light of this authority I believe the doctrine of *res judicata* mandates that the petition in this case be dismissed.

As an initial matter, I do not believe the OAH has the authority to "amend" restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the board of appeals, circuit court and then the court of special appeals. In an unreported opinion (No. 810, September Term, 2009) the appellate court affirmed the agency findings, which necessarily included the conditions and restrictions found in those orders. To amend those restrictions at this juncture would be akin to reversing the appellate court, which an administrative agency cannot do.

I believe the Petition must also be denied based on *res judicata.* As discussed above, *res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard. For example, if the owner of the subject property was now proposing to operate a barbershop or beauty salon at the site, that would constitute a significant change and *res judicata* would not apply. But here, I do not believe there

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By

have been significant changes; Petitioner is still proposing to operate a restaurant that would offer live and/or recorded music.

The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010).

THEREFORE, IT IS ORDERED this **22nd** day of October, **2015** by this Administrative Law Judge, that the Petition for Special Hearing pursuant to B.C.Z.R. § 500.7 to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music, be and is hereby DENIED.

Any appeal of this decision must be filed within thirty (30) days of the date of this Order.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln

ORDER RECEIVED FOR FILING
Date 10/22/15
By sln

John E. Beverungen

From: Lawrence Schmidt <lschmidt@sgs-law.com>
Sent: Wednesday, October 14, 2015 3:20 PM
To: John E. Beverungen
Cc: borgerdinglaw@aol.com; Ken Boone (kboone@tidewaterdirect.com)
Subject: Dock of the Bay (Case 2016-003-SPH)

Judge Beverungen: In view of my longstanding friendship with him and respect for Mr. Borgerding, I hesitantly write this email to you regarding the Post Hearing Memorandum that he has submitted in the above case. Certainly, counsel is free to argue any point of law and offer any legal argument that he thinks appropriate as it relates to the issues in this case. But I must object to the offering of new evidence as part of a post hearing/closing memo. Mr. Borgerding's inclusion of Mr. Wolinski's factual affidavit and the letter from Mr. and Mrs. Kondylas (Mr. Boones' former business partners) is, in my judgment, inappropriate. How am I to cross examine them or offer rebutting evidence at this point in time? The Kondylas letter was penned after the hearing (October 8).The affidavit (dated October12) states that Mr. Wolinski didn't have the opportunity to respond to Mr. Boone's comments as they were made at the end of the hearing but such opportunity is provided through rebuttal. Indeed, even with the informal nature of the conduct of this hearing you indicated at the conclusion "does anyone have anything else" or words to that effect. Because Mr. Wolinski or Mr. Borgerding forgot or otherwise failed to offer testimony then does not justify an attempt to introduce it now.

I am certainly appreciative of the administrative nature of the hearings before you and that any appeal would be de novo. But you are presumably deciding this case on the record made in open hearing and the applicable law. I feel it incumbent on me to protect my client's interests in view of this submission.

I certainly have confidence in your judgment and that you will fairly consider this matter. I do not wish to reopen the case and reconvene the hearing. However, if you decide to consider this new evidence and deem it relevant, I would appreciate being so advised and some opportunity to respond. Please do not hesitate to contact me if you deem necessary. I have copied Mr. Borgerding on this email correspondence.

Thank you,
Larry Schmidt

Lawrence E. Schmidt
SMITH, GILDEA & SCHMIDT, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
(410) 821-0071 - fax
lschmidt@sgs-law.com

This email contains information from the law firm of Smith, Gildea & Schmidt, LLC which may be confidential and/or privileged. The information is intended to be for the exclusive use of the individual or entity named above. If you are not the intended recipient, be advised that any disclosure, copying, distribution or other use of this information is strictly prohibited. If you have received this email in error, please notify Smith, Gildea & Schmidt, LLC by telephone immediately.

IN RE:

PETITION FOR SPECIAL HEARING SE CORNER CUCKOLD POINT ROAD AND FIFTH STREET (9025 Cuckold Point Road) 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	BEFORE THE ADMINISTRATIVE LAW JUDGE FOR BALTIMORE COUNTY CASE NO.: 2016-003-SPH
BOONE KONDYLAS, LLC, KEN BOONE Petitioner	

RECEIVED
OCT 13 2015
OFFICE OF ADMINISTRATIVE HEARINGS

* * * * * * * * * *

PROTESTANTS' MEMORANDUM

Now comes Francis X. Borgerding, Jr., attorney for Protestants in the above-captioned case, and files this Memo in Opposition to the relief requested in the above-captioned case and says:

Counsel forwarded to the Administrative Law Judge a copy of the Court of Special Appeals Opinion in the case of *Back River, LLC, et al. v. Baltimore, MD, et al.*, No. 2495, September Term 2013, before the Court of Special Appeals. The case lays out the Doctrine of Res Judicata and the relevant case law thereto. It is Protestants position that Petitioner's relief cannot be granted because of the Doctrine of Res Judicata in that the thing is already decided. At the hearing of the above-referenced case Petitioner seemed to indicate through questioning that his use was different from the previous use by the owner, Larry Thanner, of the Dock of the Bay. Contrary to Petitioner's assertions, one of the Protestants, Charlie Wolinski, was in the Dock of the Bay restaurant many times while it was operated by the previous owner and has been in the current Dock of the Bay. Attached please find Affidavit of Charlie Wolinski as to the similarities between the use of the Dock of the Bay under Larry Thanner and the similarities presently. Please also find

a letter received from Donna and Mike Kondylas, former partners of Boone-Kondylas, LLC regarding this matter. In light of the attached, Protestants assert that the use of the Dock of the Bay remains largely unchanged and, therefore, the Doctrine of Res Judicata should apply.

Assuming, for the sake of argument, that the Administrative Law Judge disagrees with Protestants' interpretation. Protestants hereby request that if any of the Petitioner's relief is granted, that said grant shall not include outdoor music. The Administrative Law Judge heard much testimony about the disruptiveness of the outside music with regard to the previous operation of the Dock of the Bay. After seven years of litigation, which consummated an Opinion before the Court of Special Appeals, the Dock of the Bay was precluded from having disruptive music on their property. Since then the neighbors have lived in peace and have been able to raise their kids without disruptive noise coming from the Dock of the Bay use. Any consummation of live music outside will resume the nightmare that they have gone through before. In addition, under the Code of Maryland Regulations, specifically Title 26, Subtitle 2, Chapter 3.03, noise levels are only allowed to be 65 decibels at a residential property line during the day and 55 decibels at night. See attached Regulations and Table 1 chart. Also see Handout from the Department of Environment. This standard is basically impossible to meet with outside music. Mr. Thanner was cited for violation of this Regulation by the Baltimore County Liquor Board as they enforce those regulations numerous times and he was found guilty of violating same and fined. If Your Honor were to allow live music outside, it would simply start another cycle of the residents having to call the Liquor Board Inspectors when and if they feel this Regulation is violated and having Liquor Board hearings to enforce this Regulation. The

Protestants ask that you not approve outside music and, therefore, they do not have to get back into the same pattern of trying to enforce this Regulation. Under Section 10-403, Rule Number 2, of the Baltimore County Liquor Board Regulations, entitled Prohibitive Practices, it states in pertinent part:

> "No licensee shall commit or allow on his premises of any act which shall be contrary to any federal, state, local statute, law or ordinance or against the public peace safety, health, welfare, quiet and morals."

The Dock of the Bay is, therefore, subject to this 65 decibel restriction and 55 decibel from 10:00 p.m. to 7:00 a.m.

Protestants also had many problems with live music emanating from inside. Mainly, when the door opened the decibel level would spike and, in fact, the violations of the decibel restriction emanated from music coming from the inside when patrons when patrons would open or shut the door.

Rule 3B of the Baltimore County Liquor Board Regulations (see attached copy of said Regulation) states in pertinent part:

> "All licenses shall operate their establishments in such a manner as to avoid disturbing the peace, tranquility, safety, health and quiet the neighborhood where located. It shall be the responsibility of the licensee(s) to take precautionary measures to comply with the subsection."

Accordingly, the property owner, the owner of the Dock of the Bay, has music inside and it exceeds the above decibel limits, it is the owner's responsibility. Protestants request that the Administrative Law Judge not approve any live music inside so as not to cause a potential problem in this regard. If the Administrative Law Judge is entertaining allowing any live music inside, Protestants would request that the Petitioner condition such relief on the construction of vestibules so that when one door opens another door protects from the

spike in sound and, therefore, the above decibel limits are not violated.

In addition, Protestants would ask that the Administrative Law Judge approve no weekday indoor music and allow indoor music only on the weekends which would end at 10:00 p.m. on Friday and Saturday night and 9:00 p.m. on Sunday. Protestants request for no weekday music is based upon several of the Protestants having young children who go to bed approximately 9:00 p.m.

WHEREFORE, Protestants pray that this Honorable Court:

A. Deny the Petitioner's requested relief for music live or music indoor or outdoors; and

B. For such other and further relief as the Protestants' cause may require.

FRANCIS X. BORGERDING, JR.
409 Washington Avenue, Suite 600
Towson, Maryland 21204
410-296-6820
ATTORNEY FOR PROTESTANTS

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 13 day of October, 2015, a copy of the foregoing was mailed, postage prepaid, to:

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

FRANCIS X. BORGERDING, JR.

October 12, 2015

Honorable Judge Beverungen;

I, Charles Wolinski, am writing this affidavit to dispute some of the responses that Mr. Boone gave when questioned by Lawrence Schmidt at the zoning hearing on Monday, September 28, 20156. Mr. Boone was questioned at the end of the hearing, so I was not afforded the opportunity to dispute them before we left.

Mr. Boone answered "No" to all questions regarding whether or not Dock of the Bay met the criteria for a nightclub according to International Building Code. The previous owner, Mr. Thanner, also denied meeting the same criteria for being considered a nightclub by the International Building Code. Mr. Boone testified that he did not meet the criteria under Group A2 of the International Building Code for becoming a nightclub, however, since I was in the Dock of the Bay on numerous times when it was operated by Larry Thanner and I have been in the establishment within the last month and I assert that all the factors listed by the Court of Special Appeals to determine that the previous operation of the Dock of the Bay was a nightclub remains exactly the same. The level of lighting. The previous Dock of the Bay operation did not have a stage. The present Dock of the Bay operation does not have a stage. The tables and seating is arranged exactly as it was in the present Dock of the Bay operation as it was in the previous Dock of the Bay operation. The previous Dock of the Bay operation did not have a specific area for dancing and the present Dock of the Bay operation does not have a specific dancing area. The previous operation had a facility for service of alcoholic beverages and food and the present does. The occupant load density has not changed. After many inspections by code enforcement and years

of trials and appeals in the court system, it was determined that Dock of the Bay was, in fact, a nightclub.

The only thing that has changed from when Mr. Thanner owned Dock of the Bay then, to now, is that there is no music. All other criteria have remained the same. If it is determined that Mr. Boone is permitted to have music again, Dock of the Bay would again meet the criteria for being considered a nightclub. It is my hope that my family and our neighbors do not have to relive years of code enforcement inspections, hearing and appeals only to confirm what has previously been determined.

Mr. Boone and Mr. Schmidt talked about the music being permitted as an accessory use. Mr. Boone stated that he needed live entertainment to draw people to his restaurant and said that he would like to have a Frank Sinatra impersonator sing at his restaurant. I can't imagine Frank Sinatra or any other entertainer ever considering themselves as an accessory. More importantly, I question how Mr. Boone feels that live entertainment would be an accessory use when he stated that it was a necessity for his business to be successful.

Mr. Boone is attempting to do the same thing at Dock of the Bay that Mr. Thanner did until the courts stopped him. Mr. Boone is simply calling it something else.

I solemnly affirm under the penalties of perjury that I have personal knowledge that the contents of the foregoing paper are true.

Thank you for your time and consideration.

Charles Wolinski
9019 Cuckold Point Road
Sparrows Point, Maryland 21219
443-850-9431

October 8, 2015

To: Honorable Beverungen

Ref: Dock of the Bay

We are former partners of Boone-Kondylas LLC and the Dock of the Bay LLC.

We affirm that all parties involved were aware of the zoning restrictions regarding music and entertainment at 9025 Cuckold Road, Sparrows Point, MD 21219 at the time of partnership.

This is to also affirm the we rec'd the notification letter from Frank Borgerding reminding us of the restrictions that are in place on the property at 9025 Cuckold Pt. Road, zoned BL and personally brought it immediately to Ken Boone's attention.

Sincerely,

Donna Kondylas

Mike Kondylas

26.02.03.02

.02 Environmental Noise Standards.

A. Precepts.

(1) It is known that noise above certain levels is harmful to the health of humans. Although precise levels at which all adverse health effects occur have not definitely been ascertained, it is known that one's well-being can be affected by noise through loss of sleep, speech interference, hearing impairment, and a variety of other psychological and physiological factors. The establishment of ambient noise standards, or goals, must provide margins of safety in reaching conclusions based on available data which relate noise exposure to health and welfare effects, with due consideration to technical and economic factors.

(2) The environmental noise standards set forth here represent goals expressed in terms of equivalent A-weighted sound levels which are protective of the public health and welfare. The ambient noise levels shall be achieved through application, under provisions of laws or regulations or otherwise, of means for reducing noise levels including, but not limited to, isolation of noise producing equipment, dampening of sound waves by insulation, equipment modification and redesign, and land use management.

B. Standards for Environmental Noise — General.

(1) A person may not cause or permit noise levels which exceed those specified in this table except as provided in §B(2) or (3), or §C, of this regulation.

Table 1
Maximum Allowable Noise Levels (dBA)
for Receiving Land Use Categories

Day/Night	Industrial	Commercial	Residential
Day	75	67	65
Night	75	62	55

(2) A person may not cause or permit noise levels emanating from construction or demolition site activities which exceed:

(a) 90 dBA during daytime hours;

(b) The levels specified in Table 1 during nighttime hours.

(3) A person may not cause or permit the emission of prominent discrete tones and periodic noises which exceed a level which is 5 dBA lower than the applicable level listed in Table 1.

(4) A person may not cause or permit, beyond the property line of a source, vibration of sufficient intensity to cause another person to be aware of the vibration by such direct means as sensation of touch or visual observation of moving objects. The observer shall be located at or within the property line of the receiving property when vibration determinations are made.

(5) A person may not operate or permit to be operated an off-road internal combustion engine powered recreational vehicle, including, but not limited to, a dirt bike, an all terrain vehicle, a go cart, a snowmobile, or a similar vehicle, on private property closer than 300 feet to a neighboring residence or the associated curtilage, without the written permission of the affected resident, unless it can be demonstrated to the Department that the vehicle can be operated within the noise limits specified in Table 1 under §B(1) of this regulation.

C. Exemptions.

(1) The provisions of this regulation may not apply to devices used solely for the purpose of warning, protecting, or alerting the public, or some segment thereof, of the existence of an emergency or hazardous situation.

(2) The provisions of this regulation do not apply to the following:

Md. Dept. of Environment.

Key Points of the Noise Control Program

Effective July 1, 2005, the Maryland Department of the Environment Noise Control Program was de-funded by action of the Maryland Legislature. MDE continues to provide advice to the public concerning noise problems, but as directed by the legislative action, noise issues are being referred to local governments for action.

Background

The Noise Control Program was established by the legislature in the mid 1970's to provide technical assistance and enforcement help to citizens and local jurisdictions across the State regarding noise issues. Noise has become an increasingly contentious "Quality of Life" issue as the State's population increases and urban sprawl progresses. MDE's role is to direct affected parties to the appropriate local government office or, in certain instances, to one of our sister agencies that have the authority and funding to address specific forms of noise pollution. MDE stresses local government involvement, for two main reasons. First, most issues have their origin in local zoning and permitting decisions, and secondly, response to the often brief and variable nature of events can most readily be handled by local responders.

Authority

State Law: Environment Article, Title 3 - see www.mlis.state.md.us and http://www.nonoise.org/lawlib/states/maryland/maryland.htm
State Regulations: Code of Maryland Regulations (COMAR), Title 26.02.03.

Basic considerations for the application of noise control rules and regulations are provided below for use by local jurisdictions in administering local ordinances:

1. State noise regulations set maximum intruding sound level limits statewide for three different land uses (industrial, commercial, and residential) for both day and night. The residential limits, which are most often of concern, are:

    a. Daytime (7:00 a.m. to 10:00 p.m.) 65 dBA - for residential receiving properties
    b. Nighttime (10 p.m. to 7:00 a.m.) 55 dBA - for residential receiving properties

2. These limits were established as the upper bounds of annoyance acceptance for a majority of people, but were not expected to provide for 100% acceptance by all people. Experience has shown that 50% of the complaints investigated are not found to exceed the limit applicable limits.

3. Local jurisdictions are encouraged to establish more restrictive standards where circumstances so indicate.

4. Measurements for determining compliance are generally taken at the edge of the complainant's property. Reasonable consideration is given to the actual use at that location.

5. Responsible parties should be notified of the violation and instructed to take corrective actions.

6. Exemptions are granted in the regulations for a number of essential sources, such as emergency warning systems, and activities that cannot be readily abated (construction), are of a short duration (parade), or are of general public interest (sporting events). Details of these exemptions are contained in the regulations and below. Procedures are also established to seek a variance for conditions not specifically exempted.

7. Examples of common noise complaints include:

a. Dirt Bike noise
b. Commercial Heating, Ventilating, Air Conditioning (HVAC) systems
c. Nighttime dumpster emptying
d. Loud music from bands; clubs, taverns, bars, restaurants,
e. Swimming pool pumps;
f. Early morning (prior to 7 AM) construction noise;
g. Landscaping and lawn maintenance prior to 7 AM;
h. Street and shopping center power sweepers at night
i. Truck mounted refrigeration units in parking and loading areas;
j. Off road truck noise,
k. Gun clubs: nine counties are subject to the noise regulations / 14 Counties are exempt;
l. Commercial and industrial equipment and machinery;
m. Loudspeakers at car dealerships, fast food restaurants, swim clubs;
n. Church bells;
o. Barking dogs at commercial kennels - MDE does not address household pets.

8. Exemptions from the COMAR noise regulations:

a. Emergency sirens and warning signals;
b. Railroads;
c. Motor vehicles on public roads (these are addressed by MSP and SHA);
d. Aircraft and airports (these are addressed by FAA and MAA);
e. Construction noise 7 AM -10 PM, but not to exceed 90 dB(A)
f. Boats on State-controlled waters (addressed by DNR);
g. Residential heat pumps and air conditioners, but not to exceed 75 dB(A) and 70 dB(A) respectively;
h. Construction on public property at any time;
i. Sanctioned auto racing facilities from 7 a.m. to midnight; and
j. Parades, public celebrations, amusement parks, sporting events; etc.

9. MDE information: 410-537-3906 or 1-800-633-6101, x-3906.

F. No licensee shall lock or secure the entrance doors to his licensed premises during the operation hours of the licensed establishment from 6:00 a.m. to 2:00 a.m. while any customers or patrons of said licensed establishment are an the premises; nor shall he prohibit any law enforcement officer or duly authorized inspector of any federal, state or county government department from entering his licensed premises any time It Is occupied.

G. No licensee shall allow open containers of alcoholic beverages to be carried in or out of the licensed establishment.

RULE 3 - NOISE AND MUSIC

A. All holders of Alcoholic Beverage Licenses in Baltimore County shall cease the playing of mechanical music boxes, live music and sound-making devices at 11:00 p.m. every day unless such licensed establishments are sufficiently enclosed or located in an area where the sound will not disturb the peace of nearby residents.

B. All licensees shall operate their establishments in such a manner as to avoid disturbing the peace, tranquility, safety, health, and quiet of the neighborhood where located. It shall be the responsibility of the licensees) to take all precautionary measures to comply with this subsection.

RULE 4 - POSSESSION OF LIQUOR FORBIDDEN IN BEER ESTABLISHMENTS

No license holder shall have in his possession, nor shall there be in the possession of his agents, servants or employees, at any place on the licensed premises or in the building in which the licensed premises are located any alcoholic beverages not permitted to be sold under his license.

RULE 5 - AGE OF EMPLOYEES

In Baltimore County, it shall be unlawful for any alcoholic beverage licensee to employ any person under the age of twenty-one (21) years in the sale or service of alcoholic beverages except as otherwise provided herein.

A. The holder of an Alcoholic Beverage License may engage musicians or entertainers between the ages of eighteen (18) and twenty-one (21) years to perform on the licensed premises, provided that said musicians or entertainers have registered (See Rule 14B) with the Board of Liquor License Commissioners for Baltimore County; and

B. The owner of any Class B Alcoholic Beverage License may employ any person between the ages of eighteen (18) and twenty-one (21) years of age; said employees may serve as bus personnel and may participate in the serving of beer, wine and liquor to customers seated at tables for dining. All other persons who are employed and are under twenty-one (21) years of age for any reason by or for any licensed establishment must register for approval at the Board of Liquor License Commissioners for Baltimore County according to the procedures heretofore adopted by the Board (See Rule 14B). A person under the age of twenty-one (21) is strictly prohibited from selling any alcoholic beverages or from working behind a bar (except for cleaning purposes only) where liquor is sold, mixed or dispensed.

RECEIVED

OCT 13 2015

OFFICE OF ADMINISTRATIVE HEARINGS

PETITION FOR SPECIAL HEARING 9025 Cuckold Point Road Boone Kondylas, LLC, Legal Owner	*	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS FOR
15th Election District 7th Councilmanic Districts	*	BALTIMORE COUNTY
	*	Case No. 2016-003-SPH

* * * * * * * * * * * * *

CLOSING MEMORANDUM

This matter comes before the Administrative Law Judge as a Petition for Special Hearing for the property located at 9025 Cuckold Point Road located on Millers Island in eastern Baltimore County. The Petition was filed by Ken Boone, managing member of Boone Kondylas, LLC, owner of the subject property. This LLC owns the real estate which is the subject of the Petition and operates thereon a business known as the Dock of the Bay Restaurant. The Special Hearing requests an amendment of restrictions previously imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit the use of the property as a restaurant with limited accessory music.

FACTS

The relevant facts are largely not in dispute. The Dock of the Bay restaurant has operated at this location since the 1950's. For years, the business operated (without dispute) as a restaurant. The restaurant closed following extensive damage that was sustained as the result of Hurricane Isabel in 2003. The business was thereafter acquired and re-opened under the ownership and management of Lawrence Thanner. Mr. Thanner changed the operation of the business, in that he introduced live music, dancing and a party type atmosphere at the facility. The noise generated by Mr. Thanner's operation disrupted the neighborhood and resulted in

complaints to the Code Enforcement Division of the Department of Permits, Approvals and Inspections. Ultimately, citations were levied against the business and civil fines imposed. The civil code violation cases (CBA-06-044 and CBA-07-134) and a preemptive zoning case filed by Mr. Thanner (Case No. 07-144-SPH) were ultimately consolidated for hearing before the Board of Appeals. The Board determined that Mr. Thanner's business was a nightclub. The Board applied the definitions within Baltimore County Zoning Regulation ("BCZR") § 101 of "nightclub" and "restaurant" to the operation as conducted and determined that the Dock of the Bay was a nightclub.[1] Further, the Board noted that a nightclub was not a permitted use in the BL zone, which at all relevant times was/is the zoning of the property. The Board's determination was appealed to the Circuit Court, and then to the Court of Special Appeals. The decision was affirmed at all levels. Ultimately, being unable to operate in the manner Mr. Thanner desired, the Dock of the Bay closed.

In October 2014, Boone Kondylas, LLC acquired the property and business. After a period of renovation, Mr. Boone (owner and manager) has re-opened the business as a restaurant. The business operates seven days a week serving lunch and dinner. There is a brunch on Sundays. Typically the restaurant closes by midnight on weekends as the clientele is mature and family oriented. The Dock of the Bay has a liquor license and sells alcohol but the main focus of the business is serving meals. As the ALJ stated at the conclusion of the public hearing, the Dock of the Bay is clearly (as operated presently) a restaurant use under the BCZR. This conclusion is beyond any dispute.

[1] Several different types of restaurants are defined in BCZR § 101.1.

ISSUES PRESENTED/ARGUMENT

I. DOES RES JUDICATA BAR THE INSTANT MATTER?

At the hearing for the instant case, counsel for the Protestants raised as an issue the doctrine of res judicata; contending that the request under the instant zoning petition was barred from consideration based thereon. The ALJ is no doubt familiar with this legal principle. In at least two cases involving the undersigned counsel, the ALJ has considered the application of res judicata in a zoning case (See *In re: 810 Back River Neck Road,* Case No. 2008-531-SPHX and *In re: 4512 Old Court Road*, Case No. 2013 147-SPHA). Thus, the undersigned will not repeat the essential principles of this doctrine; other than to state that the principle bars litigation between the same parties when the issue presented was resolved with finality in prior litigation. As is well settled, in order to successfully establish a claim for res judicata, the following elements must be satisfied: (1) The parties in the present litigation should be the same or in privity with the parties to the earlier case; (2) the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction. See *DeLeon v. Slear*, 328 Md. 569, 580 (1992). In the instant case, the controversy is over the second element of res judicata; whether the claim is the same "claim" or "cause of action" that arose before the Board of Appeals involving Mr. Thanner's business. Maryland has adopted the "transaction test" of § 24 of the Restatement (Second) of Judgments as the test for determining whether two claims or causes of action are the same for purposes of res judicata. See *Gertz v. Anne Arundel County*, 339 Md. 261, 269-70 (1995). The transaction test has been stated as follows:

> What factual grouping constitutes a "transaction"...are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the

parties' expectations or business understanding or usage. *Id.* at 270. (Emphasis added).

A review of all four of the prior decisions (Zoning Commissioner, Board of Appeals, Circuit Court and Court of Special Appeals) leads to the unmistakable conclusion that the issue presented therein was "what is the nature of the use?" That is; "is Dock of the Bay a nightclub?" That question was answered in the affirmative and is entirely different then the issue presented here. The Dock of the Bay no longer operates as a nightclub. The ALJ determined as much when he stated, at the conclusion of the hearing, "the Dock of the Bay is a restaurant." Thus, the issue presented in the instant case is not to identify the use; but to determine if an accessory use is permitted for the restaurant use. Res Judicata simply does not apply in this case as the cause of action (as well as the actual operation on the Property) is different..

Moreover, the underlying and relevant facts are different. Where there is a material change in relevant facts between the first and second cases, Maryland Courts have established that the transaction test will not be satisfied, thus precluding the application of res judicata. See *Gertz*, 339 Md. at 270-72. Specifically, the Court of Special Appeals has opined that "where the facts are subject to changes which might reasonably lead to an opposite result from that arrived at in an earlier case, and if there have been substantial changes in fact and circumstances between the first case and the second, the doctrine of res judicata would not prevent the granting of the special permit sought by the appellees." See *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719, 737 (2010) (citing *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1956)). The facts relevant in the first case (what business was then conducted by Mr. Thanner) are different to those which are germane in the instant matter (should accessory entertainment be allowed at a restaurant).

For all of these reasons, res judicata surely does not apply.

II. CAN A RESAURANT PROVIDE MUSIC FOR THE BENEFIT OF ITS PATRONS?

The answer to this question is undoubtedly "yes." First, the providing of music and other limited forms of entertainment by restaurants is something that everyone (in our common experience) has personally seen and experienced. Italian restaurants provide the traditional strolling violinist or a tenor singing Italian songs. Mexican restaurants frequently provide a strolling troubadour as part of the dining experience. Other forms of entertainment abound in the restaurant industry. Restaurants provide recorded music, play the radio, have televisions and feature live entertainment. Dock of the Bay seeks only to conduct an activity that is commonplace in the industry. It does not propose to morph into a nightclub. There will be no dancing, battles of the band and similar activities which characterize a nightclub use.

From a zoning regulation standpoint, the BCZR recognizes the legitimacy of "accessory uses" that effectively supplement a primary use. Indeed, that term is defined in BCZR § 101.1 as an activity which is "customarily incidental and subordinate to and serves a principle use." This is precisely the nature of the entertainment proposed to be provided at the Dock of Bay to its customers. Indeed, the music/entertainment will be subordinate to the purpose of the primary use of serving meals. Finally, as specifically provided in the definition, the providing of music as an accessory use will contribute to the "comfort", "convenience" and "necessity" of the primary business (ie. the serving of meals). As Mr. Boone testified without contradiction, patrons come to the Dock of the Bay to dine, not to be entertained. But the providing of limited entertainment will greatly enhance the dining experience. Clearly, the providing of entertainment (music) at a restaurant is a permissible accessory use under the BCZR.

III. WHAT IS THE APPROPRIATE LEVEL OF MUSIC FOR THE DOCK OF THE BAY?

Having determined that Dock of the Bay is a restaurant and may have music, the ultimate question is establishing the extent/limits of the accessory use. The facts of this case present an unusual scenario. On the one hand, the property on which the Dock of the Bay is located is zoned BL, a business zone. The restaurant use (as is an accessory use thereto) is permitted by right. This is not a special exception case where the ALJ is required to consider whether the proposal is "detrimental to the health, safety and general welfare of the locale (BCZR 502.1) Moreover, as noted above, the Dock of the Bay has been here since the 1950's, well before all the neighbors lived here or, in some cases, were even born. This is not the case of a new business moving into an exclusive and tranquil residential neighborhood. There is an active boat yard immediately next door which has an outdoor "tiki bar" with loud outdoor music. Other restaurants and businesses are nearby. Just as individuals living next to a farm can expect to smell fertilizer, those living next to a restaurant can expect to hear the sounds associated therewith. Allowing music at this location is fair and appropriate. On the other hand, Mr. Boone acknowledged that he wants and needs to be a good neighbor. Homes are in the immediate neighborhood. No one disputes that the neighbors are entitled to the peaceful enjoyment of their homes.

There is no zoning requirement or standard which regulates noise. The limits of music/entertainment are left to the sound discretion of the ALJ. However, the ALJ does not have jurisdiction over the Dock of the Bay's liquor license and whether the establishment operates in accordance with the requirements attached thereto. Obviously, any alleged violation of the State's/County's liquor laws would be monitored, enforced and determined by the County Liquor Board. It is respectfully submitted that the ALJ does not have jurisdiction to enforce

liquor laws and any assertion by the Protestants to the contrary should be disregarded by the ALJ.[2]

Although noise regulation is absent in the BCZR, noise is addressed in Article Seventeen, Title Three of the Baltimore County Code. That section defines noise broadly and includes noise produced by radio, instrument or voice (singing). Although the section appears to be focused toward disruptive noise by one neighbor to another in a residential setting, the language could conceivable apply here. The title does not regulate noise from a time standpoint (e.g. prohibited during certain hours) nor a level standpoint (decibels). Instead it applies what the Petitioner urges to be considered by the ALJ; to wit, what is "reasonable." That is, this Title prohibits a person from creating noise which "unreasonably disturbs the peace, quiet and comfort of the neighboring inhabitants."

The Department of Planning, in its Zoning Advisory Committee comment, considered the matter and issued recommendations to the ALJ. The Petitioner has reviewed and accepts those recommendations. They set out time limitations when music can be played, both inside and out. This recommendation, if adopted by the ALJ, could be easily followed and monitored. It is a reasonable and workable restriction that can be easily understood and followed. Arguably, other restrictions could be imposed, such as a limitation on decibel level. But this restriction is more difficult to monitor and enforce and could be cumbersome. Opportunities for dispute are ripe (e.g. where and how will the decibel measurements be taken?) However, whatever limitations are ultimately imposed, the Petitioner will abide by them. But the Petitioner believes that the comment offered by the Planning Department is reasonable and makes sense.

---

[2] Insofar as liquor laws, Rule 3 of the Baltimore County Rules of the Liquor Commission provides that uncontrolled music (outdoor) must cease at 11p.m. Music enclosed within a building (indoor) can continue to later hours. Interestingly, this rule is consistent with the ZAC comment and recommendation for this case from the Department of Planning.

CONCLUSION

As Mr. Boone testified, he wants to be a good neighbor. He is not Larry Thanner and will not run his business as the prior owner did. As he indicated, he has operated the restaurant for nearly a year without serious issue or complaint. On one occasion, he attempted to provide live entertainment and was threated by a Code Enforcement Officer that he would be "shut down" if any music was played. This petition, seeking clarification of the issue and the allowance of the reasonable use of the premises, followed. As he further testified, the Dock of the Bay's clientele is a mature crowd. As Mr. Boone also said, "nothing good happens at a restaurant between midnight and 2:00 a.m." He typically closes at midnight. He does not want any heavy metal, battle of the bands, dance halls or concerts. Simply the ability to provide enrichment to the dining experience he offers and the opportunity to fairly compete with other similar business. The Petition should therefore be granted within the limits herein suggested.

Respectfully submitted,

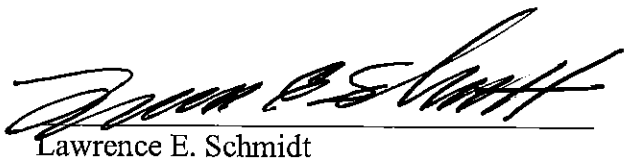
Lawrence E. Schmidt
Smith, Gildea & Schmidt, LLC
600 Washington Ave., Suite 200
Towson, MD 21204
410-821-0070
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of October, 2015 a copy of the foregoing document was mailed via first class mail, postage prepaid to:

Francis X. Borgerding, Jr., Esquire
Law Offices of Francis X. Borgerding, Jr.
409 Washington Avenue, Suite 600
Towson, MD 21204

Peter Max Zimmerman, Esquire
Carole DeMilio, Esquire
People's Counsel for Baltimore County
The Jefferson Building105 West
Chesapeake Avenue, Room 204
Towson, MD 21204



Lawrence E. Schmidt

PLEASE PRINT CLEARLY

CASE NAME Dale of the Bay
CASE NUMBER 16-003
DATE 9/28/15

PETITIONER'S SIGN-IN SHEET

NAME	ADDRESS	CITY, STATE, ZIP	E- MAIL
Lawrence E Schmidt	600 Washington Ave	Towson, MD 21204	lschmidt@sp-law.com
Kevin Doane	9025 Lochside Point N	Pleasure Point MD 21219	kdoane@tidewaterproject.com

PLEASE PRINT CLEARLY

CASE NAME
CASE NUMBER 2016-0003-SPH
DATE 9-28-2015

CITIZEN'S SIGN - IN SHEET

NAME	ADDRESS	CITY, STATE, ZIP	E - MAIL
Charles Wolinski	9019 Cuckold Point Rd	Sparrows Point MD 21219	cwolinski@bcps.org
BRAD METHENY	2704 6TH ST.	SPARROWS PT. MD. 21219	bradmet@hotmail.com
MATT CIARPELLA	2716 6th St	Sparrows Pt. Md 21219	mattciarpella@comcast.net
BONNIE METHENY	2704 6th Street	Sparrows Pt. Md. 21219	bonniemetheny@hotmail.com
Tami Wahlmann	9014 Cuckold Point Rd.	Sparrows Pt. MD 21219	wayne.wahlmann@hotmail.com
Francis X. Borgerding	409 Washington Ave Suite 660	Towson, MD 21204	Borgerdingfrancis@aol.com

KEVIN KAMENETZ
County Executive

ARNOLD JABLON
Deputy Administrative Officer
Director, Department of Permits, Approvals & Inspections

September 23, 2015

Boone Kondylas LLC
Ken Boone
9025 Cuckold Point Road
Sparrows Point MD 21219

RE: Case Number: 2016-0003 SPH, Address: 9025 Cuckold Point Road

Dear Mr. Boone:

The above referenced petition was accepted for processing **ONLY** by the Bureau of Zoning Review, Department of Permits, Approvals, and Inspection (PAI) on July68, 2015. This letter is not an approval, but only a **NOTIFICATION.**

The Zoning Advisory Committee (ZAC), which consists of representatives from several approval agencies, has reviewed the plans that were submitted with your petition. All comments submitted thus far from the members of the ZAC are attached. These comments are not intended to indicate the appropriateness of the zoning action requested, but to ensure that all parties (zoning commissioner, attorney, petitioner, etc.) are made aware of plans or problems with regard to the proposed improvements that may have a bearing on this case. All comments will be placed in the permanent case file.

If you need further information or have any questions, please do not hesitate to contact the commenting agency.

Very truly yours,

W. Carl Richards, Jr.
Supervisor, Zoning Review

WCR: jaw

Enclosures

c: People's Counsel
Lawrence E Schmidt, Esquire, 600 Washington Avenue, Suite 200, Towson MD 21204

Larry Hogan, *Governor*
Boyd Rutherford, *Lt. Governor*

SHA State Highway Administration
Maryland Department of Transportation

Pete K. Rahn, *Secretary*
Douglas H. Simmons, *Acting Administrator*

Date: 7/14/15

Ms. Kristen Lewis
Baltimore County Office of
Permits and Development Management
County Office Building, Room 109
Towson, Maryland 21204

RE: Baltimore County
Item No 2016-0003-SPH
Special Hearing
Boone Kondylas LLC, Ken Boone.
9025 Cuckold Point Road.

Dear Ms. Lewis:

Thank you for the opportunity to review your referral request on the subject of the above captioned. We have determined that the subject property does not access a State roadway and is not affected by any State Highway Administration projects. Therefore, based upon available information this office has no objection to Baltimore County Zoning Advisory Committee approval of Item No. 2016-0003-SPH

Should you have any questions regarding this matter, please contact Mr. Richard Zeller at 410-229-2332 or 1-866-998-0367 (in Maryland only) extension 2332, or by email at (rzeller@sha.state.md.us).

Sincerely,

David W. Peake
Metropolitan District Engineer
Baltimore & Harford Counties

DWP/RAZ

9/28

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon
Deputy Administrative Officer and
Director of Permits, Approvals and Inspections

DATE: August 4, 2015

FROM: Andrea Van Arsdale
Director, Department of Planning

RECEIVED

AUG 26 2015

OFFICE OF ADMINISTRATIVE HEARINGS

SUBJECT: 9025 Cuckold Point Road

INFORMATION:

Item Number: 16-003

Petitioner: Ken Boone

Zoning: BL

Requested Action: Special Hearing

SUMMARY OF RECOMMENDATIONS:

The Department of Planning has reviewed the Petition for a Special Hearing to determine whether the Administrative Law Judge should approve amendments to previous restrictions imposed in Zoning Cases 07-144-SPH, CBA-06-044, CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music and other and further relief as may be required.

Testimony in the aforementioned cases established the fact of the prior use of the property as a "nightclub" which is not listed as an allowed use in the zone. Upon a site visit and discussions with the petitioner's counsel, the Department understands the future use of the property will be as a permitted restaurant that will have music, both live and reproduced, as an accessory component.

The Department has no objection to the granting of the petitioned zoning relief conditioned upon the following:

There shall be no dance floor, nor shall the restaurant become a "nightclub" as defined in the BCZR Section 101.1 and the Building Code of Baltimore County.

All accessory music shall be limited to reasonable sound levels so as not to disturb adjacent properties.

All accessory music shall be limited to the following hours or as may be otherwise established by the Administrative Law Judge:

a. No outdoor music after 10:00 p.m. Monday thru Saturday.

b. No indoor music after 12:00 a.m. (midnight) Monday thru Saturday.

c. No music after 8:00 p.m. on Sundays.

For further information concerning the matters stated herein, please contact Bill Skibinski at 410-887-3480.

Division Chief: Kathy Schlabach

AVA/KS

C: Bill Skibinski

BALTIMORE COUNTY, MARYLAND

INTEROFFICE CORRESPONDENCE

TO: Arnold Jablon, Director
Department of Permits, Approvals
And Inspections

DATE: July 17, 2015

FROM: Dennis A. Kennedy, Supervisor
Bureau of Development Plans Review

SUBJECT: Zoning Advisory Committee Meeting
For July 20, 2015
Item No. 2016-0003

The Bureau of Development Plans Review has reviewed the subject zoning item and we have the following comment.

The property and business is within Zone VE8 (coastal flood zone with velocity hazard with base flood elevation 8), Zone AE7 (base flood elevation 7) and is subject to wave action in excess of 3 feet based upon Flood Insurance Rate Map, FIRM, 2400100560G dated May 5, 2014.

If you have any questions please contact Terry Curtis @410-887-3117.

Landscape and Lighting Plans are required.

* * * * *

DAK:CEN
cc:file

ZAC-ITEM NO 16-0003-07202015.doc

THE BALTIMORE SUN MEDIA GROUP

501 N. Calvert St., P.O. Box 1377
Baltimore, Maryland 21278-0001
tel: 410/332-6000
800/829-8000

WE HEREBY CERTIFY, that the annexed advertisement of Order No 35

Sold To:
Smith Gildea & Schmidt LLC - CU00433777
600 Washington Ave Ste 200
Towson,MD 21204

Bill To:
Smith Gildea & Schmidt LLC - CU00433777
600 Washington Ave Ste 200
Towson,MD 21204

Was published in "Jeffersonian", "Bi-Weekly", a newspaper printed and County on the following dates:

Sep 08, 2015

NOTICE OF ZONING HEARING

The Administrative Law Judge of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County will hold a public hearing in Towson, Maryland on the property identified herein as follows:

Case: # 2016-0003 SPH
9025 Cuckold Point Road
SE/s of Cuckold Point Road, 15 ft. SW of the centerline of 5th Avenue
15th Election District - 7th Councilmanic District
Legal Owner(s) Boone Kondylas, LLC Ken Boone

Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music; and for such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Hearing: Monday, September 28, 2015 at 10:00 a.m. in Room 205, Jefferson Building, 105 West Chesapeake Avenue, Towson 21204.

ARNOLD JABLON, DIRECTOR OF PERMITS, APPROVALS AND INSPECTIONS FOR BALTIMORE COUNTY

NOTES: (1) Hearings are Handicapped Accessible; for special accommodations Please Contact the Administrative Hearings Office at (410) 887-3868.

(2) For information concerning the File and/or Hearing, Contact the Zoning Review Office at (410) 887-3391.

JT 9/660 Sept. 8 3553350

The Baltimore Sun Media Group

By S. Wilkinson

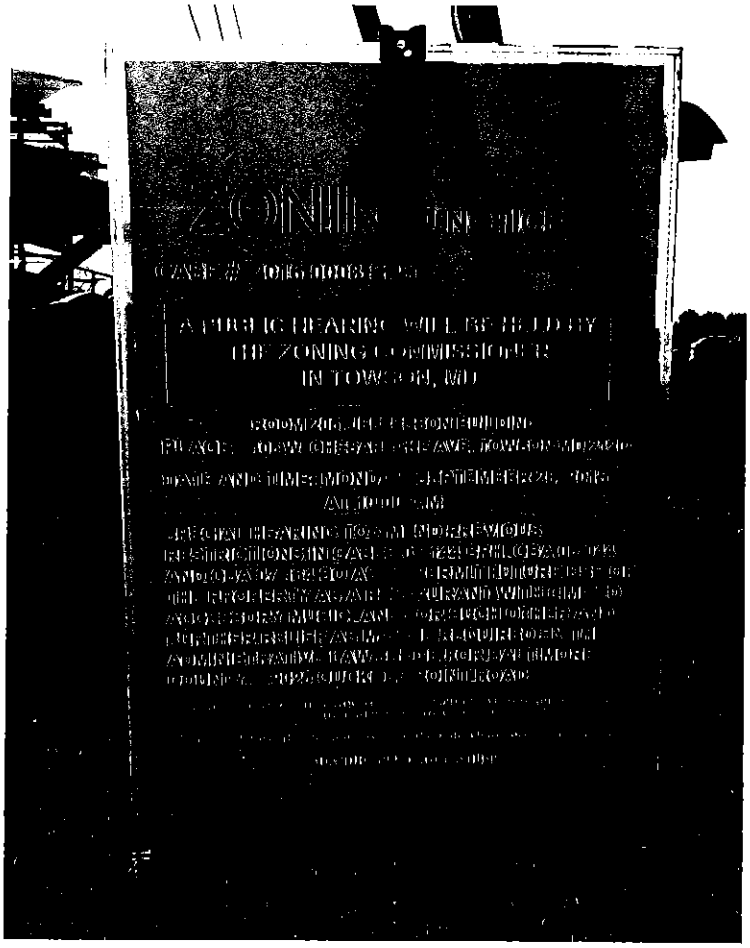
Legal Advertising

CERTIFICATE OF POSTING

ATTENTION: KRISTEN LEWIS
DATE: 9/6/2015
Case Number: 2016-0003-SPH
Petitioner / Developer: LAWRENCE SCHMIDT, ESQ. ~ KEN BOONE
Date of Hearing (Closing): SEPTEMBER 28, 2015

This is to certify under the penalties of perjury that the necessary sign(s) required by law were posted conspicuously on the property located at:
9025 CUCKOLD POINT ROAD

The sign(s) were posted on: SEPTEMBER 6, 2015



Linda O'Keefe
(Signature of Sign Poster)

Linda O'Keefe
(Printed Name of Sign Poster)

523 Penny Lane
(Street Address of Sign Poster)

Hunt Valley, Maryland 21030
(City, State, Zip of Sign Poster)

410 – 666 – 5366
(Telephone Number of Sign Poster)

KEVIN KAMENETZ
County Executive

ARNOLD JABLON
Deputy Administrative Officer
Director, Department of Permits,
Approvals & Inspections

August 3, 2015

NOTICE OF ZONING HEARING

The Administrative Law Judges of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 2016-0003-SPH
9025 Cuckold Point Road
SE/s of Cuckold Point Road, 15 ft. SW of the centerline of 5th Avenue
15th Election District – 7th Councilmanic District
Legal Owners: Boone Kondylas, LLC, Ken Boone

Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music; and for such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Hearing: Monday, September 28, 2015 at 10:00 a.m. in Room 205, Jefferson Building, 105 West Chesapeake Avenue, Towson 21204

Arnold Jablon
Director

AJ:kl

C: Lawrence Schmidt, 600 Washington Ave., Ste. 200, Towson 21204
Ken Boone, 9025 Cuckold Point Road, Sparrows Point 21219

NOTES: (1) **THE PETITIONER MUST HAVE THE ZONING NOTICE SIGN POSTED BY AN APPROVED POSTER ON THE PROPERTY BY TUESDAY, SEPTEMBER 8, 2015**
(2) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMMODATIONS PLEASE CALL THE ADMINISTRATIVE HEARINGS OFFICE AT 410-887-3868.
(3) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

RE: PETITION FOR SPECIAL HEARING 9025 Cuckold Point Road; SE/S Cuckold Point Road, 15' SW of c/line of 5th Avenue 15th Election & 7th Councilmanic Districts Legal Owner(s): Boone Kondylas, LLC By Ken Boone Petitioner(s)	*	BEFORE THE OFFICE OF ADMINSTRATIVE HEARINGS FOR BALTIMORE COUNTY 2016-003-SPH

* * * * * * * * * * * * *

ENTRY OF APPEARANCE

Pursuant to Baltimore County Charter § 524.1, please enter the appearance of People's Counsel for Baltimore County as an interested party in the above-captioned matter. Notice should be sent of any hearing dates or other proceedings in this matter and the passage of any preliminary or final Order. All parties should copy People's Counsel on all correspondence sent and all documentation filed in the case.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

RECEIVED
JUL 23 2015

Carole S Demilio

CAROLE S. DEMILIO
Deputy People's Counsel
Jefferson Building, Room 204
105 West Chesapeake Avenue
Towson, MD 21204
(410) 887-2188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 2015, a copy of the foregoing Entry of Appearance was mailed to Lawrence Schmidt, Esquire, 600 Washington Avenue, Suite 200, Towson, Maryland 21204, Attorney for Petitioner(s).

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

CBCA

FLOOD

PETITION FOR ZONING HEARING(S)

To be filed with the Department of Permits, Approvals and Inspections

To the Office of Administrative Law of Baltimore County for the property located at:

address 9025 Cuckold Point Road **which is presently zoned** BL

Deed Reference 35488/00133 10 Digit Tax Account # 1 5 0 8 7 9 0 1 1 0

Property Owner(s) Printed Name(s) Boone Kondylas, LLC

CASE NUMBER 2016-0003-SPH **Filing Date** 7/6/15 **Estimated Posting Date** / / **Reviewer** RJD

(SELECT THE HEARING(S) BY MARKING X AT THE APPROPRIATE SELECTION AND PRINT OR TYPE THE PETITION REQUEST)

The undersigned legal owner(s) of the property situate in Baltimore County and which is described in the description and plan attached hereto and made a part hereof, hereby petition for:

1. ✓ **a Special Hearing** under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

Please see attached.

2. ____ **a Special Exception** under the Zoning Regulations of Baltimore County to use the herein described property for

3. ____ **a Variance** from Section(s)

of the zoning regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons: **(Indicate below your hardship or practical difficulty or indicate below "To Be Presented At Hearing". If you need additional space, you may add an attachment to this petition)**

TO BE PRESENTED AT HEARING

Property is to be posted and advertised as prescribed by the zoning regulations.
I, or we, agree to pay expenses of above petition(s), advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.
Legal Owner(s) Affirmation: I / we do so solemnly declare and affirm, under the penalties of perjury, that I / We are the legal owner(s) of the property which is the subject of this / these Petition(s).

ORDER RECEIVED FOR FILING
Date 10/22/15
By DLW

Contract Purchaser/Lessee:

Name- Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

Legal Owners:

Boone Kondylas, LLC
Ken Boone

Name #1 – Type or Print Name #2 – Type or Print

Signature #1 Signature # 2

9025 Cuckold Point Road, Sparrows Point, MD

Mailing Address City State

21219 kboone@tidalwaterdirect.com

Zip Code Telephone # Email Address

Attorney for Petitioner:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name- Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

Representative to be contacted:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name- Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

REV. 2/23/11

ATTACHMENT TO PETITION FOR ZONING HEARING

9025 Cuckold Point Road
15th Election District
7th Councilmanic District

Special Hearing:

1. To amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music; and

2. For such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Item #0003

CENTURY ENGINEERING

10710 Gilroy Road
Hunt Valley, MD 21031

Zoning Description for
9025 Cuckold Point Road*

Beginning at a point on the southeast side of Cuckold Point Road which is 30 feet wide, at the distance of fifteen feet southwest of the centerline of Fifth Street which is 30 feet wide. Being Lots 500 through 505 in the subdivision of Swan Point as recorded in Plat Book L.McL.M. # 9, Folio #5. Containing 1.031 acres of land, more or less. Also known as 9025 Cuckold Point Road and located in the 15th Election District and the 7th Councilmanic District.



W/file/login2/ld/ld06/descriptions/9025 Cuckold Point Road-08-17-06
* Legal Description from Case No. 07-144-SPH

II-144

Item #0003

FRANCIS X. BORGERDING, JR.
ATTORNEY AT LAW

409 WASHINGTON AVENUE, SUITE 600
TOWSON, MARYLAND 21204
(410) 296-6820
FAX: (410) 296-6884

September 24, 2014

Mr. Mike Kondylas
Ms. Donna Kondylas
8909 Miller Island Boulevard
Baltimore, Maryland 21219-1642

RE: Dock of the Bay Restaurant

Dear Mike and Donna Kondylas:

I represent neighbors of the Dock of the Bay who were in long running court battles over the previous use of the Dock of the Bay. It has come to our attention that you may be interested in purchasing the Dock of the Bay. Enclosed please find correspondence from Baltimore County indicating that all previous zoning decisions still apply to the property. This is being sent for your information.

If you have any questions, please contact me. Thank you.

Very truly yours,

FRANCIS X. BORGERDING, JR.

FXBJr:bjk
Enclosure
cc: Mr. Charles Wolinski

FRANCIS X. BORGERDING, JR.
Attorney at Law
MERCANTILE BUILDING - SUITE 600
409 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
(410) 296-6820
FAX (410) 296-6884

August 20, 2014

Mr. Arnold Jablon
Baltimore County Zoning Review Office
111 West Chesapeake Avenue
Towson, Maryland 21204

RE: Dock of the Bay Restaurant
9025 Cuckold Point Road, Sparrows Point, MD 21219

Dear Mr. Jablon:

Please be advised that I represent residents who have longstanding previous issues with the music emanating from the Dock of the Bay Restaurant. My clients have heard that a new owner is potentially interested in buying the Dock of the Bay and are very concerned that they will have the same disturbance from music which they had in the past. This letter is being written to ask your Department to clarify that all decisions rendered in the past concerning 9025 Cuckold Point Road, Sparrows Point, MD 21219 run with the land and any potential new purchaser of the Dock of the Bay Restaurant will be held by all previous decisions including the Court of Special Appeals' decision with regard to the previous operator of the property and the contempt petition filed in the Circuit Court for Baltimore County also related to the previous operator. Enclosed herewith please find a check in the amount of $150.00 to cover the filing cost in this matter.

Thank you for your anticipated cooperation with regard to this matter. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

FRANCIS X. BORGERDING, JR.

FXBJr:bjk
Enclosure
cc: Mr. Charles Wolinski

KEVIN KAMENETZ
County Executive

ARNOLD JABLON
Deputy Administrative Officer
Director, Department of Permits,
Approvals & Inspections

September 12, 2014

Francis X. Borgerding, Jr., Esq.
409 Washington Avenue
Suite 600
Towson, MD 21204

Re: Zoning confirmation letter
Dock of the Bay Restaurant
9025 Cuckold Point Road
Sparrows Point, MD 21219

Mr. Borgerding:

This correspondence is in response to your recent request for confirmation that the prior legal decisions regarding the above-captioned property run with the land and bind future owners. As you are well aware, a zoning case proceeded through the Court of Special Appeals and it was held that Dock of the Bay was maintaining an impermissible night club on the property due to their playing of music, among other factors. The owner was then fined by both the Baltimore County Liquor Board and Circuit Court for Baltimore County for failure to abide by the ruling in the zoning case.

By this letter, Baltimore County is confirming that the zoning on the property remains the same and any future owner would be bound by the ruling handed down by the courts in the prior zoning cases. The specific fines issued in the contempt and liquor board proceedings were geared towards the prior owner and will not transfer to any future owners, but the prohibition against a night club on the property remains in effect.

Sincerely,

Adam M. Rosenblatt
Assistant to the Director and
Assistant County Attorney

111 West Chesapeake Avenue , Room 319 | Towson, Maryland 21204 | Phone 410-887-3251 | Fax 410-887-3270
www.baltimorecountymd.gov

IN RE: **PETITION FOR SPECIAL HEARING*** BEFORE THE
S/E corner Cuckold Point Road and
5th Street * ZONING COMMISSIONER
(9025 Cuckold Point Road)
* OF
15th Election District
7th Council District * BALTIMORE COUNTY

Fifth Street, LLC *
d/b/a Dock of the Bay
Petitioner * **Case No. 07-144-SPH**

* * * * * * * * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of a Petition for Special Hearing filed by the owner of the subject property, Fifth Street, LLC, by Lawrence J. Thanner, Jr., managing member, and through their attorney, J. Carroll Holzer, Esquire. In accordance with Section(s) 500.6 and 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), the Petitioner requests a determination as to whether the use of the B.L. zoned property at 9025 Cuckold Point Road is in violation of the zoning regulations and specifically, is the restaurant, which provides music at this location during the day, a "nightclub" as defined in B.C.Z.R. Sections 101, 102.1 and 230. The subject property and improvements are more particularly described on the site plan submitted which was accepted into evidence and marked as Petitioner's Exhibit 1.

Appearing at the public hearing in support of the request were several of the past and present residents of Millers Island, namely Mike Kondylas, Dorothea M. Reilly, and Judith Kurek. As indicated above, the Petitioner and Lawrence Thanner were represented by J. Carroll Holzer, Esquire. This request generated significant public interest and numerous residents from the surrounding locale appeared, including Patricia A. and Wayne E. Waldmann, Sr., Wayne E. Waldmann, Jr., Tammy Lynn Waldmann, Doug W. Waldmann, Philip and Kay Sessa, Charlie and

Daryl Wolinski, Robert Poleski, Terri Poleski, and Michael Poleski, Louis Pertrovia, David McWilliams, David and Vena Steck, Robert Haas, Ken Schoff, Tammy Novak, and David Znamirowski. Matthew J. Ciarpella and his wife, Nancy Jean Ciarpella, who live at 2716 Sixth Street, adjacent to the Dock of the Bay, were represented by Francis X. Borgerding, Jr. Esquire. Most of the Protestants voiced an overwhelming concern with the live bands and loud outdoor music being played in their backyards, parking overflow and traffic leaving the Dock of the Bay late at night. Also appearing were James H. Thompson, Supervisor, Bureau of Code Enforcement, and Chip Raynor, Code Enforcement Officer, within the Division of Code Inspections and Enforcement.

As a preliminary matter, Mr. Borgerding argued that the petition, as filed, should not be allowed as it is subject to the doctrine of judicial estoppel (*See Board of County Com'rs of Cecil County v. Racine* 24 Md. App. 435, 332 A.2d 306 [1975] and *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 125 A.2d 41 [1956]). He points out that the Baltimore County Code (B.C.C.) Section 3-6-201 et seq. sets up the mechanism and procedure to be followed for Code Enforcement hearings and those procedures were followed in the underlying Violation Case No. 06-3683. That case involved the same property, parties and nightclub issues. Allegations of a nightclub enterprise were made by neighbors, an investigation as authorized by the Department of Permits and Development Management was conducted, correction notices issued, a public hearing held and findings of fact made by the Code Enforcement Hearing Officer Raymond S. Wisnom, Jr. *See* Protestant's Exhibit 10. According to Mr. Borgerding, allowing the Petitioner, under these circumstances, a "second bite of the apple" would launch a new and undesirable precedent. Petitioner's remedy, he asserts, is an appeal to the Board of Appeals not a new hearing before the Zoning Commissioner. Mr. Holzer countered by pointing out that the Petitioner filed the instant petition prior to the issuance of the Code Enforcement Hearing Officer's Order, that he (Holzer) had

requested a postponement of the enforcement proceedings until after a determination/interpretation of the regulations of the B.C.Z.R. was made. He points out that Mr. Wisnom is not designated by the County Charter to interpret zoning definitions and regulations. At the conclusion of hearing Counsels' arguments, Mr. Borgerding's Motion was denied.

At issue in the instant case is not whether a zoning violation exists, but a determination, through a clear analysis of the B.C.Z.R. and its definitional section as to what constitutes a nightclub. In this regard, Section 500.6 of the B.C.Z.R. vests the Zoning Commissioner with the authority to conduct hearings involving any violation or alleged violation/non-compliance with any zoning regulation. Additionally, that section allows the Zoning Commissioner to conduct a hearing to determine the proper interpretation of the B.C.Z.R. Similarly, Section 500.7 of the B.C.Z.R. allows the Zoning Commissioner to conduct such hearings and pass such Orders as shall be necessary for the proper enforcement of all zoning regulations.

As is often the case with cases presenting difficult legal issues, the facts are relatively simple and largely not in dispute. As noted above, Fifth Street, LLC purchased the property in October 2003 and due to Hurricane Isabel damage did not open until March 2004. The property is rectangularly shaped, 600' wide x 1,200' deep with frontage on the Chesapeake Bay. The property as shown on Petitioner's Exhibit 1 contains a gross area of 1.03 acres, more or less, zoned B.L. The land is improved with a large existing restaurant and tavern, pavilions, wood pier, as well as a parking lot and an overflow parking lot located on the north side of Cuckold Point Road. The subject site is on Millers Island situated between the Back River and the Chesapeake Bay, referred to as Swan Point. Lawrence Thanner described the Dock of the Bay's long history of commercial uses beginning in 1955 and indicated that since the subject property was established, there has always been music played. In the 1960's, it was owned by the Hicks family and known as the "Fisherman's

Inn" and music was played inside and on a partially open patio. Later, after becoming the Dock of the Bay, the two brothers who then owned it built a pavilion and live band music was played outside. This testimony was corroborated by three long-time residents of the area – Mr. Kondylas, Ms. Reilly, and Ms. Kurek, who indicated most all of the waterfront restaurants on Millers Island played music which historically included Ramona's, Worchester's, The Islander Inn, White Swan and Rum Runners. Ramona's was the first to initiate live bands, Worchester's in the 1990's (later named as Rum Runners) played music on the pier. The Islander and White Swan provided disc jockey entertainment inside. The Dock of the Bay, however, is the only remaining waterfront establishment on the island today with a live band playing outdoors. Mr. Thanner describes the current operation as primarily a food service/restaurant business accounting for 70% of the revenues derived and the other 30% from the sale of alcoholic beverages. He delineates the entertainment provided as follows:

- 10 television sets inside and 2 television sets outside. These televisions, for the most part, are used for showing sporting events and shows such as MTV and American Idol, which contain music.

- The house music sound system has 8 speakers inside and 4 speakers outside. The system plays music continuously except when other forms of entertainment are being utilized. The system is used to play either satellite music or compact discs.

- On Friday and Saturday nights, after 9:00 PM, usually a disc jockey plays music or karaoke and occasionally a band plays inside until about 1:00 AM. Mr. Thanner says this is exactly what many bars and taverns do throughout the County, including two other bars located on Millers Island.

- On Saturday and Sunday afternoons, a band plays outside from 4:00 PM until 8:00 PM during daylight hours from the beginning of May through September. Again, Thanner indicates that's exactly what the River Watch and Wild Duck waterfront establishments do as well.

- The live music and entertainment enumerated above consists of approximately 7.5 percent of the total time that the restaurant is open for business.

Mr. Thanner, as managing member of the business, therefore, has requested a special hearing in order for a determination to be made whether such use occurring on the property is that of a nightclub or simply a restaurant where ancillary entertainment is provided. The reason for drawing this distinction is that a restaurant is a use permitted as a right on the property, whereas a true nightclub use is not permitted. Therefore, this distinction is very important to this particular business owner who submits that the definition of nightclub, as contained within the B.C.Z.R., is overly broad and encompasses almost every type of restaurant, diner, café and other similar type of commercial establishment.

The Protestants testified on the second day of the hearing, and as noted above explained the inconveniences they endure as a result of the loud music being played on the weekends and to a lesser extent during the weeknights. Mr. Ciarpella discussed the activities and the impact it had on his wife and three children. In September when his children are in school, the loud music which he testified goes into the night, and the people coming and going (leaving after 2:00 AM) is most disturbing. He described the sound level, even with the doors closed as *loud*. His family and other neighbors, Charlie Wolinski, Kay Sessa and Wayne Waldmann put up with this 40 days out of 365 a year, mostly Saturdays and Sundays in spite of numerous complaints. Messrs. Znamirowski (7 blocks away), Hass (1 mile away), Schoff (1 block away) and McWilliams (3-4 blocks away) each state they can hear the band music when played.

In rebuttal, Mr. Thanner testified that in the winter, music is played from 9:00 PM to 1:00 AM inside on Fridays and Saturdays, and in the summer, music is played from 9:00 PM to 1:00 AM

inside and on Saturdays and Sundays, the music is played outside from 4:00 PM to 8:00 PM. He explained that as a result of complaints the County Liquor Board inspectors have measured the noise level at the property line which allows for 65 decibels until 10:00 PM and then 55 decibels to 11:00 PM with no music thereafter. He thinks he is doing much better and explains just how important it is for a waterfront restaurant business to provide music entertainment.

It has been stated that it is the responsibility of the Zoning Commissioner to determine the intent of the legislature when construing any regulation/statute. [*Marzullo v. Kahl* 36 Md. 158, 175 (2001)] Interpretation of the regulations is a daunting task and made even more difficult given the excellent arguments presented by counsel. There are a number of land uses defined in Section 101 of the B.C.Z.R. that are relevant to rendering a decision in this case. Initially, it is to be noted that "Restaurant, Standard" is defined in the B.C.Z.R. as "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term includes cafes, cafeterias, tea rooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principle restaurant operations. ..." Next a "Tavern" is "an establishment which has a Baltimore County Class D Liquor License. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub. The term "Nightclub" is defined in Section 101 of the B.C.Z.R. as "a tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County".[1] Baltimore County Council Bill No. 1-05 adopted the International

[1] Although interpreted in the B.C.Z.R., the Petitioner urges this Commission to use Webster's Third New International Dictionary (Unabridged) definition of Nightclub, "a restaurant open at night usually serving liquor, having a floor show, and providing music and space for dancing." To apply the B.C.Z.R. definition literally, they submit, would open a *Pandora's Box* in that it encompasses both live or recorded entertainment. Recorded would include house systems and jukeboxes. In that situation, every restaurant and bar in a B.L. zoning classification providing some form of live or recorded entertainment would be classified as a "nightclub". This would include restaurants such as Denny's, International House of Pancakes (IHOP) and the Bel-Loc Diner.

Building Code (I.B.C.) 2003 as the Building Code of Baltimore County. The I.B.C. provides in Section 303 Category A-2, A Certain Assembly Group. Group A-2 is Assembly uses intended for food and/or drink consumption, including but not limited to banquet halls, *nightclubs*, restaurants, taverns and bars. The characteristics of Group A-2 are categorized by some or all of the following: low lighting levels; entertainment by a live band or recorded music generating above-normal sound levels; no theatrical staged accessories; later-than-average operating hours; tables and seating arranged or positioned so as to create ill-defined aisles; a specific area designated for dancing; service facilities for alcoholic beverages and food; and high occupant load density. While the Protestants and Petitioner argue as to whether The Dock of the Bay includes all of the characteristics 1-8 or just some of the characteristics is of little consequence. The B.C.Z.R. definition of nightclub only states that it be "categorized as a nightclub" in the I.B.C. It falls within this Group A-2 for fire protection and crowd control due to the potential for multiple fatalities and injuries from fire or other sudden emergency.

In ascertaining the County Council's intent, I must look to the language in the regulation itself, giving that language *its ordinary and natural meaning* and avoiding a construction that is illogical, unreasonable or inconsistent with common sense. *Papillo v. Pockets, Inc.* 119 Md. App. 78, 83-84 (1997).

Mr. Wolinski and Mr. Waldmann, a neighbor next to the Fisherman's Inn and Dock of the Bay for some 43 years, emphasize emphatically that the law is the law and adherence to the regulations should be strictly enforced. *See* Protestants' Exhibits 14 and 15 for commentary on the live bands performing at 9025 Cuckold Point Road and the physical affects on the residents. Mr. Ciarpella's testimony corroborated by Code Enforcement Supervisor James H. Thompson makes it clear under Section 101 of the B.C.Z.R. that they believe the Petitioner is conducting a nightclub on

the subject property and that this use is not a permitted use in the Business, Local Zone (B.C.Z.R. Section 230). In considering this unrefuted testimony, there is little to suggest that "provides live or recorded entertainment, with or without a dance floor" is ambiguous or means anything other than that learned from reading the plain language of the nightclub definition. This Commission's goal is to discern and implement legislative intent, and, to do that, I must begin with the plain meaning of the statutory language. If the intent is clear from that language, there is no need to search further. *Walker v. Dept. of Human Res.*, 379 Md. 407, 420 (2004). I find that that is the case here.

Mr. Holzer argues that Section 230 provides permitted uses in the B.L. zone that envision the playing of music by the County Council. *See* B.C.Z.R. Sections 230.7 providing for dancing schools and conservatories for music and the arts. His argument that I should avoid a construction that is inconsistent with common sense is fully addressed in Petitioner's written memorandum. He notes that the definition in Merriam-Webster's Dictionary of "nightclub" as a place of entertainment open *at night*, usually serving food and liquor and providing music and space for dancing and often having a floor show - would assist in separating out water oriented uses such as marinas and waterfront restaurants that are dependant on accessory entertainment in recreational areas of the County vis-à-vis other cafes and restaurants located next to residential uses.[2] However, this I cannot do. The General Provisions of B.C.Z.R. Section 101 Definitions are clear on this point and mandate that "any word or term not defined in this section shall have the ordinary accepted definition as set forth in the most recent addition of Webster's ... ". As noted above, the B.C.Z.R. defines a Night Club. Moreover, the definition of Tavern again, refers the reader back to "the criteria of a nightclub, as defined in these regulations" further neutering Petitioner's argument that Webster's Dictionary

[2] Mr. Thompson's testimony on cross-examination illustrated confusion on what constitutes a nightclub. He focused on the playing of *live* music in the B.L. zone but side stepped the hundreds of restaurants that play *recorded* music. Likewise, this Commission found it convenient to not open a "Pandora's Box" in Case No. 02-074-SPHA involving a "non conforming nightclub use" in the B.L. zone.

definition of nightclub be used.

This finding is of no comfort to the Petitioner and its managing member, Larry Thanner, since what they seek is to play live music during daylight hours as has been the custom in the area for many years. To Mr. Thanner and the many restaurant owners similarly situated, I can only offer a quote from Dickens Classic "Oliver Twist" and as uttered by one "Mr. Bumble" (which seems appropriate here) "If the law supposes that, ... [providing music during the day is a nightclub] ... then the law is an ass – an idiot". Mr. Bumble was referring, of course, to a legal fiction that had no basis in reality. No doubt many restaurant owners, as aptly pointed out by Mr. Holzer will believe that Mr. Bumble was right, however, I am obligated to apply the applicable law.

Based on counsel's arguments and evidence presented and examination of the words contained in the regulations and definitions, I find that the Petitioner's use of the property at 9025 Cuckold Point Road, Millers Island, to be in violation of the B.C.Z.R.; and further that Fifth Street, LLC's Dock of the Bay restaurant by providing music during the day is a "nightclub" as defined in the B.C.Z.R. Sections 101, 102.1 and 230.

Pursuant to the advertisement, posting of the property and public hearing on this Petition held, and for the reasons set forth above, it is my opinion that the Petitioner is conducting a nightclub on the subject property and, further, that Petitioner's use of the property is not permitted pursuant to Section 230 of the Baltimore County Zoning Regulations (B.C.Z.R.).

THEREFORE, IT IS ORDERED, by the Zoning Commissioner for Baltimore County, this 30th day of May, 2007, that the Petition for Special Hearing pursuant to Sections 500.6 and 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), requesting a determination as to whether the use of the B.L. zoned property at 9025 Cuckold Point Road is in violation of the zoning regulations and specifically, is the restaurant, which provides music at this location during the day, a

"nightclub" use as defined in the B.C.Z.R. Sections 101, 102.1 and 230, is hereby answered in the affirmative and that the playing of outdoor music either by way of an outside speaker system, live/or recorded entertainment, must be discontinued.

Any appeal of this decision must be taken in accordance with Section 32-3-401 of the Baltimore County Code.

WJW:dlw

WILLIAM J. WISEMAN, III
Zoning Commissioner for
Baltimore County

CHRISTINE R. LEARY
LEGAL TRANSCRIPTIONIST
9529 Fox Farm Road
Baltimore, Maryland 21236
(443) 622-4898
crleary1@verizon.net

INVOICE

December 5, 2016

COPY

TO: Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

IN THE

MATTER OF

BOONE KONDYLAS, LLC

Hearing Dates: 2/17 & 4/28/16

Case No.: 16-003-SPH

To transcribe 411 pages @ $3.50 per page = $1,438.50

BALANCE DUE **$1,438.50**

RECEIVED
DEC 09 2016
BALTIMORE COUNTY
BOARD OF APPEALS

Payment should be made payable to "Christine R. Leary".

Transcript will be e-mailed and/or mailed upon receipt of payment.

IN THE MATTER OF:

BOONE KONDYLAS, LLC
CASE NUMBER: 16-003-SPH

Hearing Date: February 17, 2016

Pursuant to Notice, the above-entitled hearing was held before the Board of Appeals for Baltimore County at the Jefferson Building, Second Floor, Suite 203, 105 West Chesapeake Avenue, Towson, Maryland 21204, commencing at 10:00 AM.

PANEL PRESIDING:

MAUREEN E. MURPHY, CHAIRMAN

BENFRED B. ALSTON, BOARD

JANE M. HANLEY, BOARD

PRESENT ON BEHALF OF THE PARTIES:

LAWRENCE E. SCHMIDT, ESQUIRE

FRANCIS X. BORGERDING, ESQUIRE

PETER M. ZIMMERMAN, ESQUIRE

Christine R. Leary
9529 Fox Farm Road
Baltimore, Maryland 21236

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(ON RECORD - 10:26:30 AM)

CHAIR: Okay. Good morning, everyone. We are here in the matter of Boone Kondylas, LLC, 9025 Cuckold Point Road, case number 16-003-SPH. This is a Petition for Special Hearing to amend previous restriction imposed in case, cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited, let's see, limited music, it looks like. Opinion and order of the ALJ was denied on 11/7/2013. Let's have counsel for the record identify themselves.

MR. SCHMIDT: Good morning, Chairman, Chairwoman Murphy and members of the Board, I'm Lawrence E. Schmidt with the Law Firm of Smith, Gildea & Schmidt, with offices in Towson at 600 Washington Avenue, on behalf of the Petitioner below, Boone Kondylas, LLC.

MR. BORGERDING: Good morning, Your Honor. Francis X. Borgerding, I'm on behalf of Charlie Wolinski and several other neighbors here (inaudible).

CHAIR: Okay.

MR. ZIMMERMAN: Peter Max Zimmerman, People's Counsel for Baltimore County, Towson. I'd like to alert the Board that I will have a preliminary Motion (inaudible).

CHAIR: Okay. We did have trial memorandums, I think, filed and we got information, got the response from the Protestants and we had something submitted by People's Counsel,

the case law, an e-mail and I'm, I'm guessing that your preliminary Motion has to do with that?

MR. ZIMMERMAN: Yes.

CHAIR: Okay. It's on the res judicata issue, did, were you, okay, let me, I'll let you make the Motion. We're probably going to reserve on that issue.

MR. ZIMMERMAN: All right.

CHAIR: But just so, let you know, so we'll put the case on.

MR. ZIMMERMAN: All right and, and if the Board decides to reserve on it, this may substantially be most of my opening statement so it won't be repetitive, although I was hoping despite the late start, the Board might see an early end would be appropriate. So, my position is that, and the Board knows res judicata very well, and the last five res judicata cases have been disposed of on Motions to Dismiss, three of them on oral Motions, two of which, Madam Chair, you presided over, namely, Galasso, which I, on Friday, forgot about when I submitted copies of previous cases. But I --

CHAIR: I think Ms. Demilio was on that one, that's why you --

MR. ZIMMERMAN: Well, actually it was Nancy West from the County Attorney's Office and myself. But Carol Demilio successfully (inaudible) then argued the (inaudible) case, which was an oral Motion to Dismiss and she also successfully

argued the, the *Sprint* case, in which actually it was Adam Rosenblatt, then of the County Attorney's Office, who made the oral Motion. I think Mr. Belt, Andrew Belt chaired that case and Ms. Demilio then proceeded to successfully argue (inaudible) sustain the Board's decision in the Court of Special Appeals with Judge Kevin Arthur's opinion last year, which of course we think was an excellent decision. So, my point is that it's, it's been the pattern for the Board to consider Motions to Dismiss, even if the Board decides to reserve on this one. But those Motions were all granted without the necessity of a hearing. It is my position, as I've now reviewed the memos and Judge Beverungen's decision below once again, that even taking the proffer that the Petitioner has made in its trial memorandum, even if you take that at its most favorable to the construction to the Petitioner, it doesn't add up to a sufficient change in circumstances to overcome the Board of Appeals' majority decision in 2008 and Judge Deborah Eiler Court of Special Appeals' decision sustained it. And I've provided, I have a package to explain my reasons and I've already provided this morning Mr. Schmidt and Mr. Borgerding copies. I have a copy for each Board member. And what it consists of is the, the definition of night club, which then refers to the BOCA Code that was central to the Board's decision in 2008. I have pages two thou, nine and ten of the, the Board's majority decision and have marked

in yellow the, the characteristics, the eight characteristics, that, that are, that are listed in the BOCA Code and the way it works is to be a night club, you don't have to meet all the eight criteria you just have to meet some of them and the Board actually found six of the eight were met in 2008. I then have the Petitioner's trial memorandum, page five, which lists their proffer and the proffer, among other things, includes words anticipate and typical. So, I have the thesaurus for those words and then I have the full majority opinion of the Board of Appeals in 2008, then the key pages of Judge Debra Eiler's Court of Special Appeals' decision, 2010, beginning with page eighteen, then Judge Beverungen, who (inaudible) in the current case and also the first page of the Dock of the Bay restaurant's current website. So, so here is my, my point, okay? We know that a night club is a tavern or other establishment with live or recorded music and then it references to the, the BOCA Code. The BOCA Code has not changed. I don't think there's any dispute on that. Everyone is looking at the BOCA Code and the Petitioner, in the trial memorandum, is claiming that there has been some significant change that should have caused this Board to come to a different conclusion. So, let's take a look at each of their claims and, and compare it to the, to the 2008 situation. So, we look at page five, the proffer, they say, okay, first, they say lighting levels do not fine when entertainment will be

provided. Well, this isn't perhaps the major factor. The major factor is the, the music but the criteria is low light levels, okay? Whether or not the light levels change or not is not the point, it certainly most likely at twelve midnight or later, or even 11:00 p.m., you're not going to have extremely bright light levels and, so to say that they're not changing the lighting level really doesn't mean anything. That's number, number one. Number two, which is, I think, one of the two most important points, they claim the nature of the entertainment is marketed different. The owner anticipates solo acts of adult contemporary music geared towards a mature crowd and not live rock and roll bands. Now, the criterion is basically in, in the BOCA Code, having entertainment of live, live bands or recorded music above normal sound levels. That's the criterion and, and first of all, anticipates, I, I, that's a conjectural word, okay?

CHAIR: Let me stop you because what, in the trial memo I do see where you're reading from page five. These are proffered and that's why I suggested that we hear the case because it, I mean, what they proffered it may be that what they put into evidence, that's why we wanted to hear it.

MR. ZIMMERMAN: All right.

CHAIR: To see, may, you know, and, and you certainly could ask those good questions but rather than go through the list, I don't want to prevent you from making your Motion.

MR. ZIMMERMAN: All right.

CHAIR: Because you, for the record, you need to make your Motion.

MR. ZIMMERMAN: All right. I'll do it, then I'll, I'll be rather --

CHAIR: Since we're --

MR. ZIMMERMAN: -- quick about it but the, the key p point here is anticipates is a conjectural word but most important, if one looks at the Board of Appeals' majority from 2008, even then, the former owner tried to, to tone things down, (inaudible) duos or reggae music, no rock, no R&B implicitly, none of the loud stuff. That was his claim. So, he was claiming he was toning it down. No, and the Board in 2008 also said there was, was actually no proof that State regulations were being violated. You don't have to violate State regulations to, to have a (inaudible) and, you know, solo performers can be quite loud also, okay? If you listen to Adele or, I mean, I listened to the Grammys the other night was so loud with, with these solo people I had to turn the channel. But, just because you have a solo person doesn't mean that it's going to be really quiet. And what Judge Beverungen in this current case below said that there was nothing in the Board of Appeals' 2008 decision or Court of Special Appeals' decision to say that if you have a different type of late night music, you're okay. He said, there was nothing to differentiate

between Frank Sinatra and rock music. He said that on page three and he's right. So, you don't, you don't get out of it and, you know, to say a mature crowd, he anticipates a mature crowd, I mean, it's not as if they're going to bar anyone under fifty or forty from going to this place. And I'll say third criterion, no stage or stage accessories. That was the same in 2008 as the Board found. A restaurant typically stays open until midnight. Well, typically is, is another one of these soft words and midnight, well, guess what? Their website, current website which we checked the other day, says they're open till 1:00 a.m. on weekends. So, they are, and the criterion is later than average operating hours, that's, and that's later than average for a restaurant and it's pretty close to what Mr. (inaudible) was, in 2008 he was (inaudible) open till 2:00 a.m., so now the website says 1:00 a.m. The next, number five, tables and seating in defined aisles or undefined aisles. They say they have defined aisles. Well, that was the situation with (inaudible) back in 2008. He had defined aisles, the Board found (inaudible). No dance floor. Same thing with the 2008 case, no difference there. And the seventh criterion, it's important, they claim the primary and focus of the business is to serve meals, not provide entertainment. Well, basically the same argument was made in 2008 and Judge Eiler really dealt with that very well in her opinion because she said you can have a duel use situation.

You could have a restaurant and a night club and, of course, the restaurant hours are going to be more extensive then the night club hours by definition because the restaurant is open during the day but that doesn't prevent it from being called a nightclub. So, that, that proffer doesn't work. And then they say the rest of the, the eighth criterion, was high occupant, low density, well, they still have the same capacity and they, they're giving us the spin that the restaurant is typically not overcrowded or even at capacity. I mean, that's speculation but are they, are they telling us that they want the restaurant to fail, that they don't want too many people in there? I don't think they're going to bar people from coming in. So, what I'm suggesting comparable to a, the case in Circuit Court where it's a Motion to Dismiss the Complaint or, in effect, summary judgment, even if you take their proffer at its most favorable, okay? Putting aside all the evidence that the citizens may have as to what happened, I don't think that their proffer, proffer works and I understand the Board wants to reserve on it so that, that, if that's so, then let that be the majority of my opening statement. I think there's going to be other evidence which negates many of the things the Petitioner was saying and I think that, my understanding from interacting with the citizens, that Mr. Borger, Borgerding has a fair amount of evidence so. So, there's more to it but I think the Board could, if it so determined to dismiss this Petition, even

without a hearing, I would have no trouble with that (inaudible) that the Circuit Court and Court of Special Appeals. So, that's my Motion.

CHAIR: Okay. All right. Thank you very much. Anybody want to respond to or add or join?

MR. BORGERDING: Your Honors, I'd just like to, and I do apologize, I didn't make enough copies for everybody but I'm going to put in the Court of Special Appeals' opinion and Judge Beverungen's decision below.

MR. ZIMMERMAN: And could my package be considered a Motion exhibit for the record?

BOARD: Okay.

MR. ZIMMERMAN: By the way, for the tape, do we have to identify who's speaking?

CHAIR: When we have a lot of people, sometimes that is helpful.

MR. ZIMMERMAN: All right.

CHAIR: Although you all have distinctive voices, so maybe we'll be able to figure it out.

MR. ZIMMERMAN: Okay and am I close enough to the microphone?

CHAIR: Is that the only microphone on your, you don't have one on your table?

MR. ZIMMERMAN: No.

CHAIR: Okay. Move it over.

MR. ZIMMERMAN: All right.

MR. BORGERDING: Your Honors, I would just (inaudible) support (inaudible) requesting a finding of res judicata in this case. The only other thing I would like to bring to your attention is on page two of Judge Beverungen's decision, he states, as an initial matter, I do not believe the OAH has the authority to amend restrictions found in previous cases, at least under the circumstances presented here. As Petitioners requested, the zoning violation and special hearing cases cited in the Petition was appealed to the Board of Appeals, Circuit Court and Court of Special Appeals. It is an unreported opinion and he states that, the number and term. The Appellate Court affirmed the agency findings, which necessarily included the conditions and restrictions found in those Orders. To amend those restrictions at this juncture would be reversing the Appellate Court, which the Administrative Agency could not do. I would ask you to keep that in mind and I believe that logic applies to the Board's consideration (inaudible). So, in addition to res judicata, I think there's a second hurdle that the Petitioner should not be able to overcome and I would ask (inaudible) that. Thank you.

CHAIR: So we should make these two exhibits, again, Motion exhibits, would that be --

MR. BORGERDING: That would be great.

CHAIR: Motion, motion. Mr. Schmidt, would you like

to respond?

MR. SCHMIDT: Thank you, Chairwoman Murphy. Maybe in the interest of, I guess, judicial economy, I'm going to try to respond to the Motion and also present my opening statement, if that would be okay. First of all, I would just ask, there were certain exhibits below before Mr. Beverungen that were submitted and I know the Board's policy and practice is anything that is in your file is evidence in this case. I may be offering some of those documents again and I'll put a copy of the plan that was offered below and accepted below on the board. Although, there's no proposed construction here, it may be helpful as witnesses are called upon to testify.

MR. ZIMMERMAN: Do we get a chance to object to any of the (inaudible) now or should I want until the hearing? Because the site plan is something (inaudible). I can do it now or we can, I don't mind --

CHAIR: Are you offering it now or --

MR. ZIMMERMAN: -- I don't mind waiting, I don't mind --

MR. SCHMIDT: Well, it's, it's in, it's in Judge Beverungen's, it was accepted below.

CHAIR: Right.

MR. SCHMIDT: My understanding is if it's accepted below, it's part of the file that is transmitted to the Board and is part of the record of the case that you would consider.

I did not call, because there is no construction proposed, although the plan, as indicated, you can see, it's indicated by, prepared by Morris & Ritchie, I do not have a witness from there. I didn't anticipate the objection and, obviously, Mr. Zimmerman didn't let me know but if he wants to object, he can do it now, I guess.

MR. ZIMMERMAN: Yeah, I don't think it's a question whether somebody comes from Morris Ritchie but I believe the Code indicates, and I don't have the Code in front of me, but--

MR. SCHMIDT: Which Code is that, Mr. Zimmerman?

MR. ZIMMERMAN: The County Code.

MR. SCHMIDT: Okay.

MR. ZIMMERMAN: The Baltimore County Code, I believe there's, always been a provision that the evidence from the lower, the ALJ hearing, can be considered but there's also an opportunity to object to it.

MR. SCHMIDT: What section of the Code is that, Mr. Zimmerman?

MR. ZIMMERMAN: I don't have it in front of me. We, we can, we can, I'm sure I can provide that. I believe there is a Code provision.

MR. SCHMIDT: I'm unfamiliar with it but, okay.

MR. ZIMMERMAN: But we'll, I believe it's the same Code provision that refers to the ability of the Board to consider evidence from, what used to be (inaudible) but we'll,

we'll get, we'll, we'll take a look at that and if I'm wrong, I'm wrong. I think I'm right, but my, my point, whether or not anyone from Morris Ritchie shows up is that the site plan does not meet the, the various criteria in the zoning checklist for non-residential building permits and/or zoning public hearing applications.

MR. SCHMIDT: And is that, is that a law in Baltimore County, Mr. Zimmerman? Is that a requirement in the County Code?

MR. ZIMMERMAN: In my, in my opinion, it's a requirement, in my opinion. So, I think Mr., I think I have an extra copy for Mr. Schmidt. I have a copy for the Board.

CHAIR: But this is not a development plan, this is a special hearing to amend previous restrictions.

MR. SCHMIDT: Right.

CHAIR: We're not here to talk about setbacks and variances and, so I'm not sure I understand why, why there would be an objection to that, because this is for, I guess, I mean, I'm, you know, for explanation, I mean, for descriptive purposes --

MR. ZIMMERMAN: Well, my, my reasoning is that the site plan doesn't actually show the layout of the, the establishment, where the tables and chairs are, where the, where the music is --

MR. SCHMIDT: That's not required. That's not even

required in, under the --

MR. ZIMMERMAN: I think in the context of this case, plus it doesn't show the adjoining land owners, in my opinion, sufficiently, doesn't show the height of the building, I, I don't think --

CHAIR: But, I guess, but evidence could be submitted by the Protestants and by, by People's Counsel to show, even through photographs, what the chairs look like.

MR. ZIMMERMAN: All right.

CHAIR: Or what the other, I mean, this is, has it, you know, it's being submitted for whatever it has on it, maybe it doesn't have the neighbors' property, maybe it does.

MR. ZIMMERMAN: Well, I don't think --

MR. SCHMIDT: It does.

MR. ZIMMERMAN: I don't think the site plan really, in the context of, the question of nightclub and so on, it doesn't really show us anything about --

CHAIR: Well, that's argument so.

MR. ZIMMERMAN: All right.

CHAIR: Okay, that's argument.

MR. ZIMMERMAN: I've made my point.

CHAIR: Okay.

MR. SCHMIDT: Just responding to that, I would say two things briefly. You're exactly right, Ms. Murphy. There's, there's a provision in the County Code that talks

about development plans being sealed by a professional engineer, a surveyor, registered landscape architect, but those are development plans. We're not here on any development plan. This is a zoning case. The other thing is and we, we will testify about this, there is no proposed construction at all. I mean, we're not proposing to do anything in terms of building. We're not building a new building, we're not adding an addition, we're not putting a second story on. We do have photographs which we'll submit and I think this was just submitted to sort of give the Board some information about how the property lays out, where it is, the neighbors are all identified, the immediate neighbors, by both deed reference and name and obviously anyone who's here who wants to testify and say where they live would be wiling to do that. So, I don't know what the problem is. If the Board has any problem, I'll try to get somebody from Morris & Ritchie to come over and authenticate that they prepared the plan but it, it is, it's sort of basically is what it is. By way of opening statement and sort of response to the Motion that's been made, if I can, and I just wanted to give you a little bit of background. This property, the subject property is about an acre and a quarter, just by way of background. It is a waterfront property down on the Chesapeake Bay and it's on Millers Island, which is well known, older community in eastern Baltimore County. The property is zoned BL, which is the business local designation,

which allows among uses that are permitted in the BL is, are restaurants. And as you are, of course, aware, the County zoning regulations define a number of different kinds of restaurants, carry-out, fast food, what are called standard restaurants, which are the typical sit down meal restaurants, which is what this property indeed is and the type of business that is here. The Dock of the Bay, which is the name of the restaurant, has been here and it was previously known I believe back in the fifties and sixties as the Fisherman's Inn, but this has been a place that's been serving food since the 1950's, at least that's what I proffer our evidence will be and you'll hear testimony from my client, Mr. Boone as well as there are other folks who are familiar with this area. And for many years, the Dock of the Bay operated as a, as a restaurant. I don't think there's any dispute as to that. You would go in there, you would get a hamburger, a crab cake and it was your typical restaurant. Obviously because of its location on the water and because there's a pier, it was a very popular summer destination. People would arrive by boat and could, could dock there and come in and get something to eat and it operated in that fashion. Things changed when Hurricane Isabel struck Baltimore County in 2003 and this area suffered a lot of damage. I represented some other people who live in this area who told me that there was water all over the place and, and a lot of degree of flooding and the building was, was damaged.

Ultimately, the building, the operations ceased and it was reopened later and came under the ownership of a gentleman by the name of Lawrence Tanner, who was a principal in an LLC called Fifth Street, LLC. While we're offering exhibits and so that the record is clear, I heard Mr. Borgerding offer some exhibits. These were offered below. I do have copies for everybody but I guess if I could have the plan offered and I'll mark it as exhibit number one for the Petitioner.

CHAIR: We did hear Mr. Zimmerman's objection, understood your objection, Mr. Borgerding and --

MR. ZIMMERMAN: Yeah, I mean, I don't need to repeat it, I just thought I should show really what the (inaudible).

CHAIR: Understood. Mr. Borgerding, any objection?

MR. BORGERDING: I have no objection.

CHAIR: No objection. Okay, we're going to submit Petitioner's Exhibit 1, which is the site plan.

MR. SCHMIDT: Okay. Thank you. I have copies of these for the other parties, but I think they may have them. If, gentlemen, if you don't, let me know. In any event, the business came under the ownership of Mr. Tanner. I think most of the folks in this room, although I don't live there, would say there was quite a difference in Mr. Tanner's operation than had been the historic Dock of the Bay operation. The business changed from sort of a neighborhood restaurant and it morphed into a business that had a lot of music. I'm going to say a

lot of music, my understanding is a lot of electronic music, rock and roll, hard rock, loud music, that kind of music. Additionally, the music, there's an area of outdoor seating now, there was a stage out there before, a stage, stage type structure, there was a tent that was out there and there was a lot of music that was being played at this facility. That music, obviously, generated concerns by the folks who live around here. As you can see from the plan, Mr. Zimmerman's comments notwithstanding, there are buildings and houses nearby and the, some of these are residential. There's a boatyard next door, which is not residential, there's other restaurants nearby but there is a mix on Millers Island of both residential and business uses and the folks who live there, I think rightfully so, became concerned that Dock of the Bay had become a nightclub. They filed a series of complaints with Baltimore County, Code enforcement complaints as you know, the process in Baltimore County is if the County Code Enforcement Division gets a complaint, they send an inspector out to investigate what's going on. The inspector in this case went to Dock of the Bay and issued to Mr. Tanner and Fifth Street, LLC, his company, several citations and he was ultimately fined. In addition to that, Mr. Tanner filed a zoning case through his attorney at the time, to basically address the use of the, of the, of the property and ultimately those violation cases and that zoning case were all appealed to you, to the Board of

Appeals, not you individually because I don't think any of the members of this panel heard the case, but the case ended up here in, in, at the Board of Appeals. The Board of Appeals issued a split decision, interestingly, and I'll submit as Petitioner's 2-A and Petitioner's 2-B a copy of the majority and the dissenting opinion that was authored by the Board of Appeals and as you can see from just the caption and the first page, it was actually three cases again that had been consolidated, the two Code violation cases and the zoning case. And the Board basically concluded, in its majority opinion, that Mr. Tanner was operating a night club at this facility, at this location. A night club is a separately defined use in the County zoning regulations, as Mr. Zimmerman has pointed out. A night club is not a restaurant, a restaurant is not a night club and the Board determined that Mr. Tanner was operating, operating a, a restaurant, excuse me, operating a night club. Based on that, and if you check the BL zoning regulations, you will find that a night club is not permitted in the BL zone so it was determined that Mr. Tanner's use was, therefore, illegal. There was a Motion for Reconsideration filed in that case and the Board denied that. I'll give you a copy in the interest of completeness, Petitioner's Exhibit 2-C, Mr. Alston, which is the denial of the Motion for Reconsideration that was filed by Mr. Tanner. Mr. Tanner was undeterred. He appealed the decision of the Board. It went to the Circuit Court of

Baltimore County, as you know, under a Petition for Judicial Review and Petitioner's Exhibit 3, which I'm going to give you, is a short Order by Judge Daniels of the Court at the time. Mr. Zimmerman was counsel in that case, as was Mr. Borgerding and Judge Daniels affirmed the decision of the Board of Appeals.

MR. ZIMMERMAN: Is there a date on that?

MR. SCHMIDT: It is dated, actually Mr. Zimmerman, I'll give you a copy. May the 14th of 2009 and I've marked that as Exhibit 3. Mr. Tanner wouldn't give up though. He wanted to keep going so he filed another appeal further up the chain and as Mr. Zimmerman has indicated and I think this is already in evidence but I'll submit it as a Petitioner's exhibit as well, number four, he went to the Court of Special Appeals and the Court of Special Appeals said, affirmed, the Board is affirmed. Mr. Tanner is operating a night club not permitted in the BL zone, business is not allowed here as it is operated and described and determined based on the findings of the fact of the Board of Appeals, which the Court obviously had to give deference to under the substantial evidence rule. Obviously, that didn't work out too well for Mr. Tanner's business plans. Shortly thereafter, the business was closed and Mr. Tanner went away, I'm sure much to the relief of many of the citizens of Millers Island. Enter my client, Ken Boone and his LLC, Boone Kondylas, they purchased the property a couple years ago in

2014 and reopened the business as Dock of the Bay. That brings us to the case today. Our testimony is going to be and I'm not going to take more time than I have to, is that the business here that is currently operating is not a night club, it is a restaurant, it is not what Mr. Tanner did, it is what Mr. Boone did and, in fact, we would say is much more like what Dock of the Bay had been back in the fifties and sixties when it was operated before Hurricane Isabel. It is not, we believe, a night club at the present time. The testimony that we're going to present is about the business operation and you will hear how the business works and that we don't have heavy metal rock and roll bands. I would point out to you and Mr. Boone will testify that last fall, after being in operation for a little less than a year, he decided it would be a nice touch, like a lot of restaurants, I think we've probably all been out to restaurants at one time or another, to have a single acoustic guitar player come to the restaurant facility. And so, he lined that up to happen on a Saturday night and shortly after that performance, he was visited by an inspector from Department of Baltimore County's Code Enforcement saying we heard you had a musician down here this weekend. Mr. Boone said, yes, I did. They said, can't do it, therefore, it's impermissible.

VOICE: He came before the performance.

MR. SCHMIDT: Okay, before the performance.

VOICE: He stopped the performance.

MR. SCHMIDT: Stopped the performance and this Petition resulted where we have asked for the approvals that you've already, you've already discussed. There are really two issues in this case that we see. One of them Mr. Zimmerman has already touched upon, which is the res judicata issue and I've already submitted a trial memorandum on it and you may very well require briefs on it, Ms. Murphy, or the parties may wish to brief it, but basically our position is very simple. We all know, I've been a, unfortunately, the attorney representing the litigants in some of the res judicata cases that this Board has been involved with, the Backriver Neck Road, Sprint Cell Tower case, the Matis (phonetic) case, involving a couple of crabbers down on the east side of the County and there have been some others that Mr. Zimmerman points out in his e-mail to you. We all know what res judicata is and there's no dispute that res judicata, as we informally call it, is the one bite of the apple rule, that a litigant gets one shot to make his case and if you're unhappy with that, you can file an appeal but when that case is over, you are done. So, Mr. Zimmerman's argument, essentially, here is Mr. Tanner took his shot. The property owner here took his shot, it was determined that this was a night club, end of story, it was a night club then, it's always been a night club, it'll always be a night club and no matter what else happens it's the end of the story and we can't even

present our case. Mr. Zimmerman, however, ignores what is also, what we believe is the persuasive and more appropriate application of res judicata and the language in my, is in my trial memo from both I think it's the Whittle case and also the case for the Seminary Galleria, which is up here on York Road and Seminary Avenue, which the Courts have said in those cases, if there is a change in the facts of the case, then res judicata doesn't apply. And indeed, that is what we submit has happened here. We're not Larry Tanner, we're not proposing to represent Larry, or to produce Larry Tanner's business. What Mr. Boone wants to do, what he's proposing to do, is not to run a night club here, but to run a restaurant here. The facts, what is proposed, is different. You're not going to have heavy metal bands playing until 2:00 a.m. out on, out by the pier, which is what Mr. Tanner did. That's not what he has in mind. So, we believe that we would be entitled to bring this case and that we're not barred by res judicata. Really, if you're following Mr. Zimmerman's arguments to its logical conclusion, it really gets to be ridiculous because you could have another user come in here under a BL, another BL use, whatever it would be, a bank, whatever it is, and if they played music while you're standing in line to deposit your check, they would be considered a night club because that's what the Court of Special Appeals has decided for this case, that music can't be played here under any circumstances, or so say Mr. Zimmerman

and I think, by extension, Mr. Borgerding and obviously that's not what res judicata is all about and intended to be. So, we don't think there's res judicata because we think what's proposed and what existed are different things. The second issue in this case, we believe that you have to address, is what I would call the accessory component of the restaurant operation. Now, I think we've all been to restaurants and I think this Board can take judicial notice of restaurants. I've been in Italian restaurants where a musician playing a violin and Italian music walks around from table to table. I have been in Mexican restaurants where a two or three-piece Mariachi band, guys in big hats, come around and play Mexican music. I have been in Michael's restaurant, Timonium Road, High Topps, the Riverwatch, numer, down in this area, Carson's Creekside, Sunset Cove, Sue Island Grill, Riverwatch, I can go on, and there are, there is music, either live, by a DJ, radio or whatever it might be. In our estimation, that does not mean that those businesses are not restaurants. The Baltimore County zoning regulations allow accessory uses. For example, a church can have a pre, pre-school, it can have a daycare operation but the nature of that use is a church with an accessory component. I hear on the radio driving in this morning that one of the car dealerships, you can get a manicure when you take your car, car up there. I would submit to you that Jones Toyota, or whatever the name of that business is, is

not a beauty salon, it is a car dealership. But there is an accessory component of that use which is in place to allow patrons of that use to have an amenity, that's exactly what we're proposing here. We're not suggesting that this is a night club. People aren't paying cover charges, they're not buying tickets, they're not coming down here to listen to music, to watch bands, that's not performances which draws them there. What draws them there is getting something to eat and maybe having a Coke or a beer or whatever they like to drink. But while they're there, they would have reasonable opportunity, we submit, to have some limited music and not be barred and prevented from having any music, which is what the Court of Special Appeals did in the, in the context of the Larry Tanner case. So, we're here seeking an Order from this Board and obviously, we think this Board has jurisdiction and Mr. Boone will testify and tell you to set the limits on the music, how loud it can be, can it be inside, can it be outside, how late it can go, can it be past twelve o'clock on a weekend, eleven o'clock on a weekday, whatever it might be. You clearly, under the provisions of Section 500.7, which is the section which allows you and allows the zoning commissioner, to hear special hearings, which is what this is, have the authority to grant whatever restrictions and limitations that you deem appropriate to safeguard the neighborhood. And Mr. Boone is fine with that. He wants to be a good neighbor. He

doesn't want to have a problem with his neighbors. But he does want to be able to do what every other restaurant, maybe not every other, but the majority of restaurants, and I think what your common knowledge will tell you, because I'm sure you've all been in a restaurant where there's some kind of music playing, whether it's the strolling violinist, the Mexican band, the radio or a guitar player who comes on at 9:00 on a Friday night, whatever it is, and we think that is a legitimate and proper accessory use. Now, I'll say one other thing. I think those are the two issues that you have to decide. Mr. Borgerding, I think I follow his final argument, that you don't have the authority to issue this Order. Well, sure you do. Zoning commissioner, there are plenty of cases, plenty cases when I was a zoning commissioner and plenty cases that you've seen on the Board, where somebody comes in and asks you to change a restriction to allow additional variance or whatever it might be and that's all we're asking for here. We're just asking that this user for this property be allowed to do what he wants to do and that is to have some reasonable accessory use and I think that's well within the Board's discretion. With that being said, I've offered those exhibits and I'm prepared to call my first witness.

MR. ZIMMERMAN: Madam Chair?

CHAIR: All right.

MR. ZIMMERMAN: Mr. Schmidt went, I think, beyond my

Motion. I just would like to make a (inaudible) observation.

CHAIR: And it was supposed to be a response to the Motion plus an opening statement.

MR. ZIMMERMAN: Right.

CHAIR: Can we be brief and not repeat?

MR. ZIMMERMAN: Absolutely going to be brief.

CHAIR: No res judicata.

MR. ZIMMERMAN: Yes. First of all, the holding of the Court of Special Appeals was not that this was a night club and not a restaurant, which Judge Eiler said is this is both a night club and a restaurant. The idea that the music use is accessory, that was essentially brought up by Mr. J. Carroll Holzer representing the Dock of the Bay in 2008 and the holding was that you, you can have two principal uses. You can't get away from it just by saying you're mostly a restaurant. The idea of the strolling guys in the Italian restaurants and, well, you know, the music in all other sorts of restaurants, I mean, that, that was brought up in 2008. They claimed the night club definition was over broad, that it would close down so many places in Baltimore County and, and the dissenting member, Lawrence (inaudible), more or less bought that argument. But the majority wasn't buying it and Judge Eiler wasn't buying it. Judge Eiler said if you think the statue is overbroad, the County Council can change it and the County Council has not changed that definition. So, so we went

through that sort of, you know, nightmare, equitable, how horrible, how horrible it's going to be to, to rule (inaudible) and Tanner didn't have cover charges either, that's in the opinion. And basically, what, they're making a kind of Goldilocks argument, that, you know, the music was too hot and now we're going to do it just right. I mean, that, there's nothing in the previous decisions that, that allows that and it's, it's impractical as far as implementation or enforcement. Once you start allowing the late night music, I mean, it, it's going to be above normal sound levels and to say oh, we're just going to have a real quiet acoustic guitar, they haven't even bound themselves to that, but once you have the late night music, you know, it's, it's opening up, it's opening up the box and as Judge Beverungen said, he, he can't, the opinions don't differentiate between Frank Sinatra and, and rock music. So, I guess it's, you know, to say that it's a Yogi Berra, it's dejavu all over again, despite all the, whatever you're going to hear. I think in the end, there, there's just no, there's no lawful and practical way to, to say that this Petitioner can kind of slide, slide through because, you know, he's, he's the Goldilocks that's just right and the other guy easily, the other guy was the bad guy, the other guy was the ugly guy with the music and this is the good guy. That's really, but that doesn't square with the earlier decision of (inaudible) so that's, that's my brief preliminary observation.

CHAIR: Okay. Any opening from you? I don't want to cut you off.

MR. BORGERDING: Yeah, just briefly, Your Honors. I would ask if you speak with my, hear testimony from Protestants here today about what it was like to endure seven years of Larry Tanner and with all due respect, this gentleman was a bull in a china shop. He basically wrote, waved the red flag at the neighbors and just, a lot of them have children, they'll testify to that, and the children couldn't sleep at night and Mr. Tanner took it all the way for seven years to the Court of Special Appeals, lost, and then he was still undeterred. He tried to have a barge and put live bands on the barge and the County filed a contempt Petition against him and threatened to throw him in jail and only then did it stop and the, the business (inaudible). This was a nightmare for the people in the, this community and they are very gun shy about going through something like that again so I ask you to keep that in mind. The other thing I'd ask you to keep in mind, if you read the Court of Special Appeals' opinion, it does, it prohibits live music and that is exactly what they're asking for, live music. And that's the fear of the residents. Once you get the live music in, are you going to get a higher occupant density load there or are you going to get more people there, are they going to be loud again, you know, so on and so forth. Especially if you have outside music, you're going to attract a

certain amount of, certain type of person who is going to drink, who is going to get loud, you know, they're worried about that. And what happened repeatedly when Mr. Tanner owned the place is, was not only the bands and the music but at two, three o'clock in the morning, you'd have people in the parking lot talking loud, urinating, you know, just doing things that were incompatible with them living in peace and quiet of a residential area. So, I'd ask you to just think about that and you're going to hear testimony from the Protestants about what it was like to go through that. And that's why we're so gun shy, they don't want to go through that again. When Mr. Schmidt respectfully says, you know, that our argument for res judicata if taken for the logical conclusion is just, is kind of crazy, the bottom line is, the Court of Special Appeals, read their opinion, prohibited live music and that's exactly what's being requested here. Now, at this moment, is everything exactly the same? No, but if you put the music in, are you going to attract those crowds again? Are you going to make them relive this nightmare and that's what the fear of the community is. So, I'd just ask you to keep that in mind. Thank you.

CHAIR: Okay.

MR. SCHMIDT: Ms. Murphy, just because Mr. Borgerding referenced it and I've got a copy, there was the contempt proceeding that he mentioned when Mr. Tanner was in contempt.

There was an opinion by the Circuit Court and just since that's been mentioned, I'll offer that. I think we're at number five, Mr. Alston?

BOARD: Yeah.

MR. SCHMIDT: And that's, again, against the evil Mr. Tanner. Hopefully he's not sitting here.

CHAIR: Now, the exhibits that you just submitted.

MR. SCHMIDT: Yes.

CHAIR: They're for the merits of the case, as opposed to the Motions?

MR. SCHMIDT: Yes.

CHAIR: Mr. Zimmerman wanted his two exhibits as motions.

BOARD: Oh, okay. So, your exhibits are for --

MR. SCHMIDT: Yeah, mine would be as to the merits. Yes, if that's okay, yes.

MR. ZIMMERMAN: I think I, did I have one exhibit?

CHAIR: You had two exhibits.

MR. ZIMMERMAN: Oh, the second was the zoning hearing checklist.

CHAIR: Checklist?

MR. ZIMMERMAN: Right, right.

CHAIR: Okay. We'll just, we'll mark that as People's Counsel Motion Exhibit.

MR. SCHMIDT: I have no objection whether they're

considered as to the merits or whatever, Mr. Zimmerman. Mine are as to the merits, particularly since, Chairwoman Murphy, you're indicating you're reserving and you're going to hear the, the case.

CHAIR: That's right, but for whatever reason Mr. Zimmerman wants his exhibits the way, and he likes it that way, that's fine.

MR. SCHMIDT: That's fine.

CHAIR: We'll, we'll accommodate and, and Mr. Borgerding also has Motion exhibits and now he can put in exhibits as to the merits. Okay. Eleven-fifteen. Can we get a witness on?

MR. SCHMIDT: Let's do it. Mr. Boone, if you could go up to there and you'll be sworn in.

BOARD: Okay. Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. BOONE: I do.

BOARD: Would you please state your name and address for the record?

MR. BOONE: Kenneth J. Boone, 250 South President Street, Baltimore, Maryland 21202.

BOARD: And spell your last name for the record.

MR. BOONE: B-O-O-N-E.

BOARD: Thank you.

MR. SCHMIDT: Mr. Boone, as I indicated in my opening, through the LLC, Boone Kondylas, LLC, you are the managing member of that LLC?

MR. BOONE: That is correct.

MR. SCHMIDT: And that is the, now the current owner of the Dock of the Bay property?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. What's your occupation, sir, other than owning a restaurant?

MR. BOONE: In addition to owning the restaurant, I own two printing copies, direct marketing, or, I'm sorry, American Direct, which is located just inside Baltimore City and Tidewater Direct, which is located in Centerville, Maryland.

MR. SCHMIDT: Okay. Do you own any other businesses in Baltimore County?

MR. BOONE: I own a property, 4545 Annapolis Road, which is now occupied by a company called (inaudible), I sold a direct mail firm to them in 1999. It's a, probably a three hundred and sixty thousand square feet. I pay $175,000 in Baltimore County taxes on that property and employed as many as six hundred people in that building.

MR. SCHMIDT: Okay. For either that property or any other property in Baltimore County, including Dock, the Dock of

the Bay property, have you ever or any of your companies ever been cited by any, the zoning authorities or code enforcement of Baltimore County for any violations?

MR. BOONE: I've never been cited for a zoning violation in any of my years of owning properties in Baltimore County.

MR. SCHMIDT: Okay. Let me, let me go back, if I can, maybe take this chronologically. When did you purchase this property, Mr. Boone, the Dock of the Bay property?

MR. BOONE: It was in August of 2014.

MR. SCHMIDT: Okay and was the restaurant or the business in operation at that time or had it been shut down?

MR. BOONE: It had been closed for slightly less than two years.

MR. SCHMIDT: Okay and who did you buy the property from when you bought it in 2014?

MR. BOONE: Bought it from Larry Tanner.

MR. SCHMIDT: Okay and that was actually Fifth Street, LLC was the name of his company?

MR. BOONE: That's correct.

MR. SCHMIDT: Do you know how long Mr. Tanner or Fifth Street, LLC had owned the property?

MR. BOONE: I think from 2006.

MR. SCHMIDT: Okay.

MR. BOONE: Or maybe sooner.

MR. SCHMIDT: Okay.

MR. BOONE: I'm not sure when he, when he bought it.

MR. SCHMIDT: Okay. I've got a couple of aerial photos that were taken. I would offer to the Board that these are taken from the County data base called My Neighborhood. So, they are in the public domain. I'll give one to Mr. Zimmerman and Mr. Borgerding and just to give the Board a sense, since the site plan is allegedly incomplete, this might help the Board and I would offer this, if I can, to Petitioner's exhibit number six, I believe, Mr. Alston?

BOARD: Six.

MR. SCHMIDT: And while the Board has that one, I'll show you this one. Mr. Boone, this is an aerial photograph. Can you tell us if the Dock of the Bay is shown on this photograph?

MR. BOONE: Yes, it is.

MR. SCHMIDT: Okay and where is it shown? Can you put an X maybe, actually after the Board members, after Ms. Hanley looks at that, I'll have the witness mark this one. If you could maybe put an X on the Dock of the Bay restaurant or Dock of the Bay facility? Okay. Let it reflect that the witness has marked that with an X and I would offer that. Now, this property is down on Miller's Island?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. I'm going to show you another

photograph I'll mark as Petitioner's exhibit number seven, again, taken from the same data source. Mr. Borgerding, if you would hand one of those over?

MR. BORGERDING: Sure.

MR. SCHMIDT: And can you tell us, I don't need him (inaudible), can you tell us generally what this is, what, this, this area?

MR. BOONE: That's a map of, of Miller's Island.

MR. SCHMIDT: Okay and there's a thumb tack, thumb tack pre-printed, is, what's the significance of that, what property is that thumb tack located on?

MR. BOONE: That's located on Dock of the Bay.

MR. SCHMIDT: Dock of the Bay, okay and I would offer that as number seven.

MR. ZIMMERMAN: Just different scale?

MR. SCHMIDT: Yes, obviously. One is, they're both taken from My Neighborhood, Mr. Zimmerman, the County website.

MR. ZIMMERMAN: Right, no, I, I don't object to it.

MR. SCHMIDT: Mr. Boone, since you bought the property, have you made any exterior changes to the building, put an addition on, put a second floor on, anything like that?

MR. BOONE: We, we poured a pad outside of the kitchen to expand our kitchen operating so we can steam crabs out there, we can pull pork --

MR. SCHMIDT: In the summer?

MR. BOONE: -- for summer and so forth.

MR. SCHMIDT: But that's a concrete pad?

MR. BOONE: It's a concrete pad. It just expanded the kitchen. We eliminated the tent that was once there, that's been removed. We spent $3,000 restoring the play area for the children, where the children play on the pirate ship and so forth.

MR. SCHMIDT: Okay, we'll get to that.

MR. BOONE: We dismantled the little stage they had out there, took that out.

MR. SCHMIDT: Okay. So, there was a stage outside that was dis, that you dismantled?

MR. BOONE: Yeah, a small stage.

MR. SCHMIDT: And a tent outside at one, during Mr. Tanner's ownership, that you removed?

MR. BOONE: That's correct.

MR. SCHMIDT: Any changes though to the building in terms of put an addition on or second floor?

MR. BOONE: No, the four walls are still the four walls.

MR. SCHMIDT: Okay. Same size?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. If, if you know, do you know how big the property is?

MR. BOONE: No, I don't.

MR. SCHMIDT: If you don't, okay, it's on the plan. I showed you the photos, can you tell us a little bit about the neighborhood of Miller's Island? We have people who live here but just a little bit so the Board understands what surrounds you and what's in the immediate area, what, what type of activities and uses are there, residences, businesses or whatever?

MR. BOONE: There's a combination of both. Coming down Cuckold Point Road there are two bars and right beside me is a, an additional, it's a, called Rowboat Willy's, which they have, which is a bar/restaurant beside me. Once Isabel came through and destroyed a lot of properties, many, one of many of the ones which were once summer homes are now permanent residence, were rebuilt as permanent residence, so there's a mixture of residence from before and after Isabel.

MR. SCHMIDT: Okay. Now, let me take you back, you have some familiarity by virtue of your ownership and familiarity with the historic use of this property, is that correct?

MR. BOONE: Yes.

MR. SCHMIDT: If you know, when did a restaurant start on this property? When did a bus, a restaurant use business start, if you know?

MR. BOONE: I'm told it's been a restaurant since the sixties.

MR. SCHMIDT: Okay.

MR. BOONE: The name prior, some of my employees worked in a place called Fisherman's Inn, which is the same restaurant prior to it being called Dock of the Bay.

MR. SCHMIDT: Okay and at that time, could you describe the nature of the business at that time during the sixties when it was Fisherman's Inn?

MR. BOONE: I was never there but --

MR. ZIMMERMAN: Objection.

MR. BOONE: -- several people here --

CHAIR: I'm sorry, one second.

MR. ZIMMERMAN: How, how would this witness know?

MR. SCHMIDT: If, if you know.

CHAIR: I'm sorry, what, what --

MR. ZIMMERMAN: How would he know? I don't see any foundation --

CHAIR: The, the question was about Fisherman's Inn prior, right?

MR. SCHMIDT: Yeah, Fisherman's Inn is the name of the business that operated here. I'm just asking him if he, if he knows, if you know, Mr. Boone, can you, do you know how the business was operated when it was the Fisherman's Inn?

CHAIR: Okay, overruled. Go ahead, if you know.

MR. BOONE: It was operated as a, as a bar with, with music and it had a skating rink for, or a skateboard ramp for

people to skateboard, catered to young people and, and had music that the young people liked to listen to and I'm, I'm told by some of the neighbors who are here to testify to the music was quite loud back when Fisherman's Inn owned it.

MR. SCHMIDT: Okay.

MR. BOONE: Back when it was owned by the other family.

MR. SCHMIDT: Okay and there came a time when the business was owned by, became, came under the ownership of Mr. Tanner, who we've heard about?

MR. BOONE: Yeah, there was a separate operator for a number of years, someone in between the time that, that the people who owned the property owned it and Larry Tanner bought it, someone else operated it for a few years as Dock of the Bay and then after Isabel, Larry Tanner bought it as Dock of the Bay.

MR. SCHMIDT: Okay and then he operated it until he sold it to you?

MR. BOONE: Until the time he closed it in 2012 and sold it to me in 2014.

MR. SCHMIDT: Okay. When did you actually acquire it?

MR. BOONE: August of 2014.

MR. SCHMIDT: Okay and when did you re-open?

MR. BOONE: In October 2014.

MR. SCHMIDT: Okay. I'm going to show you some photographs. Again, I'll, these were in the file previously, but I'll give a copy to Mr. Borgerding and Mr. Zimmerman. And, Mr. Alston, do you want me to mark these or will you mark them as submitted?

BOARD: Either way.

MR. SCHMIDT: Either way? Okay. I'll then maybe hand them up one at a time.

BOARD: Okay.

MR. SCHMIDT: If I can, offer them as 7-A.

BOARD: No, (inaudible).

MR. SCHMIDT: I'm sorry, eight. I apologize. And I'll hold them up so the Board can see them. Mr. Boone, if I can, we're going to go through these and if you could just describe to the Board what, what we're looking at?

MR. BOONE: That's the entrance to our, our Dock of the Bay.

MR. SCHMIDT: Okay. Now, in the background of this photos, I see a bunch of boats on boat racks.

MR. BOONE: That's our neighbor, Bill's Boats.

MR. SCHMIDT: Okay. Is that, that's not the Dock of the Bay property?

MR. BOONE: That's not part of the Dock of the Bay, no.

MR. SCHMIDT: Okay. But you are right next to a

boatyard?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. Offer that as 8-A, okay.

BOARD: 8-A, okay.

MR. SCHMIDT: Mr. Alston will like this in view of my prior case with him. This one shows a zoning sign. But it, what, what are we looking at here?

MR. BOONE: That's the zoning notice that went out in September that was preamble to the, to the, to the hearing we had on September 28th regarding this Petition.

MR. SCHMIDT: Okay. Now, and to the left in this photograph are the boats, that's the Bill's Boats operation?

MR. BOONE: That's, that's correct.

MR. SCHMIDT: Okay. Is the Dock of the Bay restaurant building visible in this photograph?

MR. BOONE: Yes, it is.

MR. SCHMIDT: What, what is that?

MR. BOONE: It's the salmon colored building right there.

MR. SCHMIDT: Okay. So, the Dock of the Bay is the salmon colored building. Okay. Next one is, again, I think it speaks for itself, but is it a boatyard next door?

MR. BOONE: That's correct.

MR. SCHMIDT: And the macadem or gravel area, is that your parking lot or Bill's Boats' parking lot?

MR. BOONE: That's our parking lot.

MR. SCHMIDT: Okay. 7-D, and I think these speak for themselves, but a close up, more close up view of the building?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. Now, Dock of the Bay is on the water, correct?

MR. BOONE: That's correct.

MR. SCHMIDT: And does it have a pier that extends into the water?

MR. BOONE: Yes, it does.

MR. SCHMIDT: How many slips are on there, if you know?

MR. BOONE: Fourteen.

MR. SCHMIDT: Okay and are those for rental or how are they used? How, how does --

MR. BOONE: No, those, those are used for customers who come by boat to Dock of the Bay.

MR. SCHMIDT: Okay. So, if I'm out boating in the summer and I want to get something to eat, I can pull up if there's room to one of the fourteen slips?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and the next photograph I'm showing you, can you tell us what we're looking at here?

MR. BOONE: That's a view from the end of the dock looking at the Dock of the Bay from water.

MR. SCHMIDT: Okay. From the pier, obviously in the foreground?

MR. BOONE: From the pier, yes.

MR. SCHMIDT: Okay. Now, do you have seating inside the restaurant and outside or one or the other or both?

MR. BOONE: We have both.

MR. SCHMIDT: Okay and let me show you this photograph and ask you what this is?

MR. BOONE: That's outdoor seating.

MR. SCHMIDT: Okay and generally, when is this outdoor seating available in terms of times of the year? Can I go out there now?

MR. BOONE: You can if you have a coat on.

MR. SCHMIDT: Okay.

MR. BOONE: We, we serve people generally out there from April through October.

MR. SCHMIDT: Okay and again, what are we looking at in the next photograph?

MR. BOONE: We're looking at outdoor seating looking into a patio area.

MR. SCHMIDT: Okay. Now, when you bought the property, was there a tent outside from Mr. Tanner?

MR. BOONE: The, the tent had been taken down but it was right there to be put back up, yeah, there was a tent outside.

MR. SCHMIDT: And is that in this area that we're looking at in this photograph?

MR. BOONE: This entire area was at one time under tent, that's correct.

MR. SCHMIDT: Okay. And the next photograph, which one, what are we up to, Mr. Alston?

BOARD: This is 8-G, so you'd be at 8-H.

MR. SCHMIDT: H, H, again, the outdoor seating area?

MR. BOONE: Outdoor seating, that's correct.

MR. SCHMIDT: The boats that are docket and the piers that are in the background, are those Dock of the Bay or are they neighbors?

MR. BOONE: No, those are Bill's Boats.

MR. SCHMIDT: Bill's Boats, okay, the boatyard. Okay. And I believe your plan shows that you're on the Chesapeake Bay?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and I am assuming, I, I believe this is 8-I, is the pier looking out into the bay?

MR. BOONE: That's correct. That's the Craig Hill Lighthouse in the background.

MR. SCHMIDT: Okay. 8-J, can you tell us what we're looking at in 8-J?

MR. BOONE: That's again a view from the dock, but it's looking towards what is now Rowboat Willy's and Bill's

Boatyards.

MR. SCHMIDT: Okay. Now, you've referred to Rowboat Willy's. Is, is that on the Bill's Boats' property or is that a separate property or what?

MR. BOONE: It's on Bill's Boat, Bill Boats' property, Bill's Boats.

MR. SCHMIDT: Okay. So, Bill's Boats has a boatyard?

MR. BOONE: That's correct.

MR. SCHMIDT: And they have, what is it called, Rowboat Willy's?

MR. BOONE: It's called Rowboat Willy's, it's this structure right here and it's an outdoor restaurant/bar.

MR. SCHMIDT: Okay and is it the structure that has the sort of the salmon colored roof?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. So, there is a establishment next door as part of the boatyard where you can get something to eat and drink as well, just like Dock of the Bay?

MR. BOONE: Eat, drink and you can listen to live music there if you like.

MR. SCHMIDT: Okay. They have live music at, at Rowboat Willy's?

MR. BOONE: Yes, they do.

MR. SCHMIDT: That's right next door?

MR. BOONE: Right next door.

MR. SCHMIDT: Okay. Okay. The next one, I think, is the outdoor seating of your restaurant, is it not? It's sort of self-explanatory because it has a name there?

MR. BOONE: Yes, it is.

MR. SCHMIDT: Okay. Now --

MR. BOONE: You can also, in that picture, you can see the proximity of Rowboat Willy's. We, many of our patrons will ask to be seated over here in the summertime so they can listen to the music at --

MR. SCHMIDT: At Rowboat Willy's?

MR. BOONE: Yeah.

MR. SCHMIDT: Okay, okay. Since you've, good point, since you've owned the restaurant, have you had any live music or entertainment at Dock of the Bay, since you've owned it since 2014?

MR. BOONE: I had a, I, I wasn't familiar with the zoning law, there was no manual that came with the restaurant regarding zoning laws and I had a disc jockey on New Year's Eve 2014. Other than that disc jockey in 2014, there's been no live entertainment, no karaoke or disc jockey or anything else.

MR. SCHMIDT: Okay. So, you don't, you haven't heard any karaoke, haven't had any live acts?

MR. BOONE: No.

MR. SCHMIDT: You haven't had any disc jockey, you haven't had anything like that?

MR. BOONE: No.

MR. SCHMIDT: How about recorded music, do you do that? Have you done any of that?

MR. BOONE: We have a radio that plays inside.

MR. SCHMIDT: You have a radio inside?

MR. BOONE: Right.

MR. SCHMIDT: Okay. Televisions inside?

MR. BOONE: Yes, we do.

MR. SCHMIDT: Okay. Okay. The next photograph, you mentioned there's a children's play area in association with the Dock of the Bay?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and I'm showing you a sign which reflects the pirate ship rules and it appears to be sort of a play pirate ship in the background.

MR. BOONE: That's correct.

MR. SCHMIDT: And what is that?

MR. BOONE: That's a play area for the children. While the parents are eating, their children can play on the pirate ship and we set up little games for them out there and so forth. So, it's a place for children to, to occupy themselves while their parents are eating.

MR. SCHMIDT: Okay. Now, you talk about, in addition to the outdoor photograph, or the outdoor seating, which you've described and we've had some photographs, there's an area of

indoor seating?

MR. BOONE: That's correct.

MR. SCHMIDT: Tell us a little bit about that. What's inside the facility in terms of tables, bars, whatever it might be?

MR. BOONE: There's a bar that I believe was built in the two thousands in there that remains and we seat about ninety-eight people inside.

MR. SCHMIDT: Okay. How many can you seat outside?

MR. BOONE: A little bit over a hundred outside.

MR. SCHMIDT: Okay. If it's fully occupied?

MR. BOONE: If it's fully occupied.

MR. SCHMIDT: Okay.

MR. ZIMMERMAN: Excuse me, how, how many inside, I didn't --

MR. SCHMIDT: Ninety-eight and that would be at the bar and the tables inside?

MR. BOONE: I'm sorry, table seating is ninety-eight, there's probably another twenty-five around the bar.

MR. SCHMIDT: Okay. So, say a hundred and twenty-five to a hundred and thirty at the bar?

MR. BOONE: Sure, sure.

MR. SCHMIDT: If people are standing.

MR. BOONE: Right.

MR. SCHMIDT: And I see in this photograph of the bar

that there are televisions over the bar?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. Oh, I'm sorry, Mr. Alston. Is there one room inside for seating or are there several different dining rooms?

MR. BOONE: There's just one room inside.

MR. SCHMIDT: Okay and this photograph purportedly inside, which includes a television, looks like the Orioles were playing that day, is that the seating area inside other than around the bar?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and finally, I do have a photo, we do have a photograph of the bar and that reflects just the bar in the, in the dining room seating area?

MR. BOONE: Yeah, that's a, yeah, that's one of our patrons in here, that's Jack there.

MR. SCHMIDT: Is he here today?

MR. BOONE: No, his son is.

MR. SCHMIDT: Oh, okay.

MR. BOONE: Okay.

MR. SCHMIDT: Okay. I would collectively offer all these exhibits as Exhibit 8.

MR. ZIMMERMAN: Last one is 8-O?

BOARD: Yes.

MR. SCHMIDT: Thank you for marking those, Mr.

Alston. I appreciate it. Now, tell us, I'm going to ask you, Mr. Boone, if I can, about the operation. How many days of the week are you open, every day or just limited hours?

MR. BOONE: We're open seven days a week.

MR. SCHMIDT: Okay and what are the hours?

MR. BOONE: We generally open for lunch at 11:00 a.m., in the summertime we serve breakfast, we open at 9:00 on weekends but right now we open 11:00 a.m. seven days a week.

MR. SCHMIDT: Okay. What time do you close?

MR. BOONE: We've, we have it posted on our sign midnight, but we've, basically have had lights out anywhere from 9:00 to 10:00, including Fridays and Saturdays for the last six months.

MR. SCHMIDT: Okay.

MR. BOONE: Over the winter, the lights have been out about 9:00 or 10:00.

MR. SCHMIDT: Okay. You basically close when there are no more people there?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and how about your typical clientele, young, old, family, singles, pick up place?

MR. BOONE: No, we, we, we cater to the community, which is a, a mature community. Our average patron is probably fifty years old. The, the number of patrons who generally, you'll see from forty to seventy years old.

MR. SCHMIDT: Okay. Now, I can obviously get, you indicated, lunch there and dinner there.

MR. BOONE: That's correct.

MR. SCHMIDT: And I can also consume an alcoholic beverage if my desire would be to do that, correct?

MR. BOONE: That's correct.

MR. SCHMIDT: After this hearing, I think that will be my desire but, in any event, in terms of a breakdown, let's just take last weekend was Valentine's Day weekend, so it was somewhat of a holiday on Valentine's Day was Saturday, what kind of ratio, if you know, percentage of food sales versus percentage of alcohol sale?

MR. BOONE: I do know. Valentine's weekend we ran eighty-two percent food and eighteen percent alcohol.

MR. SCHMIDT: Okay. So, four out of every five dollars that people spend there are on food?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. Is that, you said that's Valentine's Day, is that consistent with other times of the year or was that remarkably different on Valentine's Day?

MR. BOONE: No, the, the, the lowest number I've ever seen is seventy-five percent food.

MR. SCHMIDT: Okay.

MR. BOONE: So we're, we're consistently in the eighty percent food, twenty percent alcohol range.

MR. SCHMIDT: Okay. Now, you corrected me on my opening statement before, but there came a time when, I understand, when you scheduled some live entertainment.

MR. BOONE: That's correct.

MR. SCHMIDT: At the, at, at the, at Dock of the Bay. When was that?

MR. BOONE: It was, I believe, in April of 2015, I announced that we hired an acoustic guitar player, Mark Allen (phonetic), who was here but had to leave, to, to play on a Saturday night.

MR. SCHMIDT: Okay.

MR. BOONE: I put on the front sign that we were having Mark Allen and the day before his appearance a young zoning official came in and threatened to pull the liquor license right off the wall if he happened to play there on Saturday night, so we had to cancel the, cancel the performance.

MR. SCHMIDT: Okay. Have you had any live music or live entertainment of any type at the Dock of the Bay?

MR. BOONE: Well, that was my first lesson in, lesson in zoning and when he came in, and since then we've been, we've obliged by the law. We've not had any live entertainment.

MR. SCHMIDT: Okay. What, what type of, I know Mr. Zimmerman indicated that apparently Frank Sinatra is the same as Black Sabbath or something but what type of music do you,

would you like to have? Or tell us, tell the Board what you would like to do?

MR. BOONE: Keeping a look at our demographic --

MR. ZIMMERMAN: I, I object the characterization of what I said. I didn't say they're exactly alike, what I said was the decision before the Court of Special Appeals would cover any sort of late night music.

CHAIR: Understood.

MR. SCHMIDT: I, I stand corrected. What, what would you like to do? Tell the Board what you would like to do?

MR. BOONE: Well, in actuality, what I had planned for was, everybody knows I had Mark Allen planned as an acoustic guitar player to play there on Saturday night. I engaged a seventy-three-year-old Italian man who sings Frank Sinatra to play one weekend, I had to cancel him and in anticipation of a positive response on September 28th, I had engaged an Oompah band to play for Octoberfest.

MR. SCHMIDT: Okay.

MR. BOONE: Those are the three, three music, act, acts that I had to cancel.

MR. SCHMIDT: Okay. Mr. Allen, is he a solo act or does he have an entourage or a band behind him?

MR. BOONE: He, he generally plays as a solo act but he could bring a band if I wanted to pay for a band.

MR. SCHMIDT: Okay.

MR. BOONE: I only engaged him as a soloist.

MR. SCHMIDT: Okay and he plays an acoustic guitar?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and you said an Oompah band and a guy who sings Frank Sinatra?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. If you can, do you, do you propose any type of stage or anything like that where any musician would play?

MR. BOONE: I have, I have no plans for anything beyond what I've just described.

MR. SCHMIDT: Okay, all right. And the type, the type of music, to characterize it, is it, do you, do you propose to have heavy metal, rock and roll, amplification, those kinds of things?

MR. BOONE: I intend to cater to the demographic so that people who are coming into the restaurant, which are the fifty-year-old and, and, from an economic standpoint, soloists are much easier to pay than bands.

MR. SCHMIDT: Okay.

MR. BOONE: From an economic standpoint, I want complimentary music to the, and then have soloists.

MR. SCHMIDT: Okay and if the Board proposed limitations on the type of music or the volume of music, you would, you would be amenable to those and follow those

limitations?

MR. BOONE: I'd be very happy to live within sound restrictions on outside music, time restrictions of both indoor and outdoor music and I do not want to cater to the young crowd and I'd be happy to live with time restrictions, both inside and outside.

MR. SCHMIDT: Okay. Well, the Board obviously has the authority to determine that but what do you anticipate? And I know, unfortunately, I'm going to use this word anticipate because we are talking about the future and so since we can't travel to the future and see, what is it that you would like to do? What is your plan so the Board knows exactly and precisely what it is you would like to do and when I say that, Mr. Boone, if you could express it in terms of inside, outside, days of the week, how late it would go and all those issues that I'm sure people are concerned about.

MR. BOONE: Our, our customers are working people and they don't, they're not out to 2:00, 3:00 in the morning. What I would anticipate would be music on Friday and Saturday night from 6:00 till 10:00, I'd have last call for alcohol at midnight and hopefully have the place completely cleared out by 12:30.

MR. SCHMIDT: Okay.

MR. BOONE: On outside, I would expect Sunday afternoons, it's pretty traditional in the boating community,

to have Sunday afternoons and the majority of our people sit outside in the summer time so I would expect music six, probably 5:00 till 8:30 outside. I don't expect music to go outside long, we have a mosquito problem on Miller's Island. No matter what I plan to do, mosquitos are sending everybody inside once it gets dark. So, I don't, I don't expect to have music outside after dark.

MR. SCHMIDT: Okay. So, that's what you would like to do and if the Board restricted you to that hours and those places, you would be amendable to that?

MR. BOONE: I'm very amenable to that. I'm very amenable to a sound level.

MR. SCHMIDT: Okay.

MR. BOONE: I am, I'm perfectly happy with a sound level. I don't, our customers want to be able to talk while music is playing. I don't ever want to have a band in there that prohibits the conversation from going on. We, we'll be, we're very amenable to a sound level and to a time restriction.

MR. SCHMIDT: Okay. Mr. Tanner, you indicated that the Rowboat Willy's, I'm sorry, I called him Mr. Tanner.

MR. BOONE: Gee.

MR. SCHMIDT: Sorry about that. Mr. Boone, boy, my bad. I'm reading my notes. Mr. Boone, you indicated that Rowboat Willy's next door has music, is that correct?

MR. BOONE: That's correct.

MR. SCHMIDT: Are there other, who, who basically for the dining dollar in Miller's Island area, who do you, who do you compete with? What other establishments are there?

MR. BOONE: Well, because I'm a waterfront, I complete with more than just Miller's Island. I compete with the other eight restaurants all in Baltimore County area that do have music outside.

MR. SCHMIDT: Okay.

MR. BOONE: But locally we compete with a facility called the White Swan, the Islander and Rowboat Willy's.

MR. SCHMIDT: Okay.

MR. BOONE: All, all three of whom are not living with the restriction I'm living with. All three of whom, the Islander has a sign up right now for karaoke on Tuesday night and live mike on Monday night or whatever it may be. The White Swan is always packed at 10:00 at night when I'm leaving, they're filling up then. I'm not sure what they do inside.

MR. SCHMIDT: Do they have music?

MR. BOONE: I'm not sure.

MR. SCHMIDT: Okay.

MR. BOONE: I have not been inside. I have not been inside that, that facility for ten years.

MR. SCHMIDT: Okay.

MR. BOONE: But I do know that next door, Rowboat Willy's, has, has music at decent sound levels. I mean, music

that, outside usually on Fridays and Saturday nights.

MR. SCHMIDT: Okay.

MR. BOONE: My customers appreciate their music.

MR. SCHMIDT: Okay. All right. You, you, presently, I know you discussed the hours of operation for the music when I asked you to tell the Board what it is you'd like to do. What's your hours of operation right now without the music?

MR. BOONE: Generally 11:00 a.m. till about 10:00 p.m. seven --

MR. SCHMIDT: On, is that weekdays or weekends or both?

MR. BOONE: That would be weekends and weekdays except Sunday, Sunday we're usually out of there by 8:30, 9:00.

MR. SCHMIDT: Okay. You have a dance floor?

MR. BOONE: No.

MR. SCHMIDT: Do you propose a dance floor?

MR. BOONE: No.

MR. SCHMIDT: Do you propose moving any of the tables or chairs that are in the restaurant or even outside the restaurant to create a stage kind of area or build a stage?

MR. BOONE: No plans.

MR. SCHMIDT: Okay. If you know, how late did Mr. Tanner's operation go?

MR. BOONE: I was never at his operation when it was open late, I don't know.

MR. SCHMIDT: You don't know? Okay. Mr. Boone, you do have a, a business license from the State of Maryland, do you not?

MR. BOONE: Yes, I do.

MR. SCHMIDT: I believe we're up to Petitioner's exhibit number nine, Mr. Alston?

BOARD: Yes.

MR. SCHMIDT: I've pre-marked this as Petitioner's exhibit number nine and I'd ask Mr. Boone if you can identify that, please, sir?

MR. BOONE: That's a business license issued by the State of Maryland to be a restaurant.

MR. SCHMIDT: Okay and you're licensed as a restaurant according to the State of Maryland?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. I would offer that as Petitioner's exhibit number nine. You have a liquor license as well, obviously?

MR. BOONE: That's correct.

MR. SCHMIDT: That allows you to sell liquor?

MR. BOONE: That's correct.

MR. SCHMIDT: Did you acquire that from Mr. Tanner as part of the, and Fifth Street, LLC?

MR. BOONE: Yes, I did.

MR. SCHMIDT: Okay. Now, Mr. Boone, you indicated

that, let me ask you this, since you, you've operated the business, have you had any problems with, with your neighbors? Have there been any issues with the operation of Dock of, Dock of the Bay?

MR. BOONE: We've had four phone calls that I'm aware of.

MR. SCHMIDT: In the, what, year and a half you've been operating?

MR. BOONE: In the year and a half, that's correct.

MR. SCHMIDT: Related to what?

MR. BOONE: Noise.

MR. SCHMIDT: What kind of noise?

MR. BOONE: In one case it was, the Orioles were playing and somebody hit a homerun and people cheered and I got a phone call.

MR. SCHMIDT: Okay. They were Yankee fans, huh?

MR. BOONE: I guess, it was outdoors.

MR. SCHMIDT: Okay and what else, what other kinds of issues?

MR. BOONE: There was one occasion where an employee celebrated his birthday at the restaurant and drank a little bit too much and got into an argument with his wife, the argument went out onto the parking lot and we got a phone call from, we don't know which neighbor it was, but we got a phone call from a neighbor threatening to call 911 if we didn't deal

with it.

MR. SCHMIDT: Okay. What did you do?

MR. BOONE: We got them to stop and leave and, and as a result of the policy that I have, you have in your hand there, we suspended the employee for a week.

MR. SCHMIDT: Okay.

MR. BOONE: So it was a week without pay.

MR. SCHMIDT: Okay. So, you had a homerun being hit and an employee in a domestic dispute?

MR. BOONE: That's correct.

MR. SCHMIDT: What other types of problems? You said you had four phone calls over the year and a half.

MR. BOONE: The other two, the other two phone calls were just noise related from outside patrons being too loud.

MR. SCHMIDT: Talking? I mean, not music related.

MR. BOONE: Well, there's never been live entertainment, but it was outside noise.

MR. SCHMIDT: Okay.

MR. BOONE: Related to the operation of the restaurant.

MR. SCHMIDT: Okay. Do you have a policy with your patrons in terms of trying to respect your, your neighbors?

MR. BOONE: Well, keep in mind, the patron we're looking for is the forty to sixty-year-old working person, we're not looking for the twenty-two-year-old or twenty-one-

year-old. We don't want people there that will be leaving the restaurant late at night making noise.

MR. SCHMIDT: Okay.

MR. BOONE: And, and that's not the, the patron we're looking for.

MR. SCHMIDT: Okay. I'm going to show you, if I can, a photograph of, I guess this is a sign or a posting of some type?

MR. BOONE: That's a posting that, as you're leaving the restaurant, it's the last thing you see as you're leaving the restaurant.

MR. SCHMIDT: Okay. As you're leaving by car or you're walking out the door?

MR. BOONE: As you're walking out the front door, it's the last sign you see as you're walking out the front door.

MR. SCHMIDT: And if you can, what does that, can you read that to the Board and then we'll submit it as Petitioner's exhibit number ten.

MR. BOONE: Please be respectful of our neighbors and their sleeping children. Please leave peacefully. Failure to comply will result in suspended privilege, suspended privileges at this establishment.

MR. SCHMIDT: Have you ever had to enforce that where you've had --

MR. BOONE: The one week suspension of the employee.

MR. SCHMIDT: Okay. This will be Petitioner's exhibit number ten. Where, where do most of your clientele come from, Mr. Boone, if you know? Are they local folks from Miller's Island or you get a mix of people from Miller's Island and also from elsewhere or one or the other or both?

MR. BOONE: Well, seasonally, this time of year, before boating season, it's heavily the Edgemere, Dundalk, Miller's Island area, some people from Essex, but mostly Dundalk, Edgemere and Miller's Island. Once, once boating season starts, then we attract people from all over the County.

MR. SCHMIDT: Okay and did you, did you circulate a Petition among your customers and clients and neighbors and others who patronize for their support?

MR. BOONE: Yeah, I posted, I posted a letter on Facebook letting everybody know about the, the hearing and so forth and a lot of people reached out and said how can we show our support and so we put a Petition at the bar for people to sign if they wanted to show their support by signing a Petition.

MR. SCHMIDT: Okay and I'm going to show you what I'm going to mark as Petitioner's Exhibit 11, I believe, Mr. Alston. Am I correct?

BOARD: Yes.

MR. SCHMIDT: And I'll mark this 11-A and 11-B and I

think these are self-explanatory. I realize it's hearsay and I understand that the Board typically gives these, they will admit them and give them the weight that you deem appropriate. But these are Petitions, one is for residents of Miller's Island who support your request and the other is for non-residents, is that correct?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and these were kept at the restaurant and then people would come in and --

MR. BOONE: As people came in and requested to sign and we, we had them sign, even the one that says non-residents, you'll see that there's a zip code there and you'll see the majority of the people, even though they're not residents of Miller's Island, live somewhere close in the area, 21219, 21222.

MR. SCHMIDT: Okay. How long were you collecting these signatures? There's quite a few, how long it take you to get that, that many signatures?

MR. BOONE: We collected them, I believe we started in December.

MR. SCHMIDT: Okay.

MR. BOONE: So that's from December till now.

MR. SCHMIDT: Okay. Okay. I don't believe I have any further questions of Mr. Boone. Mr. Boone, you're subject to questioning by Mr. Borgerding or Mr. Zimmerman.

MR. BOONE: Thank you.

CHAIR: Who's going to be first? Go ahead, Mr. Borgerding.

MR. BORGERDING: I'll start first.

MR. BOONE: I'm getting double teamed.

MR. BORGERDING: Mr. Boone, would you describe yourself as an experienced business man?

MR. BOONE: Yes, I would.

MR. BORGERDING: Okay. You, if I heard correctly, you had six hundred employees at one property?

MR. BOONE: That's correct.

MR. BORGERDING: Okay. So, you were a patron of the Dock of the Bay when Mr. Tanner owned it?

MR. BOONE: I would, the majority time I came to Dock of the Bay was to eat crabs but, yes, I had visited the Dock of the Bay at least twelve occasions.

MR. BORGERDING: And then you became interested in purchasing the property?

MR. BOONE: I became interested in purchasing the property after it was closed.

MR. BORGERDING: Okay. Didn't, being an experienced businessman, didn't you think it made sense to check out the litigation history of the Dock of the Bay ahead of time?

MR. BOONE: I was getting advice at the time from both Mr. Tanner and from my operating partners at the time

(inaudible) both of whom expressed an opinion that, that this was a hurdle that they could easily navigate.

MR. BORGERDING: The, the music hurdle?

MR. BOONE: That's correct.

MR. BORGERDING: Okay. I'm going to show you some correspondence that I sent to your partner (inaudible) and your partners were Mike Kondylas and Donny Kondylas, that's the Kondylas in Boone Kondylas?

MR. BOONE: That's correct.

MR. BORGERDING: Okay. So, this correspondence was sent in September of 2014, which is about the time you --

MR. SCHMIDT: Mr. Borgerding, before you offer that, can I see it, to see if I might have any objection?

MR. BORGERDING: Oh, I'm sorry. I'm sorry.

MR. SCHMIDT: Thank you. Okay, thank you. You have a copy for me or no?

MR. BORGERDING: No, unfortunately, I --

MR. SCHMIDT: You want to leave me in the dark.

MR. BORGERDING: My bad.

MR. ZIMMERMAN: What are the exhibit numbers?

BOARD: This will be Protestant one for his case in chief.

MR. ZIMMERMAN: Which, which --

BOARD: I don't know which one is which.

MR. ZIMMERMAN: Yeah, can we find out which one is

which?

BOARD: He has to tell me. Which is, this is one?

MR. BORGERDING: Right.

BOARD: This is two?

MR. BORGERDING: Yeah.

BOARD: Okay.

MR. SCHMIDT: And, and I'll just --

MR. ZIMMERMAN: Can we (inaudible).

BOARD: I'm going to let him identify his document and then give it to me, that's --

MR. ZIMMERMAN: Right.

BOARD: -- typically (inaudible).

MR. SCHMIDT: Okay, sure.

MR. BORGERDING: Okay. So, this, indeed, is the correspondence dated September 24th of '14 to Mike Kondylas and Donny Kondylas from myself, correct?

MR. BOONE: Yes, it is.

MR. ZIMMERMAN: That's number one?

MR. BORGERDING: Number one. Okay and attached to that is a letter from the County from Adam Rosenblatt, who used to be with the County, correct?

MR. BOONE: That's on here, yes.

MR. BORGERDING: And the date of that?

MR. BOONE: September 12th.

MR. BORGERDING: Okay. That would be number two, I'd

move both of those into evidence.

CHAIR: Any objection?

MR. SCHMIDT: I'm just going to tech, technically object. I mean, I know we're in an administrative proceeding but I find, I just find it interesting and Mr. Rosenblatt is not here, that the letter from Mr. Rosenblatt is not on any kind of County stationary. And it's not signed either, so I, just from an authenticity standpoint, I'm just not quite sure--

MR. BORGERDING: I will proffer to the Board, I had that discussion with my secretary this morning and she said, well, maybe he sent it by e-mail and that's why it doesn't have the letterhead.

CHAIR: Well, wouldn't it have the e-mail information then (inaudible)?

MR. SCHMIDT: Or the signature or something? I, I don't know.

MR. ZIMMERMAN: You know, it doesn't really matter because the letter (inaudible) 24th he attached to the letter from Mr. Rosenblatt and the purpose was to give notice so it really doesn't matter.

CHAIR: Well, I'm not sure it doesn't matter. I'm not sure it doesn't matter. It, I mean, I mean, typically we get these and we say they're from County files, it'll have County letterhead with the seal, you've been doing this for so long, you've been in front of us many times and so could you

get another copy of this --

MR. BORGERDING: I, certainly, I'm sure the County does have a copy.

CHAIR: Right.

MR. BORGERDING: I could get that and --

CHAIR: Why don't we mark this as Protestant's one, we'll, we'll say Exhibit 2 is I, for i.d. only, for right now and then you could get a copy of that and maybe one that's signed.

MR. BORGERDING: Okay.

CHAIR: That would be helpful. Sure --

MR. SCHMIDT: Yeah, and I'm not doubting Mr. Borgerding's integrity.

CHAIR: -- and I understand --

MR. SCHMIDT: But it's just unusual.

CHAIR: That's correct.

MR. SCHMIDT: Because it's not a, it's not a, it's not on County letterhead, it's not signed, it's just, it's just --

MR. BORGERDING: Well, Your Honors, I assume will take a lunch break and I will go ahead and do that.

CHAIR: Sure, or, or you can, we might need another day, I'm not sure how this is going to work but, you know, at some point, if you could submit that and the bottom of it does have a, you know, a file identification and it appears to be,

has, (inaudible) letter to Frank Borgerding dot, dot doc x. I don't know. It appears to look like it has been typed.

BOARD: It's a word document.

CHAIR: Word document as it, so if you could do that, we'll, how about that? We'll just, for now.

MR. SCHMIDT: That's fine.

CHAIR: Okay?

MR. ZIMMERMAN: But either, the main thing is that Borgerding's letter to Kondylas gives notice.

CHAIR: I understand. Okay, that's your argument. Okay. But just for identifying the document and putting it into evidence. All right.

BOARD: But there's an objection to this document?

CHAIR: Yes.

MR. SCHMIDT: Yes, there is.

BOARD: There's an objection raised to this document.

CHAIR: I.d. only.

MR. SCHMIDT: Yes.

BOARD: All right, i.d. only, okay.

CHAIR: Okay.

MR. ZIMMERMAN: To, just to the second one, not to the first.

CHAIR: Correct.

BOARD: That's correct.

CHAIR: The first one was --

MR. BORGERDING: So Mr. Kondylas, or Mr. Kon, Mr., Mr. Boone, did you see this correspondence before you purchased the property?

MR. BOONE: No, I did not.

MR. BORGERDING: Did you have any knowledge of the prior, you, I, I guess you did say that you did, you thought the hurdle could be overcome so you did have knowledge that there was a Court of Special Appeals prohibiting live music before you purchased the property?

MR. BOONE: I was not familiar at all with the, with, with the, any of the restrictions. I was familiar, the operators had at the time, Donna and Mike Kondylas told me they got a letter from the attorney and that's the extent of my knowledge.

MR. BORGERDING: Okay. When you say the hurdle could be overcome, what was the hurdle, in your opinion?

MR. BOONE: At the time they were operating the restaurant, they, they, they thought or they advised me that once liquor license transferred that the hurdle would go away and that's how they advised me. They, they then scheduled music to commence on November 23rd and they hired Mark Allen. Unfortunately, Mark had to leave, he had to go to a viewing, they hired Mark Allen to play New Year's Eve 2014. So, they were fully, they were completely moving forward with music at that facility when they were managing it in, in October,

November 2014.

MR. BORGERDING: Do you happen to know whether Mr. Tanner hired Mark Allen?

MR. BOONE: I don't know if he ever played there or not.

MR. BORGERDING: Okay.

CHAIR: But you said the hurdle to overcome and then you said if the license, the liquor license had transferred the hurdle would go away but he, the question was, what was the hurdle?

MR. BOONE: They, they made me aware that it was a music restriction, that it was, they led me to believe that it was levied against the liquor license and that once, once the Tanner liquor license transferred, that the hurdle would go away, that the, that the restriction would be removed because it was on the liquor license, not on the building. They clearly didn't understand it.

MR. ZIMMERMAN: Excuse me, are they the Kondylas, I'm having trouble following this chain? They, the, who is --

MR. BOONE: The, the Kondylas and also Mr. Tanner.

MR. BORGERDING: Okay. But being an experienced businessman, didn't this raise some, raise your suspicion? Didn't you think you should look into this yourself?

MR. BOONE: No.

MR. BORGERDING: And why not?

MR. BOONE: They had convinced me that it was a, something that could be overcome rather easily.

MR. BORGERDING: Okay. Do you still feel that way? Obviously not if you're here.

MR. BOONE: Remember, I'm the deaf, dumb and blind guy.

MR. BORGERDING: Well, let me ask you that. Did you have any knowledge of, of the litigation that went on with Mr. Tanner and the community?

MR. BOONE: No, I didn't.

MR. SCHMIDT: Object, I'm just, what's the, what's the relevance? I mean, I don't dispute that I put those cases in.

MR. BORGERDING: He just said he was the deaf, dumb and (inaudible), dumb and blind.

MR. BOONE: Well, that's what you called me at the last hearing.

CHAIR: Overruled.

MR. BORGERDING: No, I said if you had no knowledge of what happened in the history here, you must be deaf, dumb and blind to buy a place and not know that, that's why I said--

MR. BOONE: So your, second time you're calling me deaf, dumb and blind. Thank you very much.

CHAIR: Well, wait a minute. There was a question about knowledge of litigation. I think he responded to that.

I think I what I heard him say is that --

MR. BORGERDING: Did you have any knowledge of litigation between --

CHAIR: What I heard him say --

MR. BORGERDING: -- Mr. Tanner and the neighborhood before you bought this property?

MR. BOONE: I was told there was a music restriction. I was told that music restriction would be removed when the liquor license transferred. I was working under the advice of people who were giving me bad advice. They've also given you bad advice. They've got some affidavits that they've signed for you which aren't truthful.

MR. BORGERDING: Okay. So, so, what you're saying is, you didn't think that you should check into that further?

MR. BOONE: I did not check into it further.

MR. BORGERDING: Do you know what the zoning of Rowboat Willy's is?

MR. BOONE: BM.

MR. BORGERDING: It's different than yours?

MR. BOONE: That's correct.

CHAIR: It's BL?

MR. BOONE: Rowboat Willy's is BM.

CHAIR: BM, okay.

MR. BOONE: Yeah.

CHAIR: You just might want to keep your voice up

because this is all being (inaudible).

MR. BOONE: I'm sorry.

CHAIR: And, and if it gets transcribed later, they might not be able to hear you, yeah.

MR. BORGERDING: Are you aware of any State restrictions of noise levels at the property line?

MR. BOONE: No, I'm not.

MR. SCHMIDT: You don't have a copy of that for me either?

MR. BORGERDING: No, I do not.

BOARD: I have an extra (inaudible).

MR. BORGERDING: So I'm showing you a document which indicates that there is, in fact --

MR. SCHMIDT: Thank you.

MR. BORGERDING: -- restrictions at the property line for noise emanating from your property of either sixty-five decibels, excuse me, during the day or fifty-five at night. So, I'd give you a chance to look at that.

MR. BOONE: Okay.

MR. BORGERDING: Do you have any idea what kind of noise levels would meet those thresholds?

MR. BOONE: No, I'm not.

MR. BORGERDING: Okay. Would you be surprised to know --

MR. SCHMIDT: Objection. The witness said he doesn't

know, I mean, how can he ask him again?

MR. BORGERDING: Next question.

CHAIR: All right, go ahead. It's all right, it's cross.

MR. SCHMIDT: Okay.

MR. BORGERDING: This is a decibel level counter. Would you be surprised that during your testimony with Mr. Schmidt, your noise levels ranged from sixty to sixty-six decibels?

MR. SCHMIDT: Objection.

CHAIR: Yeah, that's be hard to, I'll sustain that only because that appears to be something that perhaps an expert might testify to I suppose but we can't have counsel saying that there was, I mean, a test performed while he's on the witness stand. I would have to sustain the objection. You did ask him the question though before and he said what kind of noise level meet the threshold and he said, I think he said he didn't know.

MR. BORGERDING: Okay. Would you be surprised to learn that normal conversation would emanate to those levels of noise or (inaudible)?

MR. SCHMIDT: Objection. I think that's the same thing, Chairwoman Murphy. I mean, these are, he's not an expert witness, he doesn't know and, I mean, first of all, I don't even know what, what this is and whether this is some

State regulation or not, hasn't been offered at this, to this point but --

CHAIR: The Board hasn't seen the document so I don't, I'm not --

BOARD: Yeah, I mean, do you plan on introducing that as evidence or what?

MR. BORGERDING: Yes, yes, if I could.

CHAIR: I haven't seen the document, I don't know what it is. Is there a copy somewhere or, maybe the witness has it?

MR. BORGERDING: With that I would move it into evidence.

CHAIR: Okay. I have, I'm not sure what it is.

MR. ZIMMERMAN: Can we find out what it is?

MR. SCHMIDT: I have no idea what it is.

MR. ZIMMERMAN: Okay. We just, we just need to have it described.

CHAIR: It's not a Code section, it's not a Maryland Code section, it appears to be something from a website.

MR. BORGERDING: It's from COMAR section, Title 26, Subtitle 2, Chapter 3.003.

CHAIR: Where does it say that?

BOARD: Do you have that? Do you have that?

MR. BORGERDING: No, I do not have that.

MR. ZIMMERMAN: It's available online. Maybe Mr.

Borgerding could get it for you.

BOARD: I'll tell you what, I'll, I'll mark this as three and I'll hold it --

CHAIR: For i.d. and perhaps --

BOARD: -- for i.d. and then you'll get us a document that'll, that says what this is as identified as.

CHAIR: And just for the record, we're talking about a document, it's a one page, it looks like it's from the Maryland Department of the Environment, it appears be something printed perhaps from a website for the Department of the Environment talking about House Bill 190 and if it does reference a COMAR section, easy just to print that COMAR section, submit that or we don't even need it as evidence. I mean, if it's argument, we (inaudible), I mean, but this has been handed to the witness and I'm not sure the witness authenticated the document, the piece of paper is in front of him so we could i.d., we could mark this for i.d. perhaps and then if there's a replacement for it, until then, I don't think the witness is, is, can identify this document.

MR. SCHMIDT: Now, just let the record reflect that I would object to it for all those reasons plus it's dated May 2012, so it's coming up on four years old and it looks, so, I don't even know if it's current and it looks to me like it's a, almost an article that's written by Matthew Rowe, whoever he is.

BOARD: Well, it looks like it was printed from a website on May 19, 2014, that's what's in the corner.

MR. SCHMIDT: Yes, down at the bottom.

BOARD: Right.

MR. SCHMIDT: Yes, sir.

BOARD: So this is, this is, it was printed on May 19, 2014.

MR. SCHMIDT: So it's only, the date of its printing is two years old, or almost, coming up, twenty months.

BOARD: So we'll just hold this for i.d. purposes and if you'd like to update this, which you said there was a COMAR reg for this, right? So, if you could just (inaudible) the COMAR reg, we'd be more than happy to --

MR. BORGERDING: Okay, no problem.

BOARD: I'm going to hold it though.

MR. BORGERDING: Right. I'm going to show another document after counsel (inaudible). So, this document purports to be a noise decibel comparison level. I'd just ask you to look at that for a moment.

MR. BOONE: Okay.

MR. BORGERDING: Okay. So, can you tell me what the decibel level of a violin playing is?

MR. SCHMIDT: Objection. I mean, this witness isn't an expert. He's not a sound expert, he doesn't know what this doc, unless, I mean, there's no foundation that he knows what

this is, he's asking Mr. Boone to read some piece of paper that I don't even know where it's from or what it is.

CHAIR: Right, that's the same problem we have with the other, with the document which is marked as Protestant's three, is that it, I guess what you have in your hand there is one page, it appears to be again, I mean, I'm looking at it from a distance, something, again something MD website, is that, is that right?

MR. BORGERDING: Um hm.

CHAIR: So, I mean, but the witness is just being handed a piece of paper, he can't authenticate the document, it was printed, I suppose, by you and he's not an expert in any of those things so he would just be reading what's on the page. So, it doesn't help the Board in any sense, I mean, if there's an expert that testifies about it or perhaps it's something that could be used in argument.

MR. BORGERDING: Okay, all right.

CHAIR: I'm not sure.

MR. BORGERDING: I understand.

CHAIR: I don't want to --

BOARD: All right and it may be helpful to give it to counsel so that he can offer any objection he has before you get the witness to read it because that would be --

CHAIR: Did you see the document yet? Do, do you have the other document, Protestant's four?

MR. SCHMIDT: No, no, he showed it to me as he was walking by.

MR. ZIMMERMAN: I haven't seen it. I'm wondering if Mr. Borgerding could ask the question without the document.

CHAIR: Well, let's let Mr. Borgerding cross examine the witness and then maybe Mr. Zimmerman will cross examine the witness.

MR. BORGERDING: Now, you had said that you put out on facebook if anyone was interested in supporting you to chime in. Did you receive any facebook posts that were negative to the neighbors?

MR. BOONE: We received many, many positive comments. I don't recall seeing any negative comments regarding our appeal to, and, and there were some people that, that spouted off that, that was inappropriate.

MR. BORGERDING: Okay. No further questions.

CHAIR: All right. Mr. Zimmerman?

MR. ZIMMERMAN: Mr. Boone, just to be clear, where, again, do you live?

MR. BOONE: 250 South President Street, downtown Baltimore.

MR. ZIMMERMAN: That's in downtown Baltimore?

MR. BOONE: That's correct.

MR. ZIMMERMAN: Have you ever lived on Miller's Island?

MR. BOONE: No, I have not. I did, I grew up in West Inverness, a community not far.

MR. ZIMMERMAN: Excuse me?

MR. BOONE: I grew up in West Inverness, a community just a few miles away.

MR. ZIMMERMAN: A few miles away, that's in Dundalk, isn't it?

MR. BOONE: That's correct.

MR. ZIMMERMAN: That's not on a peninsula, that's, that's not right, it's on what is --

MR. BOONE: It's considered part of the peninsula.

MR. ZIMMERMAN: -- on a creek, on a creek? West Inverness?

MR. BOONE: West Inverness is, well, Bear Creek, but it's part of the peninsula, what I consider the peninsula.

MR. ZIMMERMAN: Not the Miller's Island peninsula?

MR. BOONE: Miller's Island is an island, it's not a, the, the, I consider the Dundalk, Sparrows Point, Patapsco High School area, one landmass.

MR. ZIMMERMAN: Yeah, how many miles away is West Inverness, two, three, four, do you know?

MR. BOONE: We had one employee walking to work from West Inverness so it's far enough, it's, it's close enough to walk to work.

MR. ZIMMERMAN: You can walk two or three miles to

work, can't you?

MR. BOONE: Yeah.

MR. ZIMMERMAN: Okay and when did you grow up in West Inverness?

MR. BOONE: I was born in 1953, I lived there until I went away to college in 1971.

MR. ZIMMERMAN: Okay. Where'd you go to college?

MR. BOONE: Sheppard University.

MR. ZIMMERMAN: In West Virginia?

MR. BOONE: That's correct.

MR. ZIMMERMAN: What did you major in?

MR. BOONE: Business.

MR. ZIMMERMAN: Okay.

MR. BOONE: Business management.

MR. ZIMMERMAN: Okay. You're not an expert in music, right?

MR. BOONE: Never purported to be.

MR. ZIMMERMAN: And after college, did you get any graduate degrees?

MR. BOONE: Excuse me?

MR. ZIMMERMAN: Did you get any graduate degrees?

MR. BOONE: No, I haven't.

MR. ZIMMERMAN: Okay. You went into business after college?

MR. BOONE: That's correct.

MR. ZIMMERMAN: What sort of businesses have you been in?

MR. BOONE: I started a firm called Direct Marketing Associates in 1998, which is the firm which I grew to, to grow into the building, the three hundred and sixteen thousand square foot building with six hundred employees located in Baltimore County on Annapolis Road. That business I sold to a company called Harthanks (phonetic) in 1999.

MR. ZIMMERMAN: You had that for one year, in other words?

MR. BOONE: Twenty-three years.

MR. ZIMMERMAN: Let me get the year straight. You started in 1998?

MR. BOONE: No. Started the business in 1978.

MR. ZIMMERMAN: Nineteen seventy-eight and you owned it till 1999?

MR. BOONE: Sold it in 1999, twenty-one years.

MR. ZIMMERMAN: Did you have lawyers helping you with that business?

MR. BOONE: When I needed lawyers, I hired lawyers, that's correct.

MR. ZIMMERMAN: Do you currently have a law firm other than Mr. Schmidt for the zoning case?

MR. SCHMIDT: I'm trying to think of what possibly this could be relevant to but, so I'll object.

CHAIR: Sustained.

MR. ZIMMERMAN: Okay. After you sold, what is it, the direct marketing firm, then what other business did you get into, if any?

MR. BOONE: In 2003, I founded a company called American Direct. We print roll to roll continuous forms for the direct mail industry. I have about forty-five employees located on Duncan's Wood Road, it's an active liable, viable business today.

MR. ZIMMERMAN: Where is Duncan Woods Road?

MR. BOONE: Right off, between Erdman Avenue and, right off Federal Street, near Curley High School.

MR. ZIMMERMAN: Okay and do you get legal advice from time to time relating to that business?

MR. BOONE: Certainly.

MR. ZIMMERMAN: What law firm?

MR. BOONE: Schwartz & Greenbaum.

MR. ZIMMERMAN: And how many properties have you owned, how many properties have you bought and sold?

MR. BOONE: Commercial or residential?

MR. ZIMMERMAN: Commercial, residential, anything.

MR. BOONE: Do you have some time?

MR. ZIMMERMAN: Yes.

MR. BOONE: Is it relevant?

CHAIR: Well, he --

MR. SCHMIDT: Well, I'll object for the record. I mean, I'm not, I'm not, just trying to figure out what the relevance of any of this would be.

MR. ZIMMERMAN: The relevance is that this is an experienced person and to suggest that he would not either know or be able to know or should have known what the restrictions were on this property is, is not very --

MR. SCHMIDT: But --

MR. ZIMMERMAN: -- appropriate, let's put it that way. So, I want to get a sense of how many properties he's bought and sold.

CHAIR: But I --

MR. SCHMIDT: But, Ms. Murphy, I'm not alleging that the restriction isn't valid because he didn't know about. I mean, it's, it was entered, I entered the restrictions, I mean, I, we haven't, I'm not making that argument.

CHAIR: That, that's right, and I agree, I mean, that's the --

BOARD: Yeah, Mr. Zimmerman, are you trying to show that he knew or should have known what the zoning restrictions are?

MR. ZIMMERMAN: I think that's an aspect of the case.

BOARD: And if, if he had known, then what?

MR. ZIMMERMAN: I, my, I think a reasonable person wouldn't have thought to purchase the property --

BOARD: Wouldn't have purchased the property?

MR. ZIMMERMAN: -- thinking that he could have late night music, that's right.

MR. SCHMIDT: And I guess my question would be, so what? What's that got to do with whether this Board should allow --

BOARD: Is there an objection on the floor, is there an objection on the floor?

MR. SCHMIDT: Yes, there is.

CHAIR: Yes.

BOARD: What, what is it?

MR. SCHMIDT: Well, my objection is, I just don't see any relevance, Mr. Alston. I mean, why, I'm not asserting, I mean, I'm not asserting that because he didn't know or should have known or whatever this argument is, that, that the Court of Special Appeals Order is invalid.

BOARD: I agree, sustained.

CHAIR: Right, right.

MR. ZIMMERMAN: I think, just for the record, I think it's, it's part of res judicata and it's an indication that he disregarded the previous situation and when confronted with the fact that he had a use that conflicts with the prior situation now he's just trying to say something to claim a change, to get around the law.

BOARD: Well, you can save that for your closing or

your brief, Mr. Zimmerman.

MR. ZIMMERMAN: All right.

BOARD: Next question.

MR. ZIMMERMAN: Yeah. Who is Mr., Mr. and Mrs. Kondylas? Who are they?

MR. BOONE: They're, they're Miller's Island residents who have operated bars on Miller's Island for years and were original partners in this, in this venture.

MR. ZIMMERMAN: Were they partners with Mr. Tanner also or did they manage his place?

MR. BOONE: I'm not aware of any relationship they had with Mr. Tanner.

MR. ZIMMERMAN: Well, how did you get to know them?

MR. BOONE: They became interested in the property, they didn't have the financial wherewithal to purchase the property and sought me out as an investor.

MR. ZIMMERMAN: And how did they know you or you know them?

MR. BOONE: I've been in, they had, they had a property called Sail Inn that I had been to on a couple occasions, friends of mine, Dave Motta knew them, Russ McClellan knew them, so I was one, in their company on a number of occasions prior to the, us getting together and, and forming a partnership.

MR. ZIMMERMAN: Okay. Are they still your partners?

MR. BOONE: No, they're not.

MR. ZIMMERMAN: Is that due in part to the, that you believe they gave you bad advice, not sufficient advice, about the legal issues concerning the property?

MR. BOONE: No, it was primary due to operational differences of opinion.

MR. ZIMMERMAN: Okay. What is the fire department maximum occupancy status?

MR. BOONE: One forty.

MR. ZIMMERMAN: And were you aware of that when you bought the property?

MR. SCHMIDT: Objection. Same objection. What's the difference if he knew what the fire document occupancy restriction is? What's that got to do with this case?

CHAIR: I'm not sure that's the restriction in any of the cases that either we, but --

MR. ZIMMERMAN: And that's indoor, presumably?

MR. BOONE: Yes.

MR. ZIMMERMAN: You indicated you could get about a hundred outdoor?

MR. BOONE: There's a hundred seats outside.

MR. ZIMMERMAN: Hundred seats outside. People can stand outside too, can't they?

MR. BOONE: They can stand on their heads.

MR. ZIMMERMAN: And your proposal for music would

include outdoor music at certain times, wouldn't it?

MR. BOONE: That's correct.

MR. ZIMMERMAN: And how many employees do you have at the, at the Dock of the Bay?

MR. BOONE: In the, we're a seasonal business and in the summertime, we had sixty employees, eighteen of whom lived on Miller's Island.

MR. ZIMMERMAN: Sixteen or eighteen, I'm sorry?

MR. BOONE: Eighteen, eighteen Miller's Island residences, residents worked at Dock of the Bay this summer.

MR. ZIMMERMAN: All right.

MR. BOONE: We're currently in the middle of the winter, we don't have as many patrons, they're, the current employee level is probably twenty total and of that maybe seven of them live on Miller's Island.

MR. ZIMMERMAN: And how many during the summer total?

MR. BOONE: It was roughly sixty.

MR. ZIMMERMAN: Okay and some of them are on different shifts?

MR. BOONE: We're a bar restaurant, we open at 11:00, we close at, we have two shifts every day, we work seven days a week. No one works all seven days.

MR. ZIMMERMAN: I get it. Okay. And your current website indicates you're open till 1:00 a.m. on weekends, isn't that correct?

MR. BOONE: We've not had our doors open past 10:00 in six months. I'm not sure what the website says. I haven't been on it for a while. If you'd like for me to change that, I'll have it changed this afternoon.

MR. ZIMMERMAN: The fact is, the website is (inaudible).

MR. BOONE: I haven't seen the website, I haven't looked at our website in a while.

MR. ZIMMERMAN: It doesn't (inaudible).

MR. BOONE: Show me a copy, show me a copy, if you like.

MR. ZIMMERMAN: This is part of the package of the Motion exhibit, it's the last page of the Motion exhibit. First page is your website, Monday to Thursday, 11:00 a.m. to 11:00 p.m., Friday, Saturday 11:00 a.m. till 1:00 a.m., Sunday 9:00 a.m. breakfast buffet, close at 8:00 p.m.

MR. BOONE: Okay.

MR. ZIMMERMAN: Did you have anything to do with arranging that website?

MR. BOONE: Yes, I did.

MR. ZIMMERMAN: And did you review the website before it was actually put online?

MR. BOONE: I'm sure I approved that.

MR. ZIMMERMAN: Okay. Let's make this as a People's Counsel Exhibit, (inaudible) one.

MR. SCHMIDT: Mr. Zimmerman, do you have a copy of that for me or is --

MR. ZIMMERMAN: You have a copy in, it the package, Motion package, it's the last page.

MR. SCHMIDT: Is that this, this?

MR. ZIMMERMAN: Okay, yes, yes, it is.

MR. SCHMIDT: Okay, thank you.

MR. ZIMMERMAN: And how often are you personally at the Dock of the Bay restaurant or institution or whatever we call it?

MR. SCHMIDT: You're right, it's Dock of the Bay restaurant.

MR. BOONE: I probably average a hundred hours a week there.

MR. ZIMMERMAN: Okay. So, your other businesses run by themselves?

MR. BOONE: I've got three other businesses, I can't be in all three of them. I operate them from my office at Dock of the Bay.

MR. ZIMMERMAN: Okay. Do you have a sound engineer on staff?

MR. BOONE: No.

MR. ZIMMERMAN: So, if somebody plays music there, there's no way of knowing how loud it's going to be.

MR. BOONE: I've got the same device he has. I'll

say they were both purchased from Radio Shack.

MR. ZIMMERMAN: And you're going to be there full-time, measuring the sound levels of every musician that you hire?

MR. BOONE: No.

MR. SCHMIDT: Unless the Board requires that, Mr. Zimmerman. Obviously, there's no music being played there now.

MR. ZIMMERMAN: No music being played there now because you were told by County authorities that it was inappropriate, correct?

MR. BOONE: I was told by County authorities they'd rip my liquor license off the wall.

MR. ZIMMERMAN: If not for that, you would have music there?

MR. BOONE: I would.

MR. ZIMMERMAN: And it would be both outside and inside at various times?

MR. BOONE: That's correct.

MR. ZIMMERMAN: And do you have anyone on staff who would be hiring musicians if you were permitted?

MR. BOONE: I haven't hired a musician. I do not have anyone on staff to hire musicians.

MR. ZIMMERMAN: The ones you were going to hire, that you did that personally?

MR. BOONE: That's correct.

MR. ZIMMERMAN: Now, if anyone under forty comes into your institution, do you tell them they can't, they can't, they're not permitted?

MR. SCHMIDT: Objection. I mean, come on.

MR. BOONE: First of all, it's a restaurant, not an institution --

CHAIR: Wait a minute, wait a minute. There is an, there was an objection.

MR. SCHMIDT: It's, it's just argumentative. That's all.

MR. ZIMMERMAN: No, it isn't. You've indicated you want your people forty, forty years old to sixty years old, correct?

CHAIR: We'll, we'll overrule it. You have an answer to the question?

MR. BOONE: Our demographic is forty to sixty.

MR. ZIMMERMAN: So, if somebody thirty-five comes in, do you check their driver's license to make sure they're --

CHAIR: Are you restricting people by age?

MR. BOONE: We're not restricting people by age.

MR. ZIMMERMAN: And if you have music there, there's a good chance you will get younger people, won't you?

MR. SCHMIDT: Objection.

MR. BOONE: That's your speculation, not mine.

MR. ZIMMERMAN: You don't know the answer?

MR. BOONE: That's your speculation, not mine.

MR. ZIMMERMAN: Can you guarantee that your demographic will not change if you have music?

MR. BOONE: There are no guarantees.

MR. ZIMMERMAN: And if the Board indicated that your establishment has to close at 10:00 p.m. every night, is that a limit you could live with?

MR. BOONE: I don't believe the Board would require me to close. The Board may require me to, to stop playing music at 10:00 at night and I would certainly have not done anything to, in violation of any of those zoning restrictions that I've been aware of.

MR. ZIMMERMAN: Why do you think the Board couldn't, if it so, if it so chose, assuming the law allowed it to, putting aside res judicata for a moment, what makes you think that the Board couldn't impose a, a restriction on hours to 10:00 p.m.?

MR. SCHMIDT: Objection. It's got nothing --

MR. BOONE: You're an attorney, not me.

MR. SCHMIDT: Mr., Mr. Boone, hold on.

CHAIR: Let him --

MR. SCHMIDT: Objection. It's argumentative, it's irrelevant, it's not whether he has a right to operate. This case is about whether he can have music or not and it's not, he's not a lawyer. Whether the Board would have the ability to

impose such a restriction, whether that would be, pass constitutional muster, it's just nothing designed other than to antagonize Mr. Boone and argue with him, that's the whole purpose of the question.

CHAIR: Now, let me, let me just rephrase. It was the question, should the question have been or was this your question, if we had a restriction that you'd stop music at 10:00 --

MR. SCHMIDT: No, close the restaurant at 10:00.

CHAIR: I, I heard him say close but did you --

MR. ZIMMERMAN: Close the establishment, whatever it is.

CHAIR: Oh, it was close the establishment.

MR. SCHMIDT: Yes.

CHAIR: Okay. Well, then that's not, that's not, I mean, close the establishment? We're talking about the music, that's the issue. The music, whether or not he can play music.

MR. ZIMMERMAN: Well, one way you make sure you don't get loud music is to close the place. Anyway, I'm asking him, would it, would it be acceptable to him to have a condition that he would have to close the establishment at 10:00 p.m.

MR. SCHMIDT: Objection.

CHAIR: Okay.

MR. SCHMIDT: Objection, because it's not relevant, I don't believe you have the authority to do it, it's a permitted

use in the BL zone, I mean, there's been no violation. He's just trying to argue with the witness.

CHAIR: Well, we're, yeah, we're not restricting the restaurant. We can't restrict the, I mean, we're not restricting the restaurant to operate. The restaurant is operating. So, we're not here in, in, in a Code violation case of the restaurant, you know, and so we're just talking about whether or not the issue is lifting restrictions on, on music. So, I'm going to sustain that objection because I don't think, I don't think it's relevant, specifically, if you're asking a question about whether he would agree to a restriction on --

MR. ZIMMERMAN: My, my point is --

CHAIR: Wait a minute. If you're going to ask a question about whether he's restricting it, if he's agreeing to a condition on time periods involving playing of music, that's relevant because he did testify about it on direct. Okay, go ahead.

MR. ZIMMERMAN: I respect the Board's decision.

CHAIR: I understand.

MR. ZIMMERMAN: My point was, that was an effective way to make sure that you're not going to get the loud, late music.

CHAIR: Okay.

MR. ZIMMERMAN: That was my point.

CHAIR: Okay, understood.

MR. ZIMMERMAN: Okay. So, so you're saying you would agree to it, part of your proposal is it's okay with you, assuming it were legal, putting aside the legal issues for a moment, to have all music stop at 10:00 p.m. on weekends, every night?

MR. BOONE: That's not what I proposed.

MR. ZIMMERMAN: Okay. So, you're not proposing the music ends at 10:00?

MR. BOONE: What I said is that music inside would stop at 11:00 p.m. on Fridays and Saturdays, stop at 7:00 p.m. on Sundays, music outside would stop at dusk.

MR. ZIMMERMAN: Every day during, when it, weather permitting?

MR. BOONE: Well, I'm not going to have music every day but, yes, it would be --

MR. ZIMMERMAN: But if some musician wanted to come in on a Thursday and wasn't very expensive, you might, you wouldn't necessarily say no.

MR. BOONE: It would be my right to have a musician on a Thursday if someone wanted to come in on Thursday. Many of my competitors have music Wednesday, Thursday and Friday.

MR. ZIMMERMAN: So, you'd like to have that, you'd like to have music if you feel it appropriate Monday, Wednesday (inaudible)?

MR. BOONE: That's not at all what I said. I told

you what my competitors are doing. It's nothing that I said.

MR. ZIMMERMAN: Well, you'd like to have that, right?

MR. BOONE: I do not --

MR. ZIMMERMAN: So, if the Board said no outside music at all Monday through Friday, that would be okay with you?

MR. SCHMIDT: Objection. That's not what he's saying. Why does Mr. Zimmerman want to argue with the witness?

MR. ZIMMERMAN: I'm asking.

MR. SCHMIDT: He said twice what he, he is proposing in terms of the hours. Say it again, Mr. Boone, what are you proposing?

MR. BOONE: Music up till 11:00 inside, music up to dusk outside.

MR. ZIMMERMAN: Every day of the week?

MR. BOONE: Every day of the week.

MR. ZIMMERMAN: And dusk, during the summer, could be 9:00 p.m.?

MR. BOONE: That's correct.

MR. ZIMMERMAN: And your proposal is that you accept not more than one musician, no back up, no, no machines that, you know, those machines that create the music like one person can play five different instruments?

MR. BOONE: I'm not sure what proposal you've looked at, but I've not proposed anything regarding the type or kind

of music I'm proposing or the background or anything else.

MR. ZIMMERMAN: So, that's open, that's left open?

MR. BOONE: Yes, it is.

MR. ZIMMERMAN: So, if it was your judgment, you could have a three-piece band, if you thought it was acceptable?

MR. BOONE: Well, there's some jazz quartets that I'd like to have, which are four pieces, but they play softly and I'm okay with that.

MR. ZIMMERMAN: Well, you're not a music expert, you don't know what's soft and what's not soft, do you?

MR. SCHMIDT: Objection. You have to be an expert to know what soft is and not soft? Come on, Mr. Zimmerman. Objection, Ms. Murphy.

CHAIR: Overrule. We'll overrule.

MR. SCHMIDT: Okay.

CHAIR: This is cross examination and the whole issue is sound and how loud it is so, do you, you, I guess the question was, --

MR. ZIMMERMAN: What was the last question?

CHAIR: Well, he --

MR. SCHMIDT: Does he know what soft is, was the last question.

MR. ZIMMERMAN: Yeah, I mean, have you ever heard When the Saints Go Marching In? Have you ever heard that

played?

MR. BOONE: Sure.

MR. ZIMMERMAN: That can be really loud, can't it?

MR. BOONE: Yes, it can. It can be loud or soft.

MR. ZIMMERMAN: One, a single jazz player can be pretty loud, can't, can't he?

MR. BOONE: A single loud, a single jazz player can be very loud and can be very soft, you're very, exactly right. Thank you for bringing that up.

MR. ZIMMERMAN: Right.

CHAIR: So, let me just ask. So, you, one of the things you said was you would agree to a condition that there was some sound regulation. How would the Board regulate sounds?

MR. SCHMIDT: Can I answer that?

CHAIR: Can I, let me ask him.

MR. SCHMIDT: Okay.

CHAIR: And maybe you can answer --

MR. SCHMIDT: Because it's a legal question as much as anything.

CHAIR: Okay. Closing argument. Do you have any idea, I mean, maybe you don't know the answer? Maybe it's not fair for me to ask the question but do you have any idea how would we, how do we regulate, I mean, we're three lawyers sitting up here.

MR. BOONE: It's, it's, I would assume by a decibel letter, level using the type of device he has there on the table.

CHAIR: Mr. Borgerding's device that I said was, he couldn't use on you?

MR. BOONE: Right, yeah. A decibel level which, which tells you how loud everything is.

CHAIR: And you say you have one of those devices?

MR. BOONE: Yes, we do.

CHAIR: And is it your, is, are you proposing that you're going to use that device every time you have a band or you have, I mean, how, how is the Board supposed to know whether --

MR. BOONE: Well, what I would suggest is that we come to an agreement what decibel level was agreeable and then we limit it to that decibel level and each, each night, anytime music was being played outdoors, we would measure what the decibel level is and make sure that the band complied to be with inside that decibel level.

MR. BORGERDING: Can, can it change though, the decibel level, depending on what notes or what they're playing? I mean, we're not sound experts either here.

MR. BOONE: Yeah. No, I'm assuming it is and I, and I would want to keep it on the, on the lower side, well within the range of the decibel level.

CHAIR: Well, how about the inside music, because one of the things we discussed in our former opinion was people had problems with the music inside. How, I mean, is there, would you suggest there would be also a regulation of that?

MR. BOONE: The loudest our facility has gotten is when the Ravens scored a touchdown against the New England Patriots.

CHAIR: I understand but like if you have music, it would be a different story.

MR. BOONE: I went outside during that time and our doors seal up pretty tight, I couldn't hear a thing outside. We, our, our music inside is, cannot be heard outside unless the doors are opened. It's pretty tight inside.

CHAIR: Okay and you might want to follow up with that. Maybe in closing or something or maybe argument (inaudible) --

MR. SCHMIDT: And closing the, let me just say, there may or may not be State regulations that might come into play and so that might be something that the Board may choose to adopt or may say we're going to defer to the State regulations as it relates to that. I think the point is, Ms. Murphy, just to, what Mr. Boone has said is he's running a restaurant where people are eating so the idea is that people are not going to be, are going to be able to eat and converse, that's what he said on direct examination.

CHAIR: I understand, right.

MR. SCHMIDT: So I think by nature, if that's what he's trying to do, most people who are, unless, I mean, you either go to hear a band or you go to eat.

CHAIR: Understand, but you're, but there might be an objection only because now you're testifying.

MR. SCHMIDT: I'm sorry.

CHAIR: But I, I understand your point, I understand, I don't want you to get the, but I understand what you're saying. I understand what you're, because we did hear him say that. Okay.

BOARD: Can we get to the next question?

CHAIR: Yes.

MR. ZIMMERMAN: Yeah, and having live music obviously is very, very important to you, isn't it?

MR. BOONE: Yes, it is.

MR. ZIMMERMAN: Did you read, have you ever read the Board of Appeals 2008 decision?

MR. BOONE: I read a number of decisions, I can't identify is that one particular one I've read, but I've, I have read a few.

MR. SCHMIDT: Now, if Mr. Zimmerman is going to get him to read and play lawyer or whatever he's going to do --

MR. ZIMMERMAN: No.

MR. SCHMIDT: -- with the Board of Appeals' decision,

I'm going to object right now. It's got no relevance. He's not an attorney, it says what it says.

MR. ZIMMERMAN: My question is, have you ever read this decision from 2008 in the Larry Tanner history --

MR. SCHMIDT: And my, objection. Who cares whether he has or not? What admissible evidence is that going to lead us to? Whether he's read that or not?

CHAIR: I'm not sure either. I mean, it speaks for itself. It's in evidence. We've read it, I can tell --

MR. ZIMMERMAN: It's an indication of how much regard he has for what he's doing.

MR. SCHMIDT: Baloney. That's a huge leap. Objection.

CHAIR: Yeah, we, yeah, sustain the objection.

MR. ZIMMERMAN: Okay. I would, I would proffer, based on Mr. Schmidt's objection, the witness probably has never read the decision.

CHAIR: Okay.

MR. SCHMIDT: How does he know? How do you know? How are you making that proffer, Mr. Zimmerman?

CHAIR: Okay, let's, let's, let's play nice in the sandbox.

MR. ZIMMERMAN: Why would you object?

MR. SCHMIDT: Because I'm trying to have --

CHAIR: Come on, okay, okay, okay. All right.

Listen, we sustained the objection.

MR. ZIMMERMAN: All right.

MR. SCHMIDT: Thank you.

MR. ZIMMERMAN: Since you're not a music expert, you have no idea what a normal sound level is, do you?

MR. BOONE: You're correct, I'm not a music expert.

MR. ZIMMERMAN: And assuming that the 2008 decision found that Mr. Tanner was operating above normal allowed sound levels, even though he wasn't violating State law, how are you going to figure out what an acceptable sound level is, especially since you're not a music expert?

MR. SCHMIDT: Do you understand that question, Mr. Boone? If you can, can understand it, take a shot at answering.

MR. BOONE: Yeah, it's my, it's my, it's my intent, intention to monitor the sound level by using the same kind of device he has there on the table.

MR. ZIMMERMAN: Okay. Is it your view that as long as you're not violating State law that it's an acceptable sound level?

MR. BOONE: I'm not familiar with State law, so I can't answer that question.

MR. ZIMMERMAN: So, what decibel level are you proposing as a maximum?

MR. BOONE: I have not made that proposal.

MR. ZIMMERMAN: So, what I would suggest to you is that what you're asking the Board to do is impractical and unenforceable.

MR. SCHMIDT: Objection. Argumentative.

MR. ZIMMERMAN: Do you disagree with me?

MR. SCHMIDT: Objection.

CHAIR: That, that is argumentative. Sustained. I mean, that's argumentative and you can say that in closing.

MR. ZIMMERMAN: Okay.

CHAIR: You can't really answer the question so --

MR. ZIMMERMAN: Okay and, and are you saying at all times that live music is being played, you're going to be personally in attendance with a sound meter?

MR. BOONE: I never said that.

MR. ZIMMERMAN: So how is all this going to be monitored?

MR. BOONE: I'll have an army of people with sound meters.

MR. ZIMMERMAN: Do you expect us to believe that?

MR. BOONE: I don't ex, I don't know what's coming out of your mouth.

MR. ZIMMERMAN: That you're going to have an army of people with sound meters?

MR. BOONE: They'll be a sound meter on presence every night, the manager will have full working knowledge of

how to use it.

MR. ZIMMERMAN: And what will be the acceptable level?

MR. BOONE: That'll be determined at a later time.

CHAIR: Yeah, he said he didn't propose a certain --

MR. SCHMIDT: By the Board of Appeals.

MR. ZIMMERMAN: And it sounds, sounds, music sounds spike, they vary, right?

MR. BOONE: I'm sorry, repeat the question.

MR. ZIMMERMAN: Music sounds, when somebody is playing music, during the same musical piece, the sound level will vary, won't it?

MR. BOONE: Most of the sound will be controlled by the level of amplification.

MR. ZIMMERMAN: And as far as your weekend afternoon hours, when weather permitting, what are the hours of live music precisely that you're proposing? You said until dusk, well, what are we talking about?

MR. SCHMIDT: Objection. I think it's asked and answered again, but go ahead, Mr. Boone.

CHAIR: Dusk.

MR. SCHMIDT: Do it again, dusk, that's when the sun goes down.

MR. BOONE: Most, most of the people on the dock bar business have Sunday afternoon music from 1:00 to 5:00, 1:00 to

6:00.

MR. ZIMMERMAN: And what's your, you said dusk.

MR. BOONE: Dock.

MR. ZIMMERMAN: D-U-S-K?

MR. BOONE: D-O-C-K, dock bar. Most of the people, there's, there's eight dock bars in the eastern Baltimore County area, they all have outdoor music, they all have Sunday afternoon music.

MR. ZIMMERMAN: Okay, that wasn't my question.

MR. BOONE: Okay. What was your question?

MR. ZIMMERMAN: My question is, your proposal is to be able to have live music on afternoons till dusk any day of the week?

MR. BOONE: Any day of the week.

MR. ZIMMERMAN: And we've already established that dusk, the longest days of the summer, could be up till close to 9:00 p.m., correct?

MR. BOONE: That's correct.

MR. ZIMMERMAN: And what is there to guarantee that the music won't keep on going after dusk?

MR. BOONE: If it's, if it's a, if it's written into the Order, I will comply.

MR. ZIMMERMAN: At an undetermined sound level to be determined later by you?

MR. SCHMIDT: Objection.

CHAIR: No, that's not what he said.

MR. SCHMIDT: Objection. That's not what he said.

CHAIR: He didn't propose a certain sound level. I think he was suggesting to the Board if the Board was imposing a sound level that he would live with that and monitor it.

MR. SCHMIDT: Right.

CHAIR: And he would monitor it either by himself or through managers, is what he said.

MR. ZIMMERMAN: But he had no idea what that sound --

CHAIR: He didn't suggest or propose a sound level, correct.

MR. ZIMMERMAN: Okay.

CHAIR: I mean, so we, we're --

MR. ZIMMERMAN: So how could the Board find --

CHAIR: Okay. He's, well, he hasn't suggested one but that doesn't mean, you know, go ahead.

MR. SCHMIDT: The Board can determine it, we can submit it in closing argument, any number of things.

MR. ZIMMERMAN: I disagree totally with Mr. Schmidt, absolutely no way.

CHAIR: Okay, I understand. But that's argument. But, go ahead. Any more questions? We're going to try to break for lunch.

MR. ZIMMERMAN: Right, I get --

CHAIR: Trying to get this witness finished.

MR. ZIMMERMAN: I'm close, I'm close, I'm close.

CHAIR: Okay.

MR. ZIMMERMAN: Have you had --

MR. SCHMIDT: Is he done, oh, I --

MR. ZIMMERMAN: Have you had music at any of your previous businesses?

MR. BOONE: Yes.

MR. ZIMMERMAN: Which one?

MR. BOONE: I've had Christmas parties with music, grand opening parties with music.

MR. ZIMMERMAN: But, I mean, have you ever operated--

MR. BOONE: I've never had music for hire, never had, never had music in there for commercial purposes. I've had music to have celebrations within my businesses.

MR. ZIMMERMAN: You've never previously operated a facility like this one?

MR. BOONE: No, I have not.

MR. ZIMMERMAN: Just to get, just to pin down, does your property have several tax accounts?

MR. SCHMIDT: For the record, it's comprised, I think, as shown on the plan, it might be two different, several different lots. It's the original plat of Bowley's Quarters. Let me see if it shows on there.

MR. ZIMMERMAN: I want to show you State Department of Assessment & Taxation real property data for what appears to

be your property. We're going to make this People Counsel Exhibit 2, it's four pages actually. Would you like to take a look at this? It's the only copy I have. Would you like to see?

MR. SCHMIDT: Why start showing me exhibits now? I, I believe, I'm not sure what the point is but I know it's, the property is comprised, Bowley's Quarters was platted back in the twenties and there are all these lots and he owns, I guess, according to this, what, lot, does it say on here, Mr. Zimmerman?

MR. BOONE: It, it's four or five lots.

MR. SCHMIDT: Four, it's four --

MR. ZIMMERMAN: Right.

MR. SCHMIDT: Lot 504, 500 --

MR. BOONE: Yeah.

MR. SCHMIDT: -- 502 and 501.

MR. BOONE: Right.

MR. ZIMMERMAN: Okay. So --

MR. SCHMIDT: They've been used in conjunction with one another, I would say that they probably merged into one legally.

MR. ZIMMERMAN: Let's mark this and then I'd have, just have one or two questions for Mr. Boone.

BOARD: This is your, I'll tell you what, I'm going to do 2-A.

MR. ZIMMERMAN: Okay.

CHAIR: Any objection to the SDAT records?

MR. SCHMIDT: They speak for themselves. I have no objection.

MR. ZIMMERMAN: Okay and according to this exhibit, all these different lots were in one deed. Would you like to look at this? Can you agree with me? It looks like you acquired, you had one deed and those included all these different lots.

MR. BOONE: I, it sounds correct.

MR. ZIMMERMAN: Okay and according to this, the date, the date of the deed was October 21st, 2014, is that, does that fit with your recollection?

MR. BOONE: That sounds a little bit late.

MR. ZIMMERMAN: Okay, we can get the deed.

MR. BOONE: Where's October 21st there?

MR. ZIMMERMAN: On seller, Fifth Street, LLC, date October 21st, 2014.

CHAIR: Most likely the recording date for the deed.

MR. ZIMMERMAN: All right.

CHAIR: Even if you purchase it in August, your sales contract might have said August.

MR. BOONE: Okay.

CHAIR: By the time the deed got recorded.

MR. ZIMMERMAN: All right.

MR. BOONE: Okay.

CHAIR: But we believe he owns the property. I don't think there's any dispute (inaudible).

MR. ZIMMERMAN: No, we can get the deed. I wanted to get the timing of it. We'll get the deed. I just wanted, I wanted to see exactly when the transaction occurred.

MR. SCHMIDT: Accor, according to the plan, and, it shows Lots 500, 501 and 502, which are three lots that were perpendicular to Cuckold Point Road, and then there are three other lots that are parallel to the road, 503, 504 and 505.

MR. ZIMMERMAN: Yeah, no, the point was just to get the timing of the transaction, that's all.

MR. SCHMIDT: Maybe Mr. Zimmerman doesn't believe we own the property or --

MR. ZIMMERMAN: No, no, it wasn't a question of not believing you owned the property.

MR. SCHMIDT: We stole it from someone or whatever it would be.

MR. ZIMMERMAN: No, that's, that's not the point. The point is to show the timing. We can get the deed. We'll, we'll, we'll get the deed.

CHAIR: If you think you need it, I mean, I'm not sure why we need that either but.

MR. ZIMMERMAN: Well, I think, I think it, I think to the extent it's relevant to the correspondence that Mr.

Borgerding showed.

CHAIR: Are you almost finished with your --

MR. ZIMMERMAN: I just, I am, I am.

CHAIR: -- and, and I, I don't want to rush you because I (inaudible).

MR. ZIMMERMAN: No, I'm really, I'm cognizant of the Board's schedule and everybody's interest (inaudible). I think we're (inaudible).

CHAIR: You're finished, okay. Is there --

MR. BORGERDING: Your Honor, if I could just have a couple more questions?

CHAIR: Okay, then are you going to have rebuttal?

MR. SCHMIDT: No, I --

CHAIR: Okay.

MR. SCHMIDT: I have about two questions just to clarify something for the Board.

CHAIR: Okay.

MR. BORGERDING: Mr., Mr. Boone, you testified that you own one of these devices?

MR. BOONE: That's correct.

MR. BORGERDING: And you know how to operate it?

MR. BOONE: I've never tried.

MR. BORGERDING: You've never operated it?

MR. BOONE: No.

MR. BORGERDING: No further questions.

CHAIR: You say one of these devices, why don't you just describe for the record what you're holding up?

MR. BORGERDING: It is a decibel monitoring device.

MR. SCHMIDT: Can I see it, Mr. Borgerding?

MR. BORGERDING: It tells you the amount of decibels in a conversation.

MR. SCHMIDT: And this has an on or off button, I'm assuming, Mr. Borgerding?

MR. BORGERDING: I do not know.

VOICE: It's a dial.

MR. SCHMIDT: It's a dial. Oh, an on and off dial, okay.

VOICE: Not on or off but it sets the rate of decibel on the side.

MR. SCHMIDT: Okay. Just, Mr., are you done, Mr. Borgerding? Excuse me.

MR. BORGERDING: Yep.

MR. SCHMIDT: Mr., just so you're clear, when you, when the LLC, which you're a member, bought the business, you were, you were members of that with Mr. and Mrs. Kondylas and you?

MR. BOONE: That's correct.

MR. SCHMIDT: Then, there then came a time that you severed that relationship with them so that you are now the entire owner of the LLC?

MR. BOONE: That's correct.

MR. SCHMIDT: No other questions. Just to make that clear.

CHAIR: Okay. Why don't we do this, take a lunch break. I think we're finished with this witness unless we have --

BOARD: He's got some re-direct.

CHAIR: Oh, you have, that was his --

MR. SCHMIDT: I did, that was it.

BOARD: Oh, that was it?

MR. SCHMIDT: That was it.

BOARD: That was it, okay.

CHAIR: Yeah, don't encourage him.

MR. SCHMIDT: Can, we can go off the record but can we approach?

CHAIR: One second.

MR. SCHMIDT: Yeah. I just want to ask about scheduling.

(RECORD PAUSED - 12:45:33 PM)

(ON RECORD - 01:36:29 PM)

CHAIR: Okay. We're back on the record after lunch. We're a few minutes late, tried not to be late but we, you know.

MR. SCHMIDT: It's hard.

CHAIR: Try to be on time. We were in the

Petitioner's case still. You have a next witness?

MR. SCHMIDT: Yeah, we have a couple of people who have shown up from the community who wanted to speak and I told them to try to make it quick, so.

CHAIR: Sure.

MR. SCHMIDT: Cheryl Gowers. Ms. Gowers, if you want to come up?

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MS. GOWERS: I do.

BOARD: Okay. Can you please state your name and address for the record?

MS. GOWERS: Cheryl Gowers, 2812 Bay Drive, Miller's Island, Maryland.

BOARD: And spell your last name for the record.

MS. GOWERS: G-O-W-E-R-S.

BOARD: Thank you.

MR. SCHMIDT: Ms. Gowers, so you live on, on Bay Drive, on Miller's Island?

MS. GOWERS: Yes, sir.

MR. SCHMIDT: How long have you lived there?

MS. GOWERS: Since '93.

MR. SCHMIDT: Okay. So, I assume you are familiar

with the Dock of the Bay property?

MS. GOWERS: Yes, I am.

MR. SCHMIDT: And did you live there, you lived there when Mr. Tanner owned it?

MS. GOWERS: Yes, sir.

MR. SCHMIDT: You've heard it described that he had very loud music going to very late at night?

MS. GOWERS: Yes, sir.

MR. SCHMIDT: Can you tell the Board a little bit about what his operation was as a resident, how you perceived it, just tell us a little bit about it?

MS. GOWERS: Very loud, heavy metal. He also didn't really care about the residents. I actually came to Court for, with the Miller's Island Association because of Mr. Tanner. He had no respect for the residents whatsoever.

MR. SCHMIDT: When you say heavy metal, rock and roll, electronic instruments and --

MS. GOWERS: Loud band, you know, full size bands and --

MR. SCHMIDT: How many people?

MS. GOWERS: Five, possibly.

MR. SCHMIDT: Okay. Outside?

MS. GOWERS: Yes.

MR. SCHMIDT: And inside or just outside?

MS. GOWERS: I know, only have known the outside.

MR. SCHMIDT: Okay. Could you hear it from your property?

MS. GOWERS: Sometimes, yes.

MR. SCHMIDT: How far away are you as the crow flies?

MS. GOWERS: Five blocks.

MR. SCHMIDT: Okay and till how late at night did he have music playing?

MS. GOWERS: Twelve, 1:00, sometimes.

MR. SCHMIDT: Okay. On weekends or weekdays?

MS. GOWERS: Mostly weekends.

MR. SCHMIDT: Okay.

MS. GOWERS: I don't recall too much during the week.

MR. SCHMIDT: All right. Now, have you been to the Dock of the Bay since Mr. Boone has owned it?

MS. GOWERS: I have been working for Mr. Boone since he opened.

MR. SCHMIDT: Okay. You work there. What do you do?

MS. GOWERS: I am a waitress.

MR. SCHMIDT: Okay and the business at the Dock of the Bay is what? What's, what do you do?

MS. GOWERS: I'm a waitress, it's very family oriented, Ken is an awesome guy. He, you know, he talks to the customers, he interacts with them, it's a wonderful establishment.

MR. SCHMIDT: Okay. Family type atmosphere?

MS. GOWERS: Yes, sir.

MR. SCHMIDT: You heard him describe the clientele as mainly older, forty to sixty, is that accurate from your experience?

MS. GOWERS: Yes, sir.

MR. SCHMIDT: Okay. Obviously, you don't throw out people who are under forty years of age?

MS. GOWERS: No.

MR. SCHMIDT: Okay. All right. Anything else you'd like to tell the Board? I know you came all the way out here today to testify.

MS. GOWERS: I've been, my father-in-law actually built his house in 1985, so I've actually been on Miller's Island since 1985 because I was with my boyfriend, which is now my husband, and Fisherman's was a lot worse than what Larry Tanner had it as and Ken is not that type of person. That's not what he wants, that's not what he's looking for and I just wish the residents of Miller's Island would just give him a chance.

MR. SCHMIDT: Now, Fisherman's is the old Dock of the Bay, just so the Board understands.

MS. GOWERS: Yes.

MR. SCHMIDT: Okay.

MS. GOWERS: Yes.

MR. SCHMIDT: I forgot to ask you too, are there any

other establishments on Miller's Island that have music?

MS. GOWERS: Yes.

MR. SCHMIDT: Which ones?

MS. GOWERS: There's the Islander and the White Swan and I have worked at both places.

MR. SCHMIDT: Okay. Now, are they restaurants?

MS. GOWERS: They are restaurant/bars, yes.

MR. SCHMIDT: Okay and do they have music inside or outside or both?

MS. GOWERS: Inside.

MR. SCHMIDT: Okay. Do they ever have it outside?

MS. GOWERS: No.

MR. SCHMIDT: Okay. How about, how about Rowboat Willy's next door at Bill's Boats?

MS. GOWERS: That is an outside.

MR. SCHMIDT: Okay and it has different zoning and different approvals but --

MS. GOWERS: Correct.

MR. SCHMIDT: -- there is outdoor music there next door?

MS. GOWERS: Correct.

MR. SCHMIDT: Okay. Okay. I don't think I have any other questions. Thank you, ma'am.

MS. GOWERS: Thank you.

MR. SCHMIDT: They can ask you questions so.

MR. BORGERDING: You don't have any bars or restaurants adjacent to your property where you live?

MS. GOWERS: As of right now, no. But when I built my house, we did. We had Woyster's (phonetic), which was all the way down at the end of Cuckold Road and Bay Drive.

MR. BORGERDING: Okay. But right now you don't?

MS. GOWERS: No.

MR. BORGERDING: So you don't have to contend with any noise from any establishments?

MS. GOWERS: As, as of right now, no. But like I said, when I built my house, yes, we did and when we built our house, there were five or six bars that would have music outside and you could hear the whole island was loud and playing music the whole time.

MR. BORGERDING: It was disturbing as a resident, right?

MS. GOWERS: I wouldn't say it was disturbing because it was, you could tell people were out and were having fun.

MR. BORGERDING: Okay. But you could hear it?

MS. GOWERS: Yes.

MR. BORGERDING: In your normal residential life?

MS. GOWERS: Yes, I mean, you got to also remember, you're on the water and water, the sound carries on the water.

MR. BORGERDING: Okay. Okay and you earn your livelihood from the Dock of the Bay now?

MS. GOWERS: I, that is a part-time job, yes, sir.

MR. BORGERDING: Okay. No further questions.

CHAIR: Mr. Zimmerman, anything?

MR. ZIMMERMAN: Yeah, just a few. Do you know whether any formal complaints have been filed against any of these other places that you mentioned?

MS. GOWERS: When I worked at the Islander, there were complaints there, yes, sir.

MR. ZIMMERMAN: Do you know what happened with those complaints?

MS. GOWERS: They went to Court and I don't un, I don't know what happened after that.

MR. ZIMMERMAN: And you don't, you know what the zoning is on those other restaurants?

MS. GOWERS: No, sir, I do not.

MR. ZIMMERMAN: Or establishments. How, and you've been working for the last year or so at Dock of the Bay?

MS. GOWERS: Yes, sir.

MR. ZIMMERMAN: Okay and has it been operating as a restaurant/bar?

MS. GOWERS: It has been operating as a restaurant, yes.

MR. ZIMMERMAN: Has it been well attended?

MS. GOWERS: Yes.

MR. ZIMMERMAN: And when does it close on, in your

experience, both summer and winter, when, when is it closed on --

MS. GOWERS: They're, they're usually, in the summer time 11:00, 11:30. During the week, I mean, during the winter months, we're closed by 9:00, 9:30. Sometimes 10:00.

MR. ZIMMERMAN: And that's with, so far at least, no music?

MS. GOWERS: Correct.

MR. ZIMMERMAN: When you say close 11:00, 11:30, that means no new people coming in?

MS. GOWERS: Correct.

MR. ZIMMERMAN: But people who are already there --

MS. GOWERS: They are leaving.

MR. ZIMMERMAN: Okay and when, when do the doors totally get locked?

MS. GOWERS: When the last person leaves.

MR. ZIMMERMAN: And that could be what, midnight, 12:30, depends?

MS. GOWERS: It's never been that late.

MR. ZIMMERMAN: Yeah, and how large a staff, in your experience, have you had in the summer and winter? How many waitresses at a time?

MS. GOWERS: I don't know because we all work in different shifts and we don't all work seven days a week.

MR. ZIMMERMAN: I mean, when you are there, how many

are there?

MS. GOWERS: In the summertime, there could be seven waitresses at one time.

MR. ZIMMERMAN: And busboys and?

MS. GOWERS: We also have busboys, food runners, and we also have two hostesses.

MR. ZIMMERMAN: And bartenders?

MS. GOWERS: Yes.

MR. ZIMMERMAN: How many bartenders?

MS. GOWERS: One.

MR. ZIMMERMAN: So, so far so good with the restaurant and the bar, you're happy with it?

MS. GOWERS: Yes, sir, I am. Ken, like I said, Ken is a very family oriented man. His family is there once a month, sometimes twice a month having dinner with him. He, like I said, I just wish everybody would just give him a chance and know the Ken that I know.

MR. ZIMMERMAN: And some restaurants don't have music that you've worked in, aren't there?

MS. GOWERS: I'm sorry?

MR. ZIMMERMAN: Did you ever work in a restaurant that has no music or an establishment that serves food and liquor?

MS. GOWERS: Yes, I have.

MR. ZIMMERMAN: Thank you. That's all I have.

CHAIR: Okay. Anything else?

MR. SCHMIDT: Nothing else. Thank you.

CHAIR: Thank you.

MS. GOWERS: Thank you.

MR. SCHMIDT: Russ McClelland.

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. MCCLELLAND: Yes, I do.

BOARD: Could you please state your name and address for the record?

MR. MCCLELLAND: Russell McClelland, 9011 Miller's Island Boulevard, it's 21219.

BOARD: Spell your last name.

MR. MCCLELLAND: M-C-C-L-E-L-L-A-N-D.

BOARD: Thank you. You can be seated.

MR. SCHMIDT: Mr. McClelland, you're also a Miller's Island resident?

MR. MCCLELLAND: Yeah, as the crow flies, I probably live about four hundred yards from the, from the restaurant.

MR. SCHMIDT: Okay. How long you been on Miller's Island?

MR. MCCLELLAND: Since '01.

MR. SCHMIDT: Okay. You were there when Larry Tanner

was there?

MR. MCCLELLAND: Yeah, I was a patron there and I'm a patron, patronized all the bars in the area.

MR. SCHMIDT: I don't know if that's a good thing or --

MR. MCCLELLAND: Well, I could walk to all of them. I can.

MR. SCHMIDT: We know what you mean. If you can, you've, you've been here all day.

MR. MCCLELLAND: Um hm.

MR. SCHMIDT: Tell us a little bit about the operation when Mr. Tanner was running it, in terms of noise, activity, how it worked.

MR. MCCLELLAND: Well, like I said, I was a patron there. I'd stop in maybe once a week, twice a week and he would have music and then I learned of the, of the fines and the complaints and this and that and the other thing and I'm not personal friends with him or anything like that, but, you know, he, he got in a lot of trouble with the, with the music. I was there a lot of times when the liquor board or people would come by, you know, and actually, you know, be on call for the complaints.

MR. SCHMIDT: Okay. Music outside under Mr. Tanner?

MR. MCCLELLAND: Yeah, yeah.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: I can remember a lot of outside music, he had a, like a stage built out there.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: And big speakers out there by the fence.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: Yeah.

MR. SCHMIDT: And what kind of music, what type, type of entertainment? Rock and roll, Sinatra, country/western?

MR. MCCLELLAND: I remember a lot of reggae but it was pretty loud, pretty loud.

MR. SCHMIDT: Okay. Amplified?

MR. MCCLELLAND: Yeah.

MR. SCHMIDT: How late did it go?

MR. MCCLELLAND: It would go on into the night.

MR. SCHMIDT: When you say that, after midnight?

MR. MCCLELLAND: After dark, I can't remember how late but it would be late, eleven, maybe twelve.

MR. SCHMIDT: Okay. Weekdays and weekends?

MR. MCCLELLAND: Yeah, it could be all times of the day, yeah.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: All times of the week.

MR. SCHMIDT: Okay. Now, you've patronized Mr. Boone's place since he's been there?

MR. MCCLELLAND: Oh, yeah, yeah.

MR. SCHMIDT: Tell us about what you find and how the operation is there?

MR. MCCLELLAND: Well, it's, it's family oriented. I help out there in the evenings and the weekends and, like I said, I'm, I'm in the neighborhood, I know pretty much ninety percent of the people that live on that peninsula, you know, I, I know them.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: So --

MR. SCHMIDT: What do you do for a living?

MR. MCCLELLAND: I run an auto body shop.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: For Koons Chevrolet.

MR. SCHMIDT: Okay, so that's your full-time job?

MR. MCCLELLAND: Correct.

MR. SCHMIDT: You said you occasionally help out Mr. Boone at night?

MR. MCCLELLAND: Yeah, night and weekends, yeah.

MR. SCHMIDT: What do you do for him?

MR. MCCLELLAND: Everything, cut the grass, police the lot at night, police the, the boat slips. People leave at night, make sure they're quiet, you know, when they're leaving.

MR. SCHMIDT: So I guess you could be, if there was a restriction put on noise, you, you may very well be the person

that Mr. Boone may ask you to help enforce that?

MR. MCCLELLAND: Yes, yes, I would be willing to take that on, it would be no problem at all.

MR. SCHMIDT: Okay, okay. You support Mr. Boone's request in this case?

MR. MCCLELLAND: Oh, yes, yeah.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: I'm behind it a hundred percent.

MR. SCHMIDT: Find him to be trustworthy, do what he says he's going to do?

MR. MCCLELLAND: Oh, yeah, he's, he's there, like he says, a hundred hours a week and I would see no problem, problem with what he's going to do and what he's going to, you know, delegate and control.

MR. SCHMIDT: Okay. Anything else? I appreciate you coming in, anything else that you want to tell the Board?

MR. MCCLELLAND: No, I don't see any problems with music there.

MR. SCHMIDT: Okay. Thank you, sir.

CHAIR: Mr. Borgerding?

MR. BORGERDING: Yes, sir, do you, you receive a pay check from Mr. Boone for what you do for him, correct?

MR. MCCLELLAND: Correct, yeah.

MR. BORGERDING: Okay.

MR. MCCLELLAND: I just started. I was volunteering

probably for about six months.

MR. BORGERDING: So he just started paying you?

MR. MCCLELLAND: Um hm.

MR. BORGERDING: Why, do you know why that switched? Why you went from volunteering to getting paid?

MR. MCCLELLAND: He volunteered to pay me.

MR. BORGERDING: Okay. No further questions.

MR. MCCLELLAND: I'd still be doing it for free.

MR. ZIMMERMAN: I'm sorry, Mr. McClelland, do I have it correct? I'm sorry, your name?

MR. MCCLELLAND: Yeah, Russell McClelland.

MR. ZIMMERMAN: McClelland. So, how long have you been working there, whether it's a volunteer or not?

MR. MCCLELLAND: A little over a year.

MR. ZIMMERMAN: And has it been successful based on your observation in the last year to the extent of the food and beverage and bar operations?

MR. MCCLELLAND: Oh, yeah. I think the, the, the restaurant has been well recepted by, you know, by everybody in the community and a lot of people coming from Pikesville and Glen Burnie, stopped by.

MR. ZIMMERMAN: Of course, during that time there's been no music, right?

MR. MCCLELLAND: No.

MR. ZIMMERMAN: I'm wrong?

MR. MCCLELLAND: No, I, I don't, I wasn't there when any music was playing, any live music or DJ's, no.

MR. ZIMMERMAN: What about recorded radio, what does he --

MR. MCCLELLAND: Radio, I've heard the radio.

MR. ZIMMERMAN: With the XM radio, Pandora?

MR. MCCLELLAND: Pandora.

MR. ZIMMERMAN: Is that indoor, outdoor, both?

MR. MCCLELLAND: Yes.

MR. ZIMMERMAN: Both?

MR. MCCLELLAND: Um hm.

MR. ZIMMERMAN: You're not a sound engineer, are you?

MR. MCCLELLAND: No.

MR. ZIMMERMAN: You mentioned your experience with Mr. Tanner. Do you know whether or not at a previous hearing he told the Board of Appeals he was going to tone down his music to duos, reggae, not, not having any rock, that kind of thing?

MR. MCCLELLAND: No, I don't recall any kind of dealings with that, no.

MR. ZIMMERMAN: Okay. That's all I have, Madam Chair.

MR. SCHMIDT: No further questions.

CHAIR: Thank you. You can step down.

MR. SCHMIDT: Charles Boland.

BOARD: Raise your right hand. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct --

MR. BOLAND: I do.

BOARD: -- to the best of your knowledge and belief?

MR. BOLAND: Sorry, I do.

BOARD: That's okay. State your name and address for the record, please.

MR. BOLAND: Charles Boland, B-O-L-A-N-D, 2414 Eugene Avenue 21219.

BOARD: Thank you. You can be seated.

MR. SCHMIDT: Mr. Boland, that's not Miller's Island, your address?

MR. BOLAND: No, it's about probably what, mile and a half out of Miller's Island.

MR. SCHMIDT: Okay. Okay and what's that, what community are you a part of?

MR. BOLAND: Edgemere, I would imagine.

MR. SCHMIDT: Okay. Are you employed at the present time?

MR. BOLAND: Retired now.

MR. SCHMIDT: Okay. What, what did you do?

MR. BOLAND: Sergeant, Baltimore County Police.

MR. SCHMIDT: How long were you with the police department?

MR. BOLAND: Thirty-five years.

MR. SCHMIDT: Okay. When did you retire?

MR. BOLAND: Last year, November.

MR. SCHMIDT: Okay. Either professionally or personally, are you familiar with the Dock of the Bay property?

MR. BOLAND: Yes, I am.

MR. SCHMIDT: How's that? How are, how do you know about the Dock of the Bay? What's your --

MR. BOLAND: Well, my son is employed there.

MR. SCHMIDT: Okay.

MR. BOLAND: So, I go down maybe four or five times a week and have dinner down there.

MR. SCHMIDT: Okay.

MR. BOLAND: It's a nice place to have dinner and then see my son too.

MR. SCHMIDT: Okay and when you were on the police force, did you ever have any connection with Dock of the Bay?

MR. BOLAND: No, I didn't work in that area.

MR. SCHMIDT: You didn't work in that area.

MR. BOLAND: Well, actually I did maybe fifteen years ago.

MR. SCHMIDT: Okay.

MR. BOLAND: And I never had a call down there. The only time I was in there is when Katrina rode through and I was in the bar itself.

MR. SCHMIDT: When Hurricane Katrina came in?

MR. BOLAND: Um hm.

MR. SCHMIDT: Okay. Took refuge --

MR. BOLAND: Maybe longer.

MR. SCHMIDT: -- took refuge in the bar?

MR. BOLAND: Not when it had the water in it, it was up to your waist.

MR. SCHMIDT: Okay, okay. Tell us, you've heard, you've been here and I don't want to be repetitious but tell us a little bit about the operation now, family kind of restaurant or tell, just, what, how does it go now? How's it work now?

MR. BOLAND: It is family oriented, that's the, that's why I go down there.

MR. SCHMIDT: Okay.

MR. BOLAND: To see my son and to enjoy a good meal.

MR. SCHMIDT: Okay. How old is your son?

MR. BOLAND: Twenty-four.

MR. SCHMIDT: Okay and you've never heard any music down there now?

MR. BOLAND: Just on the speaker.

MR. SCHMIDT: Just, just on the radio speaker?

MR. BOLAND: Right.

MR. SCHMIDT: Okay. Were you ever there when Mr. Tanner owned it?

MR. BOLAND: No.

MR. SCHMIDT: Okay. You have any objection to the request that Mr. Boone is making now, to have music now?

MR. BOLAND: No, I don't.

MR. SCHMIDT: Okay. Any, anything else that you'd like to tell the Board?

MR. BOLAND: No, the only thing I want to say, it's an, it's an enjoyable restaurant, I like going down there. It's like he said, people that go down there, it's, I mean, I'm sixty and there's young people that go in there but they're, some, most of them are with their, their families.

MR. SCHMIDT: Okay. Family oriented kind of place?

MR. BOLAND: Yes.

MR. SCHMIDT: Okay. Okay. I don't have anything further.

CHAIR: Cross?

MR. BORGERDING: No questions, Your Honor.

CHAIR: No questions.

MR. ZIMMERMAN: Well, you'll continue to go there whether or not he gets live music permission?

MR. BOLAND: Of course. I like it. That's the only reason I go there, I like it. I think music would bring a --

MR. ZIMMERMAN: Thanks. I have no further questions.

MR. SCHMIDT: What, what did you start to say? You think music would bring what?

MR. BOLAND: It would be more enjoyable to, instead

of hearing it over the radio a lot of times.

MR. SCHMIDT: Okay.

MR. BOLAND: And nothing loud because I, I don't like nothing loud, it's, something mellow, and that's nice.

MR. SCHMIDT: Okay, okay. Thank you, sir.

MR. ZIMMERMAN: Of course, if he gets permission, there's no way of knowing precisely what kind of music it's going to end up as, is there?

MR. BOLAND: No, I couldn't see that, no.

MR. ZIMMERMAN: Thank you. That's all I have.

CHAIR: Thank you, sir.

MR. SCHMIDT: Okay. I, I know the folks who are here, I know are, you know, you're going to hear the same thing, so unless anyone would like to speak that it hasn't been covered, you want to speak, ma'am?

VOICE: I would, yeah, I would like to.

MR. SCHMIDT: Okay. I just don't, didn't want to be repetitious but they're, let the record reflect there's some other people in the room.

CHAIR: Okay.

MR. SCHMIDT: Okay.

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MS. BOLAND: Yes, I do.

BOARD: Can you please state your name and address for the record?

MS. BOLAND: Gerry Boland, 2414 Eugene Avenue, Baltimore, Maryland 21219.

BOARD: Okay, thank you. You can be seated.

MR. SCHMIDT: Ms. Boland, I assume you're --

MS. BOLAND: Yes.

MR. SCHMIDT: -- Charles' wife?

MS. BOLAND: Yes.

MR. SCHMIDT: Okay. So --

MS. BOLAND: It's my husband.

MR. SCHMIDT: -- and is it your son as well?

MS. BOLAND: Yes, yes, indeed.

MR. SCHMIDT: You have the same son. What would you like to --

MS. BOLAND: Well, I am from the area, I am from not Miller's Island, but I'm from Fort Howard, a little further down so I was born and raised and I went to Fisherman's and I never urinated in the parking lot, I would never do anything like that, but, and I did go when Larry Tanner had it and never went back, I didn't like that stuff. But I will tell you this. I worked at Chesapeake Terrace and I had some of the children who are absolutely wonderful, wonderful families and, of the community and I don't, and I wish just the best but I do think

that Mr. Boone is a wonderful man and I think the Dock of the Bay is a wonderful place and not just because he employs my son, I mean, that's a plus, you know, I'm going to tell the truth. But, I, myself, have volunteered hours to Mr. Boone's establishment to pitch in when he had a little Christmas party for the kids. It, I have sat on the water to hear Rowboat Willy's music because I like to listen to nice music too when you're eating and it, and I do think it's a great thing to have. Now, I don't want to hear rock and roll because I'm fifty-three and I, and I do think it's a plus. My mother is seventy-eight years old and she brings her friends, Janet Yateman and Peggy Fultz and they go to have dinner and they like to listen, you know, to, of course not rock and roll, but it is nice to listen to soft music and, and talk and I think we should give him a chance and I, I think that Mr. Boone is a, a responsible man and, and I, and it's a nice place and I've been to the other places there and I think Dock of the Bay is a wonderful establishment and I would love to see it succeed even further and I, I hope that you give him this opportunity and I think he deserves it and I think he has shown that he should have the opportunity to have this. I really do.

MR. SCHMIDT: Okay.

CHAIR: All right.

MR. SCHMIDT: I couldn't say anything better. No other questions.

MS. BOLAND: Yes, Mr. Zimmerman?

CHAIR: Mr., well, Mr. Borgerding first.

MR. BORGERDING: Ma'am?

MS. BOLAND: Yes?

MR. BORGERDING: Do you have a bar/restaurant next to where you live?

MS. BOLAND: No, I don't.

MR. BORGERDING: Okay. So, you don't have anything emanating music?

MS. BOLAND: No, I don't.

MR. BORGERDING: Do you think that might be disturbing?

MS. BOLAND: When it was rock and roll, I'm sure, I'm sure. I'm sure, but I do believe in my whole heart that Mr. Boone does care and I do, do believe that he would not allow that to happen and if I did think that it, that he would allow it, I wouldn't stand up here and say that, sir.

MR. BORGERDING: Okay. But you don't know for sure what's going to happen if he gets approval?

MS. BOLAND: No, I can't, but I can, I, I would put my word on Mr. Boone, I would.

MR. BORGERDING: Okay. No further questions.

CHAIR: Okay.

MR. ZIMMERMAN: I appreciate your mentioning my name but, actually, I don't have any questions for you.

MS. BOLAND: Okay.

MR. ZIMMERMAN: Thank you.

MR. SCHMIDT: Okay. Thank you.

MS. BOLAND: Thank you.

MR. SCHMIDT: Anyone else? Yes, ma'am? I'm sorry. The folks just came in so I didn't know if they wanted to testify or not.

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MS. REILLY: Yes.

BOARD: Okay. Please state your name and address for the record.

MS. REILLY: My name is Dorothy O. Reilly, I live at 2809 Third Street, Miller's Island 21219.

BOARD: Okay and spell your last name for the record, please.

MS. REILLY: Excuse me?

BOARD: Spell your last name.

MS. REILLY: Oh, Reilly, R-E-I-L-L-Y.

BOARD: You can be seated.

MR. SCHMIDT: Ms. Reilly, how long have you been on Miller's Island?

MS. REILLY: Let me see, I built my residence in

1984.

MR. SCHMIDT: Okay. So, you've been there and I assume, how far are you from Dock of the Bay?

MS. REILLY: Two blocks.

MR. SCHMIDT: Okay. So, you were there when it was Fisherman's?

MS. REILLY: Yes.

MR. SCHMIDT: And then when it was Mr. Tanner's Dock of the Bay?

MS. REILLY: Yes.

MR. SCHMIDT: Okay and now, since Mr. Boone has owned it?

MS. REILLY: Yes.

MR. SCHMIDT: Okay. Just, what would you like to tell the Board?

MS. REILLY: Well, let me see, Miller's Island has done, has had a lot of changes. When I first moved there, there was music all the way down Worcester's, they had two bands every night. Fisherman's had music, the Swan had music, the Islander had music, you had Anderson's, they had music, they had live bands there. It was all inside, but he had music outside also, that is now closed down.

MR. SCHMIDT: Okay.

MS. REILLY: Okay, there's a lot of bars that were there, that are not, no longer there, okay? I mean, you had

music all over the island. Now, you don't. You have, now you do have Rowboat Willy's, Rowboat Willy's never had music but there was never a Rowboat Willy's, it was just a boat place, you know, where you went and rented boats, took them out and there was never no music there. There was never no restaurant there but there is now.

MR. SCHMIDT: How long has that been next door?

MS. REILLY: Next door, was, actually they, they started that up after Larry got closed down.

MR. SCHMIDT: Okay.

MS. REILLY: Okay, they started building, it started small and then it's gotten a little bit bigger, you know, and now they have restaurant and they have food there now and they have live music there.

MR. SCHMIDT: Right, and they have a different zoning there?

MS. REILLY: Yes, yes.

MR. SCHMIDT: Okay.

MS. REILLY: They have B&M.

MR. SCHMIDT: Right.

MS. REILLY: Okay and like I said, I mean, there was a lot of, different places and now you still, you still have the Swan, who has music, that's loud music and they have the Islander, has music and then you have Rowboat Willy's, that's all the music on Miller's Island no more, anymore, that's it.

MR. SCHMIDT: Okay.

MS. REILLY: So, I mean, like I said, I mean, I lived there, I mean, I moved, I moved away and then I came back in 2005 after Isabel and we had to rebuild so it's an enjoyable place. Mr. Boone has done very good with the Dock of the Bay. The Dock of the Bay is, has come up a lot of degrees, in a lot of degrees. I mean, it is family oriented. You have Brian, he, there's a lot of people that have moved in, that have children, they want to bring their children there and play, have fun.

MR. SCHMIDT: At the pirate ship?

MS. REILLY: At the pirate ship, yes. A lot of my neighbors, my next door neighbors, both of them, they all have children, they all come over there and they all enjoy the Dock of the Bay in the summer time. In the winter time, you know, children, they don't want to play, they want to stay inside.

MR. SCHMIDT: Too cold.

MS. REILLY: It's too cold and plus they're young so to me, I think it's a great improvement and plus, I don't really want it closed no more. I mean, my, my property is there and people come down and say, well, why is this so vacant, you know? Why is it closed? It looks so horrible, why you live here, you know? I mean, that's what I got before he opened up, you know? My mother will come down she's like, why's that so vacant, say, well, that's horrible. I don't want

that closed. I want it to stay opened. I want this man to progress. I, and I don't think he's going to have loud music. I, for one, do not like loud music. I go in there, I go in there quite a bit so I don't want no loud music. I want nice music.

MR. SCHMIDT: Okay. Thank you, ma'am.

CHAIR: Mr. Borgerding?

MR. BORGERDING: No questions, Your Honor.

CHAIR: Mr. Zimmerman?

MR. ZIMMERMAN: Just to clarify, the Islander what, what was the other?

MS. REILLY: The Swan.

MR. ZIMMERMAN: The Swan, they have indoor music only?

MS. REILLY: Yes.

MR. ZIMMERMAN: And, in any event, the Dock of the Bay is now open, right?

MS. REILLY: Yes.

MR. ZIMMERMAN: And you patronize it?

MS. REILLY: Yes.

MR. ZIMMERMAN: And you enjoy it?

MS. REILLY: Yes.

MR. ZIMMERMAN: Thank you. I have no further questions.

CHAIR: Okay. Any re-direct?

MR. SCHMIDT: Nothing further. Thank you.

CHAIR: Thank you, ma'am.

MR. SCHMIDT: Thank you, Ms. Reilly. Thanks to everyone. Is there anyone else who needs to testify? Okay. Thank you.

CHAIR: All right.

MR. SCHMIDT: That would be the Petitioner's case.

CHAIR: Thank you. Okay. Do you have anyone needed to testify for the Protestants?

MR. BORGERDING: Yes.

MR. ZIMMERMAN: Before we do that, I just wanted to indicate, Madam Chair, that I did obtain the Deed, the actual Deed document so we have the timing. I gave a copy to Mr. Schmidt so I think, are we up to number four?

BOARD: You're at three.

MR. ZIMMERMAN: Oh, only three. So, three would be the September 30th, 2014 Deed between Fifth Street, LLC and Boone Kondylas LLC, which comprises the various lots or parcels or tax i.d. numbers. And his, and as far as history goes, just for the sake of completeness.

BOARD: Have you seen this?

MR. SCHMIDT: I did, yes. No objection.

MR. ZIMMERMAN: Just for the sake of completeness, we have the Deed in 1999 from Josephine Harnicka (phonetic) to Fifth Street, LLC, so that's a bit of (inaudible).

BOARD: That's four?

MR. ZIMMERMAN: That would be number four. Mr. Schmidt has copies. Just to show the dates of the transfer of the property.

CHAIR: Okay. Anything else, Mr. Zimmerman?

MR. ZIMMERMAN: No.

CHAIR: Okay. Mr. Borgerding, you have witnesses?

MR. BORGERDING: Yes, I'd call Mr. Wolinski to the stand, Charlie Wolinski.

VOICE: I just want to put up a couple pictures of the proximity of like our houses.

MR. SCHMIDT: Sure. Okay, thank you, Mr. (inaudible). Is that yours too?

VOICE: Yes.

CHAIR: You might want to just --

BOARD: Are you planning on introducing those, because he's going to have to introduce those to you.

VOICE: Oh, I'm sorry. I think most of them --

CHAIR: You want to take the stand and then be sworn in first and then if you could do the pictures, and you don't need to put them on the board because you probably can't see them.

VOICE: Okay.

CHAIR: Probably just want to hold them up.

BOARD: Raise your right hand, please. Do you swear

and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. WOLINSKI: Yes, ma'am.

BOARD: Okay. Can you please state your name and address for the record?

MR. WOLINSKI: Charles S. Wolinski, 9919 Cuckold Point Road, Miller's Island, Maryland, or Sparrows Point, Maryland 21219.

BOARD: And spell your last name, please.

MR. WOLINSKI: Wolinski, W-O-L-I-N-S-K-I.

BOARD: Thank you. Please be seated.

MR. WOLINSKI: Thank you.

MR. BORGERDING: Mr. Wolinski, how close are you, is your property to the Dock of the Bay?

MR. WOLINSKI: It's adjacent to the property. It's about --

MR. BORGERDING: Okay. I'm going to give you a series of pictures, starting, I'll mark them as Protestant's number --

BOARD: It would be your five.

MR. BORGERDING: Okay. Five, five and forward. If you can hold them up to the Board so they can see them and describe what they show.

MR. WOLINSKI: Okay. This is a, this is an --

CHAIR: Go ahead.

MR. WOLINSKI: This is an aerial view of our properties, just to show the proximity. This is my house, this is Matt's house, excuse me, this is Dock of the Bay here. This is Brad and Bonnie and this is where Billy lives. Brad and Bonnie also own this property, it was Bonnie's mom's. But you can see that from this, the, the properties are very, very close to Dock of the Bay, especially the, the outside area where the, the entertainment would set up. I mean, literally, you're fifty feet from the property line to the, to the next house. My house is, is about two hundred feet. In the last hearing, it was all marked off. We had it measured and stuff like that, just to show how close it was. This is a, this is a picture from, from my deck, just to show you how close that is.

MR. ZIMMERMAN: Excuse me, we're going to need to know the exhibit numbers on these at this point.

BOARD: Yeah, and --

MR. ZIMMERMAN: And I wonder if the witness, when he says this is something, the record is not going to reflect what --

BOARD: Well, I'm not being helped very much up here so.

MR. WOLINSKI: Oh, I'm sorry.

BOARD: That's okay, the first one you showed --

MR. WOLINSKI: This is just the aerial view.

BOARD: You have to give that to me.

MR. BORGERDING: (inaudible) Protestant's number five and I move (inaudible).

MR. WOLINSKI: Sorry about that.

MR. BORGERDING: Can you describe for the Board Protestant's number six?

MR. WOLINSKI: Yeah, this is just a shot from my, my deck, just shows the close proximity of my home to where the outdoor entertainment is typically set up. It has the, the lady stated earlier, down by the water, the, the noise and the sound travels very, very quickly.

MR. BORGERDING: Also Protestant's number six be entered into evidence.

MR. SCHMIDT: No objection.

MR. WOLINSKI: And this, this one here is from Bonnie's mother's house. You can see just how close it is. Like I said, that one's about fifty feet.

CHAIR: Who, who's Bonnie?

MR. WOLINSKI: Bonnie is, is the lady, she's one of the other neighbors right there, I'm sorry.

MR. ZIMMERMAN: I'm sorry, I can't --

MR. WOLINSKI: Bonnie Metheni (phonetic).

CHAIR: Okay, Bonnie what, Metheni?

MR. WOLINSKI: Yes, Bonnie Metheni.

MR. ZIMMERMAN: I can't hear the witness very well.

I wonder if it's going to get on tape.

MR. WOLINSKI: Bonnie Metheni.

MR. BORGERDING: That I'd ask that Protestant's number seven be entered in evidence.

CHAIR: Have you seen that one?

MR. SCHMIDT: Yes.

CHAIR: All right.

MR. SCHMIDT: No objection.

CHAIR: All right.

MR. SCHMIDT: To the photographs collectively. Mr. Alston, when you're done marking those, could I, could I take a look at them.

BOARD: Sure.

MR. SCHMIDT: Just when you're, let me know when you're done.

BOARD: Sure.

MR. SCHMIDT: Go ahead, Mr. Borgerding. I didn't mean to interrupt you.

MR. BORGERDING: Okay. Yes, can you describe Protestant's number eight?

MR. WOLINSKI: Just another shot of the outdoor seating area from Bonnie's mother's house, just again, to show how close the entertainment is from our actual homes.

MR. BORGERDING: That I'd ask that Protestant's number eight be entered in evidence. Mr. Wolinski, do you have

children?

MR. WOLINSKI: Yes, I do.

MR. BORGERDING: How many?

MR. WOLINSKI: I have three children.

MR. BORGERDING: What are their ages?

MR. WOLINSKI: My youngest is, is four, my middle is ten and my oldest is thirteen.

MR. BORGERDING: Okay. So, I'm just going to ask you, we've sort of talked about Larry Tanner and his operations at Dock of the Bay. Can you describe generally, without spending too much of the Board's time, the impact that seven years of fighting him in litigation had and the noise emanating from the property?

MR. WOLINSKI: Yes. Fighting through this for seven years was an absolute nightmare. Every weekend it was, not if it was going to be bad, it was how bad is it going to be and then all the legal battles and the postponements and the appeals for, you know, seven years, time out of work, money spent, over and over and over again, it was just a relentless bombardment of our senses, you know, my, my children would be, you know, jerked out of bed, essentially, at, at all hours of the night, you know, eleven, twelve, one, two o'clock in the morning, sometimes later, disorderly leaving the parking lot, disorderly in the parking lot and we went through this for, like I said, about seven years of, of loud music and everything

comes with it. The patrons, the loud patrons, the, it wasn't just the band, it was after the band, all the clapping and the, the hoorahs and all that kind of stuff. You know, sometimes that was actually worse than the music. It was just the, the response after the fact, you know. Mr. Boone has a radio, there's nobody clapping at the end of a song when the radio, when a radio is finished. I mean, that's, that's it so it was the, it was the music was loud to the point that I never opened my house. Like my house stays closed year round, I run heat until air conditioning and then air conditioning until heat and it, it was so loud I could hear the music in my shower with the fan running, with the exhaust fan running, I could still hear the music outside. And it was years and years and years of this, appeals, appeals, appeals, until the end when they finally said enough is enough. Now, I've been in Dock of the Bay before when Mr. Tanner owned it, I've been in Dock of the Bay now that Ken Boone owns it. Everything about the business is exactly the same. The table, the chairs, everything. The only thing that is different is that he doesn't have live music and if he has live music then it will be identical, there's nothing different about it. So, when you, when you look at what Larry did and how he, he tried to change and he tried to get around the rule, so he decided to put a barge in and tried to play music from a barge and they said absolutely not, you're just trying to get around the ruling and that's when they

finally said, you know, that's the end and put an end to Mr. Tanner's music. After that, the last few years that Larry owned the place, to be honest with you, it's very similar to what Ken has. It wasn't, after the music stopped, there wasn't a single complaint filed against Dock of the Bay to my knowledge. I've never filed one against Dock of the Bay after the music stops or against Ken for that matter. It was very similar then as it is now. Our fear is that if Mr. Boone is granted live entertainment again, we will go through the exact same thing again. In fact, his, his first, you know, act was supposed to be Mark Allen. Mark Allen played at Dock of the Bay when Larry Tanner owned it. He is an acoustical player but that means something different then what it used to mean. It's not a guy sitting with a single guitar that's not hooked up. His guitar is, is miked and amped and all that stuff and it is very, very loud. It, it is loud to the point that, it is loud to the point that he's not allowed to play at Rowboat Willy's anymore for being too loud. So, the owners of that establishment said that he is not welcome back because of how loud his music was.

MR. SCHMIDT: Objection. Move to strike as hearsay. That portion of the testimony.

CHAIR: Okay. You can't tell us what the owners or someone else told you about.

MR. WOLINSKI: Okay, that's fine.

CHAIR: If you have personal knowledge of it.

MR. WOLINSKI: No.

CHAIR: So, we'll strike that testimony.

MR. WOLINSKI: That's fine. But I, I can say that he, he did play at, at Dock of the Bay prior to, when Larry Tanner owned it and he is, he was going to be the first act at Mr. Boone's Dock of the Bay is, I think that's okay.

CHAIR: Yep, understand, okay.

MR. WOLINSKI: So, our, our fear is that it's going to be the exact same thing, loud, disorderly and everything that comes with the live music. You're talking about the, the large number of people, obviously, it's going to stay open later than the, then the 9:00 that it's been closing down now. You know, I don't know of any business that's going to shoo people to the door and say, okay, well, we're, we're done for the evening and, and that's, that's what we'd be facing all over again.

MR. BORGERDING: So, what is your response to the people that have testified that either work at the Dock of the Bay or have relatives that say he's a nice guy, let him have the music?

MR. WOLINSKI: Well, all I would say is, the way Mr. Boone operates the business now is not disturbing, okay? It's fine, it doesn't, it doesn't interfere. He's running a restaurant and it's all well and good and chances are, you

know, they, they worked there since he opened so that, that is the case, I'm sure. But once you add the element of music, that changes everything completely. That's the same way it was with Larry. When Larry owned it and, and he's been demonized by anybody that's ever spoke about him, oh, he was terrible, he was evil, he was this and that, and I won't dispute that but what I will say is that even though all that is the case, when he didn't have music, he ran a quiet business just like Mr. Boone. You, it's very difficult to control, you know, that kind of, that kind of crowd, that kind of number when you get such large people coming down, you know, there's nowhere to park, they get blocked in. When I first, well, when Mr., Mr. Tanner first started with the live music, somebody was pinned in, you know, somebody blocked in their car and the person left by driving through my yard and so that was, that was an eye-opening experience to me because my children are playing out in my backyard and this person drives right through my yard. Obviously, shortly after, I installed a, a, you know, a fence down the property line to keep that kind of thing from happening. But I would have never, never thought that in a million years that somebody would drive in my yard just because of this. So, you have large number of people, you know, the crowds, the parking issues and everything that comes with the, having the live music and that's what we're so terrified of. I mean, the neighbors and I, you know, we fought this for, for

seven years. We thought it was put to bed, we thought it was done and our lives could continue to normal and now, you know, it's starting all up again, you know, over, it's the exact same thing that Larry did. Well, I'm doing it differently, you know, it's not going to be this. And then it morphs into, to, to something and that's what happened to Larry and, and unfortunately, once you kind of, once you kind of let it out, it's seven years for, for the, for the residents. It's not like you just go back and say, oh, that's it. It, it doesn't work that way. They appeal, they appeal, they appeal over and over and over again and then we end up in Annapolis, you know, like I said, six or seven years later and it's, it's a very difficult and life altering experience. You know, Wayne Waldman, the neighbor, he can't be here today, he was at, his family was at the hearing, the last hearing so I guess any testimony would be entered in from that but, you know, he had a heart attack in this whole process. His wife testified to that on the stand last time, so I guess that would be in evidence. But that's how dramatic it effects our lives. And, and I, you know, I understand that the, the other residents around the community say okay, well, you know, it doesn't bother me, well, sure it doesn't, because you live a mile away or five blocks away or something like that and it, it doesn't bother you. But when you live right next door to it and have to deal with it on a daily and weekly basis, it becomes, it becomes daunting, you

know. So, that, that's, that's kind of where you're at with it.

CHAIR: Excuse me, ma'am.

MR. BORGERDING: Were you aware of --

CHAIR: Can you, one second, ma'am. Can you please stop making comments because it's been like that throughout the hearing and we can't hear up here and it also interrupts the transcript, picks up all the noise.

VOICE: Sorry.

CHAIR: Thank you. Okay, go ahead.

MR. BORGERDING: Were you aware that the liquor board (inaudible) regulations against Dock of the Bay?

MR. WOLINSKI: Yes. Don Crockett would come out all the time and, with his meters and his, his meter is a little bit better than the one that Mr. Boone and that's actually Brad Metheni's meter, then the one we have and he would take readings throughout the evening.

MR. SCHMIDT: Objection. If he's going to test, if he's going to testify about what these readings were, they were taken by someone who is not here. I would object.

CHAIR: Okay.

MR. SCHMIDT: If that's where he's going.

CHAIR: Understand. Okay, we don't know where he's going yet but that is true.

MR. WOLINSKI: Okay. I mean, I have, I do have his

paperwork from the liquor board, if that would help. I don't know if you want to submit that.

CHAIR: I mean, we haven't seen it.

MR. ZIMMERMAN: Well, they took in petitions which were --

CHAIR: Wait a minute, wait a minute, this is not your witness right now.

MR. BORGERDING: I'll show you after I show Mr. Schmidt, I'll show you some documents.

MR. WOLINSKI: I don't know if you want to submit them or --

CHAIR: This is during Mr. Tanner's --

MR. WOLINSKI: Yes, during Mr. Tanner's.

MR. SCHMIDT: Okay. So, this is, this is about conditions when Mr. Tanner was operating the restaurant?

MR. BORGERDING: Correct.

MR. WOLINSKI: Yes.

MR. SCHMIDT: I don't have any objection.

CHAIR: Okay.

MR. SCHMIDT: You're going to put that in, that's fine.

MR. BORGERDING: Can you describe, starting with Protestant's number nine, they'll be individually marked, can you describe to the Board what the first document shows?

MR. WOLINSKI: Yeah, the, the first document shows

that, that basically the noise would rise up to sixty-eight decibels from the establishment. This was when music was played inside the building. When the doors would come open and closed, when people would come and go or walk outside to smoke or something like that, the noise would spike up to, in this one here it's sixty-nine and it says in approximately twenty-five minutes sitting at Mr. (inaudible)'s home, the door open and closed twenty times. So, you can, you can imagine that every minute for twenty-five, almost every minute for twenty-five minutes, the door opens up and the, and the noise spikes and then closes back up. So, it's one of those things, is right when you're trying to fall back to sleep, then it's loud again, then you go back and it's loud again. So, it, it is just, it's a daunting experience to, to have to go through.

MR. BORGERDING: I'd ask that Protestant's number nine be entered into evidence.

CHAIR: There was no objection.

MR. WOLINSKI: These are basically the same, just giving different readings, sixty, sixty-three to seventy-three decibels, you know, over here, loud noises from the parking lot registering sixty-nine decibels and these are, you know, at ten and twelve o'clock at night, this one here is at 12:05.

MR. BORGERDING: With that I'd ask that Protestant's number ten and eleven be entered into evidence.

CHAIR: Okay. There was no objection.

MR. BORGERDING: Now, Mr. Wolinski, do you have an understanding of what decibel levels are permitted from the prop, at the property line?

MR. WOLINSKI: The liquor board, what they would base their, their numbers on is sixty-five decibels during the day and fifty-five at night. On the Maryland Department of Environment website, I couldn't print out anything else other than that. It talks about sixty-five decibels during the day and fifty-five decibels at night. I'm in the process of buying a new dishwasher at this point in time and a good dishwasher is right around fifty decibels and that's based on, you know, like when you buy a dishwasher it'll tell you, this is the decibel readings. So, the fact that Mr. Boone feels that he will be able to, to have outside music and keep it quieter than a dishwasher at the property line, I, I just don't understand how that's going to be a possibility. To me, it's, it's something that is just impossible to do and, and it would just, it would just open us up to this exact same fight again that we had with Larry. Oh, it's not too loud. Well, it is when it's that disturbing. So, that, that's, that's the, that's the road that I'm afraid we're going to go down again.

MR. BORGERDING: Have you personally taken any sound level decibel readings from your meter?

MR. WOLINSKI: Yes, yes, I --

MR. BORGERDING: Okay. So, the average conversation,

just conversation, human conversation, what does that register?

MR. SCHMIDT: Objection. I just don't think it's that simple. I mean, the man, I haven't heard any qualification that he's a noise expert, how it was done, whether the machine was properly calibrated and all the rest of that. I think he is getting into expert testimony that someone who is an acoustical engineer or something may know. I have no idea what kind of machine he used, whether it was calibrated correctly, whether he knows how to use it correctly and all the rest of that. So, I would object to the testimony on that, on that basis.

MR. ZIMMERMAN: May I comment? The Petitioner was allowed to testify about what he thought was loud or not loud without any qualification whatsoever.

MR. SCHMIDT: That's because you asked him the question, Mr. Zimmerman.

MR. ZIMMERMAN: No, no, it was presented in Petitioner's case. Anyway, I think, I think it's an administrative hearing and (inaudible) then the Board can give it what weight it deserves.

CHAIR: Well, it, I mean, asking the witness, you know, what they think is loud or not is different than asking him to, you know, asking questions about a device that he, when he's not an expert in using it and so from that standpoint, we would sustain that question.

MR. BORGERDING: (inaudible).

MR. WOLINSKI: Well, with, without a question, then, then the --

CHAIR: Wait a minute. You have to wait for a question.

MR. WOLINSKI: Oh, I'm sorry.

CHAIR: Next question, Mr. Borgerding.

MR. BORGERDING: Is there something else you'd like to say, Mr. Wolinski?

MR. WOLINSKI: Well, just simply about the, the meter, just that, that makes me nervous then because Mr. Boone says that he's going to be monitoring it. Well, you know, I'm not an expert but neither is he so that, that's my fear and, and, and it's like, okay, well, this is, this is good and I don't know what his meter is or who's calibrating it and he's, you know, going to be the fox guarding the hen house, so to speak, not to, to make light of it. You know, he's going to say, well, my meter said this and if I said, well, my meter was twenty, twenty decibels higher, it'd be like okay, well, my meter said this and, and that's the, unfortunately, the, the shaky road that we go down. The liquor board isn't going to be there, code enforcement isn't going to be there every day making sure that he's going to be doing what's said and we've already went down this with Larry saying oh, I'm going to take care of this and take care of that and we all know how that

went. So, now we're back at the same exact situation, trying to ask for the exact same thing that Larry had and we're going to run into the exact same problems all over again. And, and that's why I'm afraid, you know, if the decibel meter, if I can't work it then, then neither can he and, you know, he's not going to hire a sound engineer to come in every weekend to insure that he doesn't go loud and, I mean, that that's my, that's my fear.

MR. SCHMIDT: How do you know that?

MR. BORGERDING: The documents that we just put into evidence, they were decibel readings from inside music, not outside?

MR. WOLINSKI: Inside music, yes.

MR. BORGERDING: Okay. So, obviously you would assume, it would be fair to say that you think the decibel readings would be louder if it was outside?

MR. WOLINSKI: Yes, yes, if the door is opening up and the, the music is spiking to seventy and seventy, you know, sixty-nine and seventy, inside the building, I can imagine, I, I can only imagine how loud it would be, you know, next to the, the, outside and next to the property lines with no obstruction whatsoever.

MR. BORGERDING: Do you feel in your opinion that you could have outside music and meet those decibel levels under the (inaudible)?

MR. WOLINSKI: I, I don't see how it would --

MR. SCHMIDT: Objection. It's assuming in evidence some decibel requirements of the State, of which we do not have any testimony about.

CHAIR: We don't. We don't have testimony about it, I'm going to guess we're thinking --

MR. BORGERDING: You have testimony about it, you don't have evidence.

CHAIR: -- maybe in, in conclusion --

MR. ZIMMERMAN: Well, we do have evidence. He says sixty-five and fifty-five and we can, I mean, those are the State regs.

MR. SCHMIDT: I disagree. We haven't, the COMAR, the COMAR regulations are not in.

CHAIR: And, and so --

MR. ZIMMERMAN: You don't have to have it in evidence, that's law, okay? We can cite that, we don't have to (inaudible).

CHAIR: That's going to be done in closing, we're assuming, something to that effect will be done by everybody in closing, because we don't know either.

MR. SCHMIDT: Agreed.

CHAIR: I'm sorry.

MR. SCHMIDT: The form of the question was, will it meet the State law.

CHAIR: Right, okay, so --

MR. SCHMIDT: And I, I think that's an objectionable question.

CHAIR: Right, so we don't know. We don't know. I mean, he, the question was before, is outside music going to be loud and it's (inaudible).

MR. BORGERDING: Do you feel that outside music would be too loud, it would be disturbing to you as a neighbor?

MR. WOLINSKI: Oh, absolutely. Absolutely. I don't see how --

MR. BORGERDING: Why, why do you say that?

MR. WOLINSKI: Because there would be nothing to suppress the, the noise and, and even if it was, like I said earlier, even if it was a situation where the band was extremely quiet, I don't see how you're going to control the crowd after the fact. I mean, we've all seen concerts, like Mr. Schmidt was talking about earlier, you go into restaurants and this, we've seen concerts and, and at the end of the song it's not like there's crickets, you know? Everybody gets up and claps and applauds and there's hooting and hollering and, and, you know, that, that's going to be, going to be there whether, you know, the band is quiet or not.

MR. BORGERDING: Now, you (inaudible) there's type of structure outside that you claim modulates the sound. Can you explain that?

MR. WOLINSKI: Well, there's the, there's an awning over the side bar that, that is directional. So, like when sound, instead of sound emanating outward, in all, all directions, when you, just like when you cup your hands and talk in that direction, the awning shoots the, shoots the noise out sideways and I'm not sound expert but that's just the way it appears to occur.

MR. BORGERDING: Now, is there anything else you'd like to tell the Board?

MR. WOLINSKI: Well, the only thing that, that, that I think the Board really needs to know is that whether or not it's, you know, the lighting is this and the tables are that, and that's, that's all really moot. I know it's part of the law and everything but what it boils down to is it's the, the live music, is, is why we're here today. Mr. Boone wouldn't be here if it wasn't live music, we wouldn't be here if it wasn't live music. So, his table arrangements and all that stuff are all come in second to what we're really fighting about and that is the live music is having a huge detriment on our life. It, it's, it's so disrupting to us, you know, that, you know, I sleep with earplugs when, when this happens just to, just to be able to go to sleep and that's not, that's not fair to me or my family or to the rest of the neighbors. The, the patrons and the witnesses and things like that, they, they get to go home and I, I know Mr., Mr. Boone had pages of, of people signing

saying, you know, we're in support, we're in support but, but that's a very slippery slope that we, we've seen throughout history. When you let the majority decide the rights of the minority, then the minority has no chance of real justice. I mean, you know, women's right to vote would have never passed if that was the case. You just never, you're not going to, you know, civil rights isn't going to happen if the majority is determining for the minority and that's kind of where we're at. You know, I, I can't get a hundred people to come in here and say oh, yeah, you know, we don't want music there. It's easy to get, you know, a hundred or two hundred people to say, well, sure, it doesn't have any impact on me whatsoever. Me signing this doesn't affect me negatively in any way and that's essentially what has happened here. You know, the people that, that it affects negatively are only the, the very few residents that, that are immediately around the Dock of the Bay and we fought it for years and years and years and not because we wanted to. My gosh, I mean, we tried to work with Larry for years and it just got to the point where, you know, he just, he just wouldn't hear us and, and now we are here again for the exact same thing that we went to Annapolis for and, when I first found out, I, I couldn't understand why. I was like this has been decided, I thought this would have been, been put to bed long ago and, you know, and here we are all over again and I, unfortunately, I feel that, you know, this is, we're going

to do it again for seven years, we'll be back in Annapolis. It's, and, and it's horrible to me. I don't know why we have to be put through it again so.

MR. BORGERDING: No further questions.

CHAIR: Okay. All right.

MR. ZIMMERMAN: My turn.

CHAIR: Okay.

MR. ZIMMERMAN: Okay. Mr. Wolinski, what exactly is your address?

MR. WOLINSKI: 9019 Cuckold Point Road, it's directly, Sparrows Point, Maryland 21219.

MR. ZIMMERMAN: And how long have you lived there?

MR. WOLINSKI: Probably twelve, twelve years, I would imagine, eleven, twelve years.

MR. ZIMMERMAN: How old are you?

MR. WOLINSKI: I am forty-four.

MR. ZIMMERMAN: Okay. What's your educational background?

MR. WOLINSKI: I, I'm a school teacher. I have a, I have a, I'm a school teacher. I have a degree in Biology.

MR. ZIMMERMAN: From which college?

MR. WOLINSKI: Towson.

MR. ZIMMERMAN: Okay and where do you teach?

MR. WOLINSKI: Sparrows Point High School, right down the street from where I live.

MR. ZIMMERMAN: Biology?

MR. WOLINSKI: Yes, I teach Biology, Zoology, Environmental Science. My wife is a teacher there as well.

MR. ZIMMERMAN: All right. I want to show you Petitioner's Exhibit 6, the aerial photo. I think the Board just has one copy of it. Can you identify your house?

MR. WOLINSKI: Here, that's my house right here.

MR. SCHMIDT: You, you want him to mark it, Mr. Zimmerman?

MR. ZIMMERMAN: Well, it says 9019, would it help the Board if --

MR. WOLINSKI: No, it's, it's 9019.

MR. ZIMMERMAN: 9019 is marked right on the exhibit, just show my copy to the Board.

MR. WOLINSKI: I think it's the same one.

MR. ZIMMERMAN: And, okay. So, you are, are you right next to the Dock of the Bay?

MR. WOLINSKI: Yes, my, my house is adjacent to the parking lot.

MR. ZIMMERMAN: And you mentioned some other houses that are near to the Dock of the Bay. Are some of those on Sixth Street or, or --

MR. WOLINSKI: Yes, they are on Sixth Street and that would be Matt (inaudible).

MR. ZIMMERMAN: Can you give me the, there's some

addresses on this Petitioner's Exhibit 6.

MR. WOLINSKI: Yes, twenty, excuse me, 2716 Sixth Street.

MR. ZIMMERMAN: Hold on, that's Mr. Carpela?

MR. WOLINSKI: Yes, that --

MR. ZIMMERMAN: He couldn't be here, is he here today?

MR. WOLINSKI: He's right there, um hm.

MR. ZIMMERMAN: Okay. He was the, like the named party in the previous case.

MR. WOLINSKI: Yes, he was the named party, yes.

MR. ZIMMERMAN: And who else, among others, were, are, have houses very close --

MR. WOLINSKI: This 2712, is Bonnie's mother's house, she is there in the back.

MR. ZIMMERMAN: Bonnie Metheni?

MR. WOLINSKI: Bonnie and Brad, I'm sorry. Bonnie Metheni, she's there. And then this is a vacant property, they started --

MR. ZIMMERMAN: Twenty-seven, give me the number.

MR. WOLINSKI: 2703.

MR. ZIMMERMAN: All right.

MR. WOLINSKI: I think it's three. That is a vacant property.

MR. ZIMMERMAN: And 2704?

MR. WOLINSKI: And 2704 is also Brownie, Bonnie and Brad in the back there.

MR. ZIMMERMAN: Okay and they're on Sixth Street, which is perpendicular to Cuckold's Point Road.

MR. WOLINSKI: Yes, it is.

MR. ZIMMERMAN: Now, across Sixth Street, is that a park area?

MR. WOLINSKI: No, this is, this is a, just the woods that's owned by multiple people.

MR. ZIMMERMAN: Okay. All right and the Rowboat Willy's, that's shown on Petitioner's Exhibit 6?

MR. WOLINSKI: Yes.

MR. ZIMMERMAN: You need to see it again?

MR. WOLINSKI: No, I'm good.

MR. ZIMMERMAN: Okay and that's actually zoned business major?

MR. WOLINSKI: Yes, it is business major.

MR. ZIMMERMAN: Okay. Which would allow a nightclub.

MR. WOLINSKI: Which would allow them to have live music, with restrictions.

MR. ZIMMERMAN: And, okay and then there are several other houses across Cuckold's Point Road, correct?

MR. WOLINSKI: Yes, Wayne Waldman, he's the, the man that had the heart problem during the Larry Tanner --

MR. ZIMMERMAN: Well, where does he live?

MR. WOLINSKI: He is right here. He is at 9016 Cuckold Point Road.

MR. ZIMMERMAN: Right across from the parking lot?

MR. WOLINSKI: Right across the, yes.

MR. ZIMMERMAN: And the Board can see (inaudible).

MR. WOLINSKI: And his, his wife testified in the earlier hearing, but they couldn't be here today unfortunately.

MR. ZIMMERMAN: And this is, what, in general, what type of neighborhood is this?

MR. WOLINSKI: It's a quiet, residential neighborhood.

MR. ZIMMERMAN: Okay and of course, the Rowboat Willy's has been mentioned. I'm looking at Petitioner's Exhibit 7, a wider shot of the Miller's Island area, right?

MR. WOLINSKI: Yes.

MR. ZIMMERMAN: So there are a few other business major zones.

MR. WOLINSKI: Yes.

MR. ZIMMERMAN: Are any of those the restaurants that have been mentioned?

MR. WOLINSKI: No, they are not.

MR. ZIMMERMAN: They're not, okay. So, the Islander, where's the Islander?

MR. WOLINSKI: The Islander is across the street here, in this BL, and it, it is BL as well.

MR. ZIMMERMAN: When you say, okay, so, is the Islander a problem for you?

MR. WOLINSKI: No, they don't have live music.

MR. ZIMMERMAN: Okay. Do they have outdoor music?

MR. WOLINSKI: No, they do not.

MR. ZIMMERMAN: And as far as Rowboat Willy's goes, even though it's business major, do you have any problem with, with them?

MR. WOLINSKI: No, I don't.

MR. ZIMMERMAN: Because?

MR. WOLINSKI: I guess where they set their music up, it's on the other side of their buildings, their building kind of blocks it away from us.

MR. ZIMMERMAN: The other side of their boats too?

MR. WOLINSKI: Yeah, and then there's boat racks and all that kind of stuff in between.

MR. ZIMMERMAN: So, you haven't felt a need to complaint about, but anyway they're business major?

MR. WOLINSKI: No, yeah, well, Rob, Rob (inaudible) he keeps a pretty good handle on it.

MR. ZIMMERMAN: Okay. I'll leave my exhibit up there for a moment. Now, you mentioned Mark Allen as being acoustic, acoustic with an amplifier. You've heard Mark Allen play?

MR. WOLINSKI: Yes.

MR. ZIMMERMAN: When you say he's got an amplifier,

is this one of these amplifiers that produces sounds of other instruments?

MR. WOLINSKI: Yes, it can.

MR. ZIMMERMAN: So, it's like some of these solo people have the capacity to sound like a band?

MR. WOLINSKI: Yes, sir.

MR. ZIMMERMAN: And that's Mark Allen, would be one of those who, who --

MR. WOLINSKI: Yes, sir.

MR. ZIMMERMAN: -- it's an efficient way to get more music out, right?

MR. WOLINSKI: Yes, I would think.

MR. ZIMMERMAN: But it also means it's louder than you can imagine, of a single guitar player without any amplification?

MR. WOLINSKI: Absolutely, that, that's, that's the point. The acoustic used to be just a guy playing a guitar, like no amplifier and now when you look at acoustic, you know, it's, it's, they use a microphone to amplify the acoustic guitar.

MR. ZIMMERMAN: And apparently, there's no doubt that that was going to be the first player that Mr. Boone was going to have?

MR. WOLINSKI: That's what the sign said, yes, sir. That's what the sign said, yes.

MR. ZIMMERMAN: So, that wouldn't make you feel particularly comfortable (inaudible)?

MR. WOLINSKI: No, sir, it would not. No, sir.

MR. ZIMMERMAN: Now, there's been a lot of talk about State regulations and we'll, we'll pin that down but do you recall that the actual criterion under the law is above normal sound levels, not whether it violates State regulations or not?

MR. SCHMIDT: Objection.

CHAIR: Yeah, let's not ask him what the law says. I mean, he's not an attorney. The law does say what it says.

MR. ZIMMERMAN: Well, whether, whether or not you also believe that this, for various reasons, the music will likely violate State law, putting that aside for a minute, can you tell us your observation as to whether this kind of music would be above normal sound levels?

MR. SCHMIDT: Objection.

CHAIR: How's he going to know?

MR. SCHMIDT: How can he possibly speculate as to that?

CHAIR: We don't know, we don't know the type of music, we don't know the, the sound level, we don't know, I mean --

MR. ZIMMERMAN: Well, Mark Allen. He doesn't, it's not speculation, he's heard the music.

CHAIR: Okay, okay. So, if you're going to ask the

question about Mark Allen's sound level.

MR. ZIMMERMAN: Right.

CHAIR: Is, the question is, have you heard the gentleman, Mark Allen, play?

MR. WOLINSKI: Yes, I have.

CHAIR: Okay and in your opinion, was his, the playing of his music above normal sound levels?

MR. WOLINSKI: In my opinion, yes.

CHAIR: Okay.

MR. WOLINSKI: To simplify it, if he were playing outside next to my house, it would definitely disturb us.

CHAIR: Okay.

MR. ZIMMERMAN: Okay and let me ask you this. Not with, we've heard Mr. Boone's statement of the, if I heard him correctly and correct me if I'm wrong, that he would probably close by, I don't know, around midnight, I don't know. Mr. Schmidt will correct me if I've gotten the time wrong. And yet the website says 1:00 a.m. on weekends. What's your thought process on that? How do you respond to his statements that he's going to close relatively early?

MR. SCHMIDT: Close the restaurant or the music?

MR. ZIMMERMAN: Close the facility.

MR. WOLINSKI: I, I, I have no idea what time he would close. In my, my mind though, I'd have to imagine, based on what he said earlier, when people leave they, they would

close. So, if people weren't leaving, I'd say that he would stay open until the people left or until the maximum time that he could stay open. I mean, if people are buying drinks at 10:00, 11:00 or 12:00 or 1:00, I think he would still continue to sell them.

MR. ZIMMERMAN: If the website says 1:00 a.m., is that something you think most people can rely on when they're--

MR. SCHMIDT: Just, just objection to the extent that is he talking about how long the restaurant is open or the music is playing, because it's entirely two different things. I mean, the restaurant may very well be open late but Mr. Boone has testified about the hours, the dusk and the 11:00, I mean, we've heard about that so I, I, the inference is being made that the music is going to be played as long as the restaurant is open, which is not what the testimony is, I guess what I'm saying, Ms. Murphy.

CHAIR: I understand.

MR. ZIMMERMAN: That misrepresents my question.

CHAIR: Mr. Zimmerman, what I think is concerned with, the closing of the restaurant, that, that, but, again, we are not here to talk about whether or not he can operate a restaurant.

MR. ZIMMERMAN: The closing of the facility, according to the website, is 1:00 a.m.

CHAIR: Understood.

MR. ZIMMERMAN: There's been some testimony that the whole place is closing earlier than that. The fact that the website says 1:00 a.m., without reference to what goes on, I'm asking this witness, you know, how, what impact, if any, does that have about his concern?

MR. WOLINSKI: Well, it, it does. Staying open later obviously has a, has a huge impact on, on when people leave and get in their cars and drive out and wake us up and that kind of thing. For sure that, that will definitely impact my, my life. You know, and I think I understand what you mean by, you know, the, the restaurant is, you know, going to be staying open later than normal hours as far as one of the criteria for, for does it meet that of a nightclub and I would have to assume that, that yes, that it would stay open later than, then normal hours and meet one of the criteria and that's what happened with Larry. He would stay open and, and, whether he had music playing, whether he stopped the music at 12:00 or, or 11:00, the, the music would stop and then the people would stay around, continue drinking and then, you know, that just, that just made the problem that much worse. You know, if the people, if the restaurant closed out at, at 10:00 and, you know, didn't wake us up, then that would be one thing, but when it, everybody leaves and gets in their cars at 2:00 a.m., yes, it is definitely disturbing to us.

MR. ZIMMERMAN: And just to clarify, you don't object

to there being a restaurant and bar there?

MR. WOLINSKI: Absolutely not. I haven't had one, I haven't made one complaint against Mr. Boone in, in a year and a half.

MR. ZIMMERMAN: And as far as you can tell, based on your, have you been inside the place in the last year?

MR. WOLINSKI: Yes, um hm. I was over in the summer time, I was over once for sure when the Kondylas' owned it, I was over once, when the Kondylas were partners, and I was over, over the summer, somebody was having a birthday party and Matt (inaudible) and I have been there.

MR. ZIMMERMAN: Were the Kondylas there part of the time, at some point (inaudible)?

MR. WOLINSKI: No, no, just right, right at the very beginning. Like they were, right at the very beginning, the Kondylas were part of it and I think I was coming home from a baseball game and, you know, fall, fall baseball game. I think it was right when they, when they first opened opened.

MR. ZIMMERMAN: And based on, even when you're not there, when you're at home, you see the parking lot, based on your observation has the place been relatively well attended?

MR. WOLINSKI: Yeah, I mean, there's, there's cars there for sure.

MR. ZIMMERMAN: And just so I understand your testimony, were you saying that even the inside music can be a

problem because the doors open and then the sound emanates --

MR. WOLINSKI: Yes.

MR. ZIMMERMAN: -- outside and even extends, can extend to your property, based on your experience with the Tanner operation?

MR. WOLINSKI: Absolutely. There's a, Larry Tanner tried to build like a plywood vestibule on the back of the building to try to deflect the noise but in the liquor board things, when the side door is opened, you know, we're on the side of the property so as soon as the doors open, well, that's where all the sound is directed out at, at our homes. So, and that's where, there's an outside bar there as well, so there could be people out there, you know, drinking until 11:00 and whatever and it becomes very, very loud.

MR. ZIMMERMAN: And depending on how loud recorded music could be from time to time, was that ever a problem?

MR. WOLINSKI: Occasionally, with the outside bar speakers, not so much from, from my residence but I know Mr. --

MR. SCHMIDT: Objection then if he, if it's not --

MR. WOLINSKI: Mr., Mr. Metheni will testify.

MR. ZIMMERMAN: Well, could you observe as to where the sound goes? I mean, you're not always at your place, sometimes are you at your neighbor's or, or walking down the street, I mean, are you sometimes at those locations?

MR. WOLINSKI: I am, but it hasn't, it, you know,

when I was there, it wasn't bothersome to me, no.

MR. ZIMMERMAN: The music wasn't playing at those times?

MR. WOLINSKI: Yeah, I'm not sure if it was or wasn't.

MR. ZIMMERMAN: But you'd have to ask them as far as their --

MR. WOLINSKI: Absolutely.

MR. ZIMMERMAN: -- their personal experiences on that. And just to clarify, is, is, I want to get this, is Miller's Island actually an island or is it --

MR. WOLINSKI: No, it's not, it's a peninsula.

MR. ZIMMERMAN: Yeah, and it's beyond Edgemere, basically? You drive through --

MR. WOLINSKI: Yes.

MR. ZIMMERMAN: -- part of Dundalk and then you take --

MR. WOLINSKI: Through Edgemere, go down North Point Road, turn left to go to Miller's Island, straight to go to Fort Howard.

MR. ZIMMERMAN: And it's fair to call it a peninsula?

MR. WOLINSKI: It is very fair to call it a peninsula.

MR. ZIMMERMAN: Okay. Thank you. That's all I have, Madam Chair.

CHAIR: All right.

MR. SCHMIDT: Can I have Petitioner's exhibit number six, please? Which is the aerial.

MR. ZIMMERMAN: I think I left mine up there, which is fine. The Board can take a look at it during the questions.

MR. SCHMIDT: Because I'm going to have him mark, okay. Mr. Wolinski, there's been, on Petitioner's exhibit number six, an X placed where the Dock of the Bay when Mr. Boone testified, is that right?

MR. WOLINSKI: Yes, sir.

MR. SCHMIDT: I'm going to ask you if you'll put DOB next to that X where that's the Dock of the Bay? Okay. Now, I'm next going to ask you, your house is shown on that exhibit, is it not?

MR. WOLINSKI: Um hm.

MR. SCHMIDT: And could you put your initials, CW, there? Okay. Now, a little bit about that, what zone is your house located in? What's the zoning of your property, where your house is?

MR. WOLINSKI: BL.

MR. SCHMIDT: Okay. So, your prop, your house is actually in a business zone, is it not?

MR. WOLINSKI: Yes, sir.

MR. SCHMIDT: Okay. When did you build your house?

MR. WOLINSKI: Let's see, twelve years ago,

(inaudible).

MR. SCHMIDT: Okay. Was it, was it zoned business at the time, if you know?

MR. WOLINSKI: Yes, it was.

MR. SCHMIDT: Okay. The Dock of the Bay was in existence at the time, at that time?

MR. WOLINSKI: Yes.

MR. SCHMIDT: So, you chose to build a house in a business zone next to a restaurant?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. Now, do you have, do you have any idea how close your house is to the Dock of the Bay restaurant, in terms of linear feet?

MR. WOLINSKI: Just, just guessing, my house is probably a hundred and fifty.

MR. SCHMIDT: Okay.

MR. WOLINSKI: Just based on like if you use this kind of thing, you know what I mean?

MR. SCHMIDT: As the crow flies?

MR. WOLINSKI: Yeah, kind of thing.

MR. SCHMIDT: Okay. Rowboat Willy's, I understand that's BM, but that's the property next to Dock of the Bay, correct?

MR. WOLINSKI: Um hm.

MR. SCHMIDT: And can you mark, can you write Rowboat

Willy's where the Rowboat Willy's is? Okay and how far is Rowboat Willy's to, from your house?

MR. WOLINSKI: I would probably say three hundred feet.

MR. SCHMIDT: Okay. So, you think it's twice or three times the distance to the Dock of the Bay --

MR. WOLINSKI: I was just looking at this, this is a fifty-foot lot, fifty, fifty, fifty, that's a hundred and fifty.

MR. SCHMIDT: Well, fifty, fifty, fifty.

MR. WOLINSKI: That's a hundred and fifty and this one here looks like it's probably about the same width as two of these so I would say that's two fifty and then this one lot right here is fifty, so I would say two fifty, three hundred feet.

MR. SCHMIDT: Okay. Okay, all right. So, and Rowboat Willy's is outdoor music?

MR. WOLINSKI: Yes.

MR. SCHMIDT: That doesn't bother you?

MR. WOLINSKI: No, it does not.

MR. SCHMIDT: Okay. But the Dock of the Bay, you're objecting to in, indoor music at the Dock of the Bay?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay.

MR. WOLINSKI: And, and outdoor, don't --

MR. SCHMIDT: Indoor and outdoor at Dock of the Bay?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. The Islander, your testimony is that that doesn't have any music?

MR. WOLINSKI: They don't have live music. To, to my knowledge, I've, twelve --

MR. SCHMIDT: Have you ever been in there?

MR. WOLINSKI: Yes, and I've never seen a band in Islander in my life.

MR. SCHMIDT: Okay. Do they have entertainment, amplified entertainment?

MR. WOLINSKI: They might have a DJ, yeah.

MR. SCHMIDT: So, they have a DJ?

MR. WOLINSKI: Karaoke, that's what they have typically.

MR. SCHMIDT: And karaoke, okay, karaoke --

MR. WOLINSKI: Not so much a DJ, I've seen karaoke.

MR. SCHMIDT: Okay.

MR. WOLINSKI: I haven't seen a DJ there.

MR. SCHMIDT: Okay. That doesn't bother you either?

MR. WOLINSKI: No, that's over here behind other houses.

MR. SCHMIDT: Is it, is their property shown, is their property at the intersection of Fifth?

MR. WOLINSKI: That, that's it right there, yep.

MR. SCHMIDT: Okay.

MR. WOLINSKI: So, there's, it's back here, there's other houses that, that block and --

MR. SCHMIDT: Well, if you can, can you put Islander where the corner of their property is?

MR. WOLINSKI: Yep.

MR. SCHMIDT: Okay. How far are you from the Islander Inn?

MR. WOLINSKI: I would say that I am, one, two, that's about a hundred, I, from the building itself, I'd say two, two fifty.

MR. SCHMIDT: Two hundred and fifty feet?

MR. WOLINSKI: Yeah, because --

MR. SCHMIDT: Okay, okay.

MR. WOLINSKI: Yeah.

MR. SCHMIDT: Okay, that's what your measurement is. (inaudible). So, you've got the Islander Inn two hundred --

MR. WOLINSKI: To, to the building.

MR. SCHMIDT: -- two hundred fifty feet away from you in one direction that has karaoke.

MR. WOLINSKI: Yes.

MR. SCHMIDT: You have Rowboat Willy's, you say is three hundred feet from you, which is all outdoors, which has bands playing?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay and then you have the Dock of the Bay?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. All in business zones?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Now, you mentioned that Rowboat Willy's is allowed but with restrictions?

MR. WOLINSKI: Yes.

MR. SCHMIDT: What are the restrictions that Rowboat Willy's operates under?

MR. WOLINSKI: I'm not sure. That might be something you'd have to ask them.

MR. SCHMIDT: Well, why do you say that they have some kind of restrictions then?

MR. WOLINSKI: Because that's what I was, I heard.

MR. SCHMIDT: From, from who?

MR. WOLINSKI: From other people. Like, I mean, that, I know that when you look at the, when you look at through the, the zoning codes and all that kind of stuff, there's all these different restrictions and I don't know all of them, I just know there was one that said, you know, with restrictions and I know Brad talked about them and --

MR. SCHMIDT: I'm not asking Brad.

MR. WOLINSKI: Okay.

MR. SCHMIDT: I'm asking you. So, you believe that

Rowboat Willy's is operating with some kind of restrictions?

MR. WOLINSKI: No, I'm not. I'd say that they are operating within their legal limit, they're allowed, but if somebody forced the issue, there could be restrictions put on them. That's what I mean.

MR. SCHMIDT: Okay. So, your testimony is Rowboat Willy's is operating in accordance with the County regulations, whatever they might be?

MR. WOLINSKI: Yes, I think.

MR. SCHMIDT: You, you think, well, you don't, okay.

MR. WOLINSKI: Yeah.

MR. SCHMIDT: Okay. I was confused --

MR. WOLINSKI: I don't know, I apologize, I don't know all the Code.

MR. SCHMIDT: -- Mr. Wolinski, because you said they're operating with restrictions. I wrote it down.

MR. WOLINSKI: Oh, okay, well --

MR. SCHMIDT: And I was just trying to figure out what the restrictions were. Okay.

MR. WOLINSKI: Okay.

MR. SCHMIDT: But you don't know if there are any restrictions?

MR. WOLINSKI: No, I, I do not.

MR. SCHMIDT: Okay. You're not a noise expert, you're a science teacher?

MR. WOLINSKI: Nope, not a zoning guy, I just --

MR. SCHMIDT: Not a zoning guy. Okay. You've testified a lot about when Mr. Tanner was there.

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. Did you ever go to Mr. Tanner's restaurant when he was having music played?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. The music was, that was outside, did Mr. Tanner have a, a, a stage kind of area that he would, had for the musical acts?

MR. WOLINSKI: I've never seen a band on a stage there.

MR. SCHMIDT: Well --

MR. WOLINSKI: In fact, I know that (inaudible) testify there was a stage built.

MR. SCHMIDT: Um hm.

MR. WOLINSKI: We stopped going there after, you know, we developed this kind of feud, I guess you would say.

MR. SCHMIDT: Okay. So, you don't know, you don't know whether he had a stage or not?

MR. WOLINSKI: I don't know if he, if he built one after the fact, but I do remember that, you know, they were set up on the pavement when I was there before.

MR. SCHMIDT: Okay and there was, they were not on any kind of elevation or no make shift stage, even --

MR. WOLINSKI: No, no, not when I was there.

MR. SCHMIDT: -- if it was in a formal structure?

MR. WOLINSKI: No.

MR. SCHMIDT: Okay. How many --

MR. WOLINSKI: And not a stage inside.

MR. SCHMIDT: -- how many times were you there at, at Mr. Tanner's place when music was playing, live music was playing?

MR. WOLINSKI: Handful.

MR. SCHMIDT: Okay. All right.

MR. WOLINSKI: Because the steel drum band played there and I went there for that once.

MR. SCHMIDT: Okay. When you were at Mr. Tanner's, were people dancing, were there ever people dancing when you were there?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. Did, how was that accommodated? Did they have a dance floor?

MR. WOLINSKI: No, they kind of just like, just like when they put the, the, the band inside, they would just move the tables kind of out of the way or pull the tables back and that's where people would, that's where they would set up the band and that's where they would, they would technically that's where they would dance.

MR. SCHMIDT: Right, so --

MR. WOLINSKI: It wouldn't be like, like a wedding dance floor, it was just like a few tables pulled back and you would see a few people dancing in that location.

MR. SCHMIDT: You've been over to the Dock of the Bay?

MR. WOLINSKI: Yes.

MR. SCHMIDT: You were there as recently as last week?

MR. WOLINSKI: Yes, sir.

MR. SCHMIDT: All right. I assume for the purpose of being able to fill out the affidavit that you attached to --

MR. WOLINSKI: Well, I was over there in the summer as well, but.

MR. SCHMIDT: Okay. But, answer my question. You went over there so you could say you were there and complete your affidavit, right?

MR. WOLINSKI: Oh, yes.

MR. SCHMIDT: Okay. Did you have anything to eat while you were there?

MR. WOLINSKI: No, we drank a couple beers.

MR. SCHMIDT: Okay. Now, when, when you were there, you've seen the layout of the Dock of the Bay inside?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay and I assume what Mr. Tanner did when the bands start playing, as I understand it, is he would

push those chairs and tables back or in an area so as to create a dance floor, is that right?

MR. ZIMMERMAN: Objection. Actually, the Board of Appeals found there was no dance floor. I mean, this is, this testimony is really irrelevant.

CHAIR: Okay.

MR. SCHMIDT: Mr., Mr. Wolinski has testified as to what he said and as, I'm just trying to clarify that, Mr. Wolinski and what I understand you to say, just correct me if I'm wrong, is that what Mr. Tanner did when he had a band inside is he would push the tables and the chairs in order to get, create a space, it wasn't a permanent dance floor, so people could dance?

MR. ZIMMERMAN: I object because the --

MR. WOLINSKI: I don't think Mr. --

MR. ZIMMERMAN: -- Board has made findings on this.

CHAIR: Okay, okay.

MR. WOLINSKI: I don't think Mr. Tanner --

CHAIR: Wait a minute.

MR. ZIMMERMAN: (inaudible) totally a waste of time (inaudible).

CHAIR: I understand. Overruled. Okay, go ahead.

MR. WOLINSKI: I don't think Mr. Tanner moved the tables. He moved the tables for the band to set up.

MR. SCHMIDT: Okay.

MR. WOLINSKI: And then the patrons would slide the tables back if they wanted to dance. It wasn't like, I guess depending on what type of music was playing and who was there, that would determine whether, you know, like, like if I was there, music was playing, I wouldn't, I don't dance, so I wouldn't move the tables back.

MR. SCHMIDT: Okay. But --

MR. WOLINSKI: But if there were people that were there, they would get up and the patrons would adjust the tables and then they would dance there, yes.

MR. SCHMIDT: Okay and that's all I'm asking, when you were there, you saw people doing that.

MR. WOLINSKI: Yes, sir.

MR. SCHMIDT: You saw tables being moved.

MR. WOLINSKI: Yes.

MR. SCHMIDT: Mr. Tanner or the wait staff or somebody didn't come out and say, hey, stop moving those tables, you can't do that?

MR. WOLINSKI: No, no.

MR. SCHMIDT: He allowed that to happen so that there was a de facto dance area created, correct?

MR. WOLINSKI: Yes, I, yes, probably, um hm.

MR. SCHMIDT: Okay. Okay. Now, he also had a tent outside, did he not?

MR. WOLINSKI: Yes, he did.

MR. SCHMIDT: Okay and did he have music within the tent area?

MR. WOLINSKI: Yes, he did.

MR. SCHMIDT: Okay. Is the tent still there?

MR. WOLINSKI: No, it is not.

MR. SCHMIDT: Okay. Now, the hours that Mr. Tanner played all this music, how late in the night, let's start with weekdays when he had music playing, did the music go? You lived next door --

MR. WOLINSKI: Is Friday a weekday?

MR. ZIMMERMAN: You know, I'm going to object.

MR. SCHMIDT: Let's start with the weekday.

MR. ZIMMERMAN: I object because, you know, basically Mr. Schmidt is trying to retry the 2008 case as to what was going on and the Board of Appeals made findings.

CHAIR: I understand, okay. That's all right. Overruled.

MR. ZIMMERMAN: We shouldn't have to retry the 2008 (inaudible).

MR. WOLINSKI: Is Friday a weekday?

MR. SCHMIDT: No.

MR. WOLINSKI: Okay.

MR. SCHMIDT: Let's say, let's say Sunday night through Thursday.

MR. WOLINSKI: Sunday night, he didn't, Sunday during

the day he did. Friday night he would have typically indoor stuff. On Saturday and Sunday he would typically have outdoor music during the day and then he would break for an hour or so and have like a different music, band or live entertainment inside on Saturday night and sometimes Sunday, depending.

MR. SCHMIDT: Now, how late did that go?

MR. WOLINSKI: The, the outside stuff typically, you know, 6:00, 7:00, 8:00, depending on when they would start, you know, that kind of thing. Sometimes shut down at dark, like Mr. Boone was talking about and it really just depends. Sometimes he'd have two acts, you know, and then on the inside, I, I don't really, not really sure exactly what time. They all kind of stopped at different times, if that makes sense, 11:00, 12:00, 1:00, that kind of thing.

MR. SCHMIDT: Okay. He ever have music till 2:00 in the, in the morning?

MR. WOLINSKI: No.

MR. SCHMIDT: Ever have it till 1:00 in the morning?

MR. WOLINSKI: Yes, I would think.

MR. SCHMIDT: Okay. Now, you object to Mr. Boone having any music, either inside or out, correct?

MR. WOLINSKI: Any live entertainment, yes.

MR. SCHMIDT: Any live entertainment, okay. And you also indicated that you object to people making noise when they slam car doors and leave, is that correct? That's part of the

problem too?

MR. WOLINSKI: No, I, I said that that, that can be bothersome and when the people leave after the, the large crowds leave after the music at night, that can be, that can be bothersome. But no way do I sit here and say that people leaving the restaurant, like I don't want to hear doors closing, that, that's not what I'm saying.

MR. SCHMIDT: Because people can leave the restaurant --

MR. WOLINSKI: Absolutely.

MR. SCHMIDT: -- if there's a party there, whether there's music or not.

MR. WOLINSKI: Yes.

MR. SCHMIDT: And that you would hear that, right?

MR. WOLINSKI: Absolutely right, absolutely right.

MR. SCHMIDT: Since you're right next door in the BL zone. Okay.

MR. WOLINSKI: Yeah, but that, that's, that isn't something that, you know, we're not, we're not here over the occasional nuisance noise of, of a door shutting, you know, that's not why any of us are here.

MR. SCHMIDT: Okay.

MR. WOLINSKI: And no, I would never call Mr. Boone and say somebody closed the door, it's bothering me. I mean, that's.

MR. SCHMIDT: Okay. Let me, let me ask it this way, do you know, do you know Raymond Jones, a neighbor, do you have a neighbor named Raymond Jones?

MR. WOLINSKI: I don't know.

MR. SCHMIDT: You don't know? Okay, that's all right. If he doesn't know, that's fine. You have a neighbor named Christina Ottendorf, do you know her?

MR. WOLINSKI: Yes, I do.

MR. SCHMIDT: Where does she live, if you know?

MR. WOLINSKI: Over on Fifth Street.

MR. SCHMIDT: Fifth Street, and do you know her address?

MR. WOLINSKI: I do not.

MR. SCHMIDT: Okay. Is she closer to the Dock of the Bay than you are or as, or farther away?

MR. WOLINSKI: Further away.

MR. SCHMIDT: How far away, if you know?

MR. WOLINSKI: From my, she's, I mean, there's, there's three lots in between and then thirty and thirty are the roadway, a hundred, two hundred and ten feet.

MR. SCHMIDT: Okay.

MR. WOLINSKI: From my house.

MR. SCHMIDT: From your house. Okay.

MR. WOLINSKI: And that's a, that's an approximation, I mean, you know.

MR. SCHMIDT: Okay. I don't have any other questions of the witness. Thank you.

CHAIR: All right.

MR. BORGERDING: Just quickly in follow-up. Mr. Wolinski, Mr. Schmidt asked you if you are here to protest inside or outside music, correct?

MR. WOLINSKI: Yes.

MR. BORGERDING: And you would, you don't want either?

MR. WOLINSKI: I do not.

MR. BORGERDING: Okay. Is the reason that you don't want inside music is illustrated on Protestant's, I believe, it was ten through twelve, the liquor board readings showing above allowed decibel levels?

MR. WOLINSKI: Correct.

MR. BORGERDING: Right. So, you're concerned about that happening again?

MR. WOLINSKI: Yes, sir.

MR. BORGERDING: Okay. No further questions.

MR. ZIMMERMAN: And just a couple. I know we're getting late here. You know, your residence, a residence is allowed in a business zone when it's adjacent to a (inaudible), right?

MR. WOLINSKI: Yes, sir. Yes.

MR. ZIMMERMAN: So, you had no problem (inaudible)?

MR. WOLINSKI: No, because after that they said it's deemed residential.

MR. ZIMMERMAN: Okay and as far as the Islander goes, they only have indoor music and it's not a problem for you so you didn't feel like com, there's nothing to complain about?

MR. WOLINSKI: Exactly.

MR. ZIMMERMAN: Much less spend another seven years on something.

MR. WOLINSKI: Absolutely right.

MR. ZIMMERMAN: And as far as the Rowboat place, it's BM zone and, and the boats and everything and the distance, mean it's not a problem for you?

MR. WOLINSKI: Exactly. I'm not here to, to complain about things that don't bother me and, and, you know, if, you know, I'm not going to go complain against the, the Islander, it doesn't affect us. They don't have live music, I don't hear them, it's not like I'm picking out Mr. Boone just because, you know, it has a direct impact on my life and my family's life.

MR. ZIMMERMAN: So, as far as you're concerned, all the talk about these other places has nothing to do with (inaudible)?

MR. WOLINSKI: Not really, not to me, no.

MR. ZIMMERMAN: Thank you. That's all I have.

MR. SCHMIDT: Just one follow-up very quickly. Rowboat Willy's is, is next door to Mr. Boone, right?

MR. WOLINSKI: Yes.

MR. SCHMIDT: And that's actually the, the boatyard called, it's an operation called Bill's Boats, right?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay and they have boats on racks, do they not?

MR. WOLINSKI: They do.

MR. SCHMIDT: Okay. Do you own a boat?

MR. WOLINSKI: I do.

MR. SCHMIDT: Do you keep it on a rack?

MR. WOLINSKI: No, I keep it on a lift.

MR. SCHMIDT: Okay. On your property?

MR. WOLINSKI: My parents' lot. My parents live on the water, I just hit the button, it falls in the water.

MR. SCHMIDT: Okay. So, it's a lift out on the water?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. I don't own a boat, Mr. Wolinski. I'm assuming most people keep their boats on the boat racks and the storage at Bill's Boats during the winter time, is that a fair statement?

MR. WOLINSKI: That is fair.

MR. SCHMIDT: Because if you're not, if it's, you're not going to go out cruising on the bay when it's ten degrees like it was last week.

MR. WOLINSKI: Um hm.

MR. SCHMIDT: Okay and during the summer, people would come down and would remove their boats and not have them on the racks, right?

MR. WOLINSKI: Yes and no. Basically, Mike and Rob are fairly quick at pulling the boats.

MR. SCHMIDT: Right.

MR. WOLINSKI: So, they, they need their, you know, and this is just speaking for them from, you know, I don't want it to be hearsay but they need their pier space so when a boat comes in, they, they basically pull it out and put it on a rack as, as fast as they can.

MR. SCHMIDT: Okay. But my, my point is, most people would come down to Bill's Boats and take their boats off the racks typically, I would assume, again, I don't own a boat, when it's a nice day in the summer time, right?

MR. ZIMMERMAN: Objection. It's basically asked and answered. We don't need to go into, to this (inaudible).

CHAIR: I don't think it's been asked and answered but go ahead. If you know.

MR. SCHMIDT: If you know.

MR. WOLINSKI: Yeah, I, no, I mean, any given day --

MR. SCHMIDT: My point is this, Mr. --

MR. WOLINSKI: -- five boats could be missing from the rack.

MR. SCHMIDT: Right.

MR. WOLINSKI: And the next day, five different boats would be back and, you know, it's a rack and they, they take them off, put them in, the people go out for a couple hours, come back in, forklift picks them up, puts them back in the rack.

MR. SCHMIDT: Okay.

MR. WOLINSKI: It's, it's never a time as the, the rack like empty.

MR. SCHMIDT: Okay.

MR. WOLINSKI: Nor is there a time, you know, that, that the pier would be, the, the, if the rack were to empty out, the pier couldn't handle the boats in the water, if that would, meant to say, you know, there's not --

MR. SCHMIDT: And most people take their boat and go sail to St. Michael's or something.

MR. WOLINSKI: Oh, yeah, yeah, absolutely.

MR. SCHMIDT: Right?

MR. WOLINSKI: Yeah, but the boats that are in the racks --

MR. SCHMIDT: I mean, and it, I guess all I'm trying to say, Mr. Wolinski, is this, during the winter time when people aren't taking out the boats, you've got sort of a wall of boats there along that property line because the boats are being stored there during off season, right?

MR. WOLINSKI: Yes, pretty much.

MR. SCHMIDT: And during the summer, and particularly weekends, people are taking the boats out. I don't think you have to be a boater to figure that out.

MR. WOLINSKI: No, no, not at all.

MR. ZIMMERMAN: Objection. Objection. It misrepresents his previous testimony, it's argumentative.

CHAIR: Okay. Overruled. Go ahead.

MR. SCHMIDT: Okay and so, and so my point is, Rowboat Willy's operates in the weekends during the summer, right?

MR. WOLINSKI: Well, they operate all week, but yes.

MR. SCHMIDT: Okay. But that's when they have the, most of the music, weekends in the summer, correct?

MR. WOLINSKI: Yeah, I would say, yes.

MR. SCHMIDT: And that's the time when most of the boats are gone or people are using the boats, right?

MR. ZIMMERMAN: Objection.

MR. WOLINSKI: Well, I don't know how many boats would be missing.

CHAIR: Overruled.

MR. WOLINSKI: I, I don't know.

MR. SCHMIDT: Okay. Okay. My point is made.

CHAIR: Okay, all right.

MR. SCHMIDT: Nothing else.

CHAIR: All right. I think we've conclude this witness. It's ten after three and --

MR. SCHMIDT: Yeah, I think, and I know you, the Board members indicated they were going to conclude at three.

CHAIR: At three.

MR. SCHMIDT: And you've got what, two more witnesses, Mr. Borgerding?

MR. BORGERDING: Correct.

CHAIR: Okay.

MR. WOLINSKI: Just one? I'm sorry.

MR. SCHMIDT: Two.

MR. ZIMMERMAN: Possibly another one will make it next time who couldn't make it today.

MR. WOLINSKI: I mean, their testimony is in the last hearing so.

MR. ZIMMERMAN: Yeah, but that doesn't count. It's got to be this hearing.

MR. WOLINSKI: Oh, okay.

MR. ZIMMERMAN: You may want to bring somebody else. Seriously.

CHAIR: Okay. So, it looks like we're going to need another day, I guess.

MR. SCHMIDT: I mean, you indicated, I think, Ms. Hanley and you both indicated conflicts as well, correct? I mean, correct?

CHAIR: Right, correct, that's right. And you had your conflict as well.

MR. SCHMIDT: And I, and I said I was going to, right.

CHAIR: Okay, all right. So, we'll have to schedule another day so we'll just, you'll have to, I'm sure Sunny will be contacting each of you.

MR. SCHMIDT: Okay.

CHAIR: Okay.

VOICE: Approximately when?

CHAIR: As soon as everybody is available.

MR. ZIMMERMAN: Thank you, all.

CHAIR: It's --

MR. BORGERDING: Excuse me. They're, they're indicating to me they only need like five minutes each, if we could just (inaudible).

CHAIR: Well, they need five minutes, but then there's cross examination and there's cross examination.

MR. SCHMIDT: Well, I'm, okay.

MR. ZIMMERMAN: Yeah, I don't know how long I'm going to take, it could be a while.

CHAIR: There's your answer right there. You may be fast, but Mr. Zimmerman's going to, I'm kidding, Mr. Zimmerman, you know that. Okay.

(EVERYONE TALKING AT ONCE)

CHAIR: Well, it's not five minutes because he has to cross examine and he has to cross examine.

MR. ZIMMERMAN: That's fine. No, I'll, I'll try to be short, I'll try to be, go ahead.

MR. BORGERDING: Call Matt (inaudible) to the stand.

CHAIR: Yeah, I mean, Mr., Mr. Schmidt has to be somewhere at 3:30 and, in twenty minutes.

MR. SCHMIDT: I, yeah, I'll push that back, I mean, if you, I'll leave it up to you. If you all want to --

MR. ZIMMERMAN: Can we get at least the one quick one in?

CHAIR: Well, well, that doesn't make sense. If we're going to come back another day, if we're going to come back another day, then we need to bring everybody back.

VOICE: (inaudible).

(EVERYONE TALKING AT ONCE)

MR. SCHMIDT: Whatever the Board's pleasure is so, we going to come back or what do you think --

CHAIR: Well, we're going to need to because we want to hear from everyone, I mean, we don't want to cut everyone off short, we can't get into cross examination, you can see like this one witness took however long it took, we were back here at 1:30 and we're just finishing with that one. Now, these other witnesses may not be as long but when you cross examine, you cross examine, you re-direct and you re-direct,

and you re-cross, that's my only concern. We want to be able to hear from everybody, I don't want to cut anyone off short. So, and if there's other witnesses that need to come, then they need to come next time.

MR. ZIMMERMAN: This gentleman may not be able to come back.

MR. WOLINSKI: (inaudible) his brother is going in the hospice, he has to, like this is the last day he can be here.

CHAIR: All right. Okay, but the problem is that, the problem is it's going to be until 3:30 then and Mr. Schmidt is not going to be able to cross examine him.

MR. SCHMIDT: And you've got, okay.

CHAIR: The next time. So, we can clear it with you the next time and tell you (inaudible).

MR. SCHMIDT: I am happy to work with Mr. Borgerding, Mr. Zimmerman and your office to sche, re-schedule this as promptly or as convenient for everybody as we can.

CHAIR: Okay.

MR. SCHMIDT: That's how, what I will pledge to do. Believe me, we want this over with.

CHAIR: Right. Okay.

MR. SCHMIDT: And I'll hand you up this exhibit.

CHAIR: Okay.

MR. BORGERDING: Thank you, Your Honor.

CHAIR: Thank you.

(OFF THE RECORD - 03:10:19 PM)

CERTIFICATE OF TRANSCRIBER

I hereby certify that the hearing in the matter of Boone Kondylas, LLC, case number 16-003-SPH, heard before the Board of Appeals of Baltimore County, February 17, 2016 were recorded by means of audiotape.

I further certify that, to the best of my knowledge and belief, page numbers 1 through 215 constitute a complete and accurate transcript of the proceedings as transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of this case.

In witness thereof, I have affixed my signature this 15th day of November, 2016.

Christine R. Leary

Christine R. Leary

Transcriber

IN THE MATTER OF:

BOONE KONDYLAS, LLC
CASE NUMBER: 16-003-SPH0

Hearing Date: April 28, 2016

Pursuant to Notice, the above-entitled hearing was held before the Board of Appeals for Baltimore County at the Jefferson Building, Second Floor, Suite 203, 105 West Chesapeake Avenue, Towson, Maryland 21204, commencing at 10:00 AM.

PANEL PRESIDING:

MAUREEN E. MURPHY, CHAIRMAN

BENFRED B. ALSTON, BOARD

JANE M. HANLEY, BOARD

PRESENT ON BEHALF OF THE PARTIES:

LAWRENCE E. SCHMIDT, ESQUIRE

FRANCIS X. BORGERDING, ESQUIRE

PETER M. ZIMMERMAN, ESQUIRE

Christine R. Leary
9529 Fox Farm Road
Baltimore, Maryland 21236

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(ON RECORD - 10:00:25 AM)

CHAIR: Okay. All right. Good morning, everyone. We are here in the matter of Boone Kondylas, Kondylas, Kondylas, LLC, case number 16-003-SPH. This is day two of a Petition for Special Hearing to amend previous restrictions in another case or two other cases to permit future use of the property as a restaurant with limited accessory music and we had counsel, we had a whole day of testimony. Why don't we have counsel for the record?

MR. SCHMIDT: Thank you, Chairwoman Murphy and members of the Board, I'm Lawrence E. Schmidt of Smith, Gildea & Schmidt, with offices in Towson at 600 Washington Avenue, here again this morning on behalf of the Petitioner, property owner and Ken Boone, who is the managing member of the LLC is here with me.

CHAIR: Thank you.

MR. BORGERDING: Good morning, Your Honors. Francis X. Borgerding, I'm here on behalf of the Protestants.

MR. ZIMMERMAN: And Peter Max Zimmerman, People's Counsel for Baltimore County, Towson.

CHAIR: All right. And last I remember, we were in your case, Mr. Borgerding. Am I right about that? Check my notes.

MR. BORGERDING: You are correct.

CHAIR: All right and do you still have witnesses to

put on?

MR. BORGERDING: Yes, I sure do.

CHAIR: And I know we were last time, we were leaving, and someone needed to testify. If, so if there are, you know, priority witnesses, we just, we're going to rely on counsel, you know, both sides to tell us if someone needs to leave sooner rather than later, you organize your, your witnesses the way you need to. We don't want to exclude people and, and all that.

MR. BORGERDING: Understand, understand.

CHAIR: So, we'll try to rely on you.

MR. ZIMMERMAN: All right. I have an attendance sheet for today. If you want (inaudible).

CHAIR: Okay.

MR. ZIMMERMAN: To circulate an attendance sheet for --

CHAIR: Is that an exhibit?

MR. ZIMMERMAN: Well, the last one was made People's Counsel Exhibit 5 from, the sign in sheet from the first day.

CHAIR: Thanks for reminding me.

MR. ZIMMERMAN: So, if I'm correct, I think --

CHAIR: People's Counsel --

BOARD: Exhibit 6.

CHAIR: -- six.

MR. ZIMMERMAN: -- you can verify that, so the number

of citizens are in the audience who are in the opposition. Obviously, there were some citizens who testified in support last time.

MR. SCHMIDT: Chairwoman Murphy, just one sort of preliminary scheduling thing. I have an issue over at Circuit Court at 2:00 today.

CHAIR: Okay.

MR. SCHMIDT: Probably take me about ten or fifteen minutes and I, we may very well be done by then but or, if we could move a later lunch hour, it will not take me long, but it's something that I've got to attend to.

CHAIR: Right, that's fine, that's fine. We do need to leave by probably 3:15-ish.

MR. SCHMIDT: No, 2:00 is when it --

CHAIR: I mean, but we probably have to leave by like --

MR. SCHMIDT: Okay. I mean, I'll be ten minutes with that, I just have to go over --

CHAIR: That's fine. Do you think you're going to be that long, Mr. Borgerding? How, what, what do you think?

MR. BORGERDING: I really don't know. I, it's quite possible we'll be done.

CHAIR: Okay. It's one of those, you know, it's a twenty-minute case right in District Court when they say, everyone says twenty minutes, so they can go first, right?

That's it.

MR. BORGERDING: Pretty much it.

MR. SCHMIDT: That's the whole trick.

CHAIR: That's it, that's.

MR. ZIMMERMAN: Before Mr. Borgerding starts with witnesses, I told him I have some maps that I thought might be helpful to reference (inaudible) witness' testify so if I could briefly put some documents in now, that might facilitate --

CHAIR: Any objection to that --

MR. SCHMIDT: I don't know what they are, but if they're just off the County website.

CHAIR: Maybe you want to show Mr. Schmidt.

MR. ZIMMERMAN: Well, they're, I showed already, what would be People's Counsel Exhibit 7, an aerial, GIS aerial photo produced customarily by the GIS section of Office of Information and Technology, which shows substantial parts of the area around the Dock of the Bay restaurant. It also shows the zoning specifications, the roads and identifies each property on there. So, it is different from another map that, coincidentally, apparently Mr. Borgerding's client have, have assembled.

MR. SCHMIDT: No objection.

CHAIR: All right, no objection.

MR. ZIMMERMAN: So, should we put this on the, it should be marked --

CHAIR: If it, if it helps Mr. Borgerding. Do you want it, Mr. Borgerding? It's your case.

BOARD: Yeah, you want to mark it as your Exhibit 7?

MR. ZIMMERMAN: See, if I can --

CHAIR: Mr. Zimmerman, let me see if Mr. Borgerding wants that up there.

MR. BORGERDING: Yeah, I was kind of thinking that visually that might help but maybe what he can do is just enter into evidence.

MR. ZIMMERMAN: All right.

CHAIR: All right.

MR. ZIMMERMAN: (inaudible).

CHAIR: It appears to be helping you. So, --

MR. SCHMIDT: Just put it below it, if you want.

CHAIR: Yeah, that's fine.

MR. ZIMMERMAN: I think the biggest difference is it, it does show the, the property ownership of each property on (inaudible).

MR. SCHMIDT: It also shows the zoning, does it not?

MR. ZIMMERMAN: Yeah, it shows the zoning classifications. It also identifies clearly the different streets and roads.

CHAIR: Well, then let's do this, let's just put it underneath as Mr. Schmidt suggested, underneath of that, you know, pinned up, would be great, maybe because you'll maybe

cross examine them.

MR. ZIMMERMAN: Let's see what, all right, do the best we can here. Can I have some help?

MR. SCHMIDT: Sure.

MR. ZIMMERMAN: Does this look good for the Board?

CHAIR: Sure.

MR. ZIMMERMAN: Can I be heard, I always worry about these microphones.

CHAIR: You do have to worry about them because, because we always have an inaudible problem but you always remind us about that, which is helpful, because so many transcripts lately we were reading and they, and the witness just says inaudible.

MR. ZIMMERMAN: Right, and this may be helpful, I, I guess I'm a geography person, where (inaudible)?

VOICE: Right here.

MR. ZIMMERMAN: All right. So, I have in the package of three documents, which I'm suggesting would be 8-A, B and C. The ADC aerial road map excerpt, which shows the Miller's Island area, admittedly, the copies do not show as clearly the outside, the actual waterfront boundary but the original shows it a little better. I'm going to show that to Mr. Schmidt. We can, well, it's just a standard ADC road map and then the second, what would be 8-B is another, is really a smaller version of, although not the identical geography, but a smaller

version of what's on the large aerial photo.

BOARD: Just, just for, just for housekeeping, you're calling that eight. Now, one of those maps is seven, is the other eight?

MR. ZIMMERMAN: The other has not been, the other is Mr. Borgerding's map.

BOARD: Oh, that's (inaudible).

MR. ZIMMERMAN: And that hasn't been identified.

BOARD: Okay. So, the bottom map is yours?

MR. ZIMMERMAN: Right.

BOARD: Okay.

MR. ZIMMERMAN: Mr. Borgerding will handle his map, which by the way, is upside down. Okay?

MR. BORGERDING: Oh, is it?

MR. ZIMMERMAN: Okay? So, he'll straighten that out later. The, if you look at the, it identifies the various properties in general terms, like Islander Inn, Seventh Street Park, Hinton Avenue, fortunately I can read things upside down but I think he'll, I would suggest that it probably would make more sense to have it right side up.

MR. SCHMIDT: This is 8-A, B and C, Mr. Alston?

MR. ZIMMERMAN: My, yeah, 8-A, 8-A --

MR. SCHMIDT: I've got no objection.

BOARD: When I see them.

MR. SCHMIDT: Okay.

MR. ZIMMERMAN: Yeah, 8-A is the ADC map, 8-B is a, a, kind of an eight and a half by eleven-inch aerial, again, with property owners identified and, and 8-C is a little bit closer of, of this aerial which makes it easier to read the names of the property owners and I have copy of that for every Board member. Did I give the originals, okay, so I have an 8-B color photo is the actual exhibit for the Board, the rest are in black and white and then --

BOARD: This is 8-A?

MR. ZIMMERMAN: 8-A, B, C.

BOARD: 8-A, B, C. Okay.

MR. ZIMMERMAN: That's my suggestion, 8-A, B, C.

BOARD: Okay.

MR. ZIMMERMAN: And I have a copy for --

CHAIR: Okay.

MR. ZIMMERMAN: To the extent it may be helpful, we often get official copies of the zoning map. Show this to Mr. Schmidt.

MR. SCHMIDT: Sure.

MR. ZIMMERMAN: So, this, this would be People's Counsel's Exhibit 9, the official 2012 comprehensive zoning map of the area. So, I'll, I'll mark it and then provide it to the Board.

MR. SCHMIDT: Mr. Alston, I'm just trying to follow along. Six is the sign in sheet today?

BOARD: Yes.

MR. SCHMIDT: Seven is the large aerial, A, B and C are the three?

BOARD: Yes.

MR. SCHMIDT: And then nine is the zoning map?

BOARD: Yes.

MR. SCHMIDT: Thank you, sir.

CHAIR: Any objection?

MR. SCHMIDT: None.

CHAIR: All right.

MR. ZIMMERMAN: And, while I may have some more exhibits, I think at this stage that that's, that would be sufficient.

CHAIR: And you could put them in in your case.

MR. ZIMMERMAN: Right, to get things going.

CHAIR: Yeah, I understand.

MR. ZIMMERMAN: I thought these, I always think these maps are helpful for reference.

MR. BORGERDING: Your Honor, I just had one housekeeping matter and that is that the previous Court of Special Appeals decision entered in this case, is that in evidence? If it is not, I want to enter a copy.

MR. SCHMIDT: It is.

MR. BORGERDING: Okay.

BOARD: Was that, was that your exhibit?

MR. SCHMIDT: Well, it's in as Petitioner's exhibit number four.

BOARD: Okay.

MR. SCHMIDT: And I think it's also possibly in, well, I put it in as number four, I have Mr. Alston.

BOARD: Yes, that would be number eighteen, September term?

MR. SCHMIDT: Yes, sir.

BOARD: July of 2009?

MR. SCHMIDT: Yeah, the, the --

BOARD: It's an unreported opinion.

MR. SCHMIDT: Right. Circuit Court opinion in the prior case is number three, the unreported opinion is four and then there's a contempt opinion from the Circuit Court, which is number five, at least according to what I have.

BOARD: Yes.

MR. SCHMIDT: Okay.

MR. BORGERDING: Thank you.

CHAIR: All right. Okay.

MR. BORGERDING: Then I call Mr. Matt Ciarpella.

BOARD: Raise your right hand, please.

MR. CIARPELLA: Yes.

BOARD: Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. CIARPELLA: Yes.

BOARD: Can you please state your name and address for the record?

MR. CIARPELLA: My name is Matthew Ciarpella, I live at 2716 Sixth Street, Miller's Island 21219.

BOARD: Could you spell your last name for the record?

MR. CIARPELLA: Yes, C-I-A-R-P-E-L-L-A.

BOARD: Okay. You can have a seat.

MR. BORGERDING: Now, Mr. Ciarpella, how long have you lived at that address?

MR. CIARPELLA: I've lived there for eleven years.

MR. BORGERDING: Okay. So, you were a resident when Mr. Tanner owned Dock of the Bay?

MR. CIARPELLA: Yes.

MR. BORGERDING: Okay and you're familiar with everything that happened during that time?

MR. CIARPELLA: Sure.

MR. BORGERDING: Okay. You are here in opposition, correct?

MR. CIARPELLA: Yes, I am.

MR. BORGERDING: Can you explain to the Board why you are in opposition to Mr. Boone's present request?

MR. CIARPELLA: The short of it is the outdoor music is, it's, it's, it, it just doesn't, doesn't go well with, with

the proximity to where I live and, and a lot of the other people that you're going to hear testify today. The, you know, a couple things that I'd like to say, if, if we could go back just to recap, so far what we've seen from Mr. Schmidt is testimony and, and exhibits that he submitted, all of which I feel are completely irrelevant to the --

MR. SCHMIDT: Objection.

MR. CIARPELLA: -- five to seven years of litigation and, and with that, are examples --

BOARD: There's an objection --

CHAIR: I know.

MR. CIARPELLA: -- he has submitted pictures --

CHAIR: Wait a minute. I thought he was going to finish, okay. Hold on. I was letting you finish so I wouldn't interrupt but.

MR. BORGERDING: I mean, I don't want him testifying about what everyone (inaudible) --

MR. CIARPELLA: Well, I just want to bring it up so we're --

CHAIR: Wait a minute --

MR. SCHMIDT: Sir, you have to be quiet while I'm talking. Okay? With all due respect.

CHAIR: (inaudible) only because of the transcript. What happens is if you talk and Mr. Schmidt talks, the person, if you eventually get it transcribed, then the transcriptionist

can't figure out who said what and then it just becomes a big mess, so we all have to (inaudible), go ahead.

MR. SCHMIDT: Obviously, he's a neighbor and can testify about he's opposed and all that, but when he starts off by criticizing my taste and whatever I'm doing, I just find that objectionable, I mean.

CHAIR: I understand.

MR. SCHMIDT: Just, maybe you can instruct him how to testify.

CHAIR: I understand. Yeah, we, the Board is going to rule on whether something has relevance or not --

MR. CIARPELLA: Sure.

CHAIR: -- based on the law and the facts.

MR. CIARPELLA: Okay.

CHAIR: So, you don't have to, you know, worry about whether it's relevant. But, I understand, you're just, but you're, give us your, your take, is what you're trying to do.

MR. CIARPELLA: Yeah, exactly and I'll be brief.

CHAIR: Oh, that's fine, that's fine.

MR. CIARPELLA: Pictures of Bill's Boats, boatyard and pictures of Rowboat Willy's and proximity to Bill's Boats to Dock of the Bay and it has nothing to do with seven years of litigation that we've gone through, paid for and fought and gone, and gone through. Testimony from, from people who are either employees of Dock of the Bay or names are on the liquor

license at Dock of the Bay, okay? Testimony which even contradicts what they're saying in that they want to have different music than what Larry had. Signatures from people who don't live anywhere near Dock of the Bay or have any affiliation or even affected by whether or not Dock of the Bay has outdoor music, okay? So, with that, I don't find any relevance to it. So, the only thing that is relevant, that I feel is, he wants outdoor music for his client and it has been ruled that it affects the neighborhood negatively and you know, let's see. One of the bands that played for, at Dock of the Bay, for Mr. Tanner was a guy by the name of Mark Allen, okay? You're going to hear his name brought up probably a couple more times. So, Mark Allen was here at the last hearing, I don't think you know that, but he was actually, I guess, prepared to testify but he was sitting on the side of, of Mr. Schmidt, which says to me that they were going to, they want Mark Allen to play. Well, that's the exact same music and the exact same person that played there that we had to fight over when Larry Tanner owned, owned Dock of the Bay. So, you know, you have to be careful when they say different music. You know, you have to be careful when they submit pictures of Rowboat Willy's and say it's outdoor music. Here I have a picture of the building that is Rowboat Willy's, the building, okay? This is a building, this, this is closed off, it's a wall here. This is what faces our houses here, okay? Does that appear like it's

outdoor? It doesn't, because I built this. It has a cathedral roof with sound insulation and everything else. Now, there are, a portion of this is open on the other side but that's not the side that faces our homes and this is about three hundred and fifty or more, closer to four hundred feet away from my house.

CHAIR: Are you submitting that as an exhibit?

MR. CIARPELLA: If, if Mr. Schmidt were to allow it.

MR. BORGERDING: Yes, I, it would be Protestant's number --

MR. CIARPELLA: You know, so, you know, you have to be careful with what you're hearing --

CHAIR: Well, one second, one second, one second. Protestant's number?

BOARD: Twelve.

MR. BORGERDING: I don't know, I'm asking (inaudible).

BOARD: It would be Protestant's number twelve.

MR. BORGERDING: Okay.

BOARD: But it --

MR. BORGERDING: I would ask to enter it as Protestant's number twelve.

BOARD: Well, are there copies for everybody to see? Has Mr. Schmidt seen that photograph?

MR. CIARPELLA: I can post it up here.

CHAIR: Let Mr. Schmidt see it first. Mr. Borgerding, if you could hand that to him, he can take a look at it first.

MR. SCHMIDT: Okay. Just if we could ask, maybe the witness to authenticate it or if he took it or when he took it and --

MR. CIARPELLA: I did, I, I took it yesterday evening.

MR. SCHMIDT: Okay.

MR. BORGERDING: I would ask to enter (inaudible).

CHAIR: Okay. So, this --

MR. ZIMMERMAN: Could, could we, could everyone keep their voices up? I'm, even I'm having trouble hearing some of the --

MR. SCHMIDT: So, Mr. Ciarpella, that, that's a photograph that you took yesterday?

MR. CIARPELLA: Yesterday evening, yes.

MR. SCHMIDT: Okay and that's the building on the Bill's Boats property which is known as Rowboat Willy's?

MR. CIARPELLA: Yes, yes, um hm.

MR. SCHMIDT: Okay and obviously, that's what it looks like as of yesterday, so it's a current photo?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And I, I would just ask, is that, since it's, is Rowboat Willy's open this time of the year?

CHAIR: Wait a minute. Why don't we do that after Mr., one second, because we're in the middle of cross --

MR. CIARPELLA: Yeah, I don't believe so.

CHAIR: -- it'll be confusing on the record, but those are good questions, so.

MR. SCHMIDT: Okay, okay.

CHAIR: Why don't we just let Mr. Borgerding --

MR. SCHMIDT: If he took it yesterday, it's an administrative hearing, I have no objection.

CHAIR: I understand. Understand, thank you. Go ahead, Mr. Borgerding or --

MR. BORGERDING: Can you continue, Mr. --

MR. CIARPELLA: Sure, sure. Just a couple issues. Before, I, I realize this is a zoning hearing, this is a zoning issue. Prior to that, back when Mr. Tanner had the establishment, the issue started as a liquor board hear, issue and we went to many hearings with the liquor board and the, the bulk of that basically came down to the outdoor music, the decibel level, the noise level, the microphones, the speakers and all of which, you know, essentially, in my opinion, is going to be the same if, if a microphone is used, if a speaker is plugged in, it's not acoustic and you, you cannot not affect the neighborhood, not, not the immediate neighbors, not fifty feet away. Fifty feet is too close. It's too close. You know, what, what, what a person purchases as a restaurant is

one thing, but once you introduce a band, what it operates as is another and with that, you know, we're just against the outdoor live music, you know? End of story. You know, it's going to be, I don't see how this is really any different than what we've done and been through and the testimony we're hearing from people who, you know, it's the same thing that we went through to get the ruling that we got from the, the State Board of Appeals and I just don't really see a whole lot of difference there. I mean, other than, you know, who, who regulates this music, this accessory music? We did. We had to regulate it, you know, when it got too loud because they said they'd keep it low, we had to make calls, we had to call the police, we had to do this. You know, we shouldn't have to, you know? You know, and then, and then assuming Mr. Boone keeps the place, that's great. What if he sells and someone else comes in and then they're playing bands and then we have to, you know, and here we are, spending more money in attorney fees to keep, you know, what should be peace and tranquility in our neighborhood, you know? You know, I, I know one thing. I met with Mr. Boone and I like Mr. Boone, my father likes Mr. Boone, his test, you know, all of his testimony has, they, states that Mr. Boone is a nice guy and I believe that he is and he's, he's told me personally that he wants to level the playing field, he wants what all other restaurants are afforded. He wants those privileges and, you know, it, you know, it, it's summed up like

this. All BL zone restaurants are afforded the same regulations regarding noise and noise issues. They are, they are afforded that. All restaurants are afforded the same violation if outdoor music affects its neighbors and they are, and because it's complaint driven, that is, you know, that's the issue. You know, so the way I see it is, is, they, they, they, he is afforded the same, the, the playing field is level and, unfortunately, it has been established that the, the proximity of this building in relation to the residents around it is just a not, it's just not a good place to have outdoor music and it went all the way to the State Court of Appeals and they decided that, so, you know.

CHAIR: Okay.

MR. BORGERDING: Mr. Ciarpella, could you go up to the board and show where you live in proximity to Dock of the Bay?

MR. CIARPELLA: Let's see here. Okay, well, here, here's Dock of the Bay obviously. This is their parking lot. This is my residence here.

MR. BORGERDING: And how many feet is that?

MR. CIARPELLA: From, well, I, I will say that from, from this point, which is the road on Sixth Street, to my backyard is a hundred and fifty feet total, so I believe someone has drawn a line here at a hundred and fifteen from building to building, corner of Dock of the Bay to corner of my

building. So, the proximity from the yard to yard is probably somewhere in the fifty to seventy-five-foot range.

BOARD: Excuse me, if I could just, yeah, if I could interrupt you. That, that needs to be admitted as an exhibit.

MR. BORGERDING: Okay.

BOARD: Because we won't know what he's talking about looking at this, listening to this tape later, so.

CHAIR: Are you putting it in through this witness?

BOARD: Are you going to admit that?

MR. BORGERDING: Yeah, number one, I would ask that it be marked as thirteen, be entered (inaudible).

BOARD: Okay. What, what is it pre, what is it a depiction of?

MR. BORGERDING: The general area, aerial of the general area.

MR. ZIMMERMAN: We're talking Protestant's thirteen now?

BOARD: Yes.

MR. BORGERDING: Correct.

MR. ZIMMERMAN: Not just any thirteen.

CHAIR: Is, is an aerial view of the Dock of the Bay and the surrounding community?

MR. BORGERDING: Correct, with measurements.

CHAIR: Okay.

MR. ZIMMERMAN: May I suggest that the witness not

say this because the record is not going to have any idea what this is.

CHAIR: Mr. Borgerding --

MR. ZIMMERMAN: If the witness could be more descriptive.

BOARD: Right, well, actually his lawyer is going to --

CHAIR: Yes, you have to direct your witness to make sure, because otherwise the transcript is this, that and the other and nobody knows what that means and nobody can tell later on. You have to describe things in terms of relation and think about the person who is not sitting here watching what you're doing, so.

MR. BORGERDING: Right.

CHAIR: We'll let Mr. Borgerding direct his witness. 3-And then secondly, I have a smaller version of the same thing. I'd ask that it be entered as Protestant's number fourteen and I apologize --

CHAIR: This is a duplicate?

MR. BORGERDING: -- I --

BOARD: This is a duplicate of that?

MR. BORGERDING: Yeah, but it's, it's small and I apologize, I didn't show that to Mr. Schmidt.

MR. ZIMMERMAN: I still can't hear a lot of the speaking. I still cannot hear a lot of the speaking. I don't

think the microphone is going to get half of this.

MR. SCHMIDT: Okay. Just, just so the record is clear, and I don't have an objection, but the, thirteen and fourteen, is, is that taken, Mr. Borgerding, from the County website or is, or is that taken from some, somewhere else?

MR. BORGERDING: Google Earth.

MR. SCHMIDT: It's a Google Earth photograph and I see that all the trees are in bloom so do we have, does it say, I don't know, I haven't looked at it, when it was taken, just how old it is?

VOICE: No.

MR. SCHMIDT: Okay. So, all right.

CHAIR: So, this, is this witness going to authenticate this doc, this, this exhibit on the board or, or are you --

MR. BORGERDING: He did not take that photograph.

VOICE: (inaudible).

MR. BORGERDING: Okay. Another wit, the next witness coming up is going to --

CHAIR: Authenticate it, okay.

MR. BORGERDING: Right.

CHAIR: Okay. So, but this witness was up there describing, you know, his house and is he familiar with this exhibit?

MR. BORGERDING: Mr. Ciarpella, does this look, look

accurate to you?

MR. CIARPELLA: Yes, it does. Both do, both do. I'm on this program a lot here, so.

CHAIR: Well, then, when you say --

MR. CIARPELLA: I, the, the lower exhibit showing the zoning and the property owner, that, that, I'm very familiar with that exhibit which is --

MR. ZIMMERMAN: People's Counsel Exhibit 7.

CHAIR: Thank you.

MR. CIARPELLA: Exhibit 7.

CHAIR: I was going to ask you.

MR. SCHMIDT: Just for the record, Ms. Murphy, the large aerial photograph, which I think is Protestant's exhibit number thirteen.

CHAIR: Okay.

MR. SCHMIDT: Says in the lower right hand corner, for the record, imagery 2016 Google map data 2, 20, and then it's cut off. So, apparently, the photograph was taken some time in this century, don't know when because it just says 2-0 and then it's cut off. I have no objection to it.

MR. ZIMMERMAN: People's Counsel seven shows 2014 imagery, which is the standard GIS at the moment.

CHAIR: Okay. But Mr. Schmidt has no objection right now to Protestant's --

MR. SCHMIDT: I have no objection.

CHAIR: -- exhibit number thirteen. So, sir, you were in the middle then of describing your house. Could you go back up to the board then and tell us, again, where is your house, you know, and reference it as if you're talking to somebody who is not here in the courtroom.

MR. CIARPELLA: Sure, I'll try to describe it that way.

CHAIR: That's fine.

MR. CIARPELLA: But, my, my house is from what is Sixth Street here, would be the front of my property to the back of my property is one hundred and fifty feet. From, approximately from the corner of my back, the back of my property to the front courtyard of Dock of the Bay where the area we have seen bands play in the past, is approximately sixty-five feet.

CHAIR: And you say the front courtyard, is that the water side?

MR. CIARPELLA: It is the side, it's not the water side and it's not the parking lot side of the, of the restaurant, it's, it's actually on the side of the building.

CHAIR: Okay.

MR. CIARPELLA: Which faces the residence.

MR. BORGERDING: And Mr. Ciarpella, where the bands played for Mr. Tanner, where you assume they would play for Mr. Boone, if outdoor music is allowed, is that facing neighbors or

on the other side of the building?

MR. CIARPELLA: It's facing the neighbors.

MR. BORGERDING: Okay. Thank you.

CHAIR: And there, you said there's no outside structure in that location right there where you just pointed?

MR. CIARPELLA: Not in the courtyard there is not, no. There's, there's an attached outdoor bar that has a roof, like a lean-to roof that was an add on some years ago that someone had done. But, no, out in the courtyard area and the, just some seating.

CHAIR: And, and do bands or music, is that ever, is that ever played under the covered roof that you just pointed out?

MR. CIARPELLA: I, probably a few times there may have been when Mr. Tanner had it. But obviously, there are no bands now and there, there have, hasn't been but for the most part, it was just in this general area in and outside of this outdoor lean-to. It's, you know, has some like curtain, plastic curtain walls, something you would see on a tent, to sort of wall, wall it off and close it in, so.

MR. BORGERDING: Okay. Is there anything else you'd like to tell the Board?

MR. CIARPELLA: No, I, I don't think there's really much left to say, I mean, try to remember it all, but.

CHAIR: All right.

MR. ZIMMERMAN: Can I go next?

CHAIR: Well, I, would you, would you like, Mr. --

MR. SCHMIDT: Please, Mr. Zimmerman.

MR. ZIMMERMAN: I think Mr., I think it makes sense--

CHAIR: Mr. Zimmerman would like to go next.

MR. SCHMIDT: I'm happy to defer to Mr. Zimmerman.

MR. ZIMMERMAN: Yeah. And Mr. Schmidt can try to deal with whatever comes in. All right. Mr. Ciarpella, are you in the construction business?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Are you in the forty to sixty-year-old age range?

MR. CIARPELLA: I am.

MR. ZIMMERMAN: Do you remember that was the age range that Mr. Boone testified that he views as his target audience?

MR. CIARPELLA: Sure, um hm.

MR. ZIMMERMAN: Okay and you testified in the 2008 case, did you not?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay and you, did I hear you say in response to Mr. Borgerding that, the former owner, Lawrence Tanner, indicated in that case that he was going to play kind of soft music that would not be disturbing?

MR. CIARPELLA: He, he did.

MR. ZIMMERMAN: And did Mr. Tanner indicate he had the support of many residents, customers, employees?

MR. CIARPELLA: He did. He, he --

MR. SCHMIDT: Objection.

MR. CIARPELLA: -- had submitted.

MR. SCHMIDT: Objection.

CHAIR: One second, one second, there's an objection.

MR. SCHMIDT: I just don't know what the relevance is, the Board, the Court has decided, so what's the relevance of what Mr. Tanner represented at any of those hearings to, the Board made certain findings.

MR. ZIMMERMAN: The relevance is, yeah, the relevance, and there are Court of Appeals cases on this, such as *Whittle v. Board of Appeals* (inaudible) that if, if a claim is made by a Petitioner, then it's a different situation from what was in the previous case, then it's relevant to compare the two situations, it's very simple.

MR. SCHMIDT: But the Court, I mean, the Court, actually this Board made certain findings of fact and certain conclusions and then, then it went to the Circuit Court and then it went to the, to the Court of Special Appeals. So, ultimately, that is the decision, not the underlying testimony in the case.

CHAIR: Yeah, I'd have to --

MR. SCHMIDT: I'll leave it to Ms. Murphy.

MR. ZIMMERMAN: I'm asking this witness his citizen's perspective --

MR. SCHMIDT: I don't want to relitigate that prior case.

MR. ZIMMERMAN: -- his citizen's perspective on, on this, either similarities or differences between the two cases. I think they're relevant.

CHAIR: But, well, I understand. I mean, I think it's fair to ask him the, the difference or the similarities but not specifically to what Mr. Tanner testified to because that's a transcript of that, I would imagine, and we could always refer to that.

MR. ZIMMERMAN: Well, it's not --

CHAIR: And you could always attach that to your brief, a transcript of those things, so having this witness reiterate what some, a gentleman who previously owned the bar testified to would, isn't really going to help. I mean, he, this, you know, then you're asking him what his memory, the witness' memory of this transcribed sworn testimony was so that's what your two questions went to, but I don't, I don't disagree --

MR. ZIMMERMAN: No, no, I'm not, I'm not asking simply about testimony, I'm asking in general what Mr. Tanner's pitch was based on his recollection.

MR. SCHMIDT: But that's, I mean --

CHAIR: But, but again, it's different, it's a different owner. I mean, then you're saying that, that this gentleman is going to, I mean, in other words, to assume that. I understand your argument, but, but --

MR. ZIMMERMAN: Well, they're very sim, do I have to make a prof, I mean, I could make a proffer.

CHAIR: All right. Well, make a proffer on this one point because I think it's, it's, just beyond what we need to hear.

MR. ZIMMERMAN: All right. Mr. Ciarpella was proffered that just as in the present case, the former owner of Dock of the Bay in the 2008 situation, not just in testimony, but in general, in interaction with the citizens, indicated that he had the support of many residents, customers and employees, that Mr. Tanner similarly complained that he was being singled out or that other, other places have live music that are also restaurants, so he complained about that being unfair. He also asked the Board of Appeals to tell him exactly what kind of music he could play and that may be implicitly what the Petitioner is asking for in this case. So, Mr. Ciarpella would be able to state in detail, not just the testimony of Lawrence Tanner, but the overall context of the 2006 to 2010 litigation, that there's no significant difference.

CHAIR: Understand. Okay, thanks for that proffer.

MR. ZIMMERMAN: Okay.

CHAIR: I actually think this gentleman already did that well. He actually was very clear on his own and, and actually gave us that (inaudible) already.

MR. ZIMMERMAN: All right.

CHAIR: So, we heard that.

MR. ZIMMERMAN: Just, just for the record, Mr. Ciarpella, you, you agree with me, I haven't stated anything false about what you would be saying, right?

MR. CIARPELLA: No, I concur.

MR. ZIMMERMAN: Okay. Okay. All right. As far as just, while we're on this, the age range of forty to sixty, so the, if my arithmetic is good and you have either a high school or college degree?

MR. CIARPELLA: High school degree, yes.

MR. ZIMMERMAN: And after that you went into a trade?

MR. CIARPELLA: I did some college and then into the trades.

MR. ZIMMERMAN: Okay and in your trade you have to be pretty good at math, calculating things?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: So, forty to sixty years old, that means, correct me if I'm wrong, to speed this up, born between 1955 and 1975?

MR. CIARPELLA: Right, yes.

MR. ZIMMERMAN: So, that end of baby boomer generation, beginning of Gen X, Generation X, is that fair?

MR. CIARPELLA: Um hm, yes.

MR. ZIMMERMAN: What, what, what is, do you know, being in that generation, you know, the type of music that generally attracts that generation?

MR. SCHMIDT: Objection.

MR. CIARPELLA: It's, it's tough to say --

CHAIR: Wait a minute, one second, one second, there's an objection.

MR. SCHMIDT: What could possibly be the relevance of asking this, this witness that question?

MR. ZIMMERMAN: Except, except that it was, it was raised on direct and I think when Mr. Boone testified that he only wants music that's directed to this age range, which I'm not, you know, which could be --

MR. CIARPELLA: It --

CHAIR: -- wait a minute, sir. Could be a bunch of things, could be a different, wide range --

MR. ZIMMERMAN: Yeah, that was his pitch that --

CHAIR: Wait a minute. Wide range of music, so we'll just allow it because it was sort of raised on direct.

MR. SCHMIDT: Okay.

CHAIR: We'll allow Mr. Zimmerman to cross examine. Go ahead, sir.

MR. SCHMIDT: Okay.

MR. ZIMMERMAN: Yeah. Do you remember, correct me, what is your understanding is the pitch that Mr. Boone made as to the forty to sixty-year-old generation?

MR. CIARPELLA: Yes, I, I, I would probably go back to Mr. Russell McClellan's testimony, given on behalf of Mr. Schmidt and his client, that they want to have reggae, which is the likes of Mark Allen, which is exactly who Larry Tanner had and he had reggae bands. Mr. Schmidt has made claim that Larry had rock and roll bands and, and his own, his own test, testimony from his representative has stated that he, if you, if you go back and read it, he specifically said that Mr. Tanner had reggae bands. So, the, you know, it's, it's, it's gotten convoluted.

MR. ZIMMERMAN: Well --

MR. CIARPELLA: But that, that is a fact that it was reggae bands that were played there and it is reggae bands that are, wished to be played there.

MR. ZIMMERMAN: Well, did Mr. Boone ever mention anything about reggae? I don't recall that.

MR. CIARPELLA: Mr. Boone did not. Mr. Boone had said something about someone who played an accordion which --

MR. ZIMMERMAN: Okay. Well, let me ask you this. In the forty to sixty-year-old generation, is reggae the only kind of music that's popular with that generation?

MR. CIARPELLA: No, it, it it, it could be a wide range, I mean, it's wide open. The country music, rock, rock, you know, people, I, I know people that listen to classic rock, you know.

MR. ZIMMERMAN: Alternative, new wave (inaudible) --

MR. CIARPELLA: Alternative, new wave would probably not so much but, you never know. I mean, --

MR. ZIMMERMAN: Hip hop, rap?

MR. CIARPELLA: I don't know about that. I don't think there'd be any rap but.

MR. ZIMMERMAN: Okay. Okay. All right. Let me ask you something. In addition, well, just to, just so, just so we can see, we can verify. On People's Counsel Exhibit 7, it shows a scale of one inch to thirty feet. Can, can you precisely verify the corner of, well, (inaudible) your property is shown as 2716 Sixth Street on People's Counsel's seven, correct?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: All right and it, to get, to get this through a little bit quickly, it immediately borders the Dock of the Bay, correct?

MR. CIARPELLA: Yes, yes.

MR. ZIMMERMAN: And is it, does it immed, the, and how wide is your property?

MR. CIARPELLA: My property is 55.23 feet. The

adjacent property, working our way towards the courtyard is exactly fifty feet.

MR. ZIMMERMAN: So, do you border the courtyard where the parking lot of Dock of the Bay --

MR. CIARPELLA: I, I border the parking lot, I'm adjacent to the parking lot but catty corner by fifty feet plus a few more feet, ten or twelve feet, to the courtyard.

MR. ZIMMERMAN: Is the courtyard where they play the music?

MR. CIARPELLA: That's where it has been played in the past, yes.

MR. ZIMMERMAN: Outside, so I, I want to make sure we're doing this right. I've got a ruler here. Can you show on the ruler how many inches you're talking about so there's no confusion?

MR. CIARPELLA: From the property to the courtyard is two --

MR. ZIMMERMAN: Two inches?

MR. CIARPELLA: Well, that's, that wouldn't be fair to say, that, that's the playground, I will say two and a half inches.

MR. ZIMMERMAN: All right. So, that would be seventy, excuse me, seventy-five feet according --

MR. CIARPELLA: Okay, seventy-five feet.

MR. ZIMMERMAN: Okay and while we're, while we're

doing that, Bradley and Bonita Metheny, who are here today and will probably testify, where's their property in relation to the courtyard?

MR. SCHMIDT: Why don't we let them testify then, Mr. Zimmerman?

MR. ZIMMERMAN: Because I asked the question, that's why.

MR. SCHMIDT: Okay.

CHAIR: See if the witness can answer.

MR. CIARPELLA: Well, their, they, they have a few properties and one of which is adjacent to the courtyard and backs up to the courtyard and they have another one as well, so they have two properties that are in direct contact and adjacent to the courtyard.

MR. ZIMMERMAN: So, they're even closer than you are?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay and the Waldmans are here today, do you know where they are?

MR. CIARPELLA: They are across the street and catty corner to the parking lot.

MR. ZIMMERMAN: Okay.

CHAIR: Across what street?

MR. CIARPELLA: I'm sorry, across the main road, Cuckold Point Road.

MR. ZIMMERMAN: 9014 and 9016 Cuckold Point Road,

correct?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay. So, they're diagonally across from the parking lot on the other side of Cuckold Point Road?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay. Okay. All right. I got a few more questions, you can sit down. Now, you've talked about issues of loud music, correct?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: What, if anything, in relation to late night loud music do you find about noise produced by crowds, in addition to the music itself?

MR. CIARPELLA: Well, generally, the tendency has been with a live band, which what you get is when someone does a rendition of, of a song that is popular, you'll get a lot of cheering, clapping and whistling and hooting and hollering afterwards. Normally, when that, when that same song is played on the radio, it's just enjoyed and people go about their conversation and enjoy their meal or whatever but it, in past, there, there was a lot of that going on. You, you would have thought you were at the --

MR. ZIMMERMAN: And what, if anything, would you say about late night noise in the parking lot that's over and above what you would normally --

MR. CIARPELLA: Yeah, the, the only thing I can

testify to that, obviously, there, there is traffic that comes in and out of the parking lot as a restaurant. There, but there is a difference. When you have a band and a crowd that, you know, follows that band and you have different, different bands have followers, so to speak and, you know, they have like their little, little group that kind of goes from restaurant to bar or wherever they're playing and sort of follows them so you bring in a group of people that aren't necessarily from the neighborhood and, and it can be loud and, you know, after, after the show, so to speak. It's a different noise. It's different than what is normal of restaurant traffic. People seem to be, you know, more civil and, you know.

MR. ZIMMERMAN: And when we say late night, what are we talking about, 11:00 p.m., 12:00 midnight, 1:00 a.m., what, what are we talking about?

MR. CIARPELLA: In the past, it had, it had gone to that because Mr. Tanner had indoor music as well in the winter time and, and such so it, it, when the weather wasn't, wouldn't allow for outdoor music, he would have indoor events, bands, you know, and it, yeah, 11:00 would not be uncommon, 11:00 to midnight, you would, you would see people in and out of the parking lot hooting and hollering and --

MR. ZIMMERMAN: And what about when the outdoor music and the good weather was playing, up to midnight, 1:00 a.m.? Tell, tell the Board.

MR. CIARPELLA: Well, he did not have it that late, no. He, he had it till about, I'd say about 9:30 was probably about the latest that he had outdoor music and that was, that was pretty late. On a Sunday evening with school, it, it, it was pretty irritating.

MR. ZIMMERMAN: But even then it was a problem at that hour?

MR. CIARPELLA: Yes, absolutely.

MR. ZIMMERMAN: Okay.

MR. CIARPELLA: It, you know, it was a problem at 6:00, 7:00 p.m. If I wanted, if we were having company over and we wanted to hear our little radio in our yard and have a cookout, you know, it --

MR. ZIMMERMAN: Yeah.

MR. CIARPELLA: -- you know, it --

MR. ZIMMERMAN: And if you were indoors, would --

MR. CIARPELLA: -- it was intrusive.

MR. ZIMMERMAN: -- would you have to close your windows at times?

MR. CIARPELLA: Regardless of that, I mean, with, with the outdoor music, when the sound hits the glass it becomes like its own speaker that's then transmits the bass into the house. So, yeah, I mean, it, it comes up and, and we, we all have to, we're all built up on an elevated foundation because of flood, flood restrictions and I'm not a sound expert

but I can guarantee you one thing, I don't know how I can do that because I'm not an expert, but sound travels up.

MR. SCHMIDT: Objection.

MR. CIARPELLA: I was waiting on that.

CHAIR: Overruled. I don't think he meant it the way it came out.

MR. CIARPELLA: Yeah, yeah.

MR. SCHMIDT: Okay.

MR. CIARPELLA: Sound travels up and the higher you are, the, the more the sound comes to you. Where, I guess, if you're low and you have obstructions around you, the sound doesn't quite reach you, you know? Like it, it does when you're elevated, which we are, we all, we all are. So, it, it comes into the house because even if you close the windows it, the sound, I don't know how it does it, but it makes the windows move and comes into the house.

MR. ZIMMERMAN: Do you have a two-story house?

MR. CIARPELLA: Three story, yes.

MR. ZIMMERMAN: Three story house.

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Do, are there other two and, two or three houses on Sixth Street?

MR. CIARPELLA: Yes. The, the, the majority of houses, I'd say just about all the houses.

MR. ZIMMERMAN: Okay and are there any big walls in

between your house and Dock of the Bay that, that --

MR. CIARPELLA: No, there's no big walls. I mean, I have a privacy fence with some Leland cypresses along the back and there's a garage on the property next to me and --

MR. ZIMMERMAN: How high is your fence?

MR. CIARPELLA: Six feet.

MR. ZIMMERMAN: Okay and what concern, if any, do you have that the impact on your property value of, of (inaudible)?

MR. CIARPELLA: Quite a bit, quite a bit. I mean, you know, if, if we're going to talk property value, that's, that's one of the main reasons I'm here. I mean, I've got to defend the value, you know, I mean, if, if the property is valued at X and there's outdoor live bands next door and I have to go to market with the house, the property, and I can't make a sale because of outdoor music, you know, that, that wouldn't be well, that wouldn't be good, you know?

MR. ZIMMERMAN: All right. I want to shift for a moment to, there's been a lot of discussion of a single musician, namely, Mark Allen, correct?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: And if I remembered Mr. Wolinski's testimony, Mr. Mark Allen uses an amplifier, according to Mr. Wolinski. Do you know anything about that?

MR. CIARPELLA: Yes, he does.

MR. ZIMMERMAN: Okay. Have you ever heard Mark Allen

play?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Yeah, okay. I have People's Counsel Exhibit 10?

BOARD: Ten.

MR. ZIMMERMAN: This is a, this is a two-page excerpt from the Mark Allen website. Okay. I have a cop, may I use my copy to question Mr. Ciarpella?

BOARD: Sure.

MR. ZIMMERMAN: So, does this exhibit show, there's a photograph. Is that, does that look like the Mark Allen you know?

MR. CIARPELLA: That's him.

MR. ZIMMERMAN: Okay. Now, on, on the next page, and this is an excerpt, there's more, many more pages to the website but under gear, it says, I, quote, I use Boise sound system, Shore mikes and Crafter guitars, unquote.

CHAIR: Wait a minute. He hasn't identified that.

MR. ZIMMERMAN: All right.

CHAIR: As knowing it, as, as a copy of, of the website.

MR. ZIMMERMAN: All right.

CHAIR: I mean, this, you're trying to get that document in through this witness and all you're doing is reading what it says and he's saying uh huh, uh huh.

MR. ZIMMERMAN: All right.

CHAIR: So, that doesn't, that doesn't work.

MR. ZIMMERMAN: Well, let me ask you. Have you ever seen the kind of sound systems Mark Allen uses?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Assuming for the sake of argument that his website indicates a Boise sound system --

MR. SCHMIDT: Objection. That's spec, that's all speculative. I mean --

CHAIR: Yeah, do, do you know whether his, his sound system includes a Bose, Bose, B-O-S, sound system?

MR. ZIMMERMAN: B-O-S-E.

CHAIR: Do you have any knowl, personal knowledge of that?

MR. CIARPELLA: I, I have personal knowledge that he has an amplifier.

CHAIR: Right, you said that.

MR. CIARPELLA: And a guitar that plugs in.

CHAIR: Right.

MR. CIARPELLA: Now, it might be an acoustic body guitar but it, it is electrically amplified.

CHAIR: Okay.

MR. CIARPELLA: And a microphone that is amplified and sound is projected via speakers, so I do know that first hand.

MR. ZIMMERMAN: Okay. You ever, have you ever heard of the company named, called Bose, B-O-S-E?

MR. CIARPELLA: I have. It's a high end, high end speaker amplifier system.

MR. ZIMMERMAN: Okay and what about the Sh, the company Shure that makes microphones --

MR. CIARPELLA: Shure microphones as well.

MR. ZIMMERMAN: S-H-U-R-E.

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Very famous?

MR. CIARPELLA: Yes, they are.

MR. ZIMMERMAN: Okay. So, this being an administrative hearing, I think that it's admissible to have the website, the excerpts?

CHAIR: Any objection?

MR. SCHMIDT: Yes.

CHAIR: What's your objection?

MR. SCHMIDT: My objection is, I mean, I've got a Bose radio at home and I'm sure Earth, Wind & Fire might have Bose equipment so, I mean, there's, my understand is Bose has all different kinds of equipment. I, the, the witness testified that he knows Mark Allen has a guitar, which plugs into an amplifier and he sings into a microphone and I think that's fair, because that's what he knows. The rest of this, so what? He uses Bose equipment, that, what does that mean? I

mean, is that supposed to prove that this is, Mark Allen has already been crucified, the poor man is not even here, but in any event, I don't see the relevance.

MR. ZIMMERMAN: Nobody, nobody is crucifying Mark Allen. I'm not, that's not, that's not what's going on here. Just, in context, this is just part of the, an entire picture to kind of flesh out the amplification picture that he's got, the high-end equipment.

MR. SCHMIDT: How do we know it's high end?

MR. ZIMMERMAN: I think it's a reasonable inference, that's my opinion.

CHAIR: Okay and Mr. Borgerding, anything, anything on that issue?

MR. BORGERDING: I have nothing to add.

CHAIR: You have nothing on that. We, we won't admit that into evidence because this witness can't authenticate the website pages. He's already indicated and he testified very well and he actually does well on his own --

MR. ZIMMERMAN: All right. I --

CHAIR: -- without your assistance. Hold on. Testifying that he, as Mr. Schmidt indicated, the man has an electric micro, he's got a microphone hooked up to the amplifier, he's got the guitar hooked up, whether it's Bose or something else, it really, I mean, he already said --

MR. ZIMMERMAN: I'm not, I'm not --

CHAIR: -- hold on. He, he, he, I'm, just because of the transcript, you know, you're the stickler with the transcript.

MR. ZIMMERMAN: Right.

CHAIR: This witness also indicated he understood what Bose was so, I mean, we, we don't need any more than that. We, it's just duplicative anyway of what he just said so I think he's got personal knowledge of that.

MR. ZIMMERMAN: Right. So, I have it in as i.d.?

CHAIR: It's marked for i.d. Maybe Mr. Allen will be here and he can authenticate it.

MR. ZIMMERMAN: Well, okay.

CHAIR: Do you really need those two pages in? Okay.

MR. ZIMMERMAN: I tried.

CHAIR: We're going to mark for i.d. I know you did.

MR. SCHMIDT: It's number ten, Mr. Alston?

BOARD: Yes, um hm.

CHAIR: Well, it's marked for i.d. only.

MR. SCHMIDT: Yes.

CHAIR: Okay.

MR. ZIMMERMAN: And Mr. Ciarpella, do you know whether or not Mark Allen plays music other than reggae?

MR. CIARPELLA: He does.

MR. ZIMMERMAN: What types of music?

MR. CIARPELLA: He plays everything from oldies to

classic rock to reggae, very, very diverse.

MR. ZIMMERMAN: And do you have any knowledge of whether his performances at Rowboat Willy's have generated sound that was heard all the way down on Bay Drive?

MR. CIARPELLA: I do not. I, I, I do not. I know it's been loud, I have heard him over there and he has been loud at times, depending on which way the wind blows affects, if it's a northerly wind, it makes a difference.

MR. ZIMMERMAN: So, the wind can affect this, this sound?

MR. CIARPELLA: Absolutely, carries the sound, yes.

MR. ZIMMERMAN: So, when the wind is blowing in the direction of your place from Dock of the Bay, the sound is even louder, is (inaudible)?

MR. CIARPELLA: Yes, yes.

MR. ZIMMERMAN: Okay. Well, we spent a lot of time, of course, on Mark Allen because Mr. Boone mentioned Mark Allen but what other bands frequently play Miller's Island or the east side, Dundalk, Edgemere?

MR. CIARPELLA: I couldn't, I couldn't answer that because I'm not familiar with all of the bands. But it's, it's a medley, it's not any one type of band. My guess, which, you, you, if you had the same band over and over and over again, probably wouldn't do well, wouldn't go well.

MR. ZIMMERMAN: So, what concern do you have that

actually Mark Allen is, would not be the only performer at Dock of the Bay --

MR. CIARPELLA: Absolutely --

MR. ZIMMERMAN: -- that there, there could or would be other performers?

MR. CIARPELLA: Sure, absolutely. I, I believe that in order for, if the idea is to bring, to increase the, the revenue at the establishment by use of, of live music, I believe that the only way to achieve that would be to diversify and have different types of entertainment and not the same one over and over again.

MR. ZIMMERMAN: Yeah. What about karaoke?

MR. CIARPELLA: Karaoke is even worse.

MR. ZIMMERMAN: Why is that?

MR. CIARPELLA: It's, because it's bad version of, of, of the real thing. It's, it's, it's, it's micro, if it's done on, with the use of a microphone and what it is is you, it's an attempt by people who, in my opinion, have poor singing abilities then go ahead and mic, microphone that and crank it out and hoot and holler and laugh about it and give their renditions of their favorite songs.

MR. ZIMMERMAN: And was that one of the issues or one of the elements in the previous case when Lawrence Tanner owned Dock of the Bay?

MR. CIARPELLA: I don't recall. He may have had, he

may have had it and it was probably more of an indoor thing, like one of his wintertime, you know, ploys to bring people into the restaurant. I, I don't recall that ever being outdoors. Mainly he, he had what, he had scheduled bands for entertainment, to entertain the crowd, not for the crowd to sort of entertain itself.

MR. ZIMMERMAN: So, (inaudible) obviously if it becomes a problem, especially if it were done outdoors?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay.

MR. CIARPELLA: Absolutely.

MR. ZIMMERMAN: Okay. Now, ask an interesting question I was wondering about. According to People's Counsel Exhibit 7, I think Mr., well, we may get more details on this. But if you look on, well, Sixth Street takes a little bit of a jog, or I don't know if we'd call it a dog leg, if your, your part of Sixth, did you give your address, by the way?

MR. CIARPELLA: 2716, yes.

MR. ZIMMERMAN: Yeah, so, and your part of Sixth Street dead ends at the water, correct?

MR. CIARPELLA: It does.

MR. ZIMMERMAN: Okay and then there's a slight --

MR. CIARPELLA: Offset.

MR. ZIMMERMAN: Cuckold Point Road goes a little bit then back towards Edgemere and then Sixth Street continues on

to the opposite waterfront, maybe, maybe twenty or thirty feet from, from where your section intersects Cuckold Point Road, correct?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: So, we see on that part of Sixth Street that's on the other side of Cuckold Point Road, there are several properties owned by George Kondylas or G&D, LLC, okay? Do you know whether or not George Kondylas may be the Kondylas that's named in Boone Kondylas, LLC?

MR. CIARPELLA: It is not. I do know.

MR. ZIMMERMAN: So, who, who would be the Kondylas in Boone Kondylas, LLC?

MR. CIARPELLA: That would be Mike and Donna Kondylas.

MR. ZIMMERMAN: Okay. Do they live anywhere in this neighborhood?

MR. CIARPELLA: They do, yes. It's not on the map, it's not on either map.

MR. ZIMMERMAN: Okay.

MR. CIARPELLA: But it's further up Cuckold Point Road towards Edgemere and, but it is on, they do reside on Millers Island.

MR. ZIMMERMAN: All right. Okay and do you know whether or not they live there or had any active activity in relation to the litigation when, when the litigation with Mr.

Tanner was going on?

MR. SCHMIDT: Objection. Just relevance.

CHAIR: What is the relevance?

MR. ZIMMERMAN: Well, the relevance is to show the awareness of the Boone Kondylas corporation precisely what happened with the 2008 to 2010, 2006 to 2010 litigation.

CHAIR: Okay. Well, you're --

MR. ZIMMERMAN: But I understand, I'm told Mr. Kondylas, Michael Kondylas is here so maybe we can wait till Mr. Borgerding --

CHAIR: Why, why don't we wait to see it? If you're, are you going to call him as a witness?

MR. ZIMMERMAN: No, Mr. Borgerding (inaudible).

CHAIR: Okay. Well, why, let's just wait for that question.

MR. ZIMMERMAN: So, all right, that's fine. Okay. I don't have too much more. Mr. Ciarpella, you made some mention of the liquor license, did you not, in your testimony?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay. Do you know who is on the liquor license?

MR. CIARPELLA: I, I know who I believe is on the liquor license.

MR. ZIMMERMAN: Okay. Let me, okay, well, let me have a couple of exhibits here. So, it's, the first one is,

well, I suggest we make this, are we up to eleven?

BOARD: Yes.

MR. ZIMMERMAN: I suggest we make this first exhibit 11-A, because (inaudible) to the next exhibit. Whoops, wait a minute. That's not, I'm sorry, that's the wrong exhibit. Excuse me. Okay. Okay. So, I have the November 3rd, 2014 Baltimore County website liquor license here in the document that I'm going to suggest is People's Counsel 11-A. And you can take a look at it, but on the last page of this excerpt, because we go to the 7th Council District, I didn't include 2nd, 3rd, 4th Districts, to keep it, the pages less. You see, the applicant Donna Lee Kondylas, is it Michael --

MR. CIARPELLA: It says, it's spelled Michelle, I believe it's probably supposed to be Michael.

MR. ZIMMERMAN: Okay and that shows the transfer from Lawrence Tanner, Jr. of Tanner Enterprises, t/a Dock of the Bay?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: As of November 3rd, 2014, okay. Is that consistent with your understanding of --

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: -- at that point?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay.

BOARD: You're going to admit this? Any objection?

MR. ZIMMERMAN: Yes, 11-A, yes, I would like to.

BOARD: Any objections?

MR. SCHMIDT: Yeah, I will object. I don't know what the relevance of it is and I'm not sure that the witness, I mean, other than giving him a document which apparently, he's never seen before and ask him to read it and read it, there's no authentication or anything to it, so.

CHAIR: That's the same problem we had with the other exhibit. I mean, he's not, we're not here on the, this is not a liquor board hearing and, and so how is this witness --

MR. ZIMMERMAN: This is going to connect --

CHAIR: -- the, all you're doing is handing him a document and saying, is this what it says and he says yes, this is what it says and I think it should have said this, this is a typo. But he didn't draft that.

MR. ZIMMERMAN: All right.

CHAIR: He didn't write that.

MR. ZIMMERMAN: All right, well, okay.

CHAIR: So, how, how can he really identify it? I mean, --

MR. ZIMMERMAN: It's an administrative hearing, if the Petitioner thinks that it's inaccurate, you know, he can question it or find some other evidence. But it also will connect up, especially with 11-B, which shows the additional transfer to the current license holders.

CHAIR: But, but it's not even an issue, we're not here on the liquor board so.

MR. SCHMIDT: So what?

MR. ZIMMERMAN: Well, it's, if I, once you see the document, I think you'll see the explanation or I'll --

CHAIR: But not through this witness, I don't think this witness is not the witness, obviously, to identify those documents that you have.

MR. ZIMMERMAN: Well, no, the sec, the second document is important also because it shows and I'll put it in as i.d.

CHAIR: But, but you're --

MR. ZIMMERMAN: Let me put it in as i.d. and --

CHAIR: Well, just mark it as i.d. and don't, don't give the witness indication of what it is or what you think it should say or --

MR. ZIMMERMAN: Okay, because 11-B is the March 2nd, 2015 --

MR. SCHMIDT: Can I have a copy of that, Mr. Zimmerman?

MR. ZIMMERMAN: I thought I gave it to you.

MR. SCHMIDT: No, you gave me 11-A.

MR. ZIMMERMAN: Okay. 11-B is the November, excuse me, March 2nd, 2015 Baltimore County Liquor Board website record showing on the very last page the transfer from, again, I'm

sure Michael Kondylas will be testifying, misspelled Michelle Kondylas to Russell McClelland and Dorothy Riley and also it, it refers to these people as the Kondylas' having transferred, refers to them as corporate officers. So, I think, I will argue later perhaps, just to keep this thing moving, that the, this is definitely relevant on a number of scores. It also, among other things, shows the interest of Mr. McClellan and Ms. Riley, who I, if my memory is correct, previously testified in the Petitioner's case.

CHAIR: Okay. We'll mark them for i.d. at this point.

MR. ZIMMERMAN: Right. Thank you. Thank you, Madam Chair. I think I can rest at this point with this witness.

CHAIR: All right. Any cross?

MR. SCHMIDT: Thank you. I'll try to be brief. Sir, you were referring to some documents before. Can I see those, please?

MR. CIARPELLA: Documents?

MR. SCHMIDT: That you were looking at.

MR. CIARPELLA: Oh, okay.

MR. SCHMIDT: You were looking at.

MR. CIARPELLA: Oh, okay.

MR. SCHMIDT: I guess --

MR. CIARPELLA: These, these are my notes here.

MR. SCHMIDT: Okay.

MR. CIARPELLA: And then I have, also have some here that I had been compiling from the last, from the last --

MR. SCHMIDT: Okay. These were just notes that you took to help you prepare for testimony?

MR. CIARPELLA: This is just, you know, yeah, just kind of keeping my thoughts together.

MR. SCHMIDT: Okay, that's fine.

MR. CIARPELLA: And then, you know, I've got some, you know --

MR. SCHMIDT: I just saw you looking down and I didn't know what you were looking at.

MR. CIARPELLA: No, it wasn't, it wasn't anything to submit or anything like that.

MR. SCHMIDT: It was any other document, okay. Thank you, sir. Okay. Just a couple questions. Mr. Ciarpella, you, you, you referenced your father at one point in time. He is a regular at, at Dock of the Bay, is he, is he not?

MR. CIARPELLA: Yes, he is. Yes, he is.

MR. SCHMIDT: Okay and in addition to that, do you have any family members who are employed at the Dock of the Bay?

MR. CIARPELLA: My daughter, I believe, is to be hired here soon. She hasn't worked there yet, but she was interested in, in doing some waitressing or whatever.

MR. SCHMIDT: Okay, okay.

MR. CIARPELLA: Cleaning tables or whatever they have available.

MR. SCHMIDT: All right. I tried, I tried to write this down. You said your objection in this case was, quote, you're against outdoor live music, correct?

MR. CIARPELLA: Yes.

MR. SCHMIDT: All right. Okay and I think you also indicated that when Mr. Tanner was here, he had outdoor live music in what's called the courtyard area?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. So, that's, that's really your objection, is the outdoor live music in the courtyard area?

MR. CIARPELLA: That's a big, big part of it, yes.

MR. SCHMIDT: Okay. Okay. Now, you've lived next door to the Dock of the Bay for eleven years, right?

MR. CIARPELLA: Yes, I have.

MR. SCHMIDT: Okay and when you moved in, did you build your house or was it an existing house?

MR. CIARPELLA: No, I built it.

MR. SCHMIDT: Okay and the Dock of the Bay business was there eleven years ago when you bought the property?

MR. CIARPELLA: Yes, yes, it was.

MR. SCHMIDT: Was it operating --

MR. ZIMMERMAN: Objection. Objection.

CHAIR: What's the objection?

MR. ZIMMERMAN: What difference is it, it's irrelevant?

MR. CIARPELLA: It was, it was operating --

CHAIR: Okay. One second, one second, there's an objection on the table. No, actually, overruled. Go ahead. The Board is interested.

MR. CIARPELLA: It was, it was operated and owned at the time I purchased my property by the Trumbero's. It was a family restaurant.

MR. SCHMIDT: Okay. Did it have music at the time?

MR. CIARPELLA: They did not, no.

MR. SCHMIDT: No music at all?

MR. CIARPELLA: No.

MR. SCHMIDT: Okay and what year was that?

MR. CIARPELLA: That was, see, four or five, it would have been 2004 to 2005, it was in the winter of that period there. So, it could have been either four or five.

MR. SCHMIDT: Okay and, and when, so you bought, bought the property first and --

MR. CIARPELLA: No, wait a minute, 2003. I'm sorry, 2003.

MR. SCHMIDT: Okay. Was that after Isabel or before?

MR. CIARPELLA: That was before Isabel.

MR. SCHMIDT: Okay and the Trumbero's owned it and I assume you bought your property first as what, an unimproved

lot?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And then you built a house?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And then at some point in time you moved in?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And do you know when you moved in?

MR. CIARPELLA: It was right around two months after my son's birthday, so that would have been, June, July, it would have been August of 2004.

MR. SCHMIDT: Okay. Now, at the time you acquired your property and built your house, what was your property zoned, if you know?

MR. CIARPELLA: It was zoned business local.

MR. SCHMIDT: Okay and what is it zoned today?

MR. CIARPELLA: It is, I believe still business local.

MR. SCHMIDT: So, as far as you know, sir, I assume that your property has been a business local zoned property --

MR. CIARPELLA: Yes.

MR. SCHMIDT: -- throughout the period of your ownership?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And it was zoned business local when

you acquired it?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. Now, you indicated that, and Mr. Zimmerman asked you to do some measurements and your property is shown on here, I believe, sir, Matthew and --

MR. CIARPELLA: Nancy.

MR. SCHMIDT: -- Nancy and is that, is Nancy your wife?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay, because it's just, she has a different, does she have a different last name?

MR. CIARPELLA: No, she has the same name as me but when we purchased the property, we were not married when we made the purchase.

MR. SCHMIDT: At the time.

MR. CIARPELLA: At the time.

MR. SCHMIDT: Right. The reason I, I ask is that Protestant's seven indicates Matthew J. Ciar, Ciarpella.

MR. CIARPELLA: Ciarpella.

MR. SCHMIDT: Ciarpella and Nancy Stivaletto?

MR. CIARPELLA: Stivaletto, yes.

MR. SCHMIDT: Did I pronounce that correctly? Okay and now she's Nancy --

MR. CIARPELLA: Ciarpella.

MR. SCHMIDT: -- Ciarpella, okay. Just so the Board

is clear if they were to look at this. Okay. Your property abuts the Dock of the Bay parking lot, your backyard, right?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. Now, as you go towards, I guess, the top of this page or I would assume this is north, southeast and west sort of north east direction, the closest improvement of the Dock of the Bay restaurant to your property is what, the closest thing where there's any kind of construction, other than a parking lot?

MR. CIARPELLA: It would be the playground area, which is adjacent to the courtyard.

MR. SCHMIDT: Okay. Right, so --

MR. CIARPELLA: Opposite of the building.

MR. SCHMIDT: Right, so you first go, as, if you were walking, for example, from your backyard, you'd walk across the Dock of the Bay parking lot.

MR. CIARPELLA: Yes.

MR. SCHMIDT: And then you'd come to the, and there are some photographs that were introduced, of the pirate ship playground, correct?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And then an open area, correct?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And that's the courtyard where Mr. Tanner used to have his bands?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay and then there is a building shown on Protestant's exhibit number seven with sort of a silver roof and do you know what that is?

MR. CIARPELLA: It was at one point when the Trumbero's owned the restaurant, they had done a canvas canopy over top of the deck area that, patio area just outside of the building.

MR. SCHMIDT: Okay.

MR. CIARPELLA: When Mr., well, of course, the flood, the tornado, or the, the hurricane, the flood, it tore things up pretty good. Mr. Tanner purchased the property and put a wood roof on the metal truss system, existing metal truss system.

MR. SCHMIDT: And it, is that what it is today?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay and does that sit over top of tables, chairs, bar, if you know?

MR. CIARPELLA: A combination of, of all, yes.

MR. SCHMIDT: Okay. So, and that's, so that's an, it's got a roof on it but no walls?

MR. CIARPELLA: Has no walls.

MR. SCHMIDT: Okay. So, again, just so we're clear, from your property you have the Dock of the Bay parking lot, then the pirate ship playground area and moving in sort of a

northeast direction, then the outdoor courtyard that's uncovered, open, open air.

MR. CIARPELLA: Yes.

MR. SCHMIDT: Then a bar, table, chairs area that has a roof but no walls to it, correct?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And then the actual Dock of the Bay building?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. Have you taken any measurements or do you know how far it is from your house to the Dock of the Bay building? Not, not the property, not the playground, not the parking lot, not the courtyard, not the bar, but the actual building?

MR. CIARPELLA: I have not taken measurements, no.

MR. SCHMIDT: Okay. So, you don't know how far that is?

MR. CIARPELLA: No.

MR. SCHMIDT: Okay. Now, the Rowboat Willy's, and you showed us a picture of that, that building, you constructed it?

MR. CIARPELLA: Yes, I did.

MR. SCHMIDT: How big is it, square footage?

MR. CIARPELLA: Square footage wise, let's see, about a thousand square feet.

MR. SCHMIDT: Okay. It's a thousand square feet. Does it have any tables and chairs or patron seating in it?

MR. CIARPELLA: They do, yes. It's an elevated deck.

MR. SCHMIDT: Okay.

MR. CIARPELLA: And it has a, a small kitchen area on the backside, which faces Dock of the Bay parking lot, my house, Mr. Wolinski's house, all, all of the residents on the other side. You have, Dock of the Bay sort of sits in the middle between what is Bill's Boats and Boatyard on one side to the north and all of us to the south.

MR. SCHMIDT: Okay. I understand that but the, the Rowboat Willy's pavilion --

MR. CIARPELLA: Yes.

MR. SCHMIDT: -- if that's a fair description of what that building is.

MR. CIARPELLA: Right.

MR. SCHMIDT: Okay. Is that a fully enclosed building?

MR. CIARPELLA: It is not fully enclosed, no.

MR. SCHMIDT: Okay. So, it's open on --

MR. CIARPELLA: Open on the north side.

MR. SCHMIDT: -- on the north side. Okay and there is seating in there for people to eat?

MR. CIARPELLA: They do, yes.

MR. SCHMIDT: Okay. Do you know how many, if you

know, do you know how much seating is in there?

MR. CIARPELLA: I would say twelve tables.

MR. SCHMIDT: Okay. Fairly small --

MR. CIARPELLA: With four, four seats, right.

MR. SCHMIDT: Okay. Fairly small?

MR. CIARPELLA: Fairly small, fairly small.

MR. SCHMIDT: When the bands play at Rowboat Willy's, are they in the pavilion or outside?

MR. CIARPELLA: They're in the pavilion.

MR. ZIMMERMAN: Objection. Rowboat Willy's is zoned business major so what --

THE CHAIR: Okay. Well, that's not, but that's not an object, that's not a proper objection, that's an argument.

MR. ZIMMERMAN: All right.

THE CHAIR: Go ahead, sir.

MR. SCHMIDT: Okay and they actually play inside?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. Does Rowboat Willy's ever have any outside music?

MR. CIARPELLA: Outside? As far as I know, all of the bands that I have seen there.

MR. SCHMIDT: Um hm.

MR. CIARPELLA: Have been up inside, under this roof structure that is cathedraled with a clear story up above.

MR. SCHMIDT: Okay. Within the thous, within the

area of the thousand square feet of interior place that contains a kitchen and seating and they fit a band in there?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. Now --

MR. CIARPELLA: Well, wait, wait, wait. I have to clarify that. The structure, the roof structure that you see, is about a thousand, so it's about thirty by thirty, thirty-two by thirty or so.

MR. SCHMIDT: Okay.

MR. CIARPELLA: Okay, square. To the backside of that, is an, is an additional twenty, what, I think it was about, maybe sixteen by twenty-four, and that is where the kitchen area is.

MR. SCHMIDT: Is that shown in your photograph?

MR. CIARPELLA: It is. That's actually what you see. That wall that you see is the kitchen area.

MR. SCHMIDT: Okay.

MR. CIARPELLA: And, and that, that, that's what encloses that whole south, south east side of the building.

MR. SCHMIDT: Okay. So, as far as you know, there's no outdoor music at Rowboat Willy's?

MR. CIARPELLA: No.

MR. SCHMIDT: But, however, it is an open structure, at least on one side?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Now, in addition to Rowboat Willy's, you identified the other property, the BL property, which I'm going to refer to on Protestant's exhibit number seven as being located at the intersection of Sixth Street and Cuckold Point Road, owned by G&D LLC?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. What business is there?

MR. CIARPELLA: That is called the Islander Inn.

MR. SCHMIDT: Okay. How long has that been there, all, all --

MR. CIARPELLA: That's been there as long as I can remember.

MR. SCHMIDT: They play music at the Islander Inn?

MR. CIARPELLA: They, I don't recall them having bands, but I do know that they have, inside they have a DJ by the name of Don on occasion.

MR. SCHMIDT: Okay.

MR. CIARPELLA: And they may do karaoke, I'm not sure. I don't, I don't frequent the establishment.

MR. SCHMIDT: You don't, you don't go there?

MR. CIARPELLA: So, honestly, I don't know.

MR. SCHMIDT: You ever been in there?

MR. CIARPELLA: I have, yes.

MR. SCHMIDT: Okay. How often do they have either karaoke or their DJ?

MR. CIARPELLA: Honestly, --

MR. SCHMIDT: Nightly?

MR. CIARPELLA: No, not nightly.

MR. SCHMIDT: Okay. Every, on weekends?

MR. ZIMMERMAN: Objection. He said he didn't know about karaoke.

MR. SCHMIDT: He doesn't know.

MR. CIARPELLA: I, I would say --

MR. SCHMIDT: You don't know.

MR. CIARPELLA: -- probably.

MR. SCHMIDT: Probably on the weekends?

MR. CIARPELLA: Right.

MR. SCHMIDT: Okay. Any outdoor music there?

MR. CIARPELLA: No.

MR. SCHMIDT: You hear that from your house?

MR. CIARPELLA: No.

MR. SCHMIDT: You cannot? So, can't hear the bad voices when they sing karaoke?

MR. CIARPELLA: No.

MR. SCHMIDT: That's good.

MR. ZIMMERMAN: I would object. The witness testified he didn't know if there was karaoke there and then Mr. Schmidt picked it up as if he had said yes.

THE CHAIR: He actually corrected himself and he, he actually testified clearly.

MR. SCHMIDT: Now, Mr. Zimmerman asked you a bunch of questions about what Mr. Tanner testified and what he was saying at the prior hearing. And I understood you to say that Mr. Tanner said he had the support of a lot of the neighbors, correct?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Objection. My questions were general, not just what he testified at the hearing.

THE CHAIR: Now, we, we actually sustained that earlier objection.

MR. SCHMIDT: You didn't, you allowed it.

THE CHAIR: We sustained it and then he proffered the reason why he wanted it, is what I remember.

MR. ZIMMERMAN: Yeah, I suppose I should be objecting to Mr. Schmidt asking (inaudible) --

MR. SCHMIDT: Okay. If you sustained the objection, he made a proffer, then I'm not going to follow that.

THE CHAIR: Maybe you want to --

MR. SCHMIDT: I apologize. I thought I was overruled. I'm usually overruled, Ms. Murphy.

THE CHAIR: I think we did sustain it because he did make a proffer because we, the question did go directly to what Mr. Tanner was testifying about.

VOICE: Right.

THE CHAIR: Then I indicated there was this sworn,

you know, transcript and all that.

MR. ZIMMERMAN: Okay.

MR. SCHMIDT: But in terms of participating in that case, Mr. Ciarpella, there was a fair amount of opposition to Mr. Tanner's operation from the neighbors, is that a fair statement?

MR. CIARPELLA: Yes, it is.

MR. SCHMIDT: Okay and it's also a fair statement that no matter what he represented, he had outdoor live music, did he not?

MR. CIARPELLA: He did.

MR. SCHMIDT: Um hm. Okay and if you know, just to clarify, did Mr. Kondylas, George, who apparently owns the Village, I'm sorry, the Islander restaurant property, do you know if he's related to the Kondylas' who were, not the same individual involved in (inaudible) --

MR. CIARPELLA: Not the same individual but I believe he's a relative, yes.

MR. SCHMIDT: You believe he's a relative. All right. Okay. I don't have any other questions. Thank you.

THE CHAIR: All right. Mr. Borgerding, any re-direct?

MR. BORGERDING: Mr. Ciarpella, you had said that primarily you were bothered by outdoor music, correct?

MR. CIARPELLA: Yes.

MR. BORGERDING: When Mr. Tanner operated the structure, were you ever bothered by the indoor music?

MR. CIARPELLA: Depending on the, depending on who it was and the crowd that followed, yes.

MR. BORGERDING: Okay. Can you explain that?

MR. CIARPELLA: Couple things, all right? If, it was someone that was turned up and loud, he had actually had bands, so there were drums, it wasn't just a plugged in microphone with the guitar. He had a medley, he had the likes of just Mark Allen but also had, he, he obviously did not have the same person every week. So, with that, he brought in a variety of, of entertainment bands. When patrons would leave and come out and do their cigarette smoking in and out of the building, you would get a blast of music each time the door would open.

MR. BORGERDING: Okay.

MR. CIARPELLA: And depending on how popular the, the band was, would depend on the, the size of the crowd that would follow them and sort of lead with them late in the evenings. So, indoor, indoor wise, it was usually a later event. It went on beyond, you know, the 11:00 p.m. hour into the midnight hour and with that, you had late, loud exiting of the restaurant. But when the band was inside, you didn't hear it unless the doors were being open and people were coming and going. You would get blasts of the music coming in and out.

MR. BORGERDING: All right. Okay. No further

questions.

MR. ZIMMERMAN: Just a couple --

THE CHAIR: Okay. Anything on that, on that re-direct? Anything on that question?

MR. ZIMMERMAN: Well, yes, but I also have one or two other questions.

THE CHAIR: Well, we weren't going to re-open up, we already had ques --

MR. ZIMMERMAN: Well, based on what Mr. Schmidt had--

THE CHAIR: But then we're going to go back and re-direct, re-cross and --

MR. ZIMMERMAN: Well, no --

MR. SCHMIDT: I'm trying, Ms. Murphy.

THE CHAIR: No, I know, I understand, but.

MR. ZIMMERMAN: I wanted to, well, first of all, based on what Mr. Borgerding asked, I wanted to ask whether, in terms of the, the later night issues that you just described, some of the noise would also extend into the parking lot, close, even closer to your house then the courtyard.

MR. CIARPELLA: Well, I don't understand the question.

MR. ZIMMERMAN: Well, would, would you, would there--

MR. SCHMIDT: Join the club.

MR. ZIMMERMAN: -- be a fair amount of noise in the parking lot as well as right where the music was being

(inaudible) --

MR. CIARPELLA: Yeah, no, not from the music itself.

MR. ZIMMERMAN: Right.

MR. CIARPELLA: Yes, yes. That, the noise that is generated by the exiting of the, of the, of the restaurant late night, can be much louder than the music that you would hear inside the building as it blasts out at that hour.

MR. ZIMMERMAN: Okay and that would be even closer to your house?

MR. CIARPELLA: Yes, exactly, exactly.

MR. ZIMMERMAN: (inaudible). I did want to try to pin down the precise distance between Mr. Ciarpella's building and the, the building of Dock of the Bay but if the Board feels that's beyond the scope, I will respect the --

THE CHAIR: He actually said he didn't know. I think the witness said --

THE CHAIR: Well, yeah, we can, we can measure it, I guess we can --

MR. SCHMIDT: And the Board can measure it.

THE CHAIR: We can measure it.

MR. ZIMMERMAN: Okay, the Board can measure it.

MR. SCHMIDT: You'll have an exhibit.

THE CHAIR: There's a scale on that.

MR. ZIMMERMAN: Okay. The only other, I wanted to clarify the so called Rowboat Willy's is actually a smaller

part of Bill's Boatyard where the main use is the boatyard, so I wanted --

MR. SCHMIDT: Stipulated. Agreed.

THE CHAIR: It already, I think that came out in different witness' testimony.

MR. ZIMMERMAN: Okay, all right. Then that, that's all I have. Thank you.

THE CHAIR: Okay.

MR. SCHMIDT: So, just so I'm clear, re-direct, I'm going to keep it, okay, Mr. Borgerding dragged out of you that indoor music was occasionally a problem with Mr. Tanner?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay and I think you said that it really depended on the music, whether there were bigger group drums, I think you mentioned. So, I guess depending on what the act was that was inside, or --

MR. CIARPELLA: Yeah, the crowd that would follow, see, the later, with, with the music being played in the building.

MR. SCHMIDT: Right.

MR. CIARPELLA: Okay? The music is obviously in the building.

MR. SCHMIDT: Right.

MR. CIARPELLA: So, you know, we don't hear it.

MR. SCHMIDT: In the building, sure.

MR. CIARPELLA: Like you would, okay? Now, however, when the doors are opened with people coming and going and depending on how popular the group is.

MR. SCHMIDT: Right.

MR. CIARPELLA: So, you, you could get a group that is very unpopular and people come in and sit there and nobody cheers when the, when the song is over.

MR. SCHMIDT: And you don't hear a thing.

MR. CIARPELLA: And you don't hear a thing.

MR. SCHMIDT: Or you could get a very popular group where people are screaming and yelling?

MR. CIARPELLA: Right, right and that's, and with, with that, in order to generate revenue, to increase the revenue of, of an establishment, the, the better bands are what you're going to want to have.

MR. SCHMIDT: All right and depending on the type of the music as well, would impact that, right?

MR. CIARPELLA: Well, I think we pretty much covered the variety of music that was played.

MR. SCHMIDT: Right.

MR. CIARPELLA: In the past.

MR. SCHMIDT: Right.

MR. CIARPELLA: It was, it was --

MR. SCHMIDT: Thank you, sir. No other questions.

THE CHAIR: Okay. Are we finished with this witness?

MR. BORGERDING: No questions.

THE CHAIR: All right, sir. Thank you.

MR. CIARPELLA: Thank you.

THE CHAIR: Okay.

MR. BORGERDING: With that, I'd call Brad Metheny to the stand.

THE CHAIR: Okay. Do you think we'll be able to finish this witness? Is he going to be relative short, what do you think time wise?

MR. BORGERDING: How, how long?

MR. SCHMIDT: I think you're asking the wrong person, Ms. Murphy. You might want to direct it further down, towards the other end of the room.

THE CHAIR: Maybe ask Mr. Zimmerman, that's probably, that's probably true. His cross is longer. He means it in a good way.

MR. ZIMMERMAN: Sometimes it takes a little while to get this approved.

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. METHENY: Yes.

BOARD: Can you please state your name and address for the record?

MR. METHENY: Yes. My name is Bradley Metheny, I live at 2704 Sixth Street, Miller's Island.

BOARD: Can you spell your last name for the record?

MR. METHENY: Yes, it's M-E-T-H-E-N-Y.

BOARD: Thank you. You can be seated.

MR. METHENY: Um hm.

MR. BORGERDING: Mr. Metheny, you are also here in opposition?

MR. METHENY: Absolutely.

MR. BORGERDING: Okay. Can you explain to the Board the basis of your opposition to Mr. Boone's --

MR. METHENY: Well, the basis of it comes from, started for us in 2006 up until they finally stopped, you know, that he was forced to stop having the music. Just everything that the, the commotion and the, you know, that it caused in the neighborhood and close proximity to our houses. This was every weekend, it was outside, it was inside, the people in the parking lot, the people in the piers partying, you know, bringing their boats up, standing out there partying. Saturdays and Sundays was outdoor music. Two thousand six, we moved there in 2005, 2006 we started getting involved with the liquor board, with complaint wise, you know, it started off not so bad in the very beginning and it got progressively worse. Longer hours for the music, louder bands, more often. Then they were, he started having bands, Tanner started having bands

also on the inside so on a Friday night or Saturday night, his outside music could stop at 7:00 or 8:00 and 9:30 be inside bands would start and that went till 1:30 in the morning.

MR. BORGERDING: And did you hear the inside bands? Did (inaudible) --

MR. METHENY: I heard the inside bands in our house, with our doors and windows closed. We could hear them over top of our television.

MR. BORGERDING: Okay and can you point from the exhibit where your house is in proximity to the Dock of the Bay?

MR. METHENY: Okay.

MR. ZIMMERMAN: Which exhibit are we talking about?

MR. BORGERDING: What is that, Protestant's twelve?

MR. SCHMIDT: Mr., I could, Mr. Metheny, I think your name is on the one on the bottom, it might be easier to find.

MR. ZIMMERMAN: People's Counsel seven --

MR. SCHMIDT: Protestant's number seven.

MR. METHENY: Yes, this, this is us right here, this is my wife and I.

MR. BORGERDING: And approximately how far is that from the Dock of the Bay?

MR. METHENY: Can I use this one or do you want me to use, does it matter?

BOARD: Well, you have to let us know which one.

MR. METHENY: From here, from my property to the Dock of the Bay, the outside area, is probably rough, roughly a hundred and eighty feet.

THE CHAIR: Okay. The witness is using Protestant's exhibit number.

MR. BORGERDING: Twelve.

THE CHAIR: Twelve. He's pointing to that and he indicated the feet was --

BOARD: Well, actually it's thirteen.

MR. ZIMMERMAN: I think he's pointing to his building, I, I don't think --

THE CHAIR: Hold on. You're going to use Protestant's exhibit number thirteen, you said, how, how far did you say?

MR. METHENY: I said, I'm guessing a hundred and eighty feet.

THE CHAIR: You're guessing a hundred and eighty feet, okay.

MR. METHENY: From here, from this area to their courtyard. It could be a hundred and ninety feet.

MR. BORGERDING: Okay. You can resume (inaudible).

MR. METHENY: Yes.

MR. BORGERDING: Okay. Can you tell the Board why else you're opposed to this?

MR. METHENY: Well, basically, when, when this stuff,

excuse me, when this stuff started in 2007, you know, we had the music, the, the, the activity out on the pier, which is actually closer to my house. Their, the pier from the Dock of the Bay is probably within a hundred feet of my property, it's actually closer. You know, Larry started out, you know, with, with the bands, as I said, they started out, you know, low enough, you know, not, not very loud and everything. But it was just more and more and more. There was no control. It got to that point. We fought it for years, you know, with liquor board hearings, with zoning hearings, you know, starting for us in 2006 up until it was finally ruled that he was not to have music of any kind, you know, but it, it, it was, it's been a constant battle, a constant disruption, a lot of money.

MR. BORGERDING: So, why are you opposed presently to Mr. Boone's requested music?

MR. METHENY: Basically, it's, it's, just opens the door for the same thing, you know? What happened is, is we, we dealt with Larry. We've heard that, well, Larry intends to do this, Larry intends to have a, you know, a music that's quieter and wants to play to a certain crowd. We've went to all the hearings with, you know, with his patrons, with his employees testifying, you know, on behalf of, you know, what a great place it is and this, that and the other and the previous owner is terrible. We, we're actually, this is the same thing to me. It's like we're just repeating everything all over again.

We've done seven years of this. It's went through hearing after hearing after appeal after appeal, it's been upheld all the way through the system, to the Special Court of Appeals and we're starting over again. And it, it basically created hell for us being, being that close. When we moved there, Larry was the one that brought his business outside. There were tables outside for people to eat at the Dock of the Bay. When the Trumberos had it, when it was Fisherman's Inn, there was tables outside, prior to that, for people to eat. After Larry got it, probably 2004, 2005, when we moved into the neighborhood, he started putting the bands outside. Two thousand seven, in the spring, he constructed a bar outside, underneath of the canopy that's, you know, in these photographs. They're, he put an outside bar and actually that fall, started stocking the bar and serving people. So, in addition to the outside music, plus around the same time, I think the State of Maryland invoked, you know, you couldn't smoke inside anymore, so you have a lot of the smokers now outside, you know? So, they're outside drinking and smoking, so it's not just people, you know, dining any longer, you know? The, the, the dining down there was never a problem. It's not a problem now, honestly. You bring the music into it, I believe Mr. Boone or one of the witnesses stated that that outside area capacity could hold a hundred and fifty people. You got a hundred and fifty people out there drinking, you got music, people out, you know, on the pier on

their boats, that's a whole different dynamic. It, you know, it's no longer a bar and restaurant.

MR. BORGERDING: Okay. Mr. Metheny, is there anything else you'd like to tell the Court?

MR. METHENY: First of all, with regards to repeating this, we've had, Larry Tanner brought witnesses to testify to him. Mr. Boone, as a matter of fact, one of the witnesses that testified for Larry Tanner also testified at a, at the last, first part of this hearing for Mr. Boone.

MR. BORGERDING: And who is that?

MR. METHENY: If you would like to, that would be Russell McClellin.

MR. BORGERDING: Okay.

MR. METHENY: Who, by the way, his name also, is also on the liquor license, listed on the liquor license.

MR. BORGERDING: Have you looked, is Mr. Tanner's name, or is Mr., I'm sorry, Boone's name on the liquor license?

MR. METHENY: No, it's not.

MR. BORGERDING: Okay.

MR. METHENY: As a matter of fact, I was in touch with the liquor board yesterday, I, I called them, they told me who was on the liquor license, there, it's a D license and who was on there and they gave me access to their website that I was able to go on and print that out, which I also have a copy. I printed that out yesterday also.

MR. BORGERDING: You can give me that. I'll show it to Mr. (inaudible).

MR. METHENY: That would be (inaudible) right there.

MR. BORGERDING: And this is a liquor license for the present establishment?

MR. METHENY: Yes.

MR. BORGERDING: Okay.

MR. ZIMMERMAN: Am I allowed to see it?

MR. BORGERDING: Yes, after Larry.

MR. SCHMIDT: I guess, I mean, I just don't know what the relevance it is of this, I mean, we admit we have a liquor license. I'm not quite sure how that applies to the question presented as to whether we ought to be able to have music.

MR. BORGERDING: I think, Mr. Metheny, your issue was that Mr. Boone is not on the liquor license?

MR. METHENY: Well, yeah, that definitely is a concern of mind.

MR. SCHMIDT: Well, is that something that this Board can do anything about or is that an issue for the liquor board? I mean, assuming it's even a liquor, assuming it's the case even to begin with.

MR. BORGERDING: Mr. Metheny, can you explain why that, you feel that's relevant?

MR. METHENY: Well, when I brought that, I wanted to show just, the basis, one part was to demonstrate that the two

people that testified on behalf of Ken Boone and the Dock of the Bay were also on the liquor license, you know, not just in, patrons, they're not just --

MR. BORGERDING: Okay.

MR. METHENY: -- you know, interested people. Number two, with him not being on the liquor license, there's really no requirement for him to be on the property. He's asking for reconsideration and music and, you know, I can do this and do that, but he could also move to Florida and be an absentee owner. There, there's nothing to keep him at the property.

MR. SCHMIDT: He could do that whether he's on the liquor license or not.

THE CHAIR: Okay.

MR. METHENY: Is he, is he not required to spend so much time on the property as the liquor license owner?

BOARD: Is there an objection to this document?

THE CHAIR: Any objection?

MR. SCHMIDT: There is. I, well, yeah, I will, for the record, I'll object.

THE CHAIR: Okay. Same objection and, and is this the same document, Mr. Zimmerman, that you were going to put in?

MR. ZIMMERMAN: Well, I think it's slightly different in format but I think that it's the similar substance of People's Counsel Exhibit 11-B. I would just suggest that Mr.

Metheny has excellently explained some of the reasons why there's, the document certainly has some relevance and there's no reason to exclude it.

THE CHAIR: Okay. Well, he, he explained his reasons for the relevance. I --

MR. ZIMMERMAN: Well, I think they were in addition to my reasons and I think they were excellent.

THE CHAIR: Okay. I just wanted to know whether it was the same document. I didn't want, I didn't want to hear your argument --

MR. ZIMMERMAN: It's, no, no, it's not, it's not ident, it's not an identical piece of paper.

THE CHAIR: I understand.

MR. ZIMMERMAN: But it shows the same substance I think of, of People's Counsel Exhibit 11.

THE CHAIR: So, so, this witness apparently, you know, printed this from the website, he authenticated it as the documents he printed. The relevance, I mean, the, I guess, significance of it, he indicated why he thought it was significant, now the Court can then, the Board will then, at some point, decide whether that is significant to the ultimate issue but for the purposes of the hearing, we'll admit that as Protestant's exhibit --

MR. BORGERDING: Exhibit 15? I think it's fifteen.

THE CHAIR: You tell us. Fifteen, probably is.

BOARD: Fifteen.

MR. BORGERDING: That gentleman would be the one to tell us.

THE CHAIR: All right. All right. Any other questions?

MR. BORGERDING: Okay. Any, anything else you'd like to tell the Board?

MR. METHENY: Basically, that, that this, it's created a lot of problems down there for us, this whole situation with the music. We do not want to relive it. There's, there's no controls set in place. We come in here and say we're going to have, you know, this type of band with two guitars, well, then they bring amplification in, there's no control on the volume, there's no control on the frequency, how long they play, how late they play, you know, I mean, this, this is our house, you know? We, we live there, we, we live within a couple hundred feet. All we can do in season when this starts with the bar activity over there is close our houses up, turn the air conditioner on. But, beyond that, there's nothing else that we can do. We, there's no place for, else for us to go, you know? That didn't start out, everybody says oh, it's always been a bar, it's always been this and that. I'm sorry, Mr. Tanner moved all that outside. That bar was enclosed behind walls, aside from the dining. This is something he did. He did it after Charlie built his house, he

did it after Matt built his house. Our house was certainly there prior to him even owning it, prior even to the Trumberos owning it, you know? This, this is something he wanted to do. He wanted to take that and turn it into a dock bar, no longer a bar and restaurant. It's, his zoning is not compatible for what he wants to do.

MR. BORGERDING: Thank you, Mr. Metheny.

THE CHAIR: All right. Cross, Mr. Zimmerman?

MR. ZIMMERMAN: Yes. Mr. Metheny, what, are you in that forty to six-year-old age range as well?

MR. METHENY: Yes.

MR. ZIMMERMAN: And what is your occupation, may I ask?

MR. METHENY: I am a millwright for a CP crane power generating station in Bowley's Quarters.

MR. ZIMMERMAN: And, okay, I want to look at People's Counsel Exhibit 7, are you at 2714 Sixth Street?

MR. METHENY: No, I'm at 2704 Sixth Street. If I may? Right here.

MR. ZIMMERMAN: Okay.

MR. SCHMIDT: Can you show me that? I couldn't see, Mr. Metheny.

MR. METHENY: Yes.

MR. ZIMMERMAN: Okay. This is on People Counsel Exhibit 7.

MR. METHENY: 2704.

MR. ZIMMERMAN: And the Board can see, because there's a, separately there's a, there, there are two addresses of Bradley Metheny and Bonita Metheny.

MR. METHENY: Yes.

MR. ZIMMERMAN: Are they any relation to you?

MR. METHENY: That's us, we own that property also.

MR. ZIMMERMAN: All right. So, just to clarify --

MR. SCHMIDT: I'm sorry, go ahead.

MR. ZIMMERMAN: Okay. So, so there's no confusion, you live at 2704 Sixth Street, correct?

MR. METHENY: Yes.

MR. ZIMMERMAN: And you bought that house approximately 2003?

MR. METHENY: We didn't buy that house.

MR. ZIMMERMAN: Okay.

MR. METHENY: That house was in the family.

MR. ZIMMERMAN: Oh, it was in the, okay. You moved in around 2003?

MR. METHENY: We moved in in 2005, May of 2005.

MR. ZIMMERMAN: Five, sorry.

MR. METHENY: Yes.

MR. ZIMMERMAN: Okay. Is that a two story, three story, what is that?

MR. METHENY: It's a raised two story.

MR. ZIMMERMAN: Right on the water?

MR. METHENY: Yes.

MR. ZIMMERMAN: You have a pier?

MR. METHENY: Yes.

MR. ZIMMERMAN: And a boat?

MR. METHENY: Um hm.

MR. ZIMMERMAN: Okay. So, this is, the scale is one inch to thirty feet on this, so could, could you measure from the corner of your property, or your pier, to the courtyard area where the outdoor --

MR. METHENY: Okay. Well, this is the corner of my property so we're --

MR. ZIMMERMAN: The corner that's closest to their property, to, to the Dock of the Bay.

MR. METHENY: Of, of our resident, okay. So, that would be from here to here?

MR. ZIMMERMAN: From, I'm pointing, from right here on --

MR. METHENY: That's fine.

MR. ZIMMERMAN: Wait a minute. Wait, wait a minute. I'm sorry.

MR. METHENY: I'm sorry, here's our house.

VOICE: (inaudible).

MR. ZIMMERMAN: Okay. Okay, yeah, from --

MR. METHENY: Right there.

MR. ZIMMERMAN: -- from right here, which is the edge of your property corner closest to the Dock of the Bay courtyard.

THE CHAIR: Don't forget, the transcript probably isn't picking any of this up, here and there and here and there.

MR. METHENY: About four and a quarter inches.

THE CHAIR: Everybody's talking at the Board.

MR. ZIMMERMAN: Excuse me?

MR. METHENY: Four and a quarter inches.

MR. ZIMMERMAN: Four and a quarter inches, that would be about a hundred and twenty-seven feet. Is my math right? Four times thirty is a hundred and twenty.

MR. METHENY: A hundred and twenty plus, yes.

MR. ZIMMERMAN: All right. So, about forty yards, a little, a little over forty yards, less than half a football field. Okay. Okay and basically, it's entirely water between the corner of your property and the Dock of the Bay?

MR. METHENY: Yeah, there's no obstructions.

MR. ZIMMERMAN: Yeah.

MR. METHENY: Absolutely none.

MR. ZIMMERMAN: And I, did I ask you how many stories your house is?

MR. METHENY: Yes, it's a raised two story.

MR. ZIMMERMAN: What does raised two story mean?

MR. METHENY: The foundation part of it is approximately nine foot off the ground level and then it's the first and second floor.

MR. ZIMMERMAN: So, the --

MR. METHENY: It's, it's a flood zone.

THE CHAIR: -- second floor is almost like a third, equivalent to a third story?

MR. METHENY: Yeah, yeah.

MR. ZIMMERMAN: Okay and just so, while we're here, you own 2712 and 2714, correct?

MR. METHENY: Yes.

MR. ZIMMERMAN: And do you use those or do you lease them, what's going on with those properties?

MR. METHENY: Right, right now we have tenants in 2712, 2714 is an empty lot.

MR. ZIMMERMAN: Okay. Well, that's right next to the --

MR. METHENY: Yes.

MR. ZIMMERMAN: Those two are right next to the Dock of the Bay courtyard.

MR. METHENY: Yes.

MR. ZIMMERMAN: So, you have some concern for your tenants as well?

MR. METHENY: Absolutely.

MR. ZIMMERMAN: You'd like to have your, your tenants

have a good experience.

MR. METHENY: Absolutely.

MR. ZIMMERMAN: Okay and your wife is here today?

MR. METHENY: Yes.

MR. ZIMMERMAN: Bonita, it's Bonnie?

MR. METHENY: Bonnie.

MR. ZIMMERMAN: Okay and just following up on the question of your concern about, not just your enjoyment of your life but your property values, what, what concern do you have about that?

MR. METHENY: Oh, God, I certainly have a concern about my property value. As a matter of fact, probably back in, around the time we moved down there, I know Larry Tanner had asked if I tried to, wanting to buy the house we live in. He also wanted to purchase my mother-in-law's property from her, which would have been 2712 and 2714. So, that was a concern for me, especially the way he was operating that with the music and the stuff that was going on, you know? I, I didn't know if, if, you know, what he was up to. Was he trying to create a public nuisance and then try to buy the property cheap, you know, thinking that he was going to run us out or anything. That was a thought that, that crossed our minds at the time. We had no idea.

MR. ZIMMERMAN: When you say, are you say he was offering a very cheap price?

MR. METHENY: No, he, he, he offered to buy, inquire as to the fact of whether the property was for sale and, and expressed an interest that, you know, he would like to have it.

MR. ZIMMERMAN: You never got into any detailed negotiations?

MR. METHENY: Absolutely not. No, it wasn't for sale.

MR. ZIMMERMAN: And when you say your mother-in-law's property, that's the, the property that, that you now own with Bonnie?

MR. METHENY: Twen, no, 2712, the one that borders that, was my mother-in-law's, that was built, she built that house for herself when she retired.

MR. ZIMMERMAN: Okay. That, I'm sorry, but is that now, that's, that's --

MR. METHENY: That's the rental.

MR. ZIMMERMAN: That's shown here.

MR. METHENY: Yes.

MR. ZIMMERMAN: But that's now, that's now in the name of your, of you and your wife?

MR. METHENY: Yes, yes.

MR. ZIMMERMAN: Yeah.

MR. METHENY: Yes, she passed away in 2009.

MR. ZIMMERMAN: Is that a two-story house as well?

MR. METHENY: No, it's a raised rancher.

MR. ZIMMERMAN: Raised rancher.

MR. METHENY: Yes.

MR. ZIMMERMAN: All right. Okay, not, and just to preface my question, I'm in no way criticizing Mark Allen at all, but in terms of the discussion of the kind of sound he generates, do you have anything to add about any observations? Have you listened to Mark Allen, heard Mark Allen?

MR. METHENY: I've, I've heard Mark Allen play, yes and it's very loud. I've heard him from Rowboat Willy's. The only complaints that we've ever had with Rowboat Willy's was basically over Mark Allen.

MR. ZIMMERMAN: And of course, Mark, Rowboat Willy's is the, is the property, that's actually one further then, then Dock of the Bay.

MR. METHENY: Yeah, they, they're, they're, they border, they're on the other side of the Dock of the Bay.

MR. ZIMMERMAN: Yeah.

MR. METHENY: But probably an additional couple hundred feet, I don't know.

MR. ZIMMERMAN: Yeah.

MR. METHENY: On the other side.

MR. ZIMMERMAN: Do you have any knowledge about people all the way down on Bay, Bay Drive being --

MR. METHENY: Yeah, we have friends down there that could hear him when he played down there, yes. Said they could

hear him that far down.

MR. ZIMMERMAN: And that's about a third of a mile away, Bay Drive? It's right at the end of the peninsula, right?

MR. METHENY: It's, it's at least five blocks.

MR. ZIMMERMAN: Yeah.

MR. METHENY: Down there.

MR. ZIMMERMAN: That's the last street at the end of the peninsula, Bay Drive?

MR. METHENY: Yes, it is.

MR. ZIMMERMAN: Thank you. I think that's all I have, Madam Chair.

CHAIR: Okay. Cross, Mr. Schmidt?

MR. SCHMIDT: Mr. Metheny, just a couple questions.

MR. METHENY: Sure.

MR. SCHMIDT: And because we're recording this, a lot of times when you're referring to photographs, it's not clear on the tape what you're actually talking about. So, I just want to make sure that the tape is clear. Okay, you and your wife, your wife is Bonita Josephine Metheny, correct?

MR. METHENY: Yes.

MR. SCHMIDT: And she goes by Bonnie?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and you and she are married, correct?

MR. METHENY: Yes.

MR. SCHMIDT: How long have you been married?

MR. METHENY: Thirty-one years.

MR. SCHMIDT: Okay and you presently own two different properties on Sixth Street on Miller's Island?

MR. METHENY: Three.

MR. SCHMIDT: Three properties, okay. All right and so, okay, let's, let's start to address all three of them. The first one is known as 2718 Sixth Street, is that correct? No, I'm sorry, strike that. The first one is known as 2714 Sixth Street?

MR. METHENY: Yes.

MR. SCHMIDT: Is that correct?

MR. METHENY: Yes.

MR. SCHMIDT: Okay. As I'm pointing to that, 2714 Sixth Street is immediately adjacent to the Dock of the Bay property?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and as shown on Protestant's exhibit number seven, is it a vacant lot?

MR. METHENY: Yes, it is.

MR. SCHMIDT: Okay. So, there's obviously no house or anything on that right now?

MR. METHENY: No.

MR. SCHMIDT: Okay and that property is shown on

Protestant's exhibit number, I'm sorry, People's Counsel exhibit number seven, People's Counsel seven, is zoned BL, is it not?

MR. METHENY: Yes, it is.

MR. SCHMIDT: Okay. The second property that you own is a lot that you and your wife own, is a lot that's right next door to that, is that correct?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and that is known and shown on Protestant's, People's Counsel seven as 2712 Sixth Street?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and that is also zoned BL, is it not?

MR. METHENY: Yes, it is.

MR. SCHMIDT: Okay and you do not live there?

MR. METHENY: No, no. That's a rental.

MR. SCHMIDT: Okay and even though that's a business local zoning, it's rented for residential purposes?

MR. METHENY: Used as a residence, yes.

MR. SCHMIDT: Okay. So, not, it's not used as business purposes?

MR. METHENY: No, not at all.

MR. SCHMIDT: Okay and that house, or that building on 2712, that was occupied by your mother-in-law at one point in time?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and she built that house?

MR. METHENY: She had it built in '99, moved in in 2000, yes.

MR. SCHMIDT: Okay and you indicated, I think, she built that when she retired?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and then she lived there until she passed away?

MR. METHENY: Two thousand nine, yes.

MR. SCHMIDT: Okay and then since, you and your wife inherited that and then started to lease it?

MR. METHENY: Well, actually, my son and daughter-in-law and my grand, granddaughter lived there until approximately a year ago.

MR. SCHMIDT: Okay and then they moved somewhere and then you started to lease it?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and obviously when your mother-in-law built that house, the Dock of the Bay was next door at that time?

MR. METHENY: Yes, yes.

MR. SCHMIDT: Okay. All right and then the third property that you own is further down Sixth Street towards the water, shown on People's Counsel exhibit number seven as to the

south east and that is known as 2704 Sixth Street, correct?

MR. METHENY: Yes.

MR. SCHMIDT: And that's where you live?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and that's where Mr. Zimmerman actually had you measure from the very corner of the property, and I'm pointing to it, but the very corner of the property on the water.

MR. METHENY: Yes.

MR. SCHMIDT: Towards the Dock of the Bay. Obviously, your house is not right on the water, correct? I mean, not immediately on the water, there's a part of your yard from the, from the bulkhead or the shore line back to your house, correct?

MR. METHENY: Well, from here, you're looking at about forty-five feet.

MR. SCHMIDT: Okay. So, when you said before a hundred and eighty, a hundred and ninety feet, you were going from your house to the Dock of the Bay property?

MR. METHENY: Yeah.

MR. SCHMIDT: As opposed to going to the very corner of your property on the water?

MR. METHENY: Yes.

MR. SCHMIDT: Okay. That's the hundred and twenty-seven or whatever Mr. Zimmerman tried to get you to say.

MR. METHENY: Yes.

MR. SCHMIDT: Okay.

MR. ZIMMERMAN: One twenty-seven plus forty is one sixty-seven.

CHAIR: Don't testify, Mr. Zimmerman.

MR. SCHMIDT: Okay. Okay. Now, in that house, how long have you owned that, as, was that also inherited from the --

MR. METHENY: Yes.

MR. SCHMIDT: -- from your wife's family?

MR. METHENY: Two thousand and five.

MR. SCHMIDT: Okay and when was that house built, if you know?

MR. METHENY: Nineteen ninety-seven or '98, one of those two years.

MR. SCHMIDT: Okay and obviously, your mother-in-law was living at the other place, so who was living there before you and your wife moved in?

MR. METHENY: My wife's brother.

MR. SCHMIDT: Okay and then, okay. Now, your wife, what's her maiden name?

MR. METHENY: Heronica (phonetic).

MR. SCHMIDT: Heronica. Okay and were the, was the Heronica family ever, did the Heronica family ever have any connection with the Dock of the Bay property?

MR. METHENY: My mother-in-law owned it.

MR. SCHMIDT: Okay. So, your mother-in-law owned the Dock of the Bay property?

MR. METHENY: Yes.

MR. SCHMIDT: How long did your mother-in-law own the Dock of the Bay property?

MR. METHENY: Late forties, early fifties.

MR. SCHMIDT: Until she sold it to who?

MR. METHENY: Nineteen, she sold it to two brothers, their names Trumbrero and that would be in '98, if I'm not mistaken. I'm, I'm not a hundred percent certain on the date, but it's --

MR. SCHMIDT: Okay. Around that time?

MR. METHENY: Yes.

MR. SCHMIDT: Okay. So, your mother-in-law owned the property for fifty years almost?

MR. METHENY: Yes.

MR. SCHMIDT: There's been testimony in this case that before the business on the subject property was called the Dock of the Bay, that it used to be called the Fisherman's Inn?

MR. METHENY: Yes.

MR. SCHMIDT: And when this operated as the Fisherman's Inn, is that when your mother-in-law owned the property?

MR. METHENY: It was Fisherman's Inn the whole time

(inaudible).

MR. SCHMIDT: The whole time she owned it, for the fifty years she had it?

MR. METHENY: Yes.

MR. SCHMIDT: So, it was, do you know when she bought it in the, I think you said late forties, or in the forties?

MR. METHENY: To be honest with you, what it is, the building was a house. It was right here. That was the house. The dining room was added on to it later, but, but it started out as a house and the basement was a bar.

MR. SCHMIDT: Okay. When she, when she bought it --

MR. METHENY: And that was in the late forties.

MR. SCHMIDT: In the late forties.

MR. METHENY: Early fifties.

MR. SCHMIDT: And she converted it into a full-time no longer house, but a full-time Fisherman's Inn restaurant?

MR. METHENY: Right, took the basement, made it into a bar and then at a later date, my wife's father added the dining room.

MR. SCHMIDT: Okay.

MR. METHENY: Then made it into a restaurant.

MR. SCHMIDT: When your in-laws owned it as the Fisherman's Inn, did they, did they ever have a time where they had outdoor seating?

MR. METHENY: My brother-in-law had outdoor seating

the last three, four, five, six years. He didn't have as many tables as Ken Boone or the Trumbreros had because the parking lot went all the way up to the water. So, he only had tables on the concrete bulkhead.

MR. SCHMIDT: Okay. But there was some outdoor seating there?

MR. METHENY: There was some outdoor seating.

MR. SCHMIDT: What about entertainment? Was there ever entertainment at the Fisherman's Inn?

MR. METHENY: Oh, the, in the early eighties, my brother-in-law was managing it, and he had, he had, well, he tried having rock bands there for, for a few years.

MR. SCHMIDT: Okay. Inside or outside or both?

MR. METHENY: That was inside, it was inside.

MR. SCHMIDT: Okay. So, when it was Fisherman's Inn, at least for a period of time, although more limited, there was, limited then today, there was outdoor seating, correct?

MR. METHENY: That would have been in the nineties.

MR. SCHMIDT: Okay and then --

MR. METHENY: Probably nineties, (inaudible) --

MR. SCHMIDT: And that was before Mr. Tanner got involved after Isabel?

MR. METHENY: That was before the Trumbreros even, it was still --

MR. SCHMIDT: Even the Trumbreros.

MR. METHENY: -- it was still Fisherman's Inn.

MR. SCHMIDT: Still Fisherman's Inn. Okay. In addition to the outdoor dining area and the, and the music that was at the Fisherman's Inn, any other activity associated with the business that was outside? Did you have the pirate ship playground?

MR. ZIMMERMAN: I would object, (inaudible) the Fisherman's Inn has nothing to do with this case.

CHAIR: Overruled. Since your, your case is built upon the fact that the Tanners' operation has everything to do with the case.

MR. SCHMIDT: Right.

CHAIR: And the Fisherman's Inn, if we're going to go there, then we have to hear the testimony of the Fisherman's Inn.

MR. ZIMMERMAN: But the Fisherman's Inn was not the problem obviously, it was mainly essentially a restaurant.

CHAIR: It's, we're going through the history of the, of this establishment and the music that's been there.

MR. SCHMIDT: Or what I'm asking, Mr. Metheny, to get to it, my understanding there was a skate park?

MR. METHENY: Yes. My, my, now that was my wife's brother.

MR. SCHMIDT: Okay.

MR. METHENY: He owned and operated, he put in two

skateboard ramps and he had, you know, I think they called it Chesapeake Skateboard or, it's on Facebook.

MR. SCHMIDT: Okay and that was actually, what that, that, the skateboard activity was where the outdoor seating area is now?

MR. METHENY: No.

MR. ZIMMERMAN: Objection.

MR. SCHMIDT: If you know.

CHAIR: Well, --

MR. ZIMMERMAN: Absolutely nothing to do with the current case.

CHAIR: Okay. Overruled. Go ahead. Go ahead.

MR. SCHMIDT: Go ahead, sir.

MR. METHENY: Okay. This area here where the garage is, this is the Dock of the Bay, this is the main building, this is the dining room, this is the outside area.

MR. SCHMIDT: Okay and he's pointing to Protestant's exhibit number --

BOARD: Thirteen.

MR. SCHMIDT: -- thirteen, which is the aerial photograph and you've indicated the area of the Dock of the Bay buildings, where you can see the roofs --

MR. METHENY: Exactly.

MR. SCHMIDT: -- was the restaurant as it was then?

MR. METHENY: The two ramps were right here.

MR. SCHMIDT: So, the ramps were actually --

MR. METHENY: On lots that wasn't part of the Dock of the Bay. There's, there's three lots that run this way, three lots that run this way.

MR. SCHMIDT: Okay.

MR. METHENY: Then these lots run this way, the, the two ramps were where that garage is now.

MR. SCHMIDT: Okay.

MR. METHENY: Right in this area right here.

MR. SCHMIDT: Okay and so --

MR. METHENY: This house wasn't there.

MR. SCHMIDT: Okay. So, the tape is clear, the skateboard ramps, you indicated that, I think, your mother, when she re, I'm sorry, your mother-in-law, when she retired, she built the house which is now owned, now occupied by your tenants.

MR. METHENY: Tenants, yes.

MR. SCHMIDT: At 2712 Sixth Street.

MR. METHENY: Yes.

MR. SCHMIDT: You also indicated that next to that property is a, unimproved lot known as 2714 Sixth Street?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and is, do I understand it that the skateboard ramps, an operation that your brother-in-law ran, was on that unimproved lot, is that where it was?

MR. METHENY: It, it might even, it might have even been on both lots.

MR. SCHMIDT: Both the Dock of the Bay property and--

MR. METHENY: This was all, this was all their property.

MR. SCHMIDT: Okay. So --

MR. METHENY: Except for this, this right here was all their property.

MR. SCHMIDT: Okay.

MR. ZIMMERMAN: You don't, we're not even going to understand what --

MR. METHENY: So, right in this area.

MR. SCHMIDT: And the witness is indicating, for the record, on, on People's Counsel exhibit number seventeen, that the Dock of the Bay property, which is outlined in yellow, was owned by your in-laws.

MR. METHENY: The Heronicas.

MR. SCHMIDT: They also owned 2714, I'm going to go south to north, 2712, which is where your tenants live.

MR. METHENY: Yep.

MR. SCHMIDT: 2714, which is the vacant lot.

MR. METHENY: Yes.

MR. SCHMIDT: 2718, which is owned by Miller's Island Land Company.

MR. METHENY: Yeah.

MR. SCHMIDT: You know who that is?

MR. METHENY: No.

MR. SCHMIDT: Is it a, is it a, is that a, is that a residence there?

MR. METHENY: No, it's a garage.

MR. SCHMIDT: It's a --

MR. METHENY: It's an empty lot with a garage on it and my knowledge is that it has just been sold.

MR. SCHMIDT: Okay.

MR. METHENY: So, but I, I don't, I don't know anything about it.

MR. SCHMIDT: Not, and then next to that is 2716, which is Mr. Ciarpella's property.

MR. METHENY: Matt Ciarpella's, yes.

MR. ZIMMERMAN: I'll maintain my objection to what happened in the twentieth century. That's another century.

CHAIR: Okay. Overruled.

MR. ZIMMERMAN: It's not this case.

CHAIR: Overruled.

MR. SCHMIDT: Thank you. And you also indicated that your in-laws, in addition to the properties that I've just described, also owned what is now the Wolinski property at 9109 Cuckold Point Road?

MR. METHENY: (inaudible).

MR. SCHMIDT: Yes. Okay, which are both (inaudible)

the Wolinskis, okay. And obviously in those days, a lot, those houses weren't built because Mr. Wolinski bought, built his house when he moved in as did Mr. Ciarpella, so when your in-laws owned it, that was no residences were there, correct?

MR. METHENY: Oh, no, no, not at all.

MR. SCHMIDT: Okay.

MR. METHENY: The only residence was there would be this, I don't know who lived there, but there's a, a house right here on the corner.

MR. SCHMIDT: Corner of what?

MR. METHENY: I'm sorry, the corner of Cuckold Point and Sixth.

MR. ZIMMERMAN: Yeah, I object.

MR. SCHMIDT: Very well.

MR. ZIMMERMAN: The timing, you know, the timing of, on the residence (inaudible) Fisherman's Inn was there, is irrelevant to this case.

CHAIR: Okay.

MR. ZIMMERMAN: The same thing was true back in the 2008 case, the residents were built when they were built, the Fisherman's Inn had been there when it was. The problem is the late night music, the nightclub use, that's the problem. The Fisherman's Inn is not the problem. People are entitled to build their houses and live there in peace and quiet enjoyment.

CHAIR: Overruled. Okay.

MR. SCHMIDT: Thank you, Chair. I have no other questions, thank you.

CHAIR: Okay. Any re-direct?

MR. BORGERDING: No re-direct.

CHAIR: No re-direct? Anything based on Mr. --

MR. BORGERDING: Oh, I'm sorry, I have one question. My client just --

CHAIR: Mr. Borgerding does have a question.

MR. BORGERDING: Did your son live near the subject property?

MR. METHENY: My son, Steve?

MR. BORGERDING: Your son, did he used to live there?

MR. METHENY: Yes, he lived at 2712.

MR. BORGERDING: When, how close is that (inaudible)?

MR. METHENY: Okay. Again, going to 2712.

MR. BORGERDING: For the record, you're referring to, is that Protestant's seven?

BOARD: It's People's Counsel seven.

MR. BORGERDING: I'm sorry, People's Counsel seven, my bad.

MR. METHENY: The house that, that we, is a rental for us now.

MR. BORGERDING: Okay. So, did he move out, he and his family? He lived there with his family?

MR. METHENY: Yes, yes.

MR. BORGERDING: He and his family moved out?

MR. METHENY: Yes, they did.

MR. BORGERDING: When did they move out?

MR. METHENY: Not too long after they put up a sign that they were having live music at the Dock of the Bay.

MR. BORGERDING: Why did he decide to move out?

MR. METHENY: He wasn't going through that. I got a four-year-old at that time, a four-year-old granddaughter and he, he just wasn't living that mess. They started looking for a house, they found one in Bel Air and moved to Bel Air.

MR. BORGERDING: Okay. No further questions.

CHAIR: Okay.

MR. ZIMMERMAN: Yeah, just a follow-up. Did the people who live at, your tenants at 2712, do they also use 2714 for recreation or gardening or anything like that?

MR. METHENY: No, I mean, they can, you know, but, but, no, they don't.

MR. ZIMMERMAN: Any plans for 2714?

MR. METHENY: Nothing right at this point. Maybe put a house there, don't know yet.

MR. ZIMMERMAN: And if you did put a house there, you'd be worried about --

MR. SCHMIDT: Objection.

MR. ZIMMERMAN: -- the live music?

MR. SCHMIDT: Objection.

CHAIR: That would be testimony.

MR. SCHMIDT: So speculative. He just said he didn't have any plans.

CHAIR: He has no plans but if they did have plans, maybe someday we might (inaudible) --

MR. ZIMMERMAN: Well, you're entitled to do something with that property, aren't you?

CHAIR: Well, everybody is entitled to do something with their property. This gentleman is very honest, I mean, I appreciate your honesty, sir.

MR. ZIMMERMAN: Yeah.

CHAIR: I mean, you didn't, you know, you have no plans yet. Let's leave it at that.

MR. ZIMMERMAN: All right.

CHAIR: How about that?

MR. ZIMMERMAN: All right. Thank you, Madam Chair.

CHAIR: Okay.

MR. SCHMIDT: Just, just one follow-up and it does relate, what's your son's name?

MR. METHENY: Steven.

MR. SCHMIDT: What's he do for a living?

MR. METHENY: He is a senior network engineer for Johns Hopkins.

MR. SCHMIDT: Does he do any disc jockeying on the side?

MR. METHENY: No.

MR. SCHMIDT: He does, did he ever?

MR. METHENY: No.

MR. SCHMIDT: Okay. Do you have a son that's a disc jockey?

MR. ZIMMERMAN: Objection. Now, we're, --

MR. SCHMIDT: I thought maybe this was his son.

MR. ZIMMERMAN: Yeah, it has nothing to do with this case whether his son was a disc jockey or not. It's ridiculous.

CHAIR: Okay.

MR. SCHMIDT: Okay.

CHAIR: He said no, I think he said no, so, I'm not sure.

MR. SCHMIDT: Well, that's, Steven is not a disc jockey. Do you have any other children, do you have another son who is a disc jockey?

MR. ZIMMERMAN: Objection.

CHAIR: Well, that, but that's going to go beyond the scope and, and --

MR. SCHMIDT: Okay. Okay. No problem.

CHAIR: All right.

MR. SCHMIDT: It's not a big deal.

CHAIR: Okay. Thank you, sir.

MR. METHENY: All right.

CHAIR: It's 12:00. Mr. Borgerding, how many more witnesses do you have?

MR. BORGERDING: Three. I've got three.

CHAIR: You have three more witnesses?

MR. BORGERDING: I, I, I would imag, I don't know what the, when the Court would think about taking a lunch --

CHAIR: We were going to do it now and we could, we could take a half an hour short.

MR. SCHMIDT: That's fine.

CHAIR: Everybody could take a half, which is kind of rushes everyone.

MR. BORGERDING: Or, or what I'm thinking, Your Honor, is I could probably be done by 1:00.

MR. SCHMIDT: Done everything?

CHAIR: Done everything?

(EVERYONE TALKING AT ONE TIME)

MR. BORGERDING: I don't know how much rebuttal Mr. Schmidt has.

CHAIR: Yeah, Mr. Zimmerman --

MR. SCHMIDT: Is Mr. Zimmerman leaving?

CHAIR: Mr. Zimmerman is going to be here, he's going to, you might be done at 1:00 --

MR. ZIMMERMAN: Unless the, unless the witness, you know, has to, has to, Mr. Kondylas needs to testify now, let's do it, but otherwise I wouldn't mind a lunch break.

MR. BORGERDING: Well, just my thought was, due to Mr. Schmidt's engagement at 2:00, we could maybe plow through and get done.

CHAIR: Well, I was just thinking and we could take, you know, if we took maybe a half an hour, then it would be 12:30, you know, an hour and a half before he, you actually have to leave before 2:00?

MR. SCHMIDT: Just, all I have to do is run across the street.

CHAIR: Oh, yeah, yeah, yeah, but you need to be there at 2:00?

MR. SCHMIDT: Yes, and, and I've asked, I've, I've got to be there but I'm going to have one of my associates go there and tell them I'm on my way so.

CHAIR: I understand. All right.

MR. SCHMIDT: Yeah.

CHAIR: Well, hopefully you're defending some case that we, we've (inaudible).

MR. ZIMMERMAN: I'm just saying is, if we need to have, if a witness --

MR. SCHMIDT: Defending the Board.

MR. ZIMMERMAN: -- if a witness needs to be on the stand now because he's got to go, let's do that. But otherwise, let's --

CHAIR: Well, that's not what he, I don't think

that's what he indicated but I don't know if we're going to get all done by 1:00. We could at least take, does everybody agree --

MR. BORGERDING: My thought would be we should try to plow through.

CHAIR: Okay. Well, let's just take at least a ten-minute break then.

MR. BORGERDING: Okay.

CHAIR: Let's just take a ten-minute break until, you know, 12:15.

MR. BORGERDING: Okay.

CHAIR: Give us ten minutes and then we'll come right back and then we'll start with that gentleman.

MR. SCHMIDT: Very well.

CHAIR: How's that sound?

MR. BORGERDING: Thank you, Your Honor.

MR. SCHMIDT: Thank you, all.

CHAIR: Because I'm going to eat something.

(RECORD PAUSED - 12:03:01 PM)

(ON RECORD - 12:18:17 PM)

CHAIR: Okay. We're back on the record after just taken a little break. Mr. Borgerding, you had a witness? Who is ready?

MR. BORGERDING: Yeah, with that, I'd call Mr. Kondylas.

CHAIR: Mr.?

MR. BORGERDING: Kondylas.

CHAIR: Kondylas.

MR. BORGERDING: From Boone Kondylas. If I could see Protestant's one and 1-A or one and two.

MR. ZIMMERMAN: Again, may I remind people to speak up because I can't even here half, half the voices.

CHAIR: You might want to keep your voice up, Mr. Borgerding.

MR. BORGERDING: Okay, I apologize.

CHAIR: Oh, no worries.

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. KONDYLAS: Yeah. Yes.

BOARD: Can you state your name and your address for the record, please?

MR. KONDYLAS: Yeah, Mike Kondylas, my address 8909 Miller's Island Boulevard.

BOARD: And spell your last name, please.

MR. KONDYLAS: K-O-N-D-Y-L-A-S.

BOARD: Thank you. You can be seated.

MR. BORGERDING: Mr. Kondylas, were you Mr. Boone's former partner in the establishment for which we're here today?

MR. KONDYLAS: Yes.

MR. BORGERDING: And when were you partners, from when and what time did you exit the business?

MR. KONDYLAS: Well, when we bought the place, it took six, eight months to renovate.

MR. BORGERDING: Do you know what time that was, when that was?

MR. KONDYLAS: I got out in '14, November of '14, so that was the summer of --

MR. BORGERDING: Of '14?

MR. KONDYLAS: -- '14.

MR. ZIMMERMAN: Two thousand fourteen, not 1914?

MR. KONDYLAS: Right, 2014.

MR. BORGERDING: During that summer, do you recall getting a letter from me in reference to Mr. Tanner's use of the property?

MR. KONDYLAS: Yes.

MR. BORGERDING: Okay. I'm going to show you a copy of a letter --

MR. SCHMIDT: This is, this is already in evidence, I think.

MR. BORGERDING: I can still ask about it, can't I?

BOARD: Sure.

MR. SCHMIDT: Sure. Okay.

CHAIR: Is it an exhibit all --

BOARD: It, it was. I mean, did you take my exhibit out of there?

MR. SCHMIDT: It's, it's exhibit number one.

BOARD: Yes.

MR. SCHMIDT: Okay. I, I've seen it, I got a copy of it.

CHAIR: Why don't you just, let's identify then if there's an exhibit already in evidence, do you want to use that, Mr. --

BOARD: He just took (inaudible).

CHAIR: Oh.

MR. BORGERDING: I took it, I have it.

CHAIR: You know, I (inaudible), you are one step ahead of me.

MR. BORGERDING: I'm one step ahead of you.

CHAIR: I apologize. (inaudible).

MR. BORGERDING: Can you identify what you're looking at?

MR. KONDYLAS: Yeah, this is the letter we got, received in the mail, stating, reminding us that a restrictions for the music on the property.

MR. BORGERDING: Okay. So, there's a letter attached to that, which purports to be from Baltimore County. That is not on Baltimore County's letterhead, but is that, in fact, the letter that was attached?

MR. KONDYLAS: Yes.

MR. BORGERDING: Okay. I'd ask that 1-A or was it two, I'm not sure --

MR. ZIMMERMAN: My record shows it's People's, Protestant's Exhibit 1, letter --

BOARD: Right, it's a letter dated 9/24.

MR. ZIMMERMAN: -- 9/24/14, Borgerding to Kondylas, to letter dated 9/12/2004 previously for i.d. only.

BOARD: Okay.

MR. BORGERDING: I'd ask that Protestant's number two, which was previously admitted for i.d., be entered into evidence.

MR. SCHMIDT: Objection.

MR. ZIMMERMAN: Is that Rosenblatt to --

MR. BORGERDING: Correct.

MR. ZIMMERMAN: -- to whom? It's 9/12/2014, Rosenblatt to?

CHAIR: Wait a minute, Mr. Zimmerman.

MR. ZIMMERMAN: I'm sorry.

CHAIR: You keep interjecting in the middle of, of Mr. Borgerding's --

MR. ZIMMERMAN: All right.

CHAIR: -- direct examination and he's talking about two exhibits, one of which was --

BOARD: Right, this is, this is, this exhibit, which

is supposedly for Protestant exhibit number two, was not admitted.

MR. BORGERDING: It was marked for i.d. and I'm asking now, after he has referred to it --

BOARD: Properly authenticated it, is that what you're saying? He's identified it and authenticated it.

MR. BORGERDING: Yes, I am asking that it now be entered into evidence.

CHAIR: Do you have any objection to Exhibit 2?

MR. SCHMIDT: I do.

CHAIR: Okay.

MR. SCHMIDT: I think what happened before, Ms. Murphy, as I recall and I listened to the tape, is that Mr. Borgerding submitted into evidence over my objection exhibit number one, which is a letter that he wrote to Mr. and Mrs. Kondylas and he then attempted to offer exhibit number two into evidence, which I objected to because I said it's not signed, it's not on County stationary and there's no indication that it's actually a County authenticated letter. This gentleman, the only thing he has testified to today, is that he got it, it was received by him in a letter attached to Mr. Borgerding's letter. That doesn't change the fact that it's still not signed, it's still not on County letterhead, it's still not authenticated as a document produced by Baltimore County. The mere fact that this man got it from Mr. Borgerding, I mean,

arguably, if he got it directly from the County, then there would be a stronger argument but he just testified he got this from Borgerding in a letter, with Exhibit 1. I believe it's still not properly authenticated and I would object to it.

MR. ZIMMERMAN: May I comment before a ruling is made, may I comment after, either before or after Mr. Borgerding?

CHAIR: Okay. I was going to ask Mr. Borgerding, but why don't you say what you need to say, Mr. Zimmerman?

MR. ZIMMERMAN: Yes. I think Mr., Mr. Schmidt's argument is a red herring. Whether or not this particular exhibit is signed or not, it's relevant for the purpose of notice. It's an additional, I mean, the, Exhibit 1 itself is a notice to Mr. Kondylas of the attached letter is further detail as to notice. It so happens that what's in that letter is consistent with everything else in this record anyway, in the public record. But the point is, it's relevant to notice. Doesn't matter whether it was signed, doesn't matter, the authentication is, as to the County is not even the issue. The issue is, this is more information which Mr. Kondylas probably knew already, but we'll get into that later. It's, it's fine to be admitted into evidence. It's what, it's the extent of notice that Mr. Borgerding provided.

CHAIR: Mr. Borgerding?

MR. BORGERDING: Yeah, I, I guess a couple of points

I'd make. Number one, this is an administrative hearing, so I would ask the Board to keep that in mind. Number two, I agree, this, this correspondence was dealing with notice issues and so the fact it is not on County stationary or signed, it still provided the notice and that's what my further questioning is going to be about.

MR. SCHMIDT: Ms. Murphy, if Mr. Borgerding is done, can I be heard very briefly?

CHAIR: Yes.

MR. SCHMIDT: First of all, my, my particular objection to the document is that surely the, the Board is an administrative body and the Board has more latitude than a Court of law would and I think we all understand that. Nonetheless, I think the Board does have to operate within the precepts of fundamental fairness and due process and I just don't see this unsigned letter, which is on a blank sheet of paper and not on County letterhead as being reliable enough to, to, on its own face. But let me get beyond that. I have thought about this issue and listened to the tape recording of the hearing before and this may go to this gentleman's entire testimony. As I understand it, and Mr. Zimmerman said this at the first hearing, there is apparently a dispute or an allegation as to what Mr. Boone knew or didn't know or should have known or whatever, as it related to the prior proceedings involving Mr. Tanner and I guess I'm going to say right now and

I will note an objection depending on your ruling, I'll not it continuing, I think that's irrelevant. Certainly, in the context of a zoning variance case, the concept of self-imposed hardship is a, a factor which this Board can decide when it's considering a variance, as to whether the variance should be granted and whether the circumstances giving rise to the variance were self-created. This is not a variance case. The concept of, I guess they're arguing a self-imposed special hearing or, or whatever it is. This is a special hearing case. We're not asking for a variance. I looked at the cases involving this issue and the one that jumps out at me is the, and Mr. Zimmerman cited this, is the *Seminary Galleria* case, which involved the property up near Heaver Plaza, up at Seminary Avenue and in that case, which Mr. Zimmerman cited it when his initial Motion, the owners of that property attempted to obtain relief for their parking. They were denied, then they came back in a separate filing and attempted to retain, obtain relief and the relief was denied again on the grounds of res judicata. And I don't know if that's where they're going with this argument, but if one reads that decision, the, the second case wasn't denied because there was a self-created hardship or an earlier case, it was denied because of res judicata. My, my point is, is that self-created hardship, if that's what they're arguing, is a variance issue, but not in the context of the relief here, either in the res judicata

argument or in the underlying special hearing which was filed. And so, I would just say, who cares what Mr. Boone knew? Whether he knew about Tanner, whether he didn't, it doesn't matter. There's no relevant to it and I haven't, I'm unaware of any case law that supports a proposition otherwise. So, I think that's, I, I objected to this before. The questions I objected to of the cross examination of Mr. Boone about what he knew and when he, and all the rest of that stuff, I don't think it's got anything to do with whether he can make this request and whether the Board should grant it now. I'll shut up.

CHAIR: Okay.

MR. ZIMMERMAN: I think Mr. Borgerding goes next.

MR. BORGERDING: Yeah. Your Honors, I'll proffer exactly what I'm getting at with this witness and what he's going to testify to. Mr. Boone testified on the stand that he had no knowledge of the zoning issues with Mr. Tanner, nor the Court's ruling. When my clients, after all they had been through, caught wind that Mr. Kondylas and Mr. Boone were thinking of buying the property, Mr. Wolinski called me and said, you need to write them a letter, notify them because he also, my, my client also heard that there were spreading amongst Miller's Island, which is a small community, the attitude that we can buy this and do whatever we want. We're not bound by the previous decisions. That is the reason I sent that letter to Mr. Kondylas. Mr. Kondylas is going to, we'll

have him, he'll testify to what he's going to testify, but he is going to testify that he gave that letter to Mr. Boone. Mr. Boone testified under oath that he had no knowledge of this. So, I think it is absolutely relevant to his credibility. It has nothing to do with res judicata or any other issue, his credibility. He testified, I didn't know about this and this gentleman is going to testify, yes, he did know about it.

CHAIR: Okay.

MR. BORGERDING: So, I think that's relevant.

MR. ZIMMERMAN: Yeah. Well, as this sometimes happens, Ms., I don't think Mr. Schmidt has accurately described what my position is or what may be my position is in this case. It's not a variance case, okay? Every case has its legal dimension and then at administrative hearings, there's the sympathy or extraneous dimensions. When it comes to res judicata, even if Mr. Boone subjectively had no idea that there was ever a case before, okay? That wouldn't excuse him from the res judicata impact. All right? Even if he had come from Mars and not read any of the public records, not talked to anyone at all. Res judicata would still apply. However, as a sympathy dimension in this case, building on, consistent with what, what Mr. Borgerding said, I, I can't state word for word what Mr. Boone testified, but the gist of it was that he, he knew there was a problem but he thought he could overcome it. He didn't realize the depth of the decisions that had been

made, that Kondylas didn't show him the letter, his partners weren't clear with him or Tanner wasn't clear. I think the Board may remember it as well as I. Petitioner, as often happens in these cases, in addition to whatever legal argument they may have, they make a play for sympathy, okay? So, the Petitioner in, as often happens, even though it's really not, doesn't really justify legally their case, they make a play for sympathy for some, some degree of ignorance, okay? You know, Petitioner's case is, Tanner's a bad guy, Tanner didn't tell them everything, current Petitioner is a good guy, don't, don't equate him with Tanner. So, when Mr. Borgerding legitimately points out that he sent information directly to one of the partners, apparent partners, we don't have, we don't have a partnership agreement, but we know it's Boone Kondylas LLC, when Mr. Borgerding points out that not only was there a problem of public record, but Mr. Borgerding made a special effort on behalf of his clients to remind them that there was this problem, then that, that's legitimate in the context of the way the Petitioner presented their case. And there can't be a double standard in these cases. Like Petitioner can do, put in and do whatever they want and they, they open it up, Madam Chair, and --

CHAIR: Okay.

MR. ZIMMERMAN: -- even though it's irrelevant, right? There's no sympathy argument that should be made, the

Petitioner has opened up this sympathy position to try to, again, differentiate the current owners from the, the evil Mr. Tanner, who was the subject of the previous case. Well, that good and evil argument is, frankly, irrelevant. But they opened it up and Mr. Borgerding is legitimately pointing out that the knowledge of Boone Kondylas, which is the Petitioner, Kondylas being one of the principals, that the knowledge was greater. Now, whether or not Mr. Kondylas told Mr. Boone, maybe Mr. Borgerding is going to get into that questioning, that's a detail and it frankly doesn't change the outcome of the case. But the Pet, one of the Petitioner's big pitches is, gee, I didn't know or I didn't know the degree or I wasn't told this, I wasn't, you know, that was, that was part of their case and, yeah, we could say none of it really matters. And, of course, my view is the case should have been dismissed before we even had this trial but, but once these things start to open up, the Petitioners make these kind of equitable, sympathetic, try to, try to look good and guess what? The Petitioner, Boone Kondylas, was on full notice, should have been on, with notice anyway, but, but, but the citizens made the effort, the extra effort, which they didn't have to make, but they made the extra effort to say, wait a minute. We had all this problem all these years and now you're going to start up again? Come on. So, I think it's outrageous for Mr. Schmidt to object.

CHAIR: Okay. Anything else?

MR. SCHMIDT: Just very briefly. Mr. Borgerding says that the, the neighbors sent this letter so that Kondylas, or so that Boone just wouldn't think the prior restrictions were not applicable to him. Obviously, we know the restrictions are, are applicable to us, that's why we filed the Petition. I mean, that doesn't make any sense. And if we want to talk about sympathy, Mr. Zimmerman, I've heard nothing but pity party from the neighbors about the hell they endured for seven years of Larry Tanner. I, I wrote down --

CHAIR: I object to that, I object to that, you know, additional red herring.

MR. SCHMIDT: I wrote down exactly what Mr., what Mr. Boone said. Mr., and this was on cross examination and I objected to it, but the Board allowed it and Mr. Boone testified, quote, this is a hurdle that could be navigated. That was his understanding, that's what he said. And then he said, either Mr. Tanner or Mr. Kondylas told me that there was a music restriction related to the liquor license and that it would go away when the liquor license was transferred. And that's what his testimony was. So, he was aware of some problem but my point is, he's aware of it, he's now filed this Petition to address it and what's all the rest of this got to do with anything? I, I still can't get there.

CHAIR: All right. Can you pause that for one second?

(RECORD PAUSED - 12:37:11 PM)

(ON RECORD - 12:37:54 PM)

CHAIR: All right. The objection was to exhibit number two, that's when we started with this fifteen minutes ago, which is why we're never going to finish by 1:00. It's okay, but just calling Mr. Borgerding.

MR. BORGERDING: Oh, well.

CHAIR: So, --

MR. BORGERDING: I'm being overly optimistic.

CHAIR: -- Prot, Protestant's exhibit number one was the letter from Mr. Borgerding, which is already in evidence, to Kondylas. Protestant's number two is, as was indicated, is an unsigned letter from, it appears to be Adam Rosenblatt. It's not on County letterhead, it's not signed. The Protestants are arguing that their issue is notice and Mr. Zimmerman was arguing notice. The notice was provided in Protestant's exhibit number one, September 24th letter. We don't need exhibit number two necessarily. The only person actually who could identify Protestant's exhibit number two is Mr. Borgerding, if he wants to be a witness. But, normally we have these, always, not normally, always in these cases, we always have County letterhead, it's always signed and it's just not hard to get a copy of that. Now, before today's hearing, before the last time's hearing, easy to do. So, Protestant's exhibit number two will not be admitted, but Protestant's

exhibit number one already gives you the information and certainly, you know, this gentleman can testify as to what he told Mr. Boone. I mean, if, that's really what the issue is and his testimony is also evidence. So, this doesn't, the admission of this doesn't make or break anything, it's just, it doesn't come in because it doesn't have a sign and it's not, and Mr. Borgerding is not going to be a witness, so. All right. So, we're going to mark that for i.d. still. Go ahead.

MR. BORGERDING: So, Mr. Kondylas, going back to the time that you received that letter, you received it September of 2014? Did you at that time --

CHAIR: Wait a minute, wait a minute.

BOARD: Which letter are we talking about?

CHAIR: Hold on one second. Yes, you have to identify which letter and also, sir, you have to actually speak up because there's a transcript --

MR. KONDYLAS: Oh.

CHAIR: -- there's a microphone.

MR. KONDYLAS: I'm sorry.

CHAIR: That's okay. It's, it's awkward but there's a microphone and, and so when these gentlemen go to print the transcript, they'll just go, it won't even have anything that you said, so you have to actually speak up. Which document are you speaking about?

MR. BORGERDING: Mr. Kondylas, your testimony is

you've received both letters, correct?

MR. KONDYLAS: Yes.

MR. BORGERDING: Okay and did you show both letters to Mr. Boone at the time?

MR. KONDYLAS: Yeah, I just gave him the whole envelope, handed it to him and he went upstairs to the office.

MR. BORGERDING: Thank you. No further questions.

CHAIR: Okay.

MR. ZIMMERMAN: Mr. Kondylas, just to show, you live at Miller's Island Boulevard and Tenth Street, correct?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: And just to show the Board where you live, may I see Petitioner's Exhibit 7? It's an aerial photo of the whole peninsula.

MR. KONDYLAS: It's five blocks away.

CHAIR: One second, let Mr. Zimmerman ask you a question.

MR. KONDYLAS: Oh.

CHAIR: Because --

MR. ZIMMERMAN: No, I don't, I don't think, in fairness, ten, the aerial photos that are in evidence don't go down to Tenth Street, so I just want to --

BOARD: Petitioner's exhibits.

MR. ZIMMERMAN: Petitioner's seven. Okay. I have Petitioner's seven, Exhibit 7, and this, this does show

Miller's Island Road, then Miller's Island Boulevard shoots off to a wider part of the peninsula, correct?

MR. KONDYLAS: To the right, yes.

MR. ZIMMERMAN: And then Tenth Street is, I guess Tenth Street becomes Miller's Island --

MR. KONDYLAS: No, this is Tenth.

MR. ZIMMERMAN: Okay.

MR. KONDYLAS: Going to the left, going north and Miller's Island Boulevard is the same street but it, from Cuckold Point it goes south.

MR. ZIMMERMAN: Okay and your house is about --

MR. KONDYLAS: The second one in.

MR. ZIMMERMAN: -- the second one towards, on the Miller's Island Boulevard side?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: Which happens to be in a, in a modest area zoned BL, correct?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: And you're near the corner, you're, you're a house or two away from the corner of Miller's Island--

MR. KONDYLAS: One house away from the corner.

MR. ZIMMERMAN: Of Miller Island Boulevard and Tenth Street.

MR. KONDYLAS: Right.

MR. ZIMMERMAN: And if I show the, I'm going to show

the Board the area to which, to which he's pointed. Just so, so there's no confusion, there's Tenth Street, Miller Island Boulevard and that's where Mr. Kondylas lives. Okay. I just wanted to clarify that.

BOARD: What's his home address (inaudible)?

MR. ZIMMERMAN: Your home address?

MR. KONDYLAS: 8909 Miller's Island Boulevard.

MR. ZIMMERMAN: Okay. Okay and Mr. Kondylas, how long have you lived in the area?

MR. KONDYLAS: I've been at that address since 2000.

MR. ZIMMERMAN: And at some point, you became partners, were you partners with Mr. Boone in Boone Kondylas, LLC?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: And were you familiar with the previous litigation?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: Involving Mr. Tanner? Okay. What relationship, if any, did you have with Mr. Tanner?

MR. KONDYLAS: In the very beginning, we were trying to, to (inaudible), but then when things got too intense back and forth, we just, you know, as a friend of Tanner's, I just backed off.

MR. ZIMMERMAN: You were friends with Mr. Tanner?

MR. KONDYLAS: Oh, I'm friends with Mr. Tanner, I'm

neighbors, you know, with everybody else and I wasn't going to get caught in the middle.

MR. ZIMMERMAN: So, anyway, by the time, at some point, you made an agreement or entered into some sort, was it a partnership or a small corporation, an LLC --

MR. KONDYLAS: An LLC.

MR. ZIMMERMAN: Okay and you knew the whole history of the, the Tanner litigation, correct?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: So, so did you inform Mr. Boone about what had happened?

MR. SCHMIDT: Objection. Asked and answered. He said he got the letter, he gave it to him, he took it upstairs.

CHAIR: Right, okay.

MR. ZIMMERMAN: But did he have conversations with Mr. Boone --

MR. KONDYLAS: Yes, we did.

MR. ZIMMERMAN: -- that there was this litigation. Okay and at one point, you, the corporation acquired the property, Boone Kondylas, in, sometime in 2014 or 2015?

MR. KONDYLAS: In '14, 2014.

MR. ZIMMERMAN: Okay and you were still, would you call yourself a partners with Mr. Boone or what's, what's, what's the correct --

MR. KONDYLAS: The partnership was Boone Kondylas,

was me, my wife, Kenny and his wife.

MR. ZIMMERMAN: Okay.

MR. KONDYLAS: The Dock of the Bay, LLC, the license, was put in my wife's and my daughter's name.

MR. ZIMMERMAN: Ah. So, when it said Michelle Kondylas --

MR. KONDYLAS: That's my daughter.

MR. ZIMMERMAN: -- on the liquor license, that's, that was correct?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: Okay and, and then, and that was what we showed as People's Counsel Exhibit 11-A, the, just so --

MR. KONDYLAS: Yeah, the liquor license.

BOARD: (inaudible).

MR. ZIMMERMAN: 11-A is still in for i.d.?

BOARD: Yeah, and 11-B as well.

MR. ZIMMERMAN: So, let me show to this witness and maybe he can verify that.

MR. SCHMIDT: Objection. That's going to be the same objection. What does he know? He's going to be showing a document --

MR. ZIMMERMAN: He knows.

MR. SCHMIDT: What's the possible relevance of any of this?

MR. ZIMMERMAN: It's a thousand times more relevant

then (inaudible).

CHAIR: All right. Well, Mr., Mr. Borger --

MR. ZIMMERMAN: All right. So, I'm going to show you 11-A for I, i.d.

MR. SCHMIDT: All right. For the record, I think this is Mr. Borgerding's witness and I will object that this is beyond the scope of direct examination as well.

CHAIR: All right and you're actually cross examining him.

MR. SCHMIDT: Yes.

MR. ZIMMERMAN: Well, I'll call him as my witness now then, or, or later (inaudible), would you like --

CHAIR: On day three.

MR. ZIMMERMAN: Whenever, unless we can get through it quickly now.

CHAIR: On day three. The, the exhibits that you have, I mean, Mr. Borgerding already had one, I thought he had (inaudible) liquor license, I thought.

MR. SCHMIDT: The, the witness just testified who owned the liquor license. What else do you want to know, Mr. Zimmerman?

MR. ZIMMERMAN: I want to verify to, excuse me, because there was some confusion before, we thought that perhaps Michelle was a mis, misprint, so, I think I have the copy of 11-A. This is the November 3rd, 2014 record of the

liquor board and it, applicant's, do you recognize these names, Donna Lee Kondylas, who is that?

MR. KONDYLAS: That's my wife.

CHAIR: Okay. But, Mr. Zimmerman, we're back to the same thing before, you wrote, you turned the paper over and you said this is a 2014 liquor license and you're handing it to the witness and you're, and you're reading the same thing and he's saying, and you're asking him, does this mean, say what it says?

MR. ZIMMERMAN: All right. If, all right, let me ask you this. Is this --

CHAIR: He already testified she's on the liquor license.

MR. ZIMMERMAN: Right.

MR. SCHMIDT: And the daughter.

MR. ZIMMERMAN: So, is this document consistent with your familiarity that your wife and daughter were transferred the liquor license in November of 2014?

MR. KONDYLAS: Yes.

CHAIR: No, because he can't identify the document. He can't identify the document is the problem. He can't, that's not his document. He can't identify it.

MR. ZIMMERMAN: Doesn't matter.

CHAIR: He can't identify the document. He's already said that my daughter's name is on the license. (inaudible)

trying to go around about the question by handing him that document and saying, well, is this consistent with what you just said? Of course he's going to say yes. Mr. Zimmerman, I just --

MR. ZIMMERMAN: Well, it's rele, it is, it is relevant, it corroborates what he has said and gives you --

CHAIR: Well, it corroborates because you're handing it to him and saying it says what it says. (inaudible).

MR. ZIMMERMAN: All right. I think, I think it's admissible.

CHAIR: It's marked for i.d. right now.

MR. ZIMMERMAN: All right. It's --

CHAIR: But this gentleman, thank you, sir, you did testify that your daughter's name was on the liquor license, that's what we heard five minutes ago. But, okay, let's, (inaudible) question.

MR. ZIMMERMAN: Let me get my, let me get my documents back. Okay and then, just, in March 2nd, 2015, however, can you state whether or not the liquor license got transferred from your wife and daughter to Russell McClelland and Dorothy O'Reilly? (inaudible)?

CHAIR: I'm sorry, you have to say, sir --

MR. KONDYLAS: Oh, yeah. Yes. You know, the wife and the daughter, you know, we came to an agreement. They signed off and transferred it over.

MR. ZIMMERMAN: Was that around the time that in some fashion, you no longer became active in Boone Kondylas, LLC?

MR. KONDYLAS: That's, you know, when all the final paperwork came through and we were done with Boone Kondylas and Dock of the Bay, LLC.

MR. ZIMMERMAN: Okay, thank you. I have no further questions.

MR. SCHMIDT: No questions.

CHAIR: Thank you. Thank you, Mr. Schmidt. Mr. Borgerding? Sorry, sir, any re --

MR. BORGERDING: No further questions.

CHAIR: All right. Thank you, sir. Anymore witnesses?

MR. BORGERDING: Yep, I sure do. (inaudible).

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MS. METHENY: That's correct.

BOARD: Please state your name and address for the record.

MS. METHENY: My name is Bonita, or Bonnie, Metheny. I live at 2704 Sixth Street, Miller's Island.

BOARD: Thank you. Please be seated.

MR. BORGERDING: Ms. Metheny, you've been here this

morning, so you've heard all the testimony?

MS. METHENY: Yes, I have.

MR. BORGERDING: And you are here in opposition?

MS. METHENY: I most certainly am.

MR. BORGERDING: Can you explain to the Board why?

MS. METHENY: I am here in opposition of live entertainment inside and out. The reason being is because we've been through this before for seven years, as we all have heard. I don't want to go through that again. The only thing that is different is that we have a new owner of the Dock of the Bay and a new Board. All these people in here are the same people who have been involved before with the whole litigation for the Dock of the Bay.

MR. SCHMIDT: Not me.

MS. METHENY: Well, sorry. But you were Rowboat Willy's lawyer, weren't you? Okay. Well, that makes you a little different. Let's see, Mr. Boone had, his, his history, I think he is the president of American Direct and you have two companies, correct?

MR. SCHMIDT: Don't answer, don't answer.

CHAIR: No, he can't, you can't ask him questions.

MS. METHENY: Oh.

CHAIR: You just need to testify to us.

MS. METHENY: Okay. I am pretty certain that Mr. Boone is the president of two companies and I would think that

as a man of that stature, that he would have did due diligence with the Dock of the Bay, with spending hundreds of thousands of dollars on property, that was one of my points. This has already been decided, as I said, earlier. The hearing results of all the hearings from the lowest court to the highest court still are in place, but we're just back here again arguing the same questions and as far as accessory music, let's really call it what it is, it's not accessory music, it is entertainment, whether it's indoor or outdoor. Mr. Boone testified that he would like to have a Sinatra impersonator. Sinatra only plays nightclubs and casinos. And facebook. Mr. Boone, (inaudible) we'll get into that later. This is something that I would like to submit into the Court. This is a certification of records by Sergeant Gwendolyn Parrish. What this is, is the incident--

MR. SCHMIDT: Objection. Could we have counsel go through the appropriate process of asking that his witness --

CHAIR: That would be a better idea.

MR. SCHMIDT: -- authenticate and offer --

MR. ZIMMERMAN: I don't think counsel should interrupt testimony.

BOARD: It's appropriate.

CHAIR: It is appropriate and, and, and I think, Mr. Zimmerman, in all fairness, pretty much you interrupt testimony on a regular basis and you know I mean that in the best of ways.

MR. ZIMMERMAN: Only to try to clarify.

CHAIR: (inaudible) not only to clarify, it makes it clear to me.

MR. BORGERDING: This marked as Protestant's number sixteen.

CHAIR: Okay.

VOICE: Can you explain to us what this is?

MS. METHENY: Of course.

CHAIR: Well, why don't we have Mr. Borgerding --

BOARD: Yeah, I want the attorney to explain to me what this is.

CHAIR: What is it?

MR. BORGERDING: To my understanding, it's a list of when the police were called to Mr. Tanner's establishment.

MR. SCHMIDT: Mr. Tanner's establishment?

MR. BORGERDING: Yes, yes.

MS. METHENY: And all the calls. What I don't want to do is, I don't want to have to live that over again because of somebody else coming in and saying oh, yes, well, we'd like to have music because I can't make it without music or, it's just, I don't want to live it again. I don't, I don't want my quality of life to go down there. I have to work all week and then I come home and next door they're having a party out, or your waitresses or, not his, but the waitresses are swimming, going swimming at 2:00 in the morning. That should be in there

as a call. There's duplicate calls in there where more than one person have called about what had, what had happened or what had transpired. That's the data source and that's the graphing.

BOARD: What was presented to you? You, you have a certification here that this was a record --

MS. METHENY: This is certifying that all that --

BOARD: Yeah, but what was, were the, was the data source presented to you? Was this presented to you?

MS. METHENY: The data source was presented to me. The graphing is what I did with the data.

BOARD: Oh, you did the graphics yourself?

MS. METHENY: Yes.

BOARD: Let me show this to Mr. Schmidt.

MR. SCHMIDT: I haven't seen it, yes.

CHAIR: Yeah. Let, let, and, and we're going to need to know what came with the certification from the actual government authority as opposed to what you drafted.

MS. METHENY: Oh, the data base, data source on the back, the Excel spreadsheet, that came from Sergeant, what was her name, Gwendolyn?

CHAIR: Okay.

MS. METHENY: Certifying that this information --

BOARD: But the pie charts are something you did yourself?

MS. METHENY: Yes.

CHAIR: Okay. We have two separate documents --

MS. METHENY: It's more of a visual. I don't want to go through that again.

CHAIR: Okay. One second. (inaudible) Mr. Schmidt is looking at the document.

MR. SCHMIDT: Okay. So, just so I, just so that I understand it, the Sergeant Parrish of the police department has sent, I don't know, sent a chart of a bunch of, of a bunch of calls from 2004 to 2008. Some of which were called in by Mr. Tanner and, and the Dock of the Bay and then you made a pie chart of all this, right?

MS. METHENY: Yes, I took that information and made (inaudible).

MR. SCHMIDT: Okay. I would just object. I don't know what relevance it could possibly have to the current issue.

CHAIR: Well, we have two, two issues. One is the only thing that goes with the certification is this chart.

MS. METHENY: Okay.

MR. SCHMIDT: I guess that's a government record of some type.

CHAIR: So, that's a government record and it consists of one, well, maybe they're on the bottom here, two, it looks like, it looks like there's going to be nine pages.

It starts with page two and goes to page ten. So, the only thing that actually goes with the certification are those government records and then, of course, you know, that would come in as, because they're apparently business records, really, they're, they're government records.

MR. SCHMIDT: Right.

CHAIR: They did a business certification on the front of it.

MR. SCHMIDT: Although it says, it says at the bottom to Elaine Foltz from Kay McCubin, do you know who any of these people are?

MS. METHENY: Let me, let me, I'll have to check what that is. That was what she gave me. What it is, they're footers. Apparently one of the people sent it to the other.

MR. SCHMIDT: Chairwoman Murphy, I'll leave it to your wisdom.

CHAIR: Okay. Well, this, you know, this document will come into evidence because it is certified by a government agency and you've testified to that and you've told us what pages actually come with it. We're not going to include the pie charts with this document. This is Protestant's exhibit number --

MS. METHENY: Okay.

BOARD: Sixteen.

CHAIR: Sixteen.

MR. SCHMIDT: Sixteen is the police records, is that correct, Mr. Alston?

BOARD: Yes.

CHAIR: Okay and then you indicated there were other charts that you, that you drafted.

MR. BORGERDING: Okay. I'll show you now what'll be marked as Protestant's number seventeen. Can you identify that?

MS. METHENY: Yes. These are the summaries of calls. There's a total of eighty-six calls and this is, the incident was adjusted, I assume that was a police matter, there was twenty-six percent of these calls were report writ, written, unverified, unfounded, handled by another agency or incidents unverified.

MR. BORGERDING: Okay and what is the second page?

MS. METHENY: This is 911 service call types. Out of, let's say, a hundred percent, noise was at twenty-two percent. Then we had disturbance was at twenty percent. These are the higher percentages of, let's say, a hundred percent of the 911 service type calls. Parking and traffic, which was on the parking lot, thirteen. Duplicate calls, eight percent. That means, more than one person called to report the same incident.

MR. BORGERDING: And the third page?

MS. METHENY: These were reports written. The

highest one for, was assault, was twenty-two percent, lost or stolen property, fourteen percent, disturbance, fourteen percent, destruction of property, thirteen percent.

MR. BORGERDING: And fourth page?

MS. METHENY: No report written. Police were called, no report written, twenty percent disturbance, twenty percent duplicate call, parking and traffic complaints, seventeen percent, noise, highest, twenty-two percent. So, in other words, there was noise, the police were called, no report was written but it was documented down on that spreadsheet from Lieutenant Parrish, Gwendolyn Parrish, is it?

MR. BORGERDING: With that, I would ask that Protestant's 17-A through D be entered into evidence.

CHAIR: Any objection?

BOARD: Any objection to this?

MR. SCHMIDT: No ob, no objection. She explained how she put it in.

CHAIR: Okay and they'll come into evidence. That's correct and their summary of, of her case and, and the rules of evidence allow for summaries by witnesses and we can certainly go through and verify whether we agree to, Mr. Schmidt can cross examine on those. Okay. Mr. Borgerding?

MR. BORGERDING: Okay. Ms. Metheny, what else, why are you objecting?

MS. METHENY: Well, this whole issue has divided the

neighbors. It pits neighbors against neighbor. You'll have a neighbor, Sixth Street, okay, I don't want any music over there whatsoever. Neighbor on Second Street, oh, yeah, well, I want music. So, now somebody that I've been friends with for fifteen years, we're on opposite sides, we don't talk anymore. It pits neighbor against neighbor, but it was already decided and the whole thing settled down. Everybody was working together. Now, you have neighbor against neighbor. Also, on his facebook page, thank you for cleaning it up but there are people on there who had actually, I have it down here, from let's see, this is December 2015. I have some things highlighted. One of the, let's say, commenters, this was about going to the Dock of the Bay hearing, or what had happened the first time at the Dock of the Bay, this hearing. And the comments that the people had made. Oh, you have some unreasonable neighbors who need find homes near a convent or something. Or hey, let's use a Tony Soprano effect. Place a boat out on the water with loud speakers and stop playing music. The one that really, really upsets me was from a man named Larry Holt, who lives in Columbia. Maybe you should publish the names of the complainants. Cockroaches tend to scurry when you shine a light on them. That was in February. In February also here are the neighborhood suspects that are harassing the last owner. Probably a good chance they are the same ones that are using taxpayer money to get free legal wage,

the current, to, to wage the current campaign of harassment too. It has Charlie's name and number, our name and number, a person who doesn't live there anymore and the president of the Miller's Island Association. This is put out in public. Now these people who go by on their boats and give us hand gestures, now they know where we live, whose our names, they know who they are. They come out on the pier, they take pictures of the house. Because I am trying, we are trying to put actually implore from this Board that they uphold the results that already went through for seven years. All that litigation, the results were that the Dock of the Bay, by being zoned in BL, by having live music makes him a nightclub which he is not zoned for.

CHAIR: Anything else, sir?

MR. BORGERDING: Anything else, Ms. Metheny?

MR. BORGERDING: You can ask a question instead of just giving speeches. I think he's asked anything else like three times.

CHAIR: That you haven't already said.

MR. BORGERDING: Yeah.

MS. METHENY: Okay.

MR. BORGERDING: And you don't have to say anything. You can --

MS. METHENY: Well, I just wanted to give you my personal past history with the Dock of the Bay. The documents

that I had, our information being out on facebook, which made me very, very, very uncomfortable. And it's still out there. It was out there last night. Being a responsible business owner, I would have thought that, hey, I don't want to go through this. But now he has, you know, he can have his patrons point, oh, yeah, okay, here they are, this is where they live and this is their name. Well, you want it, I got it right here. I printed it out yesterday.

CHAIR: Wait a minute, one second. One second (inaudible). Any more questions, Mr. Borgerding?

MR. BORGERDING: I'd just like to enter that into evidence.

MS. METHENY: Wait a minute, let me find --

CHAIR: (inaudible).

MR. SCHMIDT: The facebook thing?

CHAIR: The facebook page with the --

MR. SCHMIDT: I don't know. I'm trying to decide if Mr. Alston would like to read that or not. I'm sure he --

MS. METHENY: Okay. This is, there's that.

MR. SCHMIDT: I really don't see the relevance of it, but I'll leave it up to the Board.

MS. METHENY: And, and, and this is where, this is where, this (inaudible) let's put, let's publish the names out there. And I think this is just, I mean, there's other times where we were mentioned, you know, it's the neighbors, it's the

neighbors, it's the neighbors. Who are the Wolinskis, are they wealthy, are they lawyers, are, are they rich and have a free lawyer? Here, I'll give you all this. And here's two post, there's two printouts. One was from early February and then the other, down the bottom you should see the date on the footer where it was printed out yesterday, where our addresses and our names are still out there.

MR. ZIMMERMAN: Could we get the numbers and descriptions of these various documents?

CHAIR: You want to take a look at them?

MR. ZIMMERMAN: Just to keep this thing moving, I'll let Mr. Borgerding --

MR. SCHMIDT: I, I just cannot imagine what the possible relevance of this would be.

MR. ZIMMERMAN: -- I just want to make sure the numbers --

MR. SCHMIDT: So, I'll, I'll object. But, oh, is this part of it too?

MR. BORGERDING: Yep.

MR. SCHMIDT: Okay. I'll object for the record. Just to try to keep, I've got to do my job to keep the record straight.

CHAIR: You don't want to see them, Mr. Zimmerman?

MR. ZIMMERMAN: I think I generally know the idea of it so just so, because I'm trying to be cooperative and get

this case continuing to move, let Mr. Borgerding, you know, describe what they are --

MR. BORGERDING: So, this would be Protestant's eighteen through twenty-two.

CHAIR: Okay. He --

MR. ZIMMERMAN: Yeah, but, but each one has to be identified. What's eighteen, what's nineteen? I've got to know what it is.

CHAIR: Well, then, Mr. Borgerding needs to do that. Here you go. They're his exhibits through his witness.

MR. BORGERDING: I'll show you what is now Protestant's number eighteen. Can you identify it?

MS. METHENY: Wait a minute, here. They're in order.

MR. ZIMMERMAN: And the dates of each ones, please.

MS. METHENY: Okay.

MR. ZIMMERMAN: And what, and whose facebook page it is, if there's any facebook page.

MS. METHENY: Okay.

MR. SCHMIDT: This is all facebook stuff, right?

MR. ZIMMERMAN: Yeah, but whose facebook? Is it your facebook, is it (inaudible)?

MS. METHENY: It's the website for the Dock of the Bay.

MR. SCHMIDT: Okay.

MS. METHENY: One, two, three, four, okay? And I do

have to say that some comments were either removed, people went in and took them off or maybe you cleaned it up, I'm not sure. This is December 1st at 2:51, this is the first one.

MR. ZIMMERMAN: In 2015?

MS. METHENY: December 2015.

MR. ZIMMERMAN: Okay. You said 2:51, I'm sorry, I'm just --

MS. METHENY: Oh, at 2:51 p.m.

MR. ZIMMERMAN: Oh.

MR. BORGERDING: Okay. So, these are facebook.

MS. METHENY: These are facebook.

MR. BORGERDING: Entries from the Dock of the Bay from that date.

MS. METHENY: December 1st, yes.

MR. BORGERDING: Okay, thank you. With that, I'm going (inaudible).

CHAIR: Well, let's, first of all --

MR. BORGERDING: That's eighteen.

CHAIR: Protestant's eighteen, just identify them first.

MR. BORGERDING: Can you identify Protestant's number nineteen?

MS. METHENY: Okay. This is on February 17th at the Dock of the Bay and other, let's say comments, that I guess supporters or only even, even some of my neighbors --

MR. BORGERDING: Well, suffice it to say, what's the date of this?

MS. METHENY: That is February 17th.

MR. BORGERDING: Additional facebook comments on Dock of the Bay website, correct?

MR. ZIMMERMAN: What year? What year?

MS. METHENY: Twenty fifteen.

CHAIR: I was just about to say, Mr. Zimmerman, if you could just --

MS. METHENY: No, that's 2016.

CHAIR: Okay. Okay.

MR. ZIMMERMAN: Sorry, I'm --

CHAIR: Everybody deep breath, because this transcript is going to be a mess. I'm just telling you. It's going to be a mess and then you're all going to say why is it such a mess? But, February, thank you, ma'am, February 17th 2016 was the facebook page, right?

MS. METHENY: Yes.

CHAIR: Of Dock of the Bay, perfect. Thank you.

MR. BORGERDING: And can you identify, is it nineteen or twenty? It's twenty.

MR. SCHMIDT: Twenty.

MR. BORGERDING: Twenty.

MS. METHENY: Okay.

CHAIR: We have nineteen and twenty so far, right?

MR. SCHMIDT: No, eighteen. I'm sorry. Eighteen and nineteen, I believe.

MS. METHENY: This is February 17th, 20, 2016 at 4:52 p.m.

MR. BORGERDING: Okay.

MR. SCHMIDT: What's the date of that again?

MR. BORGERDING: That's twenty.

MR. SCHMIDT: March 20, February 20th?

MS. METHENY: February 17th.

BOARD: Exhibit 19 is dated 2/21/16.

MR. BORGERDING: Shall I go on to the (inaudible)?

CHAIR: Go ahead, I'm sorry.

MR. BORGERDING: Okay. Can you identify exhibit number twenty-one?

MS. METHENY: Yes. This was just pulled yesterday.

MR. BORGERDING: Okay. What is it? Just identify it, please.

MS. METHENY: Okay. Dock of the Bay facebook page as of December 1st. There is a difference between what was on there yesterday and what was on there at, in February.

MR. BORGERDING: Okay. I don't think we need (inaudible). Okay. Twenty-two, please. Identify twenty-two, please.

MR. ZIMMERMAN: May (inaudible).

CHAIR: May 2nd?

MR. ZIMMERMAN: I'm sorry, what, what's the, I'm sorry, today's April 27th, yesterday was April 27th, 2016. For Protestant's exhibit.

MS. METHENY: This is from February 17th, yesterday.

MR. BORGERDING: Okay. Again, Dock of the Bay facebook posting?

MS. METHENY: There are difference, there are differences from February 17th to February 17th, where statements were taken off or deleted.

MR. BORGERDING: Ms. Metheny, is that it?

MS. METHENY: Yes.

MR. BORGERDING: Okay. Thank you. With that, I would ask to enter those into evidence.

MR. SCHMIDT: Mr. Alston, do I understand that collectively the facebook exhibits are eighteen through twenty-two?

BOARD: Yes. Yes, (inaudible).

MR. SCHMIDT: Okay. So, it's eighteen through twenty-two. Okay.

CHAIR: Okay. The question is whether these documents are admissible. The, one of the problems is, there are multiple pages, they contain hearsay statements of people who are not here testifying. We have a witness on the stand who is saying all this and how it impacts her. The, these witnesses are not being cross examined on this or perhaps if

there was someone who did testify they could have been cross examined on that, but they were not. Potentially, there are, at least one the, I have one document in front of me, which is Protestant's twenty-one, has a first page date December 1st, 2015. It's actually, it appears to be a letter from Ken Boone, on, I guess it is on the facebook page so, so, you know, the first page of this Protestant's twenty-one could be admitted for the purposes of, you know, I mean, we'll certainly weigh it as we deem it to be worth but the rest of the exhibit, having all this hearsay, we can't admit these hearsay statements.

MR. ZIMMERMAN: May, may I make one observation?

CHAIR: No. And, let me, let me have another one. Now, this says twenty-one, this says twenty-one, the same thing?

MS. METHENY: That page doesn't go, go with anything.

CHAIR: Oh. So, that means that's twenty-two? Okay. This is a page that says Techopedia Doxing. Is that --

BOARD: No, this, this came from this.

CHAIR: I took it out.

BOARD: Oh, you took it off.

CHAIR: Sorry.

BOARD: Okay.

CHAIR: What is this, ma'am?

MS. METHENY: That is just, it's a term for when people post your names and addresses.

CHAIR: Okay. We, we don't need that piece of paper. All right. So, so we would, I'm just going to un-staple this by taking it apart so exhibit number twenty would be the December 1st letter which, again, she's testified she pulled it off of the Dock of the Bay website. It's written from Mr. Boone, he posted it, this (inaudible) for whatever it indicates. We're not going to read it right now but (inaudible) I can look at it later but the rest of the pages, two, three, four of twenty-one, two, three, four and five are hearsay statements so these, these will not be admitted (inaudible).

VOICE: Could I see the one that was admitted?

CHAIR: Don't, don't take it.

VOICE: I'm not, just leave it right here.

CHAIR: Okay. Again, we have on, let me just go backwards then. Sorry to get this out of order. Protestant's Exhibit 18 has the first page appears to be a December 1st letter from Mr. Boone which, again, the witness has indicated she pulled off of the, the website page of Dock of the Bay so this would be an admission for the extent, you know, for, that certainly the Board would weigh the merits of it but the rest of the pages two, three, four and five are hearsay statements of other people who are not here so we would remove those documents. I'm just going to paperclip these together. So, we would admit Protestant's Exhibit 18, page one. Twenty, exhibit

number twenty, exhibit number twenty appears to be a February 17th --

MS. METHENY: There was different, let's say, links, or different spaces. Sorry.

CHAIR: Okay. Protestant's exhibit number twenty-three is a February 17th letter, which the witness indicated it was February of 2016, it appears to have Mr., something from Mr. Boone. Unfortunately, it has comments at the bottom of the page, three different comments of, of, of other people who are not here containing hearsay statements.

MS. METHENY: Okay.

CHAIR: Which are similar to pages two, three and four stapled to the exhibit. I'm not sure how, I mean, we certainly could take the first half of the page if there was some way that you could splice this and Xerox it or something but we don't want to admit this document certainly for the other indications because it has hearsay on that page so --

MR. ZIMMERMAN: May I make, I didn't, I'm interrupting, sorry.

CHAIR: Do you want to sit up here? No.

MR. ZIMMERMAN: I just want to make some observations.

CHAIR: He want to sit up here. We're going to get you a chair. He wants to make observations. Mr. Borgerding, sir, you know, I don't know how you want to handle that. I

mean, since we have this, I mean, it's not a separate, the other ones had separate pages, so how do you want to handle that? Should we just not admit it or would you like to admit that and then somehow come back with a better copy or? I'm trying to help the --

MR. ZIMMERMAN: At a break we could, we could --

MR. BORGERDING: Yeah, just don't admit it.

CHAIR: Just don't admit it?

MR. BORGERDING: Yeah.

CHAIR: Okay. We're going to, we're not going to admit twenty-three.

MR. ZIMMERMAN: But it's i.d.?

CHAIR: I.d. only for twenty-three. Protestant's exhibit number twenty-one, the printing was good, so you have the letter on the front, that makes it easy for us. Okay. We have a letter from Mr. Boone. The witness indicated she pulled this from the website, February 17th, 2016. The first page, we certainly could (inaudible) pages two, well, they're not numbered, but the other three pages attached are all comments of hearsay, people that are not here, hearsay statements. Do you want me to clip these?

BOARD: Yeah.

CHAIR: Sorry. Okay. And now we have the final one, Protestant's exhibit number nineteen, two pages of statements from people who are not here so we don't have a letter with

that from Mr. Boone so we would not admit Protestant's exhibit number nineteen because of the hearsay issues. Okay. So, we went through those. You were finished, sir. Mr. Borgerding, were you finished with your questions? I don't want to rush you.

MR. BORGERDING: I think so.

CHAIR: Mr. Zimmerman, you have questions?

MR. ZIMMERMAN: I do.

CHAIR: Okay.

MR. ZIMMERMAN: May I briefly see these?

BOARD: Sure.

MR. ZIMMERMAN: I'm not going to read them in detail, I just want to, just --

BOARD: See the ones that are admitted or the ones --

MR. ZIMMERMAN: All of them.

BOARD: Here you go.

MR. ZIMMERMAN: Okay. Okay and these are, whether for i.d. or admitted, these are Protestant's Exhibits 18 to 23, am I correct?

BOARD: Correct.

MR. ZIMMERMAN: Okay. Do, do these exhibits show the date you visited the sites, the websites?

MS. METHENY: The one I pulled, the one I pulled yesterday does, yes. It would be down at the bottom.

BOARD: Yeah, there are three of them in here --

MR. ZIMMERMAN: Okay. So, if there's a, if there's a date at the bottom, for example, Protestant twenty, just as an illustration, it says 4/27/2016, 4:57 p.m.

MS. METHENY: That's correct.

MR. ZIMMERMAN: That's when you visited the website.

MS. METHENY: Um hm, um hm, um hm.

MR. ZIMMERMAN: But then at the top of the page, it would show when a posting was made?

MS. METHENY: Um hm.

MR. ZIMMERMAN: Okay. Just so we understand that. So, do you know who operates or manages the Dock of the Bay website or facebook?

MS. METHENY: No, I do not.

MR. ZIMMERMAN: Okay. Would there be a reasonable inference that the Dock of the Bay website is owned or managed or controlled by the owners of the Dock of the Bay?

MR. SCHMIDT: Objection.

CHAIR: Sustained, yeah.

MR. SCHMIDT: Asked and answered.

CHAIR: Sustained. I mean, she doesn't know.

MR. SCHMIDT: She doesn't know.

CHAIR: You can't ask it another way. She doesn't know.

MR. ZIMMERMAN: Well, I'm asking a reasonable inference. Do you have any knowledge that anyone other than

the owners of the Dock --

MR. SCHMIDT: Objection.

MR. ZIMMERMAN: Let me finish my question.

MR. SCHMIDT: Objection.

CHAIR: Go ahead, finish the question.

MR. ZIMMERMAN: Do you have any information to indicate that anyone other than the owners of the Dock of the Bay facilities control or manage the Dock of the Bay website?

MR. SCHMIDT: Objection.

CHAIR: Sustained. It's the same question. She doesn't know. She just said, she's very honest, very honest, she says she doesn't know, we appreciate that.

MS. METHENY: I mean, I think, would imagine that it would be Mr. Boone. Do I know one hundred percent?

MR. ZIMMERMAN: Is the fact that some of the facebook documents, including some that are introduced in evidence, have postings by Mr. Boone suggested Mr. Boone has some management of the Dock of the Bay website?

MR. SCHMIDT: Objection.

MS. METHENY: I would think --

MR. SCHMIDT: Objection.

CHAIR: Wait a minute, ma'am.

MR. SCHMIDT: Objection. I mean, if this was a courtroom, I would ask you to hold Mr. Zimmerman in contempt. This is absolutely ridiculous.

CHAIR: It's the same question, fourth time, the same question so we're going to sustain the objection. The document speaks for itself and she indicates she pulled them off and had Mr. Boone's name on it. So, that's all we need to know. We don't need to know who manages --

MR. ZIMMERMAN: Well, I think it's good to pin these things down at times. Anyway, I'll move on. So, it's my, correct me if I'm wrong, but in your direct testimony, tell me whether or not your collection and submission of the facebook documents were not for the purpose of indicating the truth of every statement that was made in there but just to, to reflect this kind of civil war that's going on --

MS. METHENY: That's correct.

MR. ZIMMERMAN: -- and also how uncomfortable you were made by the posting of your name and address in the, in a negative context on the facebook page.

MS. METHENY: That's --

CHAIR: Is that, is that a question?

MS. METHENY: That's correct.

MR. ZIMMERMAN: I'm asking.

CHAIR: Wait a minute, hold on a second.

MR. ZIMMERMAN: I'm asking. I'm asking.

CHAIR: But that's what she already testified to, it's already been clear. She's very honest and testified about the neighbors against pitted against neighbors but we don't

need to rehash it.

MR. ZIMMERMAN: Hearsay is inadmissible for the truth. She, she's offering these documents not for the truth of everything that's in there. She's offering it as, to reflect this major problem and --

CHAIR: We understand that.

MR. ZIMMERMAN: Okay. All right.

CHAIR: We already know.

MR. ZIMMERMAN: Oh, okay. She's way ahead of me, I'm sorry. All right. I want to try to speed this up. As I understand your concerns, let me ask you whether this, what you can say as to whether this is an accurate reflection based on your experience, based on your concerns. Have you ever heard of the story in Greek mythology about Pandora's Jar or Box?

MR. SCHMIDT: Objection.

CHAIR: Mr. Zimmerman, we would love to be here all day, but --

MR. ZIMMERMAN: It would be a lot quicker if we didn't --

CHAIR: You didn't even want to hear the history before 1950, but you're going back to Greek mythology.

MR. ZIMMERMAN: No, no. Well --

CHAIR: It's always interesting but --

MR. ZIMMERMAN: Have you heard of Pandora's Box?

MR. SCHMIDT: Objection.

CHAIR: Ma'am, I'll let you answer it. Do you know what it, do you?

MS. METHENY: Yes.

CHAIR: Okay.

MR. ZIMMERMAN: And what did, what would you say as to whether your concern is that if --

MR. SCHMIDT: Oh, my goodness.

MR. ZIMMERMAN: -- if this Board were to allow live music in any way, shape or form at the Dock of the Bay it would be equivalent to Pandora opening that box and setting forth all the problems of the world?

MR. SCHMIDT: Objection. Can we, can we please ask Mr. Zimmerman not to testify but to ask the witness a question and not just spoon feed, I mean, this, Mr. Zimmerman is a capable attorney. He has got to know that this is totally inappropriate, even in an administrative setting and it's, quite frankly, embarrassing to, to the lawyers in the room that we have to hear this. So, I'm going to object.

CHAIR: Yeah, I agree. Sustained. We're not going to go there and you, you need to ask open ended questions of the witness that were not already asked before by Mr. Borgerding.

MR. ZIMMERMAN: Ms. Metheny, put it, put it, encapsulate, put it in your own words without my characterizing it, your --

MR. SCHMIDT: She's testified. She's said what she said.

MR. ZIMMERMAN: I'm allowed to, I'm allowed to ask questions too. You're not the only one, okay? Encapsulate, you know, if, if you were asked, and you were given, you know, thirty seconds or sixty seconds, a sound bite, a sound bite, to encapsulate the most important of your concerns about the prospect of what would happen if any live music is allowed?

MR. SCHMIDT: Objection. Asked and answered.

CHAIR: Yes. Ma'am, I only want you to answer that question if there's something in addition that you haven't already said. Mr. Borgerding asked you as Mr., I think Mr. Zimmerman said several, somebody said several times, you know, was there anything else, was there anything else, and you were very clear about all the reasons that you gave. If there's something else that you haven't already talked about, don't re-talk about everything, okay? We don't need to hear it all again. Anything in addition?

MS. METHENY: That if the Dock of the Bay were allowed music and what would happen afterwards?

CHAIR: And how, well, what are your, yeah, concerns, other than what you've already given us, because you already gave us your list.

MS. METHENY: Okay. I will go with, we pay high taxes, property values. I don't, we don't plan on selling or

going anywhere forever. I would say I don't like that we are pitted against each other, neighbors against neighbors.

CHAIR: Okay.

MS. METHENY: You know.

CHAIR: You said that, right, okay. All right.

MR. ZIMMERMAN: All right. I'm done. Thank you.

CHAIR: You're finished?

MR. SCHMIDT: Ms. Metheny, very quickly. You're the wife of the gentleman who testified before?

MS. METHENY: Um hm.

MR. SCHMIDT: You heard his testimony?

MS. METHENY: Um hm.

CHAIR: You want to say yes or no.

MS. METHENY: Oh, yes.

MR. SCHMIDT: Okay and you, you were here this morning and you heard his testimony?

MS. METHENY: That's, yes.

MR. SCHMIDT: And he described, I, that I guess it was your family, your mother and your --

MS. METHENY: Yes.

MR. SCHMIDT: -- brother who previously operated the Fisherman's Inn here.

MS. METHENY: Correct.

MR. ZIMMERMAN: Objection. It's beyond the scope of direct.

MR. SCHMIDT: His testimony, his testimony was accurate as to that history?

MR. ZIMMERMAN: Objection.

MS. METHENY: Yes.

MR. SCHMIDT: Yes? Okay. No other questions. Thank you.

CHAIR: Okay. All right. Thank you, ma'am. Mr. Borgerding, sir? Hello?

MR. BORGERDING: One final witness.

CHAIR: One final witness. It's 1:30. What time do you have to leave, Mr. Schmidt?

MR. SCHMIDT: Literally, five of two is good.

CHAIR: Five of two, you can run in the rain.

MR. SCHMIDT: I can run over, yeah.

CHAIR: In the rain.

MR. SCHMIDT: I can, I, that's fine. But I'll go through the tunnel.

MR. ZIMMERMAN: I have a document but no witnesses, I don't have any witnesses.

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. WALDMAN: Yes.

BOARD: Please state your name and address for the

record.

MR. WALDMAN: Wayne Edward Waltman, Jr., 9014 Cuckold Point Road, Baltimore, Maryland 21219.

BOARD: Okay. Thank you. Speak into the microphone.

MR. SCHMIDT: Sir, what's your last name again, I'm sorry?

MR. WALDMAN: Waldman.

MR. SCHMIDT: Waldman?

MR. WALDMAN: Yes.

MR. BORGERDING: Mr. Waldman, you are also here in opposition to the request for relief?

MR. WALDMAN: Yes.

MR. BORGERDING: Can you explain to the Board why?

MR. WALDMAN: Without being repetitive, I've lived there my whole life and I guess it's very peaceful right now. We don't, there is no outdoor music from Dock of the Bay. But, when it starts again, we still have to look forward to a more crowded area, people that aren't from the neighborhood coming in. The music generally draws people from as far away as York Road area, you know, Dulaney Valley, places in Baltimore City, you know, places where people don't usually come down but the music does bring people down and there's more trash on the roads, there's more, the parking lot has an asphalt strip in the middle but the outsides are millings and dirt. So, there's more traffic so you wash your cars and your house and then

there's just more dust all over everything. So, it's the larger crowds and it's, above, no matter what kind of music you play, it doesn't matter if it's Lawrence Welk or a rock band, one of the biggest things is is, again, when it, each song is over and you hear the uproar of the crowd. That's something that no matter what amplification you use or don't have, you still hear that all the time and that's annoying. I mean, I don't know what else there is to say. It's just all repetitive at this state. And one other thing, you mentioned about a pity party for the neighbors. It is kind of pitiful, you know, that we have to come here and do this. It's already been done, we went through all this and when the next owner comes in, are we going to have to do this all over again because it's been opened back up again? And, if Mr. Boone does sell and the doors open, we're back to the same place we are right now. Not only that, in Maryland now there is no decibel limit on music and if you call the police and ask them to come down because the music is too loud, they don't know what to do. They just look at you and say okay, you know, what are we going to do? So, we're really at their mercy to contain the music and, basically, they could do whatever they wanted to do. You know, that's about all I got to say.

MR. BORGERDING: Now, Mr. Waldman, you lived through the years with Mr. Tanner?

MR. WALDMAN: Yes.

MR. BORGERDING: Operating the Dock of the Bay. Do you feel that that affected your health?

MR. WALDMAN: Well, embarrassingly, for me anyway, I've always been in good health. In '06, and I went through this a thousand times in my head, but I had a perfect job, no stress at all in my job, I was an equipment manager, could come and go as I pleased and, as long as I did what I was supposed to do. But, in '06, I had a heart attack when I was forty-two and I had three stints put in and I always tell my wife that I never had a heart attack but I did but the thing is, it was stress, it was the stress of the daily grind of putting up with that music. Not just the music, the crowds, the whole thing, and I think it's weak because you should always have control. I don't drink, I've never used any drugs because I've always wanted to be in control of my life, my family and that stress that it created and I had to go to a psychiatrist because they wanted to know why did this happen, why did, you know, you, you had a heart attack and it was, unfortunately, it was the stress and it took a long time for me to accept that. But that was one of the things that, you know, that happened. So, that's it.

MR. BORGERDING: Is there anything else you'd like to tell the Court?

MR. WALDMAN: Just that we've been through so much of this, our time, our money and to open this back up again, it's

just unbelievable. I can't believe that we're here again but, you know, that's all.

MR. BORGERDING: Thanks. No further questions.

CHAIR: Mr. Zimmerman?

MR. ZIMMERMAN: Yeah. Now, how long have you lived on Cuckold Point Road?

MR. WALDMAN: My whole life, fifty-two years.

MR. ZIMMERMAN: I mean, (inaudible) where you're living now? People's Counsel Exhibit 7 we actually have your--

MR. WALDMAN: I started out living here.

MR. ZIMMERMAN: Well, wait a minute. Now, we're at Protestant's thirteen, is it?

MR. WALDMAN: Um hm.

MR. ZIMMERMAN: Okay. The corner of Cuckold Point Road and Sixth Street, which is now what, Poleski?

MR. WALDMAN: Poleskis, yeah.

MR. ZIMMERMAN: Yeah.

MR. WALDMAN: Then I moved to this little house, which is --

MR. ZIMMERMAN: Across Cuckold Point Road.

MR. WALDMAN: Was my grandmother and grandfather's.

MR. ZIMMERMAN: Across from Dock of the Bay?

MR. WALDMAN: Um hm. My mom and dad built this house. They sold it, we built this house and we currently reside in these houses, my (inaudible).

MR. ZIMMERMAN: All those houses you just mentioned are on the, across Cuckold Point Road --

MR. WALDMAN: Across.

MR. ZIMMERMAN: -- from either Dock of the Bay or right next, but right now, People's Counsel thirteen shows your, you have two lots?

MR. WALDMAN: Yes.

CHAIR: People's Counsel seven.

MR. ZIMMERMAN: People's Counsel seven, thank you, Madam Chair. 9014 and 9016 Cuckold Point Road and what's on there? Do you have a house, you have a couple structures?

MR. WALDMAN: There's a house.

MR. ZIMMERMAN: What's on 9016?

MR. WALDMAN: That's a house also.

MR. ZIMMERMAN: You have two, are there two houses?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: Do you live in both or?

MR. WALDMAN: Yes. This is my primary residence, this is the house that we live in. This is a back lot that my mom and dad own.

MR. ZIMMERMAN: Oh.

MR. WALDMAN: There's nothing on that lot.

MR. ZIMMERMAN: Okay and how long have you lived at your current location?

MR. WALDMAN: Probably about fifteen years maybe.

MR. ZIMMERMAN: Okay. So, that's where you've been living throughout the Tanner years?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: If we can call them that. Okay. Are you still an equipment manager or what, do you have --

MR. WALDMAN: No, I'm a mechanic.

MR. ZIMMERMAN: Mechanic, okay. Okay and now being across Cuckold Point Road, you are not right next to the courtyard?

MR. WALDMAN: No.

MR. ZIMMERMAN: And even so, the music and the associated activities, noises, created a major problem for you in the Tanner years, is that correct?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: Okay and how is it that the noise, did some of the music noise also travel to your, where you live?

MR. WALDMAN: Yes. It's hard to believe. I built that house, it's got two by six walls and it's got R-19 insulation in it but I think like Mr. Ciarpella said, the music somehow, even with the doors closed, the window on and the TV on, I mean, the air conditioner on and the TV on, you can still hear the music and the clapping through that. That's hard to believe, especially when there's a north wind blowing, you know, you can really hear it then.

MR. ZIMMERMAN: And just to be clear, the corner of 9016, where you live, is diagonally across or, or across from one of the corners of the Dock of the Day property, the parking lot, correct?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: Okay. The dis, the distance to the courtyard where it's been said that music is sometimes, or was played outside in the Tanner era, you can, looks approximately ten inches or you can tell me?

MR. WALDMAN: Oh, yeah, approximately ten inches.

MR. ZIMMERMAN: So, that would be about three hundred feet.

MR. WALDMAN: Yep.

MR. ZIMMERMAN: A football field length, a hundred yards, and even with a hundred yards, you had a problem?

MR. WALDMAN: Oh, yes.

MR. ZIMMERMAN: And then, of course, the parking lot would be a lot closer.

MR. WALDMAN: Um hm.

MR. ZIMMERMAN: To your property.

MR. WALDMAN: Yes.

MR. ZIMMERMAN: Okay. So, you were at the mercy of Mr. Tanner until the Board of Appeals and the Circuit Court and the Court of Special Appeals closed them down?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: Which took a contempt proceeding, by the way, right?

MR. WALDMAN: Um hm, yes.

MR. ZIMMERMAN: Okay and you don't want to be at the mercy of Mr. Boone?

MR. WALDMAN: Nor anyone.

MR. ZIMMERMAN: Nor anyone. As far as depreciation of property values, do you have anything, any observation on how, how this not only affected you personally but also your property values?

MR. WALDMAN: I mean, anyone in that area would have a hard time selling their house if they had to put it on the market for some reason. If there was live music next door, who would really want to live next to that. Not knowing what could come next.

MR. ZIMMERMAN: Okay. Do you have kids, by the way?

MR. WALDMAN: Yes, and that is one other thing, is that it's just us here, but, you know, we were, I have grandkids and my kids and, you know, it effects more than just the people here. It affects our families.

MR. ZIMMERMAN: And since you grew up in the area, assuming, whether or not it's relevant, you were aware of the Fisherman's Inn?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: What problems, if any, did the

Fisherman's Inn operations cause you?

MR. WALDMAN: I mean, I was young then, so I never had a problem. If there was music, it never bothered me at the time.

MR. ZIMMERMAN: You don't really recall?

MR. WALDMAN: No, I mean, it's --

MR. ZIMMERMAN: Any significant music coming from there?

MR. WALDMAN: No.

MR. SCHMIDT: Objection. That's not what he said, Mr. Zimmerman. He said he was young and it didn't bother him then.

CHAIR: Yeah, he said --

MR. SCHMIDT: That's what he said.

MR. WALDMAN: The music was inside.

MR. SCHMIDT: He didn't say there wasn't much music.

CHAIR: Okay. Wait a minute. The witness said the music was inside.

MR. WALDMAN: The music was inside then.

CHAIR: Okay.

MR. WALDMAN: The only time you heard anything was when they opened the doors up.

MR. ZIMMERMAN: And was that, there was some testimony by, was it Mr. Metheny, that it was (inaudible) a few years, it wasn't --

MR. WALDMAN: It was only a couple years, yes.

MR. ZIMMERMAN: And it didn't give rise to any complaints as far as you know, that went to the zoning authority?

MR. WALDMAN: There was no houses around then, not at that time, no.

MR. ZIMMERMAN: Oh, so it was a different, many of the houses were built after the Fisherman Inn was --

MR. WALDMAN: Yes.

MR. ZIMMERMAN: -- was closed up or, or at about that time. I don't want to put words in your mouth.

MR. WALDMAN: There was, there was few houses there then.

MR. ZIMMERMAN: So, it's within the last ten or fifteen years that you've had more houses built on Sixth Street and in that area?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: So, as far as you know, is this zoning, this unfortunate zoning case, the, the only forum where you see that you can maintain relief that you want in the battles with Mr. Tanner?

MR. WALDMAN: Yes, I mean --

MR. SCHMIDT: Objection. I mean, I don't even know what that question is.

CHAIR: Yeah, I'm going to sustain --

MR. ZIMMERMAN: I think the witness knows.

CHAIR: Sustain the objection.

MR. SCHMIDT: Thank you.

MR. ZIMMERMAN: Is this the one place where you can assert your rights?

MR. SCHMIDT: Objection.

CHAIR: Sustained. Same question.

MR. ZIMMERMAN: Anything else you want to tell the Board about your situation?

MR. SCHMIDT: Objection.

MR. WALDMAN: No, that's it.

CHAIR: Well, wait a minute. This is not your witness. Wait a minute.

MR. SCHMIDT: Asked, not his witness, asked and answered.

CHAIR: This is not your witness. Mr. Borgerding covered that very well.

MR. ZIMMERMAN: All right. I am duly admonished by the chair. That's all.

CHAIR: You're not.

MR. ZIMMERMAN: That's all I can, that's all I have.

CHAIR: Thank you, Mr. Zimmerman.

MR. SCHMIDT: Mr. Waldman, just real quickly, the People's Counsel exhibit number seven, which is on the board, that's the aerial photograph and I'm looking at, you indicate

you have two houses that you own that are, I guess, basically on the same property, essentially?

MR. WALDMAN: Yes.

MR. SCHMIDT: Is that right?

MR. WALDMAN: Yes.

MR. SCHMIDT: Okay and I know Dock of the Bay is across the street from you so the property, but are you closer to the Islander Restaurant in terms of the building or closer, what's, what's closest to you?

MR. WALDMAN: The Islander.

MR. SCHMIDT: You're closer to the Islander then you are to Dock of the Bay restaurant building?

MR. WALDMAN: Yes, yes.

MR. SCHMIDT: How about Rowboat Willy's, are you closer to that or Dock of the Bay?

MR. WALDMAN: Probably about the same.

MR. SCHMIDT: About the same? Okay. Okay. You ever had a situation where the, where sporting events are televised at any of these restaurants?

MR. ZIMMERMAN: Objection.

MR. SCHMIDT: Are you aware of that?

MR. WALDMAN: I'm sure there are.

MR. ZIMMERMAN: Objection.

MR. WALDMAN: I don't frequent, so I don't know.

CHAIR: What's, what's the objection?

MR. ZIMMERMAN: Because what happens at other restaurants has nothing to do with the present case.

MR. SCHMIDT: Okay. How about at the Dock of the Bay, they have the Oriole game or Raven game on in there?

MR. WALDMAN: I have no idea.

MR. SCHMIDT: Okay. You ever heard people cheering when something happens at a sporting event that might be televised at any of these?

MR. ZIMMERMAN: Objection.

MR. SCHMIDT: Similar to what people cheering at the end of a song?

CHAIR: Wait a minute. Overruled. Go ahead.

MR. WALDMAN: Not, it's inside, so I wouldn't hear it.

MR. SCHMIDT: Okay. So, if they're cheering inside for, if somebody scores a touchdown, hits a homerun or plays a song, you wouldn't hear that?

MR. WALDMAN: Only if the door was opened.

MR. SCHMIDT: Okay. Very well. No other questions.

CHAIR: All right. Anything, sir? Re-direct, Mr. Borgerding?

MR. BORGERDING: (inaudible).

CHAIR: Okay.

MR. ZIMMERMAN: I have a document.

CHAIR: You okay, I think we're finished, sir.

MR. WALDMAN: Thank you.

CHAIR: All right. Thank you.

MR. ZIMMERMAN: Yeah. Denise Hoss (phonetic), the president of the Miller's Island Community Association could not be here today. She had --

CHAIR: No, wait a minute, wait a minute.

MR. ZIMMERMAN: Oh, sorry.

CHAIR: Mr. Borgerding, still in your case, sir. He jumped up.

MR. BORGERDING: I rest, so.

CHAIR: Okay. You're resting your case. The Protestants rest. Mr. Zimmerman, the floor is yours.

MR. ZIMMERMAN: I'm sorry. Denise Hoss, who actually was present last time is the president of the Miller's Island Community Association. She was in touch with me, told me she could not be here today. She composed a letter which she asked me to provide to the Board. It's, I have it, I think she gave it to one of the citizens to give to me and it's dated April 25th, 2016. I'll give Mr. Schmidt a copy. I would, I would ask that it be, since the Board does accept letters routinely, and has accepted letters in the Petitioner's case, I believe, (inaudible), this would be People's Counsel's --

BOARD: Twelve.

MR. ZIMMERMAN: -- twelve, twelve? I presume there's no double standard since the --

CHAIR: Well, let me, let me ask Mr. Schmidt. I don't, I don't recall specifically on all the exhibits you had whether we admitted letters that, sometimes we do and sometimes we --

MR. SCHMIDT: Okay. Well, I'll tell you, under the well known case of goose versus gander, I will, I mean, that's okay, but I will say this, I, and just to be fair to Mr. Zimmerman, because I have two documents similar and we can put them all in or none of them in.

CHAIR: I see, okay.

MR. SCHMIDT: I'll leave it up to the Board.

CHAIR: Okay.

MR. SCHMIDT: And that's what my rebuttal would be. So, I have a, you might remember my exhibit, which you did accept indeed, Chairwoman Murphy, Petitioner's exhibit number 11-A and 11-B were two Petitions which had been signed by people and you might remember that one was from residents and one was from non-residents and I'll give a copy of these to Mr. Zimmerman and Mr. Borgerding. So, I would offer those as well and I have, I mean, if we're just going to put, if all this stuff is going to come in, then you all can --

MR. ZIMMERMAN: I thought some of it already came in but.

MR. SCHMIDT: Well, that's, that's another page that was signed since the first hearing.

MR. ZIMMERMAN: Okay and for the record, my exhibit--

CHAIR: Well, wait a minute.

MR. ZIMMERMAN: Okay.

CHAIR: What, let's, let's --

BOARD: Let's deal with this exhibit first.

CHAIR: Let's deal with first.

BOARD: Before you, here, this is twelve.

CHAIR: Mr. Zimmerman, People's Counsel twelve is the letter from --

MR. ZIMMERMAN: With an attachment, with an attachment.

MR. SCHMIDT: Oh, what's the attachment?

BOARD: But the attachment is somebody named Lisa (inaudible).

MR. ZIMMERMAN: Well, she, it's referred to in the letter

BOARD: Okay.

MR. ZIMMERMAN: You can take it for what it's worth. I mean, we, we're providing this partly as a courtesy to the Miller's Island Community Association.

CHAIR: I understand, I know you are.

MR. ZIMMERMAN: And actually the overall position of the association is neutral as stated in the letter, but Ms. Hoss provides her own perspectives on some aspects of the case. And this was, she, Ms. Hoss prepared this herself. This is

not, this is not something where it's, other than her own independent letters.

CHAIR: Okay. You know, page, page one is a letter dated April 25th, 2016 from Denise Hoss, President of the Miller's Island Community Association, it is addressed to us. We haven't really gone through the contents of it. We'll certainly read the letter but the page attached to it has to do with somebody else's comments about something or another.

MR. ZIMMERMAN: It looks like facebook postings. Sorry, I'll go in the corner.

CHAIR: You're in the time out chair. So, yeah, it looks like some other facebook comments again, and we're going to use that same, you know, principal that we applied in, in Mr. Borgerding's case and we'll admit the first page but not the second page so People's Counsel number --

BOARD: Twelve.

CHAIR: -- twelve would be the first page and Mr. Zimmerman, you can have this page back with the, the facebook comments. But then Mr. Schmidt, you now have another document.

MR. SCHMIDT: If Mr. Zimmer, if that's Mr. Zimmerman's, if that's all he has, I think he said a sole document, sole document.

CHAIR: He, that was it, right, Mr. Zimmerman?

MR. ZIMMERMAN: That's all, that's it.

CHAIR: And that's your case?

MR. ZIMMERMAN: Yeah, that's the conclusion.

CHAIR: Here's your, here's, if you want the paper back.

MR. SCHMIDT: Okay. Then, then --

MR. ZIMMERMAN: Can't this be for i.d., the attachment?

CHAIR: No, no, we're, I mean, no, because we're not, we're not --

MR. ZIMMERMAN: Isn't --

MR. SCHMIDT: Okay. Then I am, then if it's my turn, Chairwoman Murphy?

CHAIR: It is, Mr. Schmidt.

MR. SCHMIDT: I would offer 12-A and 12-B, which are basically supplements to 11-A and 11-B.

CHAIR: Okay.

MR. SCHMIDT: It was a Petition that was signed at the restaurant at the first hearing in February, it was, signatures were obtained up to that date. These are some additional signatures. They've had this Petition at the restaurant, people come in and sign it so it's one page, 12-A and 12-B.

CHAIR: All right. Mr. Borgerding, you have a copy?

MR. BORGERDING: Yeah.

CHAIR: Okay. No objection?

MR. SCHMIDT: Okay and, and then as exhibit number

thirteen, and I will give it to counsel, is I similarly, just like Ms. Hoff, was given a letter to deliver to the Board of Appeals, except this is from that scoundrel, Mark Allen, and it is a notarized letter that, and I would submit it and the Board can receive it and give it what weight it deems appropriate. Just like Ms. Hoss' letter.

MR. BORGERDING: He will not have his reputation be besmirched.

CHAIR: Okay. All right.

MR. SCHMIDT: And with that being said, did anyone else want to say anything? Did you want to say something? You have about five minutes. Is there something you wanted to say? One of these ladies came up to me during the break, is there something that you wanted to say, ma'am?

VOICE: I was talking to you about the --

CHAIR: Wait a minute, let, wait, talk to him, talk to him. Don't tell us.

VOICE: (inaudible).

MR. SCHMIDT: Okay. Do you want to just say that? Do you think that's important?

VOICE: I mean, I think so, I think so.

MR. SCHMIDT: Okay. Okay.

CHAIR: Do you have enough time, Mr. Schmidt, do get over (inaudible)?

MR. SCHMIDT: Yeah, she's going to ask, I'm going to

ask her one question.

CHAIR: But then you know what happens?

MR. SCHMIDT: Well, I think she's just going to say, go, go ahead, ma'am.

BOARD: Raise your right hand. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MS. GOWERS: Yes, I do.

BOARD: State your name and address for the record, please.

MS. GOWERS: Cheryl Gowers, 2812 Bay Drive, Miller's Island 21219.

BOARD: Okay. Be seated.

MR. SCHMIDT: Okay. Ms. Gowers, I think you wanted to testify just about Rowboat Willy's, is that correct?

MS. GOWERS: Yes.

MR. SCHMIDT: And you had heard that there was testimony that there was seating inside of Rowboat Willy's?

MS. GOWERS: Yes.

MR. SCHMIDT: And do you believe that to be the case?

MS. GOWERS: No, I do not.

MR. SCHMIDT: The seating is outside?

MS. GOWERS: The seating is outside, everything is like on a deck and it's, has like an overhang with like the

ceiling that kind of goes up but it's all open and their music is played on the deck, which is outside.

MR. SCHMIDT: Okay, okay. Very well. And you just wanted to offer that in, because someone had said that the, that the seating was inside.

MS. GOWERS: They had inside, right.

MR. SCHMIDT: Very well.

CHAIR: And you worked there, as I remember, is that right? Didn't you work there?

MS. GOWERS: I, no, my son worked there.

CHAIR: Somebody worked there, okay. You worked at the Islander?

MS. GOWERS: I worked at the Islander, the White Swan and the Dock of the Bay.

CHAIR: I remember now.

MR. SCHMIDT: Right, right. Okay.

CHAIR: Okay. Any cross? Any cross examination of this witness? Mr. Borgerding?

MR. BORGERDING: No, no, Your Honors.

CHAIR: Okay.

MR. ZIMMERMAN: No, thank you.

CHAIR: No, Mr. Zimmerman.

MR. SCHMIDT: Thank you, ma'am.

CHAIR: Thank you. I, so that, is that your rebuttal case, Mr. Schmidt?

MR. SCHMIDT: That's, just one moment.

CHAIR: Yes.

MR. SCHMIDT: That would be our case.

CHAIR: Okay, all right. So, we made it out in time. Mr. Borgerding was kind of right, almost right. A few minutes late.

MR. BORGERDING: Yes.

CHAIR: We need memos?

MR. SCHMIDT: I, I don't believe we do but I'm going to, I, I would just ask this. Mr. Boone would like somewhat of a prompt resolution. Obviously, whatever this Board does, if, if we have the warm summer season going and that, that is obviously a concern and he is a businessman so --

CHAIR: I understand.

MR. SCHMIDT: -- if the Board wants memos, I would be happy to get something in in a week's time or very quickly. I would note that we both filed memos beforehand --

MR. ZIMMERMAN: I don't think I did file --

MR. SCHMIDT: -- with, with Motion, with Motions. I, I think I did and I--

MR. BORGERDING: Relating to the res judicata issue.

MR. SCHMIDT: Res, so that you have that already but.

CHAIR: Oh.

MR. SCHMIDT: But if you want to give us a week, that, I mean, or so, I just would ask that it be very quickly.

MR. ZIMMERMAN: I need thirty days.

MR. SCHMIDT: We'd object to the thir, I mean, I just want to get something filed quickly.

CHAIR: And, and we normally are really accommodating to everyone. (inaudible) forty-five or sixty days, whatever it is, we have an issue with the Board where we actually have to have these in, and I could actually, if the three of you wanted to step back there for a second, I could tell you, but they actually do have to be in sooner. So, but I don't know if you have time for it right now. Do you have time?

MR. SCHMIDT: To, I've got, I've got --

MR. ZIMMERMAN: I mean, I can probably do it in twenty days.

CHAIR: Okay.

MR. SCHMIDT: Well, when do you need them by?

MR. ZIMMERMAN: (inaudible) whatever, whatever memos that were filed earlier were filed at the ALJ level.

MR. SCHMIDT: No, they were filed here.

MR. ZIMMERMAN: Mr., Mr. Schmidt filed a trial memo. I don't think I filed a memo, am I right? I don't think I did.

CHAIR: You tell me, I don't know.

MR. SCHMIDT: I think he did. Somebody did, either you or Mr. Borgerding.

MR. ZIMMERMAN: I, I checked the record, I didn't see, I thought maybe I had but we checked --

MR. SCHMIDT: You filed a Motion, you filed People's Counsel's Motion and I think it was a written Motion.

MR. ZIMMERMAN: We checked the record the other day, I thought I filed a Motion but we, we've checked, we couldn't find it in the record. We couldn't find it. Am I, did we miss something?

CHAIR: I don't know. I, I recall a letter from you, at least a letter, with a bunch of cases list, you do have to go. We, we can do twenty days, we just need to, and if you wanted to step back here for two minutes, I'll tell you.

MR. SCHMIDT: Okay.

CHAIR: Why don't we just go off the record and --

MR. ZIMMERMAN: But this post-trial, I'm sorry.

CHAIR: The hearing is adjourned for right now, we'll just grab a date real quick with the post --

MR. BORGERDING: Your Honor, just to clarify. Since we already briefed the res judicata issue, these memos won't concern that or should they?

CHAIR: That's, that's fine if you feel like those covered it. If you feel like it's covered, just one second. We'll --

MR. SCHMIDT: You, you want to see counsel?

CHAIR: Yeah, just real, like I know you need to leave, so.

MR. ZIMMERMAN: No, I definitely will --

(OFF THE RECORD - 01:51:40 PM)

CERTIFICATE OF TRANSCRIBER

I hereby certify that the hearing in the matter of Boone Kondylas, LLC, case number 16-003-SPH, heard before the Board of Appeals of Baltimore County, April 28, 2016 were recorded by means of audiotape.

I further certify that, to the best of my knowledge and belief, page numbers 1 through 196 constitute a complete and accurate transcript of the proceedings as transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of this case.

In witness thereof, I have affixed my signature this 5th day of December, 2016.

Christine R. Leary

Transcriber

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY, MARYLAND

IN THE MATTER OF: *
*
*
BOONE KONDYLAS, LLC *
* **Case No. 03-C-16-010551**
*
* * * * * * * * * * * * * *



ORIGINAL

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

(JUDICIAL REVIEW)

June 1, 2017

BEFORE:

THE HONORABLE H. PATRICK STRINGER, JR.

APPEARANCES:

LAWRENCE SCHMIDT, ESQ.

On behalf of the Petitioner

FRANCIS BORGERDING, JR., ESQ.

On behalf of the Protestants

PETER ZIMMERMAN, ESQ.

On behalf of Baltimore County

TRANSCRIBED BY:

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P R O C E E D I N G S

- - - - -

THE COURT: I'm calling first the matter of Boone Kondylas, LLC; case number 03-C-16-010551. Counsel, when you're ready, please identify yourselves for the record?

MR. SCHMIDT: Thank you. Good morning, your Honor. Lawrence E. Schmidt with Smith, Gildea & Schmidt here on behalf of the Petitioner under this petition for judicial review.

MR. BORGERDING: Good morning, your Honor. Francis Borgerding, Jr. representing a number of the protestants.

MR. ZIMMERMAN: Peter Max Zimmerman, Respondent, People's Counsel for Baltimore County, Towson, Maryland.

THE COURT: I'm sorry, but I should've asked you this, spell your names for the record as well.

MR. SCHMIDT: Sure, Lawrence E. Schmidt; that's S-c-h-m-i-d-t.

MR. BORGERDING: Frank Borgerding; B-o-r-g-e-r-d-i-n-g.

MR. ZIMMERMAN: Peter Max; M-a-x middle name, Zimmerman; Z-i-m-m-e-r-m-a-n.

THE COURT: All right. This is in on the petition for judicial review filed by Boone Kondylas LLC. Mr. Scchmidt, I will hear from you.

MR. SCHMIDT: Thank you, your Honor. Your Honor, preliminarily based our on brief conversation in chambers --

THE COURT: Yeah, actually before you start, I'm sorry, I wanted to do that too on the record.

MR. SCHMIDT: Yes, sir.

THE COURT: I did ask counsel to come into chambers this morning, and I advised them just ironically a couple weeks ago I had lunch at the Dock of the Bay on a Sunday afternoon. It was of no particular consequence, doesn't affect my ability to be fair and impartial, but I advised counsel. Actually I had adjudicated Larry Tanner's divorce, I don't know how many years ago now. It's been a while, but none of that effects my ability to be fair and impartial, but if anybody has any objection to my hearing the case, I'll hear from you. Mr. Schmidt, any objection to my hearing the case?

MR. SCHMIDT: No, certainly on behalf of the Petitioner we have no objection. I just point out that I client purchased the property from Mr. Tanner, but he's not a party to this suit and has no interest in the property or the business any longer.

THE COURT: Mr. Borgerding, do you have any objection to my hearing the case.

MR. BORGERDING: No, no objection your Honor.

THE COURT: Mr. Zimmerman?

MR. ZIMMERMAN: Our office has no objection, your Honor.

THE COURT: All right. Mr. Schmidt, I will hear from you.

MR. SCHMIDT: Thank you, Judge Stringer. Your Honor, with that being said, did look through my file when I got out here, and I do have a copy, if the Court would like it, of the transcript of the proceedings before the Board. I know these were transmitted by the Board of Appeals to the Clerk of the Circuit Court.

THE COURT: Okay. I advised counsel that I had read the file, I read their memos and the Court of Appeals opinion in this case, but there was no transcript in the file. So, I couldn't have read the transcript. Well, let's see if it's necessary.

MR. SCHMIDT: If you're happy to have it, I've got an extra copy, it's just that -- certainly, I'll leave it to your discretion. Obviously and since you have read the file and read the memorandums, I don't want to be repetitive, but I do represent Boone Kondylas, LLC. The Boone and Kondylas are the last names of the individuals who formed that LLC for the purpose of acquiring this property. Mr. Boone, who is seated in the front row, is my client, and he has since bought out his partner and is the sole owner through the LLC of this business.

As you indicated, this is is petition for judicial review of the decision of the County Board of Appeals which dismissed this case not on the merits, per se, but based on the principles and the doctrine of res judicata. When I was thinking of my remarks this morning, it occurred to me that I think every time I come into this court on a zoning case, typically on a petition for judicial review from a Board of Appeals decision or a zoning commissioner's decision, we're talking about zoning variances and special exceptions and whether a particular use should be allowed or whether a building should be allowed or permitted.

This case is really unusual to the extent that that's all my client wants. He wants a chance to have his day in court or have his day before the Board of Appeals for a determination of whether he had operate his business as he would like to do it, and the Board of Appeals said no because of the Board's prior decision as affirmed by the Court of Special Appeals --

THE COURT: Well, he must have had an evidentiary hearing before the zoning commissioner, I take it.

MR. SCHMIDT: Yeah, he filed a petition for a special hearing, which is akin to a declaratory judgment; that the courts have said a special hearing in the zoning context is a zoning petition you file with Baltimore County.

It went before the zoning commissioner or Administrative Law Judge John Beverungen, and there it was dismissed based on res judicata grounds.

THE COURT: So, they never had an evidentiary hearing?

MR. SCHMIDT: Well, then it was appealed to the Board of Appeals --

THE COURT: Well, was there an evidentiary hearing before the Zoning Commission?

MR. SCHMIDT: There was a hearing before the Zoning Commission --

THE COURT: Was it an evidentiary hearing? You argued -- your whole memo is arguing facts.

MR. SCHMIDT: Yes.

THE COURT: Were those facts presented to the zoning commissioner?

MR. SCHMIDT: Yes.

THE COURT: Okay. So you had an evidentiary hearing?

MR. SCHMIDT: Yes, then it was appealed to the Board of Appeals, then there was a de novo hearing.

THE COURT: There was a de novo hearing?

MR. SCHMIDT: Two days of hearings before the Board.

THE COURT: So these transcripts that you have now, were they both before the zoning commissioner and the Board of Appeals --

MR. SCHMIDT: Yeah, Board of Appeals.

THE COURT: -- or just Board of Appeals?

MR. SCHMIDT: Yes. The zoning commissioner's case, in essence, because it's de novo to the Board of Appeals.

THE COURT: I saw the zoning commissioner was an ALJ, wasn't he?

MR. SCHMIDT: Yes, but the zoning commissioner's decision, I mean, essentially because of the de novo nature of the appeal to the Board, the Board does a do-over and doesn't look at the testimony --

THE COURT: Okay.

MR. SCHMIDT: -- or the evidence submitted to the Commissioner.

THE COURT: They've had two evidentiary hearings?

MR. SCHMIDT: Yes.

THE COURT: I'm distinguishing an evidentiary hearing from just a legal argument.

MR. SCHMIDT: Yes, there was testimony by witnesses and evidence that was presented to the Board of Appeals.

THE COURT: Okay.

MR. SCHMIDT: The evidence was really, if I can characterize it -- again, I can give you the transcripts and the Court can take a look at them -- but there was evidence and argument, but there was evidence and testimony given about what I would call the historic operation of the Dock of the Bay, what happened when it was owned going back as far as the 1950's to them when it was owned by Mr. Tanner in his operation earlier in the first decade of the 2000's, as well as Mr. Boone's current operation in the several years that he's owned it, that's what the testimony was about.

As noted in the Board's decision, which I'm sure you reviewed the Board's decision, again, they never got to what I would call the merits of the case, the substance of the case, which is can there be music at the Dock of the Bay? That's the question that we have asked in our petition for special hearing. Are we allowed to have music at the Dock of the Bay, and if so, under what circumstances? Is there a prohibition on the hours when the music can be played? Can it be played inside the restaurant or outside? Because there's outside seating as you probably know if you were there. Is there going to be a sound level --

THE COURT: If it makes any difference, that is where we sat on a Sunday afternoon, we were outside.

MR. SCHMIDT: The Board never got to that, never addressed that, never answered that ultimate question, what the Board of Appeals said is, "Larry, during the prior proceedings when Mr. Tanner owned the business that this issue was litigated" -- this is the Board's judgment and the Board's wording -- "therefore, it's resolved and it's done, and Mr. Boone's present case, this case, is barred by res judicata." That's what the Board said.

So, again, I think what's unusual about this case is a lot of times I may be here arguing that the Board was wrong in permitting a building to be built or not allowing a building or allowing a certain use or not allowing a certain use, but that's the sum and substance of what zoning cases are all about, land use control; but here we never got to that.

We never had an opportunity for Mr. Boone to have his day in court or at the Board of Appeals for determination of under what circumstances music may or may not be allowed because they said, "You are bound, Mr. Boone, by the decision of the Board in the prior case as it related to Larry Tanner's operation. Now, obviously they decided that based on the principles of res judicata --

THE COURT: Well, do you have the opinions in front of you?

MR. SCHMIDT: Which ones, your Honor?

THE COURT: Both --

MR. SCHMIDT: I do have them.

THE COURT: -- Mr. Beverungen's and the Board.

MR. SCHMIDT: Yeah, I have the Board's opinion right here.

THE COURT: We'll go with that then.

MR. SCHMIDT: I certainly can -- I'm sure I brought Beverungen's as well.

THE COURT: See, although there's this talk of res judicata -- actually, I don't know that they did use that term, did they?

MR. SCHMIDT: Yes, they did.

THE COURT: Board of Appeals?

MR. SCHMIDT: Sure, they start on -- their decision starts on page 9 of the Board of Appeals' decision.

THE COURT: The pages aren't numbered, but I'm on the part that's headed, "Decision."

MR. SCHMIDT: Yes, sir. The Petitioner is before the Board requesting that the restriction against playing lot or recorded entertainment be amended so as to permit live music.

THE COURT: Right. So --

MR. SCHMIDT: Then on the next page they start with their discussion of Inseminary Galleria versus Delaney Valley Improvement Association --

THE COURT: Wait a minute, I don't see that.

MR. SCHMIDT: It's the page -- I've got numbered pages, that's page 10.

THE COURT: You do?

MR. SCHMIDT: But it's the page after the Board's decision.

THE COURT: My pages aren't numbered.

MR. SCHMIDT: I just want to make sure we're looking at the same --

MR. ZIMMERMAN: The top of the page -- excuse me, the top of the page has the numbers.

MR. SCHMIDT: On the right-hand side.

THE COURT: Page 9?

MR. SCHMIDT: Yes, sir.

THE COURT: You know what? The opinion that I'm reading, I couldn't see those numbers. It's actually missing a couple pages. This is what was attached to somebody's memo.

MR. BORGERDING: Mine, mine your Honor.

MR. ZIMMERMAN: That's Mr. Borgerding's. People's counsel, we attached all the decision and the previous --

THE COURT: Well, you missed a few pages.

MR. ZIMMERMAN: In ours?

MR. SCHMIDT: I have a copy of the Board's decision, and I've got notes on it.

THE COURT: I've got it. All right. Wait a minute, I've got another one. I've got it here.

MR. SCHMIDT: Let me see if I another --

THE COURT: I have it.

MR. SCHMIDT: -- copy.

THE COURT: I have it. I have another one.

MR. ZIMMERMAN: I think we've got all the pages in our attachment.

THE COURT: I've got it.

MR. ZIMMERMAN: It's two pages to a sheet of paper attached to our memo. That is People's Counsel's.

THE COURT: So in the decision they're referring to their prior decision.

MR. SCHMIDT: That's also interesting that they -- I'm on page 9 where it says the word "Decision," underlined. Is that where you are, your Honor?

THE COURT: Well, I'm onto page 10 now.

MR. SCHMIDT: Okay. On page 9 they incorporate their prior findings of facts and opinions.

THE COURT: Right, that's what I was gonna start with you.

MR. SCHMIDT: -- which is, I think, ridicu -- well, pardon my language. I don't understand how they could incorporate a prior findings of fact in a prior case.

THE COURT: All right. Hold on one second.

MR. SCHMIDT: Sure.

THE COURT: Let me finish reading these pages that I hadn't seen.

(WHEREUPON, a pause had in the proceedings.)

THE COURT: Okay. Go ahead, Mr. Schmidt. I think I've read the complete decision now.

MR. SCHMIDT: Okay. Just based on the Court's questions, Judge Stringer, yeah, the way we certainly read the Board of Appeals' decision in this case is that the Board after hearing the case decided that they could not decide the merits of the case, the substance of the case, the question of the case, which is whether there should be music at the Dock of the Bay and under what circumstances, because they were barred from considering that under the principles of res judicata and because under Mr. Tanner's operation several years prior, the Board, the Circuit Court and the Court of Special Appeals in affirming in that prior litigation that under Tanner's operation there could be no music. What was the upshot and the holding of that prior case is that Tanner's operation, Tanner's Dock of the Bay was a nightclub, and a nightclub is not permitted in the zoning classification on this property, which is BL or business local.

Since that determination was made in the prior case, that was, therefore, binding on Mr. Boone, and Mr. Boone, as I say, doesn't even have a chance to have his day in court. The reason that I say that is if you start looking at the Board's decision on page 9 going back there, the second paragraph under the decision, they talk about the prior decision of 2008 being affirmed by both the Circuit Court and the Court of Special Appeals, then they incorporate that opinion. I don't know how they do that, quite honestly, Judge, incorporate a prior opinion of a prior Board in a prior case.

THE COURT: It seems like an unusual statement, but to me it means the facts are pretty much the same.

MR. SCHMIDT: Yes, that's apparently what they've concluded.

THE COURT: That is what they concluded, so they did make a factual determination in your case.

MR. SCHMIDT: Well --

THE COURT: They say they did.

MR. SCHMIDT: They say that they did --

THE COURT: They say it there. That's a different way of saying it, but it said, "We made many findings of fact."

MR. SCHMIDT: In the prior case.

THE COURT: -- "prior case. We incorporate that opinion in here" --

MR. SCHMIDT: Right.

THE COURT: Then they refer the facts and holdings and the Court of Special Appeals' opinion. So, in other words, they're saying the facts haven't changed much. Then they go on --

MR. SCHMIDT: To describe them.

THE COURT: Then even say later on at page 12, "We find there has been no substantial change in the facts as proposed than was previously litigated in the code enforcement hearings" --

MR. SCHMIDT: Yes.

THE COURT: -- "before the zoning commissioner, blah, blah, blah, blah."

MR. SCHMIDT: Right, and then --

THE COURT: Restaurant operations are substantially the same, they go on with analysis. Then, again, on page 13 they say, "We've previously determined that this restaurant operated a nightclub because it met the definition in the zoning regs, the facts presented by the Petitioner here have not changed that determination."

MR. SCHMIDT: Right.

THE COURT: So, the way I read this opinion, they are making a factual determination in the present case.

MR. SCHMIDT: Yes, I don't --

THE COURT: They're saying it didn't change.

MR. SCHMIDT: -- disagree with that.

THE COURT: I really don't know that res judicata would be the determinative issue. It could be under its analysis because they don't find changed circumstance; but number two, given their finding that the facts haven't changed and that they say this is a nightclub.

MR. SCHMIDT: But they do that, I believe, your Honor --

THE COURT: The nightclub isn't --

MR. SCHMIDT: -- in the context of res judicata, because they then say, again, on page 13, and think site to this Belvedere Baptist Church of Baltimore, the third full paragraph. In that case we applied the doctrine of res judicata and found that there was no substantial change in circumstances or facts.

THE COURT: Yeah, they're using that as an element of res judicata, whether there's a different in the facts. They had to make a factual finding in the first place to determine whether the facts have changed. Since the facts haven't changed, according to them --

MR. SCHMIDT: Yes.

THE COURT: -- the Board of Appeals, then res judicata applies.

MR. SCHMIDT: Yes, I think that's what --

THE COURT: But they made a factual determination that the facts haven't changed. So, if the facts haven't changed, and it's a proposed music and entertainment proposed by your client is a nightclub, then it's still prohibited under the zoning regs, isn't it?

MR. SCHMIDT: Yes.

THE COURT: So they could have just gone that route.

MR. SCHMIDT: Well, they could have, but they didn't --

THE COURT: Yeah, but they --

MR. SCHMIDT: An applied res judicata.

THE COURT: Yeah, but they made the factual determination that you wanted.

MR. SCHMIDT: Well, they made a factual determination, but what I would say to that, your Honor, and how I would reply to that is that the facts that they determined as being the same, and the facts that Mr. Zimmerman and Mr. Borgerding cite in their memo as being the same are not the operative facts. If I can, I'll explain that. If.

THE COURT: Go ahead.

MR. SCHMIDT: The Board says the building is the same --

THE COURT: I gotcha.

MR. SCHMIDT: -- the neighborhood still the same, the zoning is still the same.

THE COURT: The same neighbors are complaining.

MR. SCHMIDT: The same neighbors are still --

THE COURT: I got it.

MR. SCHMIDT: -- complaining. That's not the point. In our view, that is not the point. The reason that we believe it's not the point, and my memo discusses this and cites to the transcript and also cites to the previous decision to the Court of Special Appeals in the prior cases is this, the County in it's zoning regulations -- let me step back. Clearly in the business local zone, in the BL zone, which is the zone for this property, a restaurant is permitted land use. A businessman can operate a restaurant in the BL zone, and just as clearly a nightclub cannot be operated in the BL zone.

Now, the regulations go onto define in Section 101 of the regulations and certainly, I think, it's cited to in my memo and you have it, but there are definitions that the zoning regulations provide as to what a nightclub is and what a restaurant is, and paraphrasing those definitions if you read them, a restaurant is a place where the primary purpose of people going to a restaurant is to eat or drink. A nightclub, on the other hand, is a business where the primary purpose is people are gonna be entertained.

Now, obviously they are similar businesses. You can go to a restaurant, I would dare say we've all been to restaurants where there's music playing either DJ or a band or whatever, but they are still a restaurant. There are restaurants all around Towson, Timonium, that have music playing. There are nightclubs where you can get something to eat and drink. The question is, what's the primary focus of the business, are people going there to get entertained, or are they going there to eat something and have something to drink? The zoning of the property, the character of the neighborhood, the fact that the building is the same, that doesn't have anything to do with the ultimate question of whether you are a restaurant or whether are you a nightclub.

When also look at the definition of a nightclub in the County zoning regulations, it drills down further and refers to you the International Building Code. The International Building Code is a building code adopted all over the United States including across Maryland and in Baltimore County. The building code -- and I've attached it to my memorandum -- talks about a number of factors in the classification of businesses and when you build, businesses where there are high levels of people, a lot of people in a small place, a place where alcohol is being served and those type of businesses which include nightclubs and include restaurants.

The building code goes further. Again, that's attached to my memorandum, and it talks about what I've identified and what's in the building code of eight relevant considerations which distinguish a nightclub from a restaurant. They're listed on page 3-6 of the building code, which I attached to my memorandum.

We submit that it is the consideration of those facts, those are the operative facts which go to the question of whether a particular business is a nightclub or a restaurant. Again, whether the zoning is the same, the building is the same, the neighbors are the same, that doesn't matter. The Board of Appeals focused on the wrong inquiry. What is significant is the facts which distinguish these very closely related businesses of nightclub or restaurant are the same.

I went through in my memorandum, your Honor, and pointed out the differences between the previous operation under Mr. Tanner and the current operation on Mr. Boone. For example, one of the criteria in the building code is -- talks about the interior lighting, and do they turn down the lights in the business when a band is playing. If you think of it, when you go to a nightclub when a band is playing, usually the audience sit somewhat in the dark and the band or performer is spotlighted and is on stage.

For example, in the Tanner case, the Board found in it's June 4, 2008 opinion -- this is the Board in 2008 -- "When the band is playing, Mr. Tanner admitted that the lights were turned down." That's on page 11 of the Board's prior decision. Mr. Boone testified in this case that there is no change in the lighting if there is any entertainment. That's on page 58 of the transcript.

The second consideration or another consideration, is there a stage? This is, again, coming right out of the building code. In the prior case in the Board's decision on page 11, the Board said, "There's a small stage for bands to play outside." In Mr. Boone's case he testified on page 59 that he had removed the stage and there was no stage.

These other factors about sound levels, the hours of operation of the business, whether there's a dance floor. There is no dance floor now, there was a dance floor in Mr. Tanner's operation. What the building code calls a high occupant low density the amount of people the size of the crowds, those are the operative facts under the building code which distinguishes a restaurant from a nightclub.

Those facts are different, they are all different, and the testimony and the evidence when you compare what the testimony was at the hearing before the Board in this case, in the Boone case -- the Boone Kondylas case versus the findings of the Board in it's prior case.

Those are to us the operative facts which are different which makes it so res judicata does not apply. I cited in my case the Seminary Galleria reported decision out of the Court of Special Appeals. There's another case which I didn't cite but the Court can certainly look at called Anne Arundel County versus Norville, it's at 390 Md 93, it's a 2005 Court of Appeals case that talks about res judicata.

In the decision the Court of Appeals talk about how in the re statement of judgment the elements of res judicata that the parties have to be the same or in privity, that there has to be a final judgment in the first case, and third one which is really the key one here is whether the "transaction is still the same," and the Court says on page 1 09 of it's decision, "Under the transactional approach, if the two claims are based upon the same set of facts, then they would be barred by res judicata," as it goes on and it cites a number of decisions.

The present case, our case, Mr. Boone's case, is not based on the same operative facts as the old case. Again, it's not the broad facts of the property and so on as I've said, but it is the specific elements that are cited in the definition of these terms in the zoning regulations, and the fact that when you drill down, look at the definitions, go to the building code and look at how restaurants and nightclubs are distinguished, then the facts are different.

Now, it's an interesting question that the Court posed, because I know there's deference given under the substantial evidence rule to the Board's findings of fact, but the question of res judicata is, I would submit -- and the law is fairly clear, and I put this in my memorandum as well -- that the question of the application of res judicata, which the Board clearly did in this case, I mean, the decision is somewhat difficult to decipher, I believe, as you've read it this morning and I've read it.

The question of res judicata is a matter of law, and this Court owes no deference to the Board's determination that res judicata applies in this case. It's a legal question. So to that extent -- although the Board made certain findings of fact, this case as I read the Board's decision was based on res judicata.

They say,we're applying the same rational that we did in the prior Belvedere Church case. We found, "There's no substantial change to the property" and, therefore, we can't rehear the case is essentially what they say, "We find the facts of this case fit squarely within the Belvedere Baptist case. There has been no change to the property, the restaurant, the neighborhood, the neighbors or the zoning which would lead to a different result." That's the bottom of page 13.

Again, it's not the property, the restaurant, the neighborhood, the neighbors or the zoning which is the issue, it's the operation of the business which continues there. So, for those reasons we believe that the Board of Appeals got this wrong. We believe the proper resolve here, your Honor, would be for the Court to reverse on the res judicata issue and remand it for the Board to make find I think so of fact in this case, and then make a determination as to the ultimate issue, which is should music be allowed in the Dock of the Bay, and under what circumstances? That is all we want. We just want to know what we should be allowed to do.

I can't fundamentally get my arms around the concept that in a zoning context because the Board of Appeals said in 2008 that Larry Tanner was running a night-club business because his business had morphed into a nightclub, because the focus was no longer serving people food and drink, but to provide entertainment, that that means that thereafter perpetually from now until dooms day there could never been a business at the Dock of the Bay in which music can be played as a restaurant. It just doesn't make -- I think that the Board got it wrong, and that their application of res judicata was wrong.

(WHEREUPON, a pause had in the proceedings.)

I would say one final thing, and I pointed this out in my memorandum as well. Clearly zoning regulations allow what are called accessory uses. This whole concept the Board didn't address at all, which I think is also very important. You have in any given situation a primary use of a particular property. For example, a church.

A church may occupy a particular property, according to designing authorities in Baltimore County the use of the property is a church, obviously enough. That church may have a day school there, it may have a daycare center there. That does not make the use of that property a school, or it doesn't make it a daycare center, which are separate identified land uses in the Baltimore County Zoning Regulations. Those are accessory, subservient components of the principal use, which is a church. It's not a day-care center and a church and a school, it's a church with a component ministry of a daycare center, perhaps, or whatever.

Similarly in this context, it's the same thing. Mr. Boone might do catering, he might have a birthday party and say I want the Dock of the Bay to deliver three dozen crab cakes to my house for my birthday celebration. That doesn't make him a catering hall which is another defined use in the zoning regulations. He's not Martin's West, he is still a restaurant.

The same principle and the same approach applies here. He might have music in his restaurant, but it doesn't automatically make it a nightclub, it makes it a restaurant with an accessory component, and the Board's task and what they should've done is determine under what circumstances a restaurant can have a component music part of it.

Again, Tanner's morphed into a nightclub. It became the primary focus. Mr. Boone's got no interest and no intention of doing that, but the Board will never get to that issue because they said the facts didn't change. Well, they have changed against all the factors that I've highlighted here. So, for all those reasonings, we believe that the Board of Appeals really got this wrong, and that a remand to determine the circumstances of music would be appropriate. Thank you, Judge.

THE COURT: All right. Thank you, Mr. Schmidt. Mr. Borgerding?

MR. BORGERDING: Your Honor, a couple things I would say. First off, my argument is going to parallel what I put in my brief, and I would just say that, you know, based upon Mr. Schmidt's comments, though he makes a good argument, he writes a good brief, but I ask you to focus on a couple things. If your Honor did the divorce case for Mr. Tanner, your Honor has a flavor for what Mr. Tanner was all about.

Suffice it to say, he was a bull in a china shop, and my client's going through seven years of hell litigating with him. He would waive the red flag and have loud rock bands and disturb the neighbors, and that went on for seven years all the way up to the Court of Special Appeals. So that's what they're leery of going back to.

They're afraid if music is allowed again, any type of music, indoor or outdoor, with the proximity of the homes there, it's gonna be disturbing, then they're gonna have to go back to Baltimore County Zoning, which is a complaint-driven system, and play the cat-and-mouse game of trying to get an inspector down there to document this. They don't want to go back to that. They went through seven years of hell, they don't want to go back to it. That's what they're leery of.

The Board of Appeals noted in its opinion that even if Mr. Boone had the best of intentions, it's not to say that there won't be disturbance to the neighbors, number one. Number two, if he sold the property, it doesn't mean that the next owner won't be Mr. Tanner. Mr. Tanner was a unique individual, and I'm sure presiding over his divorce case you got a flavor for that.

THE COURT: I think that argument plays into Mr. Schmidt's argument, though.

MR. BORGERDING: Why?

THE COURT: To say that Mr. Tanner is a unique individual, and I'm not gonna comment on that, I'm not getting into the divorce again, but to say that he is unique and that this owner is different, that's Mr. Schmidt's whole point, this is different, and the Board of Appeals didn't treat it that way.

MR. BORGERDING: I don't think it is different, your Honor.

THE COURT: It doesn't matter -- I don't think it matters what Mr. Tanner put these neighbors through. There is a new owner who's has a different plan for the restaurant.

MR. BORGERDING: He says he has a different plan, but in actuality if you put live music --

THE COURT: You'll get it a turn, Mr. Zimmerman --

MR. ZIMMERMAN: I know.

THE COURT: -- just sit still, please.

MR. ZIMMERMAN: All right. Thanks, sorry.

MR. BORGERDING: If you add the actuality of putting music back there, you'd probably have the same issues.

THE COURT: There are different kinds of music. There are different levels of the noise, for one thing, not to mention the different types of music.

MR. BORGERDING: With the proximity of the homes, you ate on the outdoor deck.

THE COURT: I think that also goes to Mr. Schmidt's point that that's what Board of Appeals did. They said, Mr. Tanner did this, and his kind of music was loud and rock bands and the neighbors didn't like it, therefore nobody can do anything different, because it might more of back into what the Dock of the Bay was under Mr. Tanner.

MR. SCHMIDT: Right.

THE COURT: That's Mr. Schmidt's whole point, this is different and it requires an analysis of the facts presented by the current owner.

MR. BORGERDING: Well, I would say a couple --

THE COURT: I think the Board did exactly what you're saying.

MR. BORGERDING: I think you ought to affirm the Board's decision based on three factors: One is res judicata, the second is what Mr. Schmidt is asking is for an amendment of the conditions of the prior ruling, which was affirmed by the Court of Special Appeals. As the zoning commissioner noted, he doesn't have the authority to over-rule a Court of Special Appeals opinion.

THE COURT: That's not what Mr. Schmidt is asking. It was such a factual oriented case, even about of Court of Special Appeals. The question was whether those facts presented in that case constituted a nightclub? That was the issue, wasn't it?

MR. BORGERDING: (No response)

THE COURT: Everybody agreed if it was a night-club, you couldn't have it in a BL zone.

MR. BORGERDING: It was the issue. The zoning office does not allow music in a BL zone. It does allow music in a BM zone which --

THE COURT: Now, you just said something that I also think is Mr. Schmidt's argument, and you can correct me or advise me. You just said it doesn't allow music in a BL zone. My understanding is it doesn't allow a nightclub in a BL zone. Correct me if I'm wrong.

MR. BORGERDING: The policy is no --

THE COURT: Correct me if I'm wrong. The zoning reg says you can't have a nightclub in a BL zone, it doesn't say you can't have music in a BL zone.

MR. BORGERDING: I think their policy -- they have policies over there, and I think their policy is no live music in a BL zone, in a BM zone you can have it.

THE COURT: Well, they can't make up a policy. What does the zoning reg say?

MR. BORGERDING: I'm sorry?

THE COURT: What does the zoning reg say, no nightclubs in a BL zone or no music in a BL zone.

MR. BORGERDING: To be honest with you, I don't know.

THE COURT: Mr. Schmidt, what do you say?

MR. SCHMIDT: It says no nightclubs in a BL zone. The way the regulations -- I don't mean to digress, your Honor, but the way the regulations are written, they're written in what's called the inclusive, which means the regulations say only the following uses are allowed, then it lists it, and restaurants are allowed.

THE COURT: Right.

MR. SCHMIDT: Then if you go into other zones, nightclubs are allowed elsewhere. So, you're exactly right, there is no mention of the word, "music," in the zoning regulations.

THE COURT: That's what the Board seems to say here.

MR. SCHMIDT: Yes.

THE COURT: They use the word, "live music," interchangeably with, "nightclub."

MR. BORGERDING: Your Honor, indicated that you read the Court of Special Appeals opinion.

THE COURT: I did.

MR. BORGERDING: It does not -- it says, "no live music," okay?

THE COURT: The way I read that decision, the whole question was whether it was a nightclub, and they went through the factors, this affirmed the Board, but they had gone through those different factors --

MR. BORGERDING: But one of --

THE COURT: -- which this board did not do in this case.

MR. BORGERDING: It affirmed the restrictions --

THE COURT: The criteria applied by the Board of Appeals.

MR. BORGERDING: -- one of which was no live music.

THE COURT: Well, that's one, I guess --

MR. BORGERDING: So to now for the administrative law judge on appeal, this Court to overturn the restriction is overturning the prior ruling of the Court of Special Appeals. So I would argue that this Court respectfully does not have the authority to do that.

THE COURT: Okay. Well, I would agree with you I can't overrule a Court of Special Appeals decision, and I --

MR. BORGERDING: Correct.

THE COURT: -- wouldn't want to, I wouldn't do so.

MR. BORGERDING: Correct.

THE COURT: But it seems to me there can be some factual distinctions.

MR. BORGERDING: So I'd say even if you got past the res judicata issue, you have that issue to contend with, and under that scenario this Court respectfully does not have the authority to overrule the Court of Special Appeals.

Your Honor, I would say that Mr. Schmidt made these same arguments to the administrative law judge at the evidentiary hearing, and he made the same arguments to the Board of Appeals which conducted an evidentiary hearing, and they determined that res judicata does apply.

THE COURT: Yeah, well, I know. That's why he's appealing.

MR. BORGERDING: Uh-huh.

THE COURT: They didn't buy his argument, there is no question about that apparently.

MR. SCHMIDT: Right. So --

THE COURT: Here's the issue. I'm reading the Court of Special Appeals opinion. The whole question was whether the Dock of the Bay is a "nightclub or simply a restaurant where ancillary entertainment is provided." They looked at the definition of nightclub in the Zoning Code. That was the issue in the case. That had been the issue all along.

That was the complaint about the Dock of the Bay. That was the zoning commissioner's decision, and that was the Board of Appeals decision that it was a nightclub, and that was the issue before the Court of Special Appeals. They reviewed those factors and said under the facts of this case they agreed it was a nightclub, and a nightclub is prohibited by the zoning.

So commissioner ruled that, the Dock of the Bay is a "nightclub," under the Zoning Code and ordered that the playing of outdoor music either by way of an outside speaker system, live or recorded entertainment must be discontinued. There's another distinction right there, outdoor music played over a speaker system. I mean, the facts matter. Okay. Anyway. Anything else, Mr. Borgerding?

MR. BORGERDING: Yeah, so again, for three reasons I think you ought to turn down the Petitioner's request, which is res judicata. Again, I don't think this Court respectfully has the authority to overturn a condition on a prior ruling, and one of the conditions was no live music. Then thirdly, if one looks at the testimony which I've outlined in my brief, I think the testimony is clear from --

THE COURT: What page of your memo?

MR. BORGERDING: I'm sorry?

THE COURT: What page of your memo?

MR. BORGERDING: Starting at page 9; so testifying on behalf of the protestants were Charlie Wolenski, Brad McKeeney, Brian McKeeney, Matt Charpella, Wayne Walman, and Mike Kondealis. I wasn't going to go through the testimony, but just as a sample I'll indicate what Mr. Charlie Wolenski's testimony was --

THE COURT: Okay. I'll read it, I got it right in front of me.

MR. BORGERDING: Okay. So, your Honor can read through that and see, get a flavor for what my clients went through.

THE COURT: I believe it. They won the case against the prior renters with whatever was going on there. If that's the same situation that this owner wants to do, I would agree, if it's the same facts then it should be the same result. The whole question is whether these are different facts? It, at least, can end up with a different result. The current owner doesn't want to operate or convert it to a nightclub, he wants a restaurant.

MR. BORGERDING: Your Honor, once you introduce the live music, I would suffice it to say if you look through the history of the litigation of this matter, I would say it's very well apt to cause a lot of the same problems. If your Honor ate on the outside deck, your Honor knows the proximity of the residents. So, I mean --

THE COURT: I agree with you, but I don't know whether -- what was the proposal, was it outdoor music?

MR. BORGERDING: He wants indoor and outdoor music.

THE COURT: He wants indoor and outdoor -- well, I mean, I get -- okay. All right. Anything else, Mr. Borgerding?

MR. BORGERDING: No, thank you, your Honor.

THE COURT: Mr. Zimmerman?

MR. ZIMMERMAN: Thank you, Judge. I'm feeling a bit frustrated because my perspective on this case is --

THE COURT: Did you file a memo, by the way?

MR. ZIMMERMAN: Absolutely. I hope it's in the file.

THE COURT: I didn't see in there.

MR. ZIMMERMAN: It was a very long memo. It's got to be in the file.

THE COURT: It seems like all memos these days are long, but I didn't see it in the file.

MR. ZIMMERMAN: It was stamped by the Circuit Court. May I show it to you?

THE COURT: No, I believe you. Go ahead, I'm listening.

MR. ZIMMERMAN: All right. Well, Mr. Schmidt tries to differentiate res judicata from the merits as if there's some hard line distinction. By way of background, in cases going back to 1936, and we cited cases in our memo, the Whittle versus County Board of Appeals, the Woodlawn Citizens, the Seminary Galleria was our case from the Court of Special Appeals in 1910. When you're dealing with res judicata in the context of zoning in a successor case, there's a factual question, is there a substantial change in circumstances?

So, the merits which we recognized is was there a substantial change in circumstances from the previous situation. It's not whether the citizens are worried, okay?

THE COURT: Okay, I agree with you.

MR. ZIMMERMAN: It has nothing to do with Mr. Tanner being unique.

THE COURT: I agree with you.

MR. ZIMMERMAN: So, I'm listening to Mr. Borgerding, and I'm saying, wait a minute, that's not my perspective here.

THE COURT: Okay.

MR. ZIMMERMAN: So, let's go back. We attached to our memorandum all the prior decisions, as well as the current decision.

THE COURT: All right. I've read those.

MR. ZIMMERMAN: Mr. Tanner claim that he was gonna have a steel band very light, light music. He went through the argument about accessory. There was nothing unique in a sense about him in the previous case. He made all the same points. He wanted a restaurant with a little bit of accessory music. The Board's decision, the majority opinion, went through all the criteria --

THE COURT: You're talking about the Larry Tanner case now?

MR. ZIMMERMAN: Right. You're right, restaurants can have music, but you have all these criteria, at what point does it become a nightclub?

THE COURT: Okay, right.

MR. ZIMMERMAN: You know, have you loud music --

THE COURT: They did that analysis in Larry Tanner's case --

MR. ZIMMERMAN: Right.

THE COURT: Where is that analysis done in this case.

MR. ZIMMERMAN: I'm gonna -- okay.

THE COURT: That's all I want to know, where is that analysis done in this case.

MR. ZIMMERMAN: Here's what I would say. First of all, from pages 2 through 9 the Board goes through all the facts. Remember, we have a two day Board of Appeals hearing where Mr. Boone testified to what he wanted to do. Beginning on page 2, the Board discusses the testimony relating to the current situation.

They went through basically every witness, and there were multiple exhibits filed, including relating to the current operation. How late it was gonna stay open, until 1:00 a.m.; some documentation relating to the liquor license, they can be open until 2:00 a.m., they got a liquor license.

Mr. Boone testified extensively as to what kind of music he would want to play. He claimed there would be -- his first guy would be a guy named Mark Allen, acoustic guitar, but then there was evidence that Mark Allen plays with an amplifier, and then there's evidence that other bands that play. Let me just before I answer your question more directly, let me point out that in the Board's -- and we call it the Tanner case, the earlier case, there was an reconsideration request which is identical to what Mr. Schmidt is asking for now. The request was to the board, what kind of music can we play, how loud, when and so on, and that's attached to our memorandum. It's called ruling on motion for reconsideration and clarification. It's a three page decision, September 12, 2008.

THE COURT: 2008?

MR. ZIMMERMAN: September 12, 2008, it's an attached memorandum. Can I show it to you?

THE COURT: Yeah, can you show it to me if you want, just hand it to the clerk.

MR. ZIMMERMAN: It follows the original Board majority descenting opinion, and then -- so my point is we know that in the earlier case the same arguments were made about accessory, it's just music accessory to a restaurant, it's not loud, it's gonna be steel band. I mean, here they said acoustic.

Mr. Tanner's presentation was a very attractive, you know, kind of promotional presentation, it was gonna be a restaurant with a little bit of music. The Board found in 2008, no, based on the facts. As I said, he said what kind of music can I play, and the Board said based on the facts here we're not gonna give an advisory opinion. Basically the Board found it was a nightclub, okay? You've read Judge Eyers Court of Special Appeals opinion, it was extensive on all the arguments. Okay.

So, now let's fast forward to the current situation. There was an evidentiary hearing before the Administrative Law Judge Beverungen, and his view was that basically based on the Court of Special Appeals' decision, it wasn't a question of whether the new music would be like Frank Sinatra. The proposal in the earlier case was soft music as well, and he found it was still a nightclub.

Let's get to the Board of Appeals, which is de novo. As you pointed out on major 12 -- first of all the Board had the earlier decision which went through all the criteria, and I was going to bring it up, but then you brought it up. Beginning on page 12 -- and I don't have it in front of me anymore because you've got my memo -- they say, hey --

THE COURT: I'm handing your memo back. Your memo is in the file.

MR. ZIMMERMAN: Oh, okay. I'm not gonna read everything -- I mean, you've read it. They said there's not been a substantial change in fact and circumstances.

THE COURT: That's what they said. The more you and Mr. Borgerding talk, the more I'm convinced that this is a change. You keep trashing Larry Tanner and what he day and how he morphed, and you're not giving this man a chance.

MR. ZIMMERMAN: No, what I'm saying -- I'm not trashing Larry Tanner. I'm saying that Larry Tanner also made the same type of argument that he had steel band music. The argument here is oh, we're gonna have acoustic music. The Board listened to the testimony of Mr. Boone. It was a two-day trial. They listened to the testimony of the --

THE COURT: Okay, I hope so.

MR. ZIMMERMAN: -- citizens relating to the kind of music. There was testimony, for example, that the --

THE COURT: Okay. Here's what I'm asking. I'm gonna ask the same question I've asked before. Where in this opinion do they analyze the testimony about whether this is a nightclub? That's the question I think is before me. Even under your statement about what res judicata is, it's an analysis of the facts to see if they are the same or whether there's been a change in circumstances. Where is that analysis in the Board of Appeals decision?

MR. ZIMMERMAN: I actually --

THE COURT: I agree they make a statement, "There's been no substantial change in the facts," but where is the analysis?

MR. ZIMMERMAN: I think the Court of Appeals in a number of cases --

THE COURT: No, I'm asking you where is the Board of Appeals analysis. Point to it in the opinion, if you would?

MR. ZIMMERMAN: I think among other things on page 10 they talk about first original case, and then on page 12, last paragraph, the restaurant operations are substantially the same other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers, but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with neighboring restaurants --

THE COURT: All right.

MR. ZIMMERMAN: -- and so on.

THE COURT: All right. I think --

MR. ZIMMERMAN: It may not be encyclopedic, but --

THE COURT: "Other than a lack of a stage, the proposal for life music is the same." Was it the same? You all are telling me that Larry Tanner had loud rock bands outside with speakers --

MR. ZIMMERMAN: He proposed steel band music ultimately. It's a question of also credibility and factual evaluation.

THE COURT: Proposed performers.

MR. ZIMMERMAN: They felt that it was not a substantial change from the type of music, that's a factual finding. It may not be encyclopedic, it may not be, you know, the length that you would have liked to see, but that paragraph, they're making a finding it's not a substantial change. If you wanna take one word out of context and say, well, they weren't taking into account sufficiently that Mr. Boone said he was gonna have acoustic whereas Mr. Tanner had said it was gonna be a steel band.

On this record the Board was entitled to find that there was not a substantial change. Whether you could take one word out of context and say, well, Mr. Boone, you know, it's not gonna be identical performers, okay. They're not denying this based on the fact that there's music period, they're denying it based on the fact that they don't view this as a substantial change, and they heard evidence for two days. I think under the Court of Appeals decision, that's a sufficient finding. The Court also has said in a number of cases, there's one called Chesapeake versus Moreland, you can look at the findings also in relations to the description of the facts.

I think if you put together page 12, and then you look at the extensive review of the facts, the Board is credited with their evaluation of the facts, and their finding is in the context of how they described Mr. Boone's testimony, which begins on, I believe, page 3. There's a description of Mr. Boone's testimony, and then you have also it goes on and on to the testimony from the citizens. For example, on page 6, Mr. Wolenski is also familiar with Mr. Boone's operation, and Mr. Allen, Mark Allen was the first musician to be hired. Mr. Allen's guitar is connected to an amplifier --

THE COURT: Where are you now, page 6?

MR. ZIMMERMAN: Page 6.

THE COURT: All right. Hold on.

MR. ZIMMERMAN: -- which Mr. Wolenski described so loud. So, I mean, there's a mix in the citizen's testimony of not only the past operation, but there was a mix relating to the current proposal.

THE COURT: I'm sorry?

MR. ZIMMERMAN: What I'm trying to say is that the citizen's testimony spanned both their observations on the previous operation, as well as the current operation and proposal, and the Board had all of that which they described.

THE COURT: Well, I think that's a problem.

MR. ZIMMERMAN: I think the Board --

THE COURT: Here's the crux of part of what you and Mr. Borgerding are arguing and what the Board of Appeals says, the neighbors are concerned that the same problems will reoccur.

MR. ZIMMERMAN: That's part of it, and I agree with you if that's all there was. I agree if that's all there was, that would not by itself be enough, but there was much more than the neighbors' concern.

THE COURT: It's not enough. It's not even --

MR. ZIMMERMAN: That's not all there was in this decision. They had Mr. Boone's testimony before them in its entirety --

THE COURT: I understand that. I got that early on, there's a two-day evidentiary hearing.

MR. ZIMMERMAN: They didn't view his proposal and his description as being substantially different from the previous case. Given the description of the criteria of the Board in the previous case, I don't think they had to go through the criteria once again, one, two -- you know, the eight criteria.

THE COURT: It would have been helpful, I can tell you. All this focus on the prior owner and years ago is really not helpful to your case.

MR. ZIMMERMAN: You know, what's the expression? Let's not with the perfect be the enemy of the good or the adequate. Yes, they could have been more detailed, but I don't think that's enough for a reversal or a remand. I think the appellate courts these days, the scope of review is such that they're not requiring that kind of perfection, and I think that the evaluation here based on the two-day evidentiary hearing, that the Board finds no substantial change in circumstances, and they evaluated all the facts. They went through them. Yes, you could pick out a sentence here or there and say, well, you know, that would not be relevant.

Mr. Tanner's unique personality is not the point, I get that. The fact that the neighbors are worried is not the point, I absolutely get that, but I think there's much more here, and I don't think -- obviously I don't think Mr. Schmidt's argument is crediting what the Board did, in fact, do after two days of testimony after an extensive description of the facts, and their page 12 paragraph does include some findings. Could it have been more perfect --

THE COURT: Okay.

MR. ZIMMERMAN: -- and could it have been more extensive? Sure.

THE COURT: All right.

MR. ZIMMERMAN: I think you --

THE COURT: You're going around the same bush Mr. Zimmerman.

MR. ZIMMERMAN: Let's just see if I have a few more points that I can make. Based on all of the Court of Appeals cases that I've cited, which I won't get into detail, but it begins on page 14 of my memo, there were all sorts of changes and circumstances that the Court of Appeals had said were not substantial. It's not substantial enough to overcome the previous case.

There are arguments about -- if I could get back to my notes -- arguments about population changes, arguments about need, arguments about new development in the area. For example, the Seminary Galleria had arguments about a different business situation with the Galleria up on York Road --

THE COURT: Where are these factors listed? You listed those in your memo, didn't you, Mr. --

MR. BORGERDING: Yes, your Honor.

THE COURT: What page, please?

MR. BORGERDING: They start in my memo on page 18.

THE COURT: Those are out of the International Building Code?

MR. BORGERDING: Yes, sir.

(WHEREUPON, a pause had in the proceedings.)

THE COURT: Okay. Mr. Zimmerman, anything further?

MR. ZIMMERMAN: Just briefly, we did go through some of the Petitioner's arguments also beginning on page 21 of our memorandum, but what I wanted to say is based on all of the Court of Appeals case, I don't think a promotional -- an allegation or statement that the management style is gonna change. It's the kind of change that the Court of Appeals indicated would be a so called substantial change in circumstances regarding the property.

THE COURT: I don't think that's the argument that it's the management's style.

MR. ZIMMERMAN: Well, that the music is not gonna be as loud. That's basically what it's coming down to, that's the main thing.

THE COURT: I would think that's the main complaint of the neighbors is the music is too loud.

MR. ZIMMERMAN: What I'm saying is I think the Board of Appeals found based on all the evidence that they did not view Mr. -- they did not view Mr. Boone's testimony as convincing or credible. They made a factual finding based on the factual inferences, which the Court of Appeals has said the judiciary must defer to the factual inferences.

THE COURT: You know what? I would agree with that statement that you just made, but Board of Appeals didn't make it. That's not what they said.

If they had made that statement that they didn't find Mr. Boone credible and they thought that the music was gonna be too loud, I would defer to that factual finding. I don't see that factual finding in here.

MR. ZIMMERMAN: That is the way I --

THE COURT: They just said Mr. Tanner did what he wanted to do and they're afraid it's gonna happen again.

MR. ZIMMERMAN: No, I think they're saying much more than that.

THE COURT: They don't say a whole lot more than that.

MR. ZIMMERMAN: No, but I disagree, because it's differently in context from the way --

THE COURT: Okay.

MR. ZIMMERMAN: I think, frankly, I would respectfully suggest that while the decision may not be perfect, I think your approach may be too strict. If you really feel the Board did not do enough in explaining it's decision, then I suppose the remedy would be a remand to have them explain it further, but I don't think it's an absolute situation for absolute reversal.

THE COURT: Okay. All right. Thank you, Mr. Zimmerman.

(WHEREUPON, a pause had in the proceedings.)

THE COURT: All right. I know Mr. Borgerding and Mr. Zimmerman want me to follow the Court of Special Appeals opinion and not overrule it, and I agree with that. That is what I should do, but the issue in the Court of Special Appeals was whether the Dock of the Bay was operating as a nightclub. That had been an original complaint.

This, again, we're going back years now, however many years whether Mr. Tanner owned it, the complaint was that the Dock of the Bay was operating as a nightclub in a BL zone, which is not permitted use in a BL zone. The issue in the special hearing before the zoning commissioner was to determine if the Dock of the Bay is a nightclub or simply a restaurant under the Zoning Code.

The commissioner ruled that the Dock of the Bay is a nightclub under the Zoning Code and the facts in this case and ordered that the outdoor music be discontinued. This is the facts now that are recited in the Court of Special Appeals' opinion.

Then the case was appealed to the Board of Appeals, which concluded that the Dock of the Bay was operating as a nightclub under the definition of a nightclub in the Zoning Code, and the Board of Appeals had considered the characteristics of this Subgroup 82 -- that's in the IBC, right?

MR. ZIMMERMAN: Yes, sir.

THE COURT: And they considered those characteristics and whether they applied to the Dock of the Bay, and the analysis was, I think there were six of the eight criteria that applied, therefore, they concluded under facts and the analysis that the Dock of the Bay was operated as a nightclub. So then that was appealed to the Court of Special Appeals. The whole analysis by the Court of Special Appeals was whether the Dock of the Bay met the definition of a nightclub. The Court of Special Appeals noted that the criteria applied by the Board of Appeals to determine whether the Dock of the Bay is a nightclub was relevant. Those criteria were relevant of whether the Dock of the Bay was a nightclub, and the Court of Special Appeals found there was substantial evidence in the record to support the findings, the factual findings, that six of these eight criteria were met.

Again, the issue was whether the Dock of the Bay under the facts that existed at that time was a nightclub, and if it was, it was not permitted in a BL zone. In order for res judicata applied, it seems to me that same analysis has to be done to see and determine whether the proposed use with the current owner would constitute a nightclub. If the facts were the same, then maybe res judicata would apply at that time, I would even -- if it did, but the analysis just was not done in this case.

I agree with Mr. Schmidt that there was a whole lot of extraneous material written about the prior owners and the fear of the neighbors that the current owner would morph into the same type of problems that they had with Mr. Tanner, and I understand that. I understand the fear and the concerns of the neighbors and it's a very nice area, Miller's Island, and they don't want a nightclub in the neighborhood next to their homes, but this Court doesn't know that's what was proposed or what was decided by Board of Appeals based on this opinion.

The Board of Appeals, I mean, I have no quibble with the recitation of the law that applies, and they cite Whittle versus Board of Zoning Appeals, and the question was whether there was a change in circumstances. The Board of Appeals says -- and this is page 12 of its decision -- applying the reasoning of Whittle here, "We find there has been no substantial change in the facts as proposed than was previously litigated in the code enforcement hearings." I think they're referring to Mr. Tanner here, because then he said, "The same neighbors who incurred attorney's fees and endured the Tanner era ownership are still protesting both indoor and outdoor music." It's not an analysis of the criteria to determine whether this is a nightclub. Then the next paragraph, I agree with Mr. Zimmerman, it constitutes the analysis.

"The restaurant operations are substantially the same." I'm not sure which operations, but that would be okay, the restaurant operations, but then it says, "Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers, but the hours for performance." It seems to be different from what I'm reading of the manner in which the music will be played. That's really it, and it goes on with other stuff about it's not really an analysis of whether it a nightclub.

"The owner expressed the desire for live music to boost revenue and compete with neighboring restaurants. There has been no change to the physical layout of the restaurant or additions or improvements such as sound-proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that in order to be successful in this request, the changes needed under Whittle, there must be more than a change in the restaurant's ownership or management style of the new owner." Okay. I would agree with that, but there seem to be other changes that they're not considering.

"It says we are mindful the fact that if the Petitioner has the best of intentions operates a family-oriented restaurant and as indicated it be sensitive to the neighbor's concern, there is no regulational policing of the restaurant other than complaints filed by the protestants.

Well, you need to be cognizant that the restaurant could subsequently be sold and the same problems could result. You could say that about any business. Now, they do say, "We previously determined that this restaurant operated a "nightclub" because it met the definition of BCZR Section 101. The facts presented by the Petitioner here have not changed that determination.

They make the conclusion, Mr. Zimmerman, I agree with you, but they don't really say how they got there, and I think we should follow the Court of Special Appeals decision. The Court of Special Appeals decision was very factually oriented, and again, the Court of Special Appeals said that those criteria, those eight criteria in the building code are relevant to a factual finding to determine whether the Dock of the Bay is a nightclub. So all I'm saying is that analysis should be done in this case. I don't know what the answer is, I'm not saying that the board is wrong. So, I don't know if this technically is not a reversal, but I am going to remand it for a determination under the facts of this case as to whether the Dock of the Bay is a nightclub, and I believe they should look at the Court of Special Appeals opinion and see what the Court of Special Appeals in the prior case said was were relevant criteria to that determines, and that Court of Special Appeals opinion should be followed.

MR. ZIMMERMAN: That would not require a new evidentiary hearing.

THE COURT: No, it does not require an evidentiary hearing. I determined that with Mr. Schmidt right at the get go. He had his two days of evidence he presented. Whether they have a hearing or not would be up to the Board of Appeals. I'm not even going to say they should have another hearing, it's up to them whether should have any type of argument or take additional testimony, they could, but I believe the case should be remanded for an analysis.

I will say under the Court of Special Appeals' opinion in the prior case, Case Number 810, September Term 2009, decided by Judge Deborah Eyler, and I believe that requires an analysis of those eight criteria in the International Building Code that the board of special appeals say were relevant. Okay, so the case is remanded for the determination of whether the proposed use would constitute a nightclub.

MR. SCHMIDT: Thank you, your Honor.

THE COURT: Now, as far as an order, I believe that's all it needs to say, right? Remanded for determines of whether the proposed use would constitute a nightclub.

MR. SCHMIDT: We certainly would have access to the transcript and your remarks herein open court as well, your Honor.

THE COURT: Okay. I'll say a determining whether the proposed use would constitute a nightclub under the analysis used by the Court of Special Appeals in that prior case. Would that do it?

MR. SCHMIDT: You could reference the international building codes specifically, your Honor.

THE COURT: I'll let the Court of Special Appeals opinion speak.

MR. SCHMIDT: Yes, sir.

THE COURT: Okay. Would that be clear enough for every one?

MR. SCHMIDT: Yes, sir.

MR. BORGERDING: Yes.

MR. ZIMMERMAN: Yes, your Honor.

THE COURT: All right. I'll sign that order and it's up to you to contact the Board of Appeals and --

MR. SCHMIDT: Once we get your order.

THE COURT: -- see how they want to proceed.

MR. SCHMIDT: Yes, sir.

MR. ZIMMERMAN: You'll be preparing the order?

THE COURT: I'll do the order.

MR. ZIMMERMAN: Great, thank you.

THE COURT: All right. Thank you all very much for your memos and your arguments.

MR. BORGERDING: Thank you, your Honor.

MR. ZIMMERMAN: Thanks, Judge.

MR. SCHMIDT: Thank you, your Honor.

THE COURT: It was interesting. Okay.

MR. SCHMIDT: Thank you.

(WHEREUPON, proceedings concluded 10:55 a.m.)

* * *

REPORTER'S CERTIFICATE

I, CONSTANCE A. STACKER-WILSON, an Official Registered Professional Reporter within and for the State of Maryland, Baltimore County, do hereby certify that the foregoing proceedings were recorded using the CourtSmart Digital Recording System and was thereafter reduced to the herein typewritten form to the best of my ability.

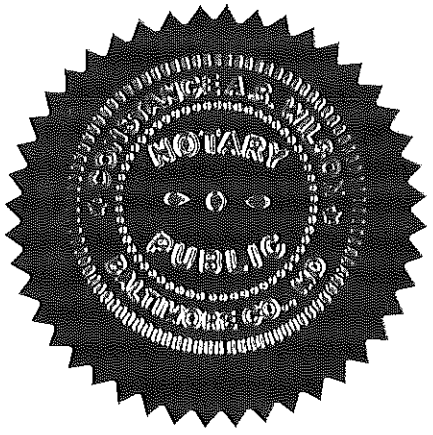
I also certify that the foregoing transcript of proceedings is a true, correct, and complete transmission of the CourtSmart recording so taken, consisting of pages 1 through 58 inclusive.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action of which these proceedings were taken, nor am I financially or otherwise interested in the outcome of this case.

Subscribed and sworn to by me this **28th** day of **August, 2017.**

Constance A S Wilson, RPR

CONSTANCE A. S. WILSON
Notary Public
Baltimore County, Maryland
My Commission Expires March 22, 2020



IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE
	*	BOARD OF APPEALS
	*	OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge (the "ALJ") in which the ALJ denied a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music.

A public hearing was held *de novo* on February 17, 2016 and April 28, 2016. The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire of Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation was held on June 14, 2016.

Factual Background

The subject property is water front property located in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" (the "Restaurant"). The Restaurant is open seven (7) days a week and has a total seating capacity of approximately 225 persons (125 persons inside and 100 persons outside). The Property is also

improved with boat slips for patrons to dock their boats and access the Restaurant via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, the Restaurant came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation, music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement actions beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing to request a determination that the Restaurant with its associated live music did not constitute a 'nightclub.' In our June 4, 2008 Opinion, this Board held that Mr. Thanner's operation of the Restaurant along with music played met the definition of "nightclub" in §101 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a 'nightclub' was not permitted in a BL zone, this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (Board Opinion 6/4/08, p. 14). Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. Thereafter, the Restaurant closed.

In or about August of 2014, the Petitioner purchased the Property. In or about October of 2014, the Petitioner reopened the Restaurant under the previous name – Dock of the Bay. At the hearing, Kenneth Boone, owner of Boone Kondylas, LLC, the Petitioner, testified before this Board that his ownership and operation of the Restaurant is one of three businesses he owns. The Restaurant has both a business license and a liquor license. The food menu varies from seafood to sandwiches, hamburgers and pasta.

The Petitioner described the minimal improvements that have been made to the Restaurant since August of 2014. These have included pouring a concrete pad where the customers can eat steamed crabs, expanding the kitchen, and removing the outside stage installed by Mr. Thanner where the musicians formerly played.

In April of 2015, the Petitioner hired Mark Allen, a guitar player, to perform at the Restaurant. Mr. Allen was also a regular performer at the Restaurant during the period that Mr. Thanner owned it. When signs advertising Mr. Allen's performance were put up at the Restaurant, a Baltimore County inspector instructed the Petitioner that the Restaurant would be closed down if music was permitted to play.

Mr. Boone mentioned that 'Row Boat Willie's', a restaurant located next to the Property is permitted to have live music. Row Boat Willie's is located in a BM (Business-major) zone which permits 'nightclubs' to operate. The Petitioner is competing with 8 other restaurants, including the 'The New White Swan' located at 8821 Millers Island Blvd. and 'The Islander' located at 9008 Cuckold Point Rd., on or near the waterfront and all of them have some type of live music. Mr. Boone was certain that the Restaurant would not be able to survive financially without live music.

While not excluding any specific age of customers, the plan is to hire musical performers who cater to a 50 year-old audience, who want to hear music while enjoying lunch or dinner. The Petitioner does not want to cater to a younger crowd as he anticipated the potential problems that might arise with a younger audience. In the summer months, boaters from all over Baltimore County patronize the Restaurant. The types of musical acts envisioned by the Petitioner would range from solo acoustic or electric guitar players to Frank Sinatra and Oompa bands.

The proposed hours for the musical groups would be Friday and Saturday nights from 6:00 p.m. to 10:00 p.m., with the last call at midnight, in hopes that the customers might leave by 12:30

a.m. On Sundays, in the summer, music would be played outdoors from 5:00 p.m. to 8:30 p.m. Also, there would not be a dance floor or stage area.

The Petitioner is amenable to a decibel level restriction for the sound stemming from the music. However, Mr. Boone has not personally operated any type of device to monitor decibel levels at the Restaurant.

On cross examination, the Petitioner conceded that the Restaurant hours of operation are in fact stated on the website. The hours of operation stated in the website are Monday to Thursday 11:00 a.m. to 11:00 p.m.; Friday and Saturday 11:00 a.m. to 1:00 a.m.; and Sunday from 9:00 a.m. to 8:00 p.m. Mr. Boone then changed his testimony on the time period during which musical acts would perform and indicated that the music would end at Friday and Saturday nights at 11:00 p.m., on Sundays at 7:00 p.m.; and, at dusk for outdoor performances in the summer months which would end as late as 9:00 p.m.

The Petitioner acknowledged that it did not want to be restricted to certain types of music but would entertain other types of music such as jazz quartet bands or Reggae bands. The Petitioner was uncertain about normal sound levels or how the proposed music might be regulated.

In support of the Petitioner's proposed business, several Miller's Island residents testified. Cheryl Gowers of 2812 Bay Drive has lived at that address since 1993. At the previous hearing, Ms. Gowers testified against Mr. Thanner's operation. She was familiar with the problems that resulted from Mr. Thanner's operation of the business which, she said permitted very loud music including heavy metal music and played until midnight or 1:00 a.m. on most weekends. Presently, Ms. Gowers works as a waitress in the Restaurant for the Petitioner. Having worked at both The New White Swan and The Islander, she corroborated that live music is played at those establishments.

Russell McClelland, 9011 Miller's Island Blvd. testified that he lives 400 yds. from the Property. Mr. McClelland was familiar with the complaints from neighbors and the level of sound

coming from Mr. Thanner's restaurant. He described music at Mr. Thanner's restaurant as being played from speakers mounted to a stage outside the Restaurant. The music was amplified over the water and would occur all days of the week until midnight. He recalled that Reggae music was played.

Mr. McClelland is in support of the Petitioner's request here because he believes, like Ms. Gowers, that Mr. Boone will not permit the type of problems associated with Mr. Thanner's operation. Mr. McClelland works for the Petitioner by cutting the grass and policing both the parking lots and boat slips. If this request is granted, he is willing to monitor the sound level.

Charles Boland and Jerri Boland, his wife, 2414 Eugene Avenue, Edgemere, MD live 1 ½ miles from the Restaurant. Mr. Boland is a retired Baltimore County police officer whose son is employed by the Petitioner. Mr. Boland frequents the Restaurant 4-5 times per week and testified that the Petitioner's operation is family-oriented. The Bolands have no objection to live music at the Restaurant.

Dorothy Reilly, 2809 3rd Street, Miller's Island, is located 2 blocks from the Restaurant. Ms. Reilly has observed loud music coming from The White Swann and The Islander. She reiterated that the Petitioner's restaurant is family oriented. She does not like loud music but would like to hear softer music while there.

In the Protestants' case in chief, Charles Wolinski, 9019 Cockhold Point Rd. testified that his home is adjacent to the Restaurant. Mr. Wolinski is a high school biology teacher at Sparrow's Point High School. He can see the Restaurant from his house. He has 4 children, ranging in age from 13 yrs. to 3 yrs. Mr. Wolinski described his family's life through the Thanner years as living through a "nightmare." He specifically described the problems with the loud music both indoor and outdoor which occurred every weekend. Disorderly patrons were loud while the music was playing and, after the music ended, the clapping and screaming was just as bad as the music itself.

These patrons would then spillover into the parking lot and would continue with loud, disruptive behavior.

Because of the loud noises made by patrons and the loud music, he can never open the windows in his home in the summer or winter. All the noise from the music and the patrons could still be heard inside the home; even in the shower with the fan running. This situation disrupted his family's sleep and the enjoyment of their home. Due to the configuration of the Restaurant's door leading to the outside, even the music played indoors by a live band can be heard in his home and it is disruptive. He explained that each time the outside door would open, the music and noise from inside the Restaurant would project outdoors. He further stated that the parking would overflow into the neighborhood streets. He described one incident where a Restaurant patron, who was blocked in by another car on the parking lot, drove across Mr. Wolinski's lawn in order to exit the parking lot. That incident forced Mr. Wolinski to incur the cost of erecting a fence. Mr. Wolinski was clear that Mr. Thanner never controlled the crowds that came with playing music at the Restaurant.

Mr. Wolinski is also familiar with Mr. Boone's operation of the Restaurant and explained that the physical layout of the Restaurant has not changed. He is very concerned that the same problems will reoccur whether the music is played inside or outdoors. Mark Allen is the same performer hired by Mr. Thanner. Mr. Allen's guitar is connected to an amplifier which Mr. Wolinski described as so loud that Mr. Allen was no longer permitted to play at Rowboat Willie's. Mr. Wolinski recalled that Mr. Thanner also hired steel drum bands. In his experience and from personal observation, the music from Rowboat Willie's does not impact him or his family. He indicated that The Islander only has karaoke music inside.

Mr. Wolinski stated that the litigation against Mr. Thanner's operation lasted seven (7) years through the various appeals in the Court system and that he and the other Protestants paid

substantial attorney's fees. Toward that end, he was surprised that the new owner could make the identical request for music when that request was previously denied in the various appeals.

Also testifying for the Protestants was Matthew Ciarpella, 2116 6th Street, Miller's Island where he has resided for 11 years. Mr. Ciarpella experienced first-hand Mr. Thanner's operation of the Restaurant and also endured seven (7) years of litigation. He opposes outdoor music at the Restaurant due the proximity of the Restaurant to his house. As such, even if the proposed music ends at 7:00 p.m., rather than 9:00 p.m., it would still be intrusive. His house, similar to others in the neighborhood is built on elevated foundations such that the sound travels upward. When wind blows from the north over the water, the sound travels. He could hear the music and loud patrons while inside his house with the windows closed. Each time the outside door opened, bursts of sound would travel. This problem occurred even with a 6' privacy fence and a wall of Leland Cypress trees.

Mr. Ciarella is convinced that the type of music will not be limited to acoustic or Reggae. He insists that the Petitioner will not repeatedly hire the same musical acts because, economically, the Restaurant will profit from hiring a variety of bands. Moreover, the more popular the band, the more revenue will be generated. Karaoke would not be a better option because a microphone will still be used. He is familiar with Mark Allen's guitar which is connected to an electric amplifier and/or microphone whether he is playing classic rock, 'oldies music' or Reggae.

Mr. Ciarpella added that when the popular rendition of a song was played, he would hear cheering, clapping and hooting for the music to continue. In contrast, this additional noise from cheering and clapping does not occur when a song is being played on a radio. At The Islander, he said that there is a DJ inside and that he cannot hear that from his house.

Mr. Ciarpella was familiar with the layout of Row Boat Willie's as he was involved with constructing the sound proofing of the pavilion where the live music plays. The pavilion consists

of a 32x30 square shape and is opened on north side. The pavilion also has table seating and an elevated deck.

In his view, the proposal presented here is the same one that was previously rejected by this Board and by the courts. He testified that there will be no regulation of decibel levels. During the Thanner years, the neighbors regulated the music levels by filing complaints with Code Enforcement. What he learned through the Thanner litigation is that there is no regulation of noise levels by Baltimore County; rather any nuisance is complaint driven. This puts a burden on the Protestants to seek enforcement against the Restaurant.

He further testified that along with bands comes the followers which he described as a 'different type of crowd' than would normally be expected with music that accompanies dinner. He also stated that the amount of traffic not only increased with the live music but the followers of those bands did not drive civilly.

Mr. Ciarpella anticipates that, if the Petitioner's request is granted, he and his neighbors will endure more litigation monitoring the Petitioner and again when the Restaurant is subsequently sold. Any live music played at this restaurant will negatively affect his property values.

Brad Metheny, 2704 6th Street, Miller's Island, testified that he too lived through the Thanner era. He recalled that the bands would play on Friday and Saturday nights until 1:30 a.m. He also heard all the music and noise while inside his house with the doors and windows closed, with the air conditioning running and the TV playing. He approximated that his home is located 180' from the Restaurant.

Mr. Metheny described the instant hearing as being the same that he heard when Mr. Thanner and his employees previously testified. Granting this request would open the door to the same problems he endured for the last 7 years. Since outside the Restaurant can accommodate 150 people, if outdoor music is combined with alcohol consumption by patrons and boaters who

dock outside the Restaurant, the situation becomes problematic. He does not want to suffer through the same 'constant battle and disruption.' Indeed, Mr. Metheny's son and his family were living at 2712 6th Street which Mr. Metheny also owns. Due to the noise problems, his son was forced to move with his 4 year old granddaughter to Bel Air.

Mr. Metheny's mother-in-law previously owned The Fisherman's Inn in the 1940s and 1950s. Mr. Metheny recalled that when the Restaurant was The Fisherman's Inn there were outdoor dining tables without any problems.

Following Mr. Metheny's testimony was his wife, Bonnie Metheny as well as a neighbor Wayne Waldmann of 9014 Cuckhold Point Road. Both of those neighbors also opposed any type of music at the Restaurant.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. In short, the Petitioner asks this Board to believe that the same problems will not result if live music is now permitted.

In our decision of June 4, 2008, which decision was affirmed by both the Circuit Court and the Court of Special Appeals, we made many findings of fact. We incorporate that Opinion in its entirety herein. We also refer to the facts and holding as set forth in the Court of Special Appeals Opinion dated July 9, 2010.

Specifically, we previously found that the Restaurant could seat 150-160 patrons inside. Outside of the Restaurant was a patio, two television sets, along with an outside bar, and tables for patrons to use. There were also outside speakers connected to a radio which played music both inside and outside. The Restaurant had 14 boat slips for "transient" boat customers.

The Restaurant opened every day from 11:00 a.m. and closed at 2:00 a.m. In the winter, the Restaurant closed early as customers left. The kitchen closed at 11:00 p.m. but the bar stayed

open until 2:00 a.m. as permitted by the liquor license. The food menu was seafood, steaks and sandwiches. We also found that 70% of sales were from food and 30% were in beverages.

On Friday and Saturday nights, we found that live bands played from 9:00 p.m. to 1:00 a.m. We also found that on Saturday and Sunday afternoons, live music played from 4:00 p.m. to 8:00 p.m. (with the caveat that the music stopped after 8:00 because of the code violation complaints).

The type of music were "mostly duos" or "steel bands." There was no charge for live entertainment and the Restaurant stayed open until 2:00 a.m. when live music was played. We also heard testimony that the Restaurant would close without live music being available. In that case, we also heard the testimony against the live music from Matthew Ciarpella, Charles Wolinski, Brad and Bonnie Metheny and Patricia Waldmann.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not even hear the facts before determining whether the doctrine of *res judicata* applies. *Id* at 995 A.2d 1070. The Court also stated that *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett*, 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

This Board's Opinion of June 4, 2008 meets this test. (1) The Board was acting in a judicial capacity by conducting a hearing on the Petition for Special Hearing, where evidence was presented, and rulings were made on disputed factual and legal issues; (2) The issue of whether music should be permitted at this location was actually litigated; and (3) the Board's Opinion of June 4, 2008 was necessary for a resolution of the issue.

Under *Deleon v. Slear*, 328 Md. 569 (1992), the Court of Appeals made clear that in determining whether claims are the same for the purposes of *res judicata*, the Court has in the past applied "same evidence test." However, the *Deleon* Court acknowledged that the concept of "claim" is broad and that "claim" is defined as a "group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from the narrow concept of a 'cause of action.'" *Id.* at 589. The *Deleon* Court, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), emphasized that the most recent test for determining when two claims or causes of action are the same for purposes of *res judicata* is the "transaction" test as set forth in §24 of the Restatement (Second) of Judgments.

The Court of Appeals in *Bilbrough*, recited the transaction test as follows:

> The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 497-498; *Deleon* at 589.

Specifically, with respect to whether the claims are the same, the *Deleon* Court reviewed the facts to see whether they "are related in time, space, origin or motivation." *Id.* at 591. As applied to the instant case, the same parties, or their privy, are involved here as were involved in the Thanner litigation which led to our June 4, 2008 Opinion. We further find that, the same piece

of property has been involved as well as the same zoning issue with respect to whether a music should be permitted on the Property.

With regard to amending previous restrictions or conditions where an earlier application has been denied by a zoning board, the Court of Appeals in *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1936) appropriately explained that:

> The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions..... This rule seems to rest not strictly on the doctrine of res judicata, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.
>
> * * * *
>
> The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County (3) decreased opposition of neighbors and some support by them; and (4) additional conditions attached to the granting of the permit.

Applying the reasoning of *Whittle* here, we find that there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner on the Petition for Special Hearing or before this Board after a *de novo* hearing. The same neighbors who incurred attorney fees and endured the Thanner era of ownership are still protesting both indoor and outdoor music.

The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that, in order to be successful on this request, the changes needed

under *Whittle* must be more than a change in the Restaurant's ownership or management style of the new owner.

We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that it be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

The County Council has determined that 'nightclubs' can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in the BM zone. In contrast, this restaurant is located in a BL zone which is not permitted to have live music. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101. The facts presented by the Petitioner here have not changed that determination.

We also cite our previous holding in *The Belvedere Baptist Church of Baltimore*, Case No. 15-004-SPH, wherein we declined to approve a request to amend a restriction in a previous ALJ Order. In that case, we applied the doctrine of *res judicata* and found that there was no substantial change in circumstances or facts between the first case and the second case to warrant the requested relief. Specifically, we found that: "there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decision." (Board Opinion, p.8).

In the Board's desire to be consistent in its holdings, we find that the facts of this case fit squarely within the relief requested in the *Belevedere Baptist* case. Here, there has been no change in the Property, the Restaurant, the neighborhood, the neighbors or the zoning that might lead to a different result.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Benfred B. Alston

Jane M. Hanley was on the panel and agreed with the majority opinion. She was not reappointed to the Board and her last day with the Board of Appeals was June 30, 2016.

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

September 15, 2016

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The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Multiple Original Cover Letters

c: Kenneth Boone/Boone Kondylas, LLC
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN RE: **PETITION FOR SPECIAL HEARING** **(9025 Cuckold Point Road)** 15th Election District 7th Council District	*	BEFORE THE
	*	OFFICE OF
	*	ADMINISTRATIVE HEARINGS
Boone Kondylas, LLC *Legal Owner* Petitioner	*	FOR BALTIMORE COUNTY
	*	**Case No. 2016-0003-SPH**

* * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Boone Kondylas, LLC, legal owner. The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

Ken Boone appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioner. Several neighbors, represented by Francis Borgerding, Esq., attended and opposed the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Bureau of Development Plans Review (DPR). Neither agency opposed the request, but suggested certain conditions be imposed if relief is granted.

The subject property is 1.27 acres and zoned B.L. The property is improved with a restaurant known as "Dock of the Bay." The restaurant has new ownership, which proposes to offer limited music and live entertainment as an "accessory" use to the food and beverage service. This property and business have been the subject of protracted litigation concerning loud music and unruly patrons which disturbed the neighborhood. The operation was found by the court of

ORDER RECEIVED FOR FILING
Date 10/22/15
By Den

special appeals to constitute a "nightclub," a use prohibited in the B.L. zone. Protestants contend the petition is barred by *res judicata,* while Petitioner argues that unlike the former operation the current business is first and foremost a restaurant, with music offered to compliment the dining experience.

Under Maryland law, an agency determination affirmed on appeal is entitled to preclusive effect. Esslinger v. Balto. City, 95 Md. App. 607, 621 (1993). This is the case, and *res judicata* will apply, unless there is a significant change in circumstances between the earlier and subsequent action. *See, e.g.*, Alvey v. Hedin, 243 Md. 334, 340 (1966). In light of this authority I believe the doctrine of *res judicata* mandates that the petition in this case be dismissed.

As an initial matter, I do not believe the OAH has the authority to "amend" restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the board of appeals, circuit court and then the court of special appeals. In an unreported opinion (No. 810, September Term, 2009) the appellate court affirmed the agency findings, which necessarily included the conditions and restrictions found in those orders. To amend those restrictions at this juncture would be akin to reversing the appellate court, which an administrative agency cannot do.

I believe the Petition must also be denied based on *res judicata.* As discussed above, *res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard. For example, if the owner of the subject property was now proposing to operate a barbershop or beauty salon at the site, that would constitute a significant change and *res judicata* would not apply. But here, I do not believe there

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By

have been significant changes; Petitioner is still proposing to operate a restaurant that would offer live and/or recorded music.

The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010).

THEREFORE, IT IS ORDERED this 22nd day of October, 2015 by this Administrative Law Judge, that the Petition for Special Hearing pursuant to B.C.Z.R. § 500.7 to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music, be and is hereby DENIED.

Any appeal of this decision must be filed within thirty (30) days of the date of this Order.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln

ORDER RECEIVED FOR FILING
Date 10/22/15
By sln

CBCA

F100D

PETITION FOR ZONING HEARING(S)

To be filed with the Department of Permits, Approvals and Inspections

To the Office of Administrative Law of Baltimore County for the property located at:

address 9025 Cuckold Point Road **which is presently zoned** BL

Deed Reference 35488/00133 10 Digit Tax Account # 1 5 0 8 7 9 0 1 1 0

Property Owner(s) Printed Name(s) Boone Kondylas, LLC

CASE NUMBER 2016-0003-SPH **Filing Date** 7/6/15 **Estimated Posting Date** __/__/_____ **Reviewer** BD

(SELECT THE HEARING(S) BY MARKING X AT THE APPROPRIATE SELECTION AND PRINT OR TYPE THE PETITION REQUEST)

The undersigned legal owner(s) of the property situate in Baltimore County and which is described in the description and plan attached hereto and made a part hereof, hereby petition for:

1. ✓ **a Special Hearing** under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

Please see attached.

2. ____ **a Special Exception** under the Zoning Regulations of Baltimore County to use the herein described property for

3. ____ **a Variance** from Section(s)

of the zoning regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons: **(Indicate below your hardship or practical difficulty or indicate below "To Be Presented At Hearing". If you need additional space, you may add an attachment to this petition)**

TO BE PRESENTED AT HEARING

Property is to be posted and advertised as prescribed by the zoning regulations.
I, or we, agree to pay expenses of above petition(s), advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.
Legal Owner(s) Affirmation: I / we do so solemnly declare and affirm, under the penalties of perjury, that I / We are the legal owner(s) of the property which is the subject of this / these Petition(s).

ORDER RECEIVED FOR FILING
Date 10/22/15
By BD

Contract Purchaser/Lessee:

Name- Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

Legal Owners:

Boone Kondylas, LLC
Ken Boone

Name #1 – Type or Print Name #2 – Type or Print

Signature #1 Signature # 2

9025 Cuckold Point Road, Sparrows Point, MD

Mailing Address City State

21219 kboone@tidalwaterdirect.com

Zip Code Telephone # Email Address

Attorney for Petitioner:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name- Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

Representative to be contacted:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name – Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

REV. 2/23/11

ATTACHMENT TO PETITION FOR ZONING HEARING

9025 Cuckold Point Road
15th Election District
7th Councilmanic District

Special Hearing:

1. To amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music; and

2. For such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Item #0003

CENTURY ENGINEERING

10710 Gilroy Road
Hunt Valley, MD 21031

Zoning Description for
9025 Cuckold Point Road*

Beginning at a point on the southeast side of Cuckold Point Road which is 30 feet wide, at the distance of fifteen feet southwest of the centerline of Fifth Street which is 30 feet wide. Being Lots 500 through 505 in the subdivision of Swan Point as recorded in Plat Book L.McL.M. # 9, Folio #5. Containing 1.031 acres of land, more or less. Also known as 9025 Cuckold Point Road and located in the 15th Election District and the 7th Councilmanic District.

STATE OF MARYLAND
BRYAN JASON HAYNIE
No. 21139
PROFESSIONAL LAND SURVEYOR

W:\file\login2\ld\ld06\descriptions\9025 Cuckold Point Road-08-17-06
* Legal Description from Case No. 07-144-SPH

IN 144

Item # 0003

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET AND FINANCE
MISCELLANEOUS CASH RECEIPT

No. 127362

Date: 7/6/15

Fund	Dept	Unit	Sub Unit	Rev Source/ Obj	Sub Rev/ Sub Obj	Dept Obj	BS Acct	Amount
001	806	0000		6150				500 00

Total: 500 00

Rec From:

For: Zoning hearing - case # 2016-0003-SPH

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER GOLD - ACCOUNTING
PLEASE PRESS HARD!!!!

PAID RECEIPT
BUSINESS ACTUAL TIME DRN
7/06/2015 7/06/2015 11:19:28 5
REG WS05 WALKIN RB05 LR0
>>RECEIPT # 802508 7/06/2015 OFLN
Dept 5 520 ZONING VERIFICATION
CR NO. 127362
Recpt Tot $500.00
$500.00 CK $.00 CA
Baltimore County, Maryland

CASHIER'S VALIDATION

Circuit Court for Baltimore City
Case No.: 03-C-16-010551

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 638

September Term, 2017

IN THE MATTER OF BOONE KONDYLAS, LLC

Meredith,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 9, 2018

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Boone Kondylas, LLC ("Boone"), appellee, filed a zoning petition for special hearing in the Baltimore County Office of Administrative Hearings ("OAH"), seeking an amendment to, or rescission of, restrictions previously placed on Boone's waterfront property ("the property"), to permit the use of the property as a restaurant with limited accessory music and entertainment. Following the special hearing, an OAH administrative law judge ("ALJ") denied Boone's zoning petition on the ground that it was barred by *res judicata,* as a result of this Court's 2010 unreported opinion in *Fifth Street, LLC, et al. v. Matthew Ciarpella, et al.*, No. 810, September Term, 2009 (filed July 9, 2010) ("*DOB I*"), wherein we held that the operation by the previous owner comprised a use as both a restaurant and a nightclub, and that use as a nightclub was prohibited by the applicable zoning regulations.

Boone appealed the ALJ's decision to the Board of Appeals of Baltimore County ("Board"), which also denied Boone's petition as barred by *res judicata*. Boone petitioned for judicial review, and the Circuit Court for Baltimore County remanded the matter to the Board for a determination of whether the subject property, under Boone's ownership, currently meets the definition of a nightclub, in light of the factors cited in our opinion in *DOB I.*

Appellants, Charles Wolinski, *et al.* ("Wolinski")—residential neighbors of the property—and People's Counsel of Baltimore County ("People's Counsel"), appealed the decision of the circuit court.

The questions presented, as set forth in Wolinski's brief, are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition?

2. As a matter of law, should the Opinion of the County Board of Appeals in this matter dated September 15, 2016 have been affirmed by the Circuit Court for Baltimore County?

3. Does an administrative agency or on appeal a reviewing Court have the authority to amend the zoning restriction previously granted by the Court of Special Appeals?

The questions as presented by People's Counsel are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition, which alleges essentially a cosmetic change in management style or operation?

2. Is the County Board of Appeals' opinion correct and at least legally sufficient based on the deferential, contextual and interpretive scope of judicial review?

3. Does the Circuit Court remand misapply *res judicata*; exceed the prudential scope of judicial review, fail to exercise judicial self-restraint, and both disrespect and undermine the administrative function[?]

For the reasons that follow, we shall dismiss appellants' appeal as premature.

FACTS AND LEGAL PROCEEDINGS

The waterfront property at the center of the controversy in this matter is located on Cuckold Point Road on Miller's Island in Baltimore County. The 1.27 acre property is improved by a restaurant/bar called Dock of the Bay ("DOB").[1]

In October 2003, shortly after it suffered extensive damage from Hurricane Isabel, Fifth Street, LLC ("FSLLC"), purchased DOB.[2] After a lengthy rebuilding period, FSLLC

[1] A restaurant, under various names and owners, has operated on the property since the 1950s.

[2] For the background of DOB before Boone purchased it, we rely primarily on the factual recitation set forth in *DOB I*.

reopened DOB in March 2004. It was licensed as a restaurant with a capacity of approximately 150-160 patrons and held a Class D liquor license. On an outdoor patio, there was more seating and a bar, along with a children's play area. DOB had an in-house music system to play satellite radio inside and outside, and it offered live entertainment by disc jockeys, bands and karaoke performers.

In 2006, residential neighbors of DOB complained to the Baltimore County Department of Permits and Development Management that the live music was too loud and disruptive and that DOB was operating as a nightclub, which was not permitted in the applicable business zone.[3] DOB was cited three times for: operating a nightclub in a B.L.

[3] DOB is located in a B.L. (Business Local) business zone. Baltimore County Zoning Regulation ("BCZR") §230.1, permits the operation of a "standard restaurant" and a "tavern" in a B.L. zone but does not permit a "nightclub," even by special exception. BCZR §230.3.

BCZR §101.1 defines "standard restaurant" as:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

The same code section defines a "tavern" as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." Finally, "nightclub" is defined by the Code section as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County."

(continued . . .)

zone; erecting a tent without a permit and; failing to cease nightclub operations and to remove the tent.

In August 2006, FSLLC filed a petition for special hearing, seeking a determination of whether DOB was a nightclub in violation of BCZR.[4] The zoning commissioner determined that DOB was a nightclub under BCZR and the International Building Code and ordered DOB to discontinue the playing of music by way of speaker system. On appeal, a majority of the members of the Board affirmed that determination.[5] Upon judicial review, the Circuit Court for Baltimore County also affirmed the determination. In an unreported opinion by a panel of this Court in *DOB I*, we affirmed the circuit court's judgment, concluding that the transcript and record provided substantial evidence to support the Board's finding that DOB was operating as a nightclub. In reaching that

(. . . continued)

The International Building Code, which was adopted as the Building Code of Baltimore County, sets forth advisory characteristics in determining whether an establishment may be characterized as, *e.g.,* a nightclub, dance hall, banquet hall, or cabaret, to include some or all of the following: low lighting levels; entertainment by a live band or recorded music generating above-normal sound levels; no theatrical stage accessories; later than average operating hours; tables and seating arranged or positioned so as to create ill-defined aisles; a specific area designed for dancing; services facilities for alcoholic beverages and food; and high occupant load density.

[4] A "request for special hearing is, in legal effect, a request for a declaratory judgment." *Antwerpen v. Baltimore County*, 163 Md. App. 194, 209 (2005).

[5] One board member dissented, finding that DOB was a restaurant offering some musical entertainment on the side.

conclusion, we analyzed DOB's operation, using the criteria (for determining whether premises are being used as a nightclub) set forth in the International Building Code.

In 2010, Baltimore County filed a petition for contempt alleging that FSLLC continued to operate DOB in violation of the Board's order. At a hearing on the matter, FSLLC argued that DOB was no longer operating as a nightclub because it was not playing music outside the restaurant.

The circuit court, citing the Board's ruling that "the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR," found FSLLC in violation of the Board's order for "continuing to play live and/or recorded entertainment on the premises." The court found FSLLC to be in contempt of court and ordered that FSLLC permanently dismantle any outdoor speaker system at DOB and refrain from allowing "any live band, Disc Jockey, karaoke or any other form of live or recorded entertainment to perform at the Site" for a period of one year beginning November 10, 2010.

DOB closed in 2012. In 2014, Boone purchased the property from FSLLC and reopened DOB. In 2015, Boone filed a petition for special hearing to "amend previous restrictions imposed . . . so as to permit future use of the property as a restaurant with limited accessory music." Before the ALJ, Boone argued that, unlike FSLLC's use of DOB as a nightclub, its business was first and foremost a restaurant, with music to be offered only as a complement to the dining experience.

In his October 22, 2015 written opinion and order, the ALJ concluded that FSLLC's zoning violation and special hearing case had been appealed to the Board, the circuit court, and this Court, all of which had affirmed the agency's finding that DOB was a nightclub, subject to the conditions and restrictions contained in the agency's order. Therefore, the ALJ concluded, "*res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard." In the absence of any evidence of such significant changes by Boone, the ALJ continued, the ruling that DOB was both a restaurant and a nightclub must stand. Boone's petition was therefore denied.

Boone appealed the ALJ's decision to the Board on November 13, 2015. The Board heard argument on the matter on February 17 and April 28, 2016.

At the start of the hearing, People's Counsel argued that the doctrine of *res judicata* permitted the Board to dispose of the matter on a motion to dismiss. Counsel for DOB's residential neighbors agreed and added that amending the zoning restrictions would require a reversal of this Court's 2010 unreported decision, which the Board was not permitted to do. Boone claimed that there had been some significant changes since 2010 that should cause this Board to come to a different conclusion.

Boone's attorney, although acknowledging that FSLLC had operated a nightclub with loud rock music, which was not permitted in the pertinent B.L. zone, argued that Boone was not operating a nightclub, but a restaurant with the occasional "single acoustic guitar player" providing music. With regard to the *res judicata* argument, counsel averred

that *res judicata* did not apply because there had been a significant change in the facts of the case since *DOB I* was decided.

The Board reserved ruling on the *res judicata* issue and heard testimony.

Kenneth Boone ("Mr. Boone") the sole managing member of Boone Kondylas, LLC,[6] testified that DOB is licensed to operate as a restaurant and maintains a Class D liquor license, which Boone purchased from FSLLC. The restaurant averages 80% food / 20% alcohol sales.

Since Mr. Boone's purchase of DOB, his corporation has expanded the restaurant's kitchen to permit the outdoor steaming of crabs and removed the outdoor stage and tent that FSLLC had erected. Indoors, he said, DOB has seating for approximately 125 patrons at dining room tables and the bar, and there is outdoor seating for approximately 100 additional patrons. DOB has no dance floor or stage, and Mr. Boone has no plans to create either one.

DOB is presently open seven days a week, with posted hours of 11:00 a.m. to midnight, but the restaurant generally closes between 9:00 and 10:00 p.m. during winter months when business is slow. The average patron is between 40 and 70 years of age.

Other than a DJ on New Year's Eve 2014, Mr. Boone testified that he had hesitated to book live performers, as he was initially unfamiliar with what the applicable zoning code permitted. His hesitation appears to have been well founded because in 2015, when Mr.

[6] Mike and Donna Kondylas, the "Kondylas" of "Boone Kondylas, LLC" were no longer in partnership with Mr. Boone by the time of the hearing.

Boone scheduled an acoustic guitarist to play on a Saturday night, the neighbors complained about the potential for noise and disruption, and a zoning official threatened to pull DOB's liquor license if the musician played. Mr. Boone cancelled the guitarist, as well as scheduled performances by a Frank Sinatra cover singer and an "oompah" band for Oktoberfest, and he had not scheduled any live music since then.

Boone's petition centered on his desire to "cater to the demographic" and book soloists to play at DOB. Mr. Boone said he was willing to "live within sound restrictions on outside music [and] time restrictions of both indoor and outdoor music" in anticipation of offering live music outdoors on Friday and Saturday nights from 6:00 until 10:00 p.m. (with last call for alcohol at midnight) and on Sunday afternoons from 5:00 until 8:30 p.m.

Several neighborhood residents testified on Boone's behalf, stating that when FSLLC owned DOB, it hired "[v]ery loud, heavy metal" full-sized bands, which played until midnight or 1:00 a.m. on weekends. In contrast, DOB under Boone's ownership has a family atmosphere with an older demographic. The supporters advocated giving Boone a chance to have live music at DOB.

Charles Wolinski, whose house is approximately 200 feet from DOB, testified that he had fought with FSLLC for seven years over the loud music and the disorderly patrons in the parking lot. In his opinion, everything at DOB now that Boone owns it is "exactly the same" as when FSLLC owned it (other than the playing of live music), and the addition of live music would return the establishment to the level of disruption it had created during FSLLC's ownership.

In the opinion of Matthew Ciarpella, who was also a neighborhood protestant in the FSLLC litigation, the playing of any outdoor music at DOB would re-introduce the same noise problems that had been previously litigated. Other neighbors who had heard the loud music played when FSLLC owned DOB also protested the reinstatement of live music outside the restaurant.

The Board issued its written opinion on September 15, 2016. Therein, the Board noted that as the parties, or their privy, and the property had been involved in the previous litigation regarding the same zoning issue of whether live music should be permitted at the DOB, which led to the Board's 2008 opinion, the only manner in which the Board could act upon the new application for special permit previously denied would be if there had been a substantial change in the facts from those previously litigated. The Board found that the restaurant operations and layout and Boone's proposal for live music were substantially the same as when FSLLC owned the premises and litigated the matter. In the Board's view, a change in the restaurant's ownership or management style did not amount to a substantial change. Having previously determined that DOB comprised a nightclub not permitted in a B.L. zone, and having currently determined that no substantial change to the property existed that would support re-litigation of the issue, the Board denied Boone's petition to amend the previous restrictions imposed upon DOB.

Boone filed a petition for judicial review in the circuit court on October 17, 2016. The court heard argument on the petition on June 1, 2017.

Boone initially argued that the Board, in denying his petition on *res judicata* grounds, never decided the merits of the matter, that is, whether DOB can play live music and, if so, under what circumstances. Counsel for Boone said "whether the zoning is the same, the building is the same, the neighbors are the same, that doesn't matter. The Board of Appeals focused on the wrong inquiry" and "got this wrong" in failing to make a determination of the "ultimate issue." Counsel for Boone requested that the court reverse on the *res judicata* issue and remand to the Board for a determination of whether music should be allowed at DOB as an accessory use to the restaurant service and under what circumstances.[7] In the alternative, Boone argued that the court should find that the operative facts had changed since the time of FSLLC's ownership such that *res judicata* should not apply as a bar to the present litigation.

The circuit court observed that the Board had determined that the prior owner played music that was "loud and [performed by] rock bands and the neighbors didn't like it, therefore nobody can do anything different, because it might [move us] back into what the Dock of the Bay was under" the prior owner. The judge went on to say that the panel of this Court, in its *DOB I* decision was "very factually oriented" when it upheld the Board's determination that DOB was a nightclub while owned by FSLLC. In the circuit court's

[7] As the court pointed out, the applicable zoning regulations prohibit a nightclub from operating in a B.L. zone but does not prohibit music from being played. The Board appeared to use "live music" and "nightclub" interchangeably in its ruling.

view, for *res judicata* to apply, "the same analysis has to be done to see and determine whether the proposed use with the current owner would constitute a nightclub." In the court's words, "[i]f the facts were the same, then maybe *res judicata* would apply at this time . . ., but the analysis just was not done in this case."

Although the Board had found no substantial change in the facts as previously litigated, the circuit court observed that the Board did not perform an adequate analysis of the relevant criteria to determine whether DOB is currently a nightclub. Determining that that analysis should be done, the circuit court remanded the matter to the Board for a determination under the facts of this case as to "whether the proposed use would constitute a nightclub under the analysis used by the Court of Special Appeals in that prior case."

The circuit court issued its written order on June 2, 2017. The order remanded the matter to the Board "for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a 'nightclub' as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC)."[8]

[8] *See* footnote 3, *supra*, for the International Business Code criteria.

DISCUSSION

Although not raised by any party, before we may consider appellants' arguments, we must ensure that the appeal has been taken either from a final judgment or from an appealable interlocutory ruling. We shall hold that this appeal is premature.

Pursuant to Maryland Code (2013 Repl. Vol., 2017 Supp.) §12-301 of the Courts and Judicial Proceedings Article ("CJP"), a party may appeal from a final judgment in a civil case. The Court of Appeals has consistently stated that "a judgment or order of a court is final when it determines or concludes the rights of parties or when it denies the parties means of further prosecuting or defending their rights and interests in the subject matter of the proceeding." *Schultz v. Pritts*, 291 Md. 1, 5–6 (1981). We will dismiss an appeal if it is not taken from a final judgment entered in a civil case by a circuit court, or if a non-final judgment does not fit within the statutory exceptions or the collateral order doctrine. *Foy v. Baltimore City Det. Ctr.*, 235 Md. App. 37, 47 (2017), *cert. granted*, 457 Md. 660 (2018).

In general, where, as here, a circuit court orders a remand of the proceeding to an administrative agency, that is an appealable final order because when "a court remands a proceeding to an administrative agency, the matter reverts to the processes of the agency, and there is nothing further for the court to do. Such an order is an appealable final order because it terminates the judicial proceeding and denies the parties means of further prosecuting or defending their rights in the judicial proceeding." *Schultz*, 291 Md. at. 6 (citing *Fred W. Allnutt, Inc. v. Commissioner of Labor and Industry*, 289 Md. 35, 40

(1980)). Nevertheless, a circuit court's remand order in a judicial review action is not always an appealable final judgment. Although a remand after the circuit court has conducted a judicial review of the sole question raised in the administrative action, thereby precluding the parties from further contesting the validity of the agency's decision on the merits of the case, is an appealable final judgment, "a remand that precedes any judicial review is not a final judgment[.]" *Metro Maint. Sys. South, Inc. v. Milburn*, 442 Md. 289, 305, 310 (2015). As we suggested in *Foy*, *supra*, the "lack [of] any discernable conclusions of law or findings of fact" and the circuit court's apparent inability to assess the merits of the Board's decision may render the remand order a non-final judgment. 235 Md. App. at 52-53.

The sole issue before the circuit court in this matter was whether the Board was correct in denying Boone's petition on the ground of *res judicata*, based on the Board's determination that DOB was a nightclub when owned by FSLLC. The circuit court declared itself unable to make a finding on that sole claim because the Board had not determined whether DOB is currently a nightclub, pursuant to the International Business Code factors that were discussed in detail in *DOB I.*

The circuit court did not find any error of law on the part of the Board, nor did it affirm or reverse the Board's decision or decide or conclude the matter in dispute. In other words, the circuit court did not conduct judicial review. As in *Milburn*, the remand was to precede the circuit court's determination of whether there was substantial evidence in the record to support the Board's ruling and whether or not to affirm. 442 Md. at 308. In other

words, although the court did not specifically so state in its order, it deferred its ruling pending the remand, and the matter "contemplates that judicial review awaits the return of the case following the remand." *Id.* at 309. Specifically, once the Board has an opportunity to apply the International Business Code factors to the facts of this case, the circuit court will then determine whether *res judicata* would apply to support the denial of DOB's petition on that basis.

As noted in *Milburn*, 442 Md. at 309, although the parties "have, in a sense, been 'put out of court'. . . there is a strong potential, bordering on certainty, that the issue at hand—the viability of . . . an administrative decision—will be back for determination by the circuit court." The remand order in the subject case does not prevent the parties from continuing to defend or challenge the Board's decision following the remand; once the Board reconsiders its decision, the parties may continue to challenge or defend the Board's decision. All this was made clear in *Milburn*, where the Court said:

> It is true that, on remand, the Board of Appeals retains discretion to reconsider its decision. Finality, however, is not determined by considering what additional proceedings may occur before the agency, but what further proceedings, if any, will occur in the circuit court. *See Brewster* [*v. Woodhaven Bldg. & Dev., Inc.*, 360 Md. 602 (2000)] (proceedings before another forum are irrelevant to finality). Thus, the breadth of the additional proceedings at the agency level do not convert the remand order here into a final, appealable judgment.
>
> After the remand, the parties will have the opportunity to litigate their positions in the circuit court and pursue appellate review of those issues, including any contention that the remand was unlawful or an abuse of discretion. It may be, of course, that the lawfulness of the remand will no longer be at issue and that other issues concerning the validity of the Board's decisions will have become moot as a result of any modifications that the Board makes. In that respect, our holding that a remand that precedes any

> judicial review is not a final judgment is consistent with the purpose of the final judgment rule—to promote judicial efficiency by limiting piecemeal appeals.

Id. at 310-11 (footnotes omitted).

APPEAL DISMISSED; COSTS TO BE PAID BY APPELLANTS.

16-003-SPH

IN THE MATTER OF BOONE KONDYLAS, LLC Petitioner	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-16-010551

* *

ORDER

This matter came before the Court for a hearing on the *Petition for Judicial Review* of the opinion of the Board of Appeals for Baltimore County dated September 15, 206, filed by Petitioner, Boone Kondylas. Upon consideration of the Petitioner's *Memorandum in Support of Petition for Judicial Review*, the *Memorandum of People's Counsel for Baltimore County*, the *Memorandum in Opposition to Petition for Judicial Review* filed by the Protestants, and arguments of counsel, for the reasons stated on the record in open court, it is this 2nd day of June, 2017, by the Circuit Court for Baltimore County, hereby

ORDERED, that this matter is Remanded to the Board of Appeals for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Clarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC).

RECEIVED
JUN 08 2017
BALTIMORE COUNTY
BOARD OF APPEALS

H. Patrick Stringer, Judge

12/15/16
TO WP

RECEIVED
DEC 14 2016
DEPARTMENT OF PERMITS
APPROVALS AND INSPECTIONS

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

December 14, 2016

VIA HAND-DELIVERY
Civil Clerk
Circuit Court for Baltimore County
401 Bosley Avenue
Towson, Maryland 21204

RE: In the matter of: Boone Kondylas, LLC
Civil Action No.: 03-C-16-010551
Board of Appeals Case No.: 16-003-SPH

Dear Clerk:

Enclosed for filing please find the Proceedings before the Administrative Law Judge and the Board of Appeals for Baltimore County. Additionally, please allow this letter to reflect the filing of one accordion folder containing the entire Board of Appeals case file, exhibits, and transcript pursuant to Maryland Rule 7-206.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Enclosures

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY	*	
PETITION OF: BOONE KONDYLAS, LLC	*	
FOR JUDICIAL REVIEW OF THE OPINION OF THE BOARD OF APPEALS OF BALTIMORE COUNTY JEFFERSON BUILDING – ROOM 203 105 W. CHESAPEAKE AVENUE TOWSON, MARYLAND 21204	*	CIVIL ACTION NO. : 03-C-16-010551
IN THE MATTER OF: BOONE KONDYLAS, LLC FOR PROPERTY LOCATED AT 9025 CUCKOLD POINT ROAD	*	
15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	
BOARD OF APPEALS CASE NO.: 16-003-SPH		

* * * * * * * * * * * *

PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes the Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the original papers on file in the Department of Permits, Approvals and Inspections and the Board of Appeals of Baltimore County:

ENTRIES FROM THE DOCKET OF THE BOARD OF APPEALS AND DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS OF BALTIMORE COUNTY

July 6, 2015	Petition for Special Hearing filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC under Section 500.7 of the Baltimore County Zoning Regulations to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

February 17, 2016 Board convened for a Hearing, Day 1.

Exhibits submitted at Motion Hearing before the Board of Appeals:

Protestants' Exhibit No.

1 – Opinion and Order of OAH (Case No. 2016-0003-SPH) dated October 22, 2015

2 – Unreported Opinion of Court of Special Appeals No. 810, Sept. Term 2009, filed July 9, 2010

People's Counsel Exhibit No.

1 – Compilation of BCZR, Opinion of OAH (Case No. 2016-0003-SPH), Trial Memorandum from Appellant (Case No. 2016-0003-SPH), definition of anticipate, Unreported Court of Special Appeals of Maryland (No. 810 Sept. Term 2009, filed July 9, 2010), Majority Opinion of Baltimore County Board of Appeals (Case Nos. CBA-06-044 and CBA-07-134)

2 – Zoning Checklist/PAI

February 19, 2016 E-mails between Board and counsel regarding scheduling and witnesses.

March 8, 2016 Notice of Reassignment issued by the Board.

April 28, 2016 Board convened for a Hearing, Day 2.

Exhibits submitted at Hearings before the Board of Appeals:

Petitioner's Exhibit No.

1 – Site Plan

2A – Majority Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2B – Dissenting Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2C – Ruling on Motion for Reconsideration and Clarification (Case Nos. 07-144-SPH, CBA-06-044, and CBA-07-134)

3 – Circuit Court Opinion, Final Order, Case No. 03-C-08-009996

4 – Unreported Opinion, Court of Special Appeals, No. 810, Sept. Term, 2009, Filed July 9, 2010

5 – Memorandum Opinion (Exhibit) Contempt-Circuit Court for Baltimore County, Case No. 03-C-08-009996

6 – My Neighborhood Map/aerial photograph of "Dock of the Bay"

10 – Letter dated June 9, 2008, letter measured decibel levels emanating from the Dock of the Bay
11 – Letter dated October 3, 2007 measuring the decibel levels from Dock of the Bay
12 – Photograph of Row Boat Willie's building
13 – Large map of aerial view of Dock of the Bay and area, 2016 Google Imaging
14 – My Neighborhood Map printed 4/27/2016, aerial view of Dock of the Bay and area
15 – 2015 Alcoholic Beverage License for Dock of the Bay
16 – Baltimore County Police Records, Sgt. Parrish
17 – Summary of Calls from Exhibit 16
18 – Facebook posts for Dock of the Bay 2/17/16 Boone Letter
19 – Facebook posts for Dock of the Bay 2/21/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
20 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
21 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
22 – Facebook post from Dock of the Bay 2/22/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
23 – Facebook posts from Dock of the Bay (ID ONLY/NOT ADMITTED/NOT IN FILE)

People's Counsel Exhibit No.

1 – Website photo showing hours of operation
2A – SDAT record showing 9025 Cuckold Point Road, Lot 504
2B – SDAT record showing Cuckold Point Road, Lot 500
2C – SDAT record showing Cuckold Point Road, Lot 502
2D – SDAT record showing Cuckold Point Road, Lot 501
3 – Deed to 9025 Cuckold Point Road dated September 30, 2014
4 – Deed to 9025 Cuckold Point Road dated March 10, 1999
5 – People's Counsel Sign-In Sheet, 2/17/16
6 – People's Counsel Sign-In Sheet, 4/28/16
7 – Map – Property ID and Zoning, 2014 image
8A – Map
8B – Map (color)
8C – Map
9 – Comprehensive Zoning Map
10 – Website page for Mark Alan date 4/26/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
11A – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.

Tammy A. McDiarmid

Tammy A. McDiarmid, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

12/15/16
to WCR

RECEIVED
DEC 9 2016
DEPARTMENT OF PERMITS
APPROVALS AND INSPECTIONS

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
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410-887-3180
FAX: 410-887-3182

December 9, 2016

Edward J. Gilliss, Esquire
Royston, Mueller, McLean & Reid, LLP
The Royston Building
102 West Pennsylvania Avenue, Suite 600
Towson, Maryland 21204-4575

RE: In the Matter of: *Community Enterprise, Inc. – Legal Owner*
Case No.: 16-328-SPHA

Dear Mr. Gilliss:

Enclosed please find a copy of the Order of Dismissal issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Sunny Cannington tam

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure

c: Paul Redding, President/Community Enterprise, Inc.
Thomas J. Hoff
Gloria Kelly
Mike Pierce
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF COMMUNITY ENTERPRISE, INC. - LEGAL OWNER AND PETITIONER FOR SPECIAL HEARING AND VARIANCE ON THE PROPERTY LOCATED AT 4217 FITCH AVENUE	*	BEFORE THE BOARD OF APPEALS OF
14TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT	*	BALTIMORE COUNTY CASE NO. 16-328-SPHA

* * * * * * * * * * *

ORDER OF DISMISSAL

This matter comes to the Board of Appeals by way of an appeal filed by Edward J. Gilliss, Esquire on behalf of Community Enterprise, Inc., Legal Owner/Petitioner, from a final decision of the Administrative Law Judge dated August 24, 2016, in which the requested variance relief was denied, and Amended Opinion and Order of the Administrative Law Judge dated September 9, 2016 wherein the requested variance relief was denied and the requested special hearing relief was dismissed as moot.

WHEREAS, the Board is in receipt of a Motion to Dismiss filed on December 1, 2016 by Edward J. Gilliss, Esquire on behalf of Community Enterprise, Inc. requesting that the appeal in this matter be dismissed as of December 1, 2016; and

WHEREAS, the Board is in receipt of People's Counsel for Baltimore County's Response to the Motion to Dismiss, filed December 2, 2016 wherein People's Counsel does not oppose the dismissal of this matter.

IT IS ORDERED this 9th day of December, 2016 by the Board of Appeals of Baltimore County that the appeal taken in Case No. 16-328-SPHA be and the same is hereby **DISMISSED with prejudice.**

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Chairman

12/15/16
TO COCA

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

RECEIVED
DEC 9 2016
DEPARTMENT OF PERMITS
APPROVALS AND INSPECTIONS

December 9, 2016

David H. Karceski, Esquire
Adam M. Rosenblatt, Esquire
Venable, LLP
210 W. Pennsylvania Avenue, Suite 500
Towson, Maryland 21286

RE: In the Matter of: *John and Bernadette Hoffman – Legal Owners*
A & I Realty, LLLP – Petitioner
Case No.: 16-062-SPHA

Dear Counsel:

Enclosed please find a copy of the Order of Dismissal issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Sunny Cannington tam

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure

c: Bernadette Hoffman
A & I Realty, LLLP/Jacob M. Antwerpen, Managing Partner
Klaus Philipsen, President/Westerlee Inc.
Westerlee Community, Inc. c/o Nayna Philipsen, Esquire/Resident Agent
Ann Uebel
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF JOHN AND BERNADETTE HOFFMAN-LEGAL OWNERS AND A & I REALTY, LLLP – PETITIONER FOR SPECIAL HEARING AND VARIANCE ON THE PROPERTY LOCATED AT 1936 POWERS LANE	*	BEFORE THE BOARD OF APPEALS OF
1ST ELECTION DISTRICT 1ST COUNCILMANIC DISTRICT	*	BALTIMORE COUNTY
	*	CASE NO. 16-062-SPHA

* * * * * * * * * * * * *

ORDER OF DISMISSAL

This matter comes to the Board of Appeals by way of an appeal filed by Adam Rosenblatt, Esquire and David Karceski, Esquire of Venable, LLP on behalf of A & I Realty, LLLP, Contract Purchasers/Petitioners and Appellants, from a final decision of the Administrative Law Judge dated November 20, 2015, in which the requested Special Hearing relief was DENIED and the requested Variance relief was DENIED AS MOOT.

WHEREAS, the Board is in receipt of a Notice of Dismissal filed on December 1, 2016 by Adam Rosenblatt, Esquire and David Karceski, Esquire of of Venable, LLP on behalf of A & I Realty, LLLP, Contract Purchasers/Petitioners and Appellants requesting that his matter be dismissed without prejudice (a copy of which is attached hereto and made a part hereof); and

THEREFORE, IT IS ORDERED this 9th day of December, 2016 by the Board of Appeals of Baltimore County that the appeal taken in Case No. 16-062-SPHA be and the same is hereby **DISMISSED without prejudice.**

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Chairman

IN RE: PETITIONS FOR SPECIAL HEARING AND VARIANCE	*	**BEFORE THE**
	*	**BOARD OF APPEALS**
(1936 Powers Lane)	*	**OF BALTIMORE COUNTY**
1st Election District **1st Council District**	*	
John A. & Bernadette S. Hoffman, ***Owners***	*	**Case No. 2016-0062-SPHA**
	*	
A & I Realty, LLLP ***Contract Purchaser/Petitioner***	*	
	*	

* *

NOTICE OF DISMISSAL

Pursuant to Rule 3(b) of the Rules of Practice and Procedure of the Baltimore County Board of Appeals, Contract Purchaser/Petitioner A & I Realty, LLLP respectfully dismisses the above-captioned appeal without prejudice.

Respectfully submitted,

David H. Karceski
Adam M. Rosenblatt
Venable LLP
210 W. Pennsylvania Ave., Suite 500
Towson, Maryland 21204
(410) 494-6200
Attorneys for Petitioner/Appellant

RECEIVED
DEC 1 2016
BALTIMORE COUNTY
BOARD OF APPEALS

CASE NO. 2016-0003-SPH

CHECKLIST

Comment Received	Department	Support/Oppose/ Conditions/ Comments/ No Comment
7/17/15	DEVELOPMENT PLANS REVIEW (if not received, date e-mail sent _____)	C
_____	DEPS (if not received, date e-mail sent _____)	_____
_____	FIRE DEPARTMENT	_____
8/4/15	PLANNING (if not received, date e-mail sent _____)	C
7/14/15	STATE HIGHWAY ADMINISTRATION	no Obj
_____	TRAFFIC ENGINEERING	_____
_____	COMMUNITY ASSOCIATION	_____
_____	ADJACENT PROPERTY OWNERS	_____

ZONING VIOLATION (Case No. _____)

PRIOR ZONING (Case No. 2007-0144-SPH)

NEWSPAPER ADVERTISEMENT Date: 9/8/15

SIGN POSTING Date: 9/6/15 by O'Keefe

PEOPLE'S COUNSEL APPEARANCE Yes ☑ No ☐

PEOPLE'S COUNSEL COMMENT LETTER Yes ☐ No ☐

Comments, if any: _____

Real Property Data Search (w4) Guide to searching the database

Search Result for BALTIMORE COUNTY

View Map View GroundRent Redemption View GroundRent Registration

Account Identifier: District - 15 Account Number - 1508790109

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	9025 CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	9025 CUCKOLD POINT RD SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			504	2015	Plat Ref:	0009/ 0004

Special Tax Areas: **Town:** NONE
Ad Valorem:
Tax Class:

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
1993	6530		7,500 SF	30

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation
		SERVICE GARAGE				

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	225,000	225,000		
Improvements	379,100	379,200		
Total:	604,100	604,200	604,133	604,167
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	**Date:** 10/21/2014	**Price:** $600,000
Type: ARMS LENGTH MULTIPLE	**Deed1:** /35488/ 00133	**Deed2:**
Seller: HRANICKA EDWARD F	**Date:** 04/08/1999	**Price:** $300,000
Type: ARMS LENGTH MULTIPLE	**Deed1:** /13658/ 00354	**Deed2:**
Seller:	**Date:**	**Price:**
Type:	**Deed1:**	**Deed2:**

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:
Exempt Class:
Special Tax Recapture: NONE

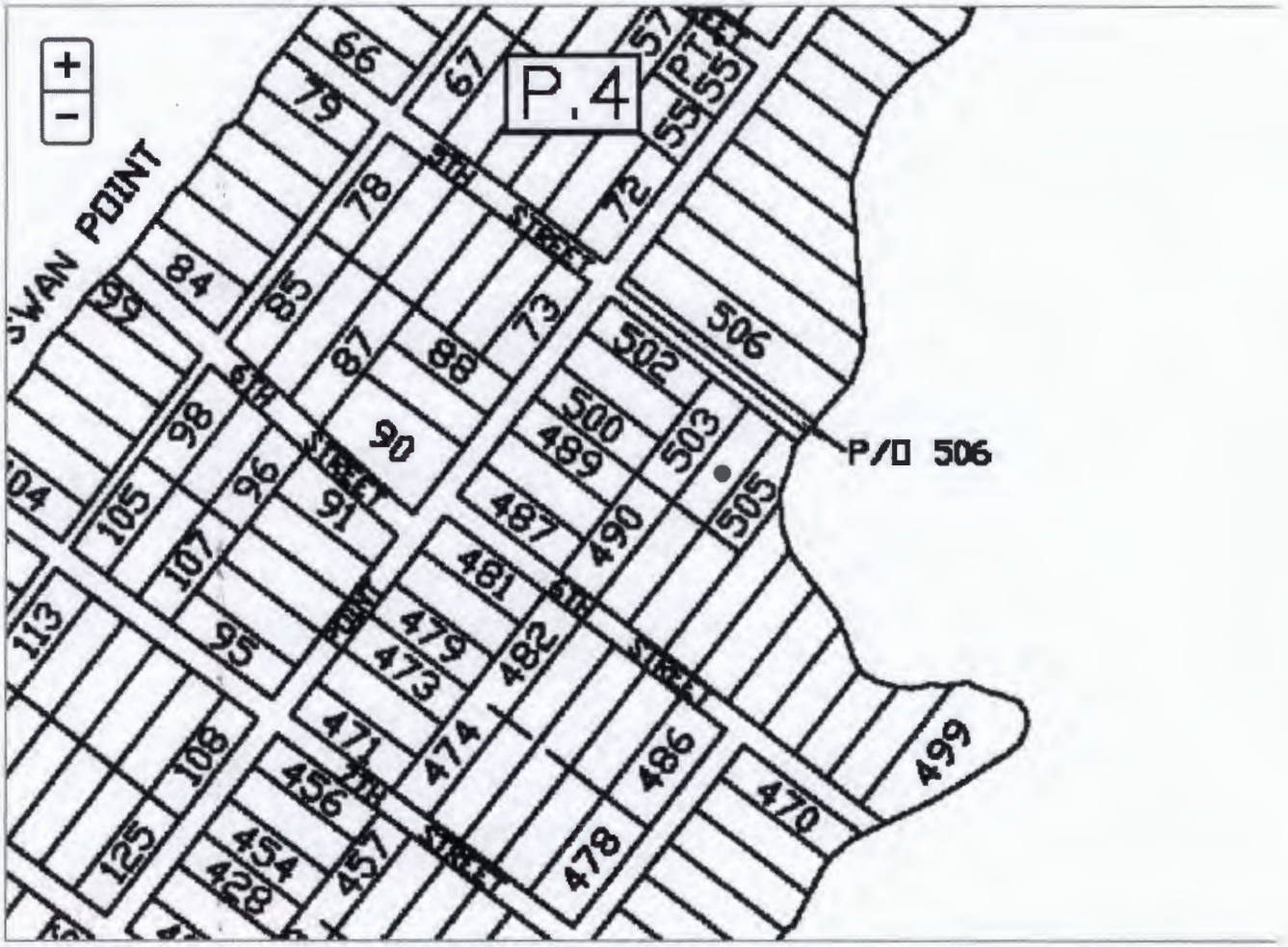
Homestead Application Information

Homestead Application Status: No Application

Baltimore County

New Search (http://sdat.dat.maryland.gov/RealProperty)

District: 15 Account Number: 1508790109



The information shown on this map has been compiled from deed descriptions and plats and is not a property survey. The map should not be used for legal descriptions. Users noting errors are urged to notify the Maryland Department of Planning Mapping, 301 W. Preston Street, Baltimore MD 21201.

If a plat for a property is needed, contact the local Land Records office where the property is located. Plats are also available online through the Maryland State Archives at www.plats.net (http://www.plats.net).

Property maps provided courtesy of the Maryland Department of Planning ©2011.

For more information on electronic mapping applications, visit the Maryland Department of Planning web site at www.mdp.state.md.us/OurProducts/OurProducts.shtml (http://www.mdp.state.md.us/OurProducts/OurProducts.shtml).



(http://imsweb05.mdp.state.md.us/website/mosp/)

Loading... Please Wait. Loading... Please Wait. -->

Larry Hogan, *Governor*
Boyd Rutherford, *Lt. Governor*

SHA State Highway Administration
Maryland Department of Transportation

Pete K. Rahn, *Secretary*
Douglas H. Simmons, *Acting Administrator*

Date: 7/14/15

Ms. Kristen Lewis
Baltimore County Office of
Permits and Development Management
County Office Building, Room 109
Towson, Maryland 21204

RE: Baltimore County
Item No 2016-0003-SPH
Special Hearing
BooneKondylas LLC, Ken Boone.
9025 Cuckold Point Road.

Dear Ms. Lewis:

Thank you for the opportunity to review your referral request on the subject of the above captioned. We have determined that the subject property does not access a State roadway and is not affected by any State Highway Administration projects. Therefore, based upon available information this office has no objection to Baltimore County Zoning Advisory Committee approval of Item No. 2016-0003-SPH

Should you have any questions regarding this matter, please contact Mr. Richard Zeller at 410-229-2332 or 1-866-998-0367 (in Maryland only) extension 2332, or by email at (rzeller@sha.state.md.us).

Sincerely,

David W. Peake
Metropolitan District Engineer
Baltimore & Harford Counties

DWP/RAZ

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon
Deputy Administrative Officer and
Director of Permits, Approvals and Inspections

DATE: August 4, 2015

FROM: Andrea Van Arsdale
Director, Department of Planning

SUBJECT: 9025 Cuckold Point Road

INFORMATION:

Item Number: 16-003

Petitioner: Ken Boone

Zoning: BL

Requested Action: Special Hearing

SUMMARY OF RECOMMENDATIONS:

The Department of Planning has reviewed the Petition for a Special Hearing to determine whether the Administrative Law Judge should approve amendments to previous restrictions imposed in Zoning Cases 07-144-SPH, CBA-06-044, CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music and other and further relief as may be required.

Testimony in the aforementioned cases established the fact of the prior use of the property as a "nightclub" which is not listed as an allowed use in the zone. Upon a site visit and discussions with the petitioner's counsel, the Department understands the future use of the property will be as a permitted restaurant that will have music, both live and reproduced, as an accessory component.

The Department has no objection to the granting of the petitioned zoning relief conditioned upon the following:

There shall be no dance floor, nor shall the restaurant become a "nightclub" as defined in the BCZR Section 101.1 and the Building Code of Baltimore County.

All accessory music shall be limited to reasonable sound levels so as not to disturb adjacent properties.

All accessory music shall be limited to the following hours or as may be otherwise established by the Administrative Law Judge:

a. No outdoor music after 10:00 p.m. Monday thru Saturday.

b. No indoor music after 12:00 a.m. (midnight) Monday thru Saturday.

c. No music after 8:00 p.m. on Sundays.

For further information concerning the matters stated herein, please contact Bill Skibinski at 410-887-3480.

Division Chief: Kathy Schlabach

AVA/KS

C: Bill Skibinski

TO: PATUXENT PUBLISHING COMPANY
Tuesday, September 8, 2015 Issue - Jeffersonian

Please forward billing to:
Lawrence Schmidt 410-821-0070
Smith, Gildea & Schmidt
600 Washington Avenue, Ste. 200
Towson, MD 21204

NOTICE OF ZONING HEARING

The Administrative Law Judge of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 2016-0003-SPH
9025 Cuckold Point Road
SE/s of Cuckold Point Road, 15 ft. SW of the centerline of 5th Avenue
15th Election District – 7th Councilmanic District
Legal Owners: Boone Kondylas, LLC, Ken Boone

Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music; and for such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Hearing: Monday, September 28, 2015 at 10:00 a.m. in Room 205, Jefferson Building, 105 West Chesapeake Avenue, Towson 21204

Arnold Jablon
Director of Permits, Approvals and Inspections for Baltimore County

NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ADMINISTRATIVE HEARINGS OFFICE AT 410-887-3868.
(2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT
ZONING REVIEW

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

The Baltimore County Zoning Regulations (BCZR) require that notice be given to the general public/neighboring property owners relative to property which is the subject of an upcoming zoning hearing. For those petitions which require a public hearing, this notice is accomplished by posting a sign on the property (responsibility of the petitioner) and placement of a notice in a newspaper of general circulation in the County, both at least fifteen (15) days before the hearing.

Zoning Review will ensure that the legal requirements for advertising are satisfied. However, the petitioner is responsible for the costs associated with these requirements. The newspaper will bill the person listed below for the advertising. This advertising is due upon receipt and should be remitted directly to the newspaper.

OPINIONS MAY NOT BE ISSUED UNTIL ALL ADVERTISING COSTS ARE PAID.

For Newspaper Advertising:

Item Number or Case Number: 2016-0003-SPH

Petitioner: Boone Kondylas, LLC

Address or Location: 9025 Cuckold Point Road

PLEASE FORWARD ADVERTISING BILL TO:

Name: Lawrence E. Schmidt, Esquire

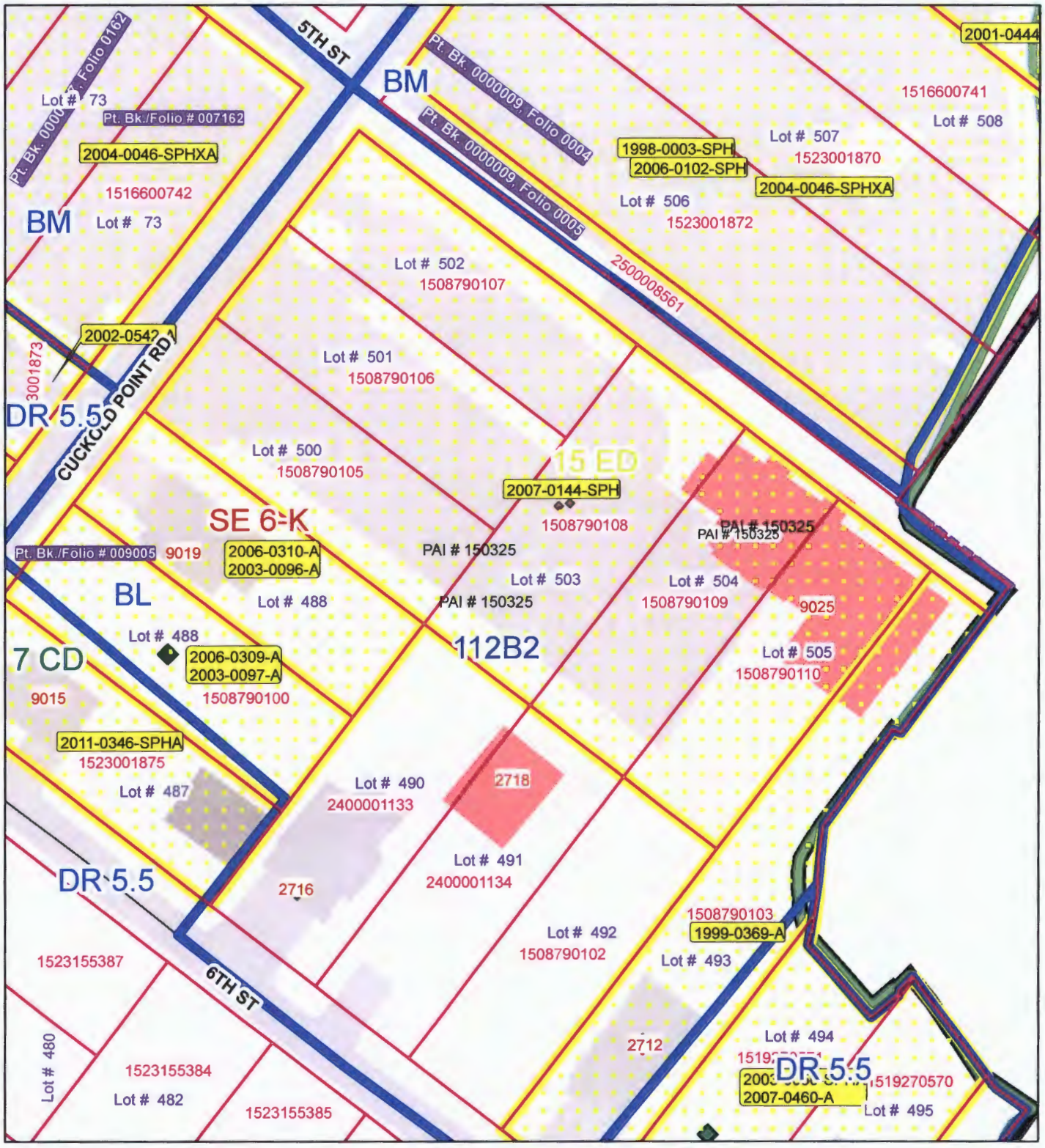
Address: Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Telephone Number: 410-821-0070

Revised 2/20/98 - SCJ


BM
BM
BL
DR 5.5
290'
170'
160'
115'
130'
58'
80'
58'
225'
9019
9025
9015
2718
2716
2712
2708
2704
2711
CUCKOLD POINT RD
61ST ST
SWAN AVE
103 Feet

9025 Cuckold Point Road



Publication Date: 7/2/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

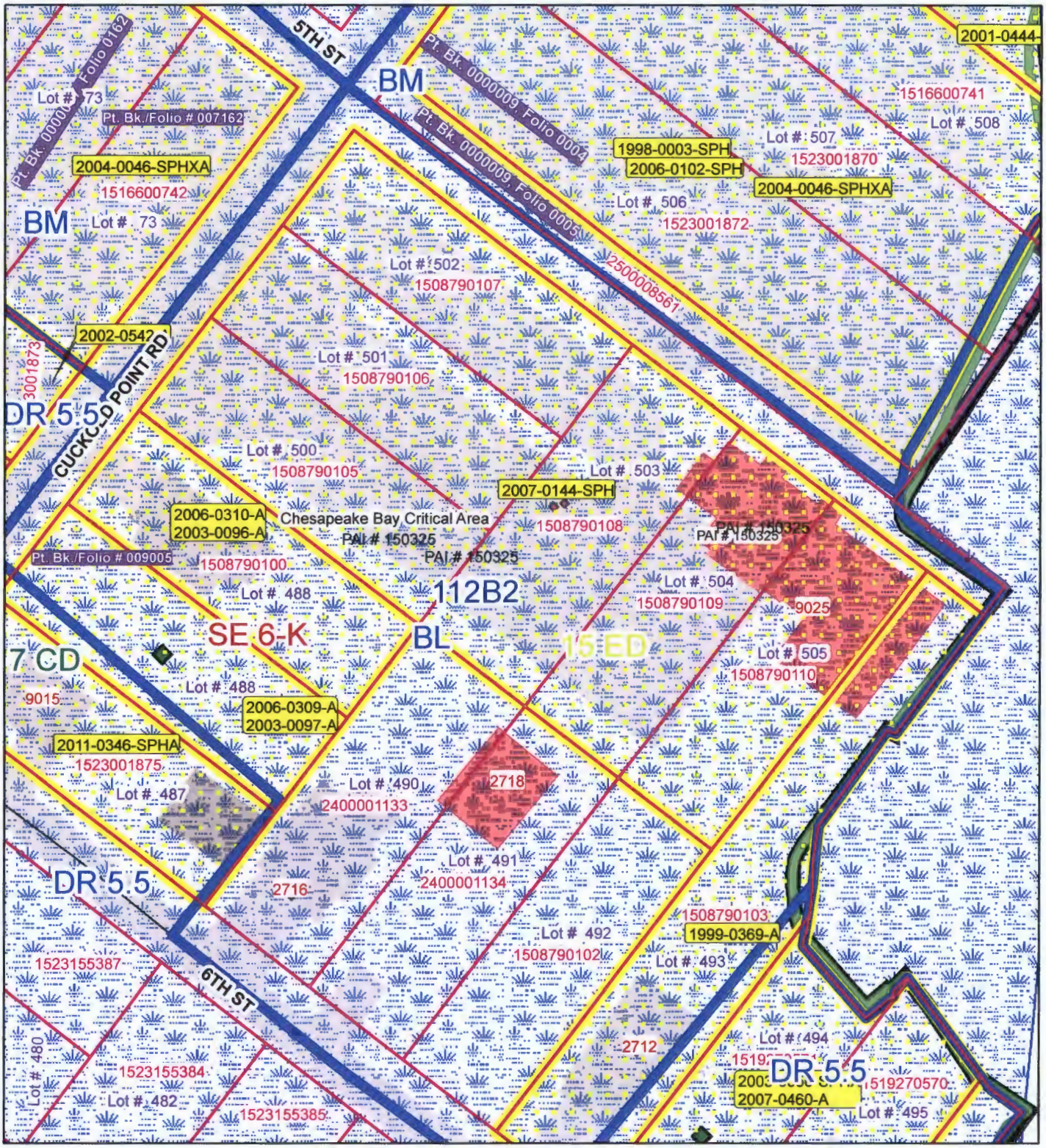
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W E
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0 15 30 60 90 120 Feet

1 inch = 60 feet

Item #0003

Chesapeake Bay Critical Area



Publication Date: 7/6/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

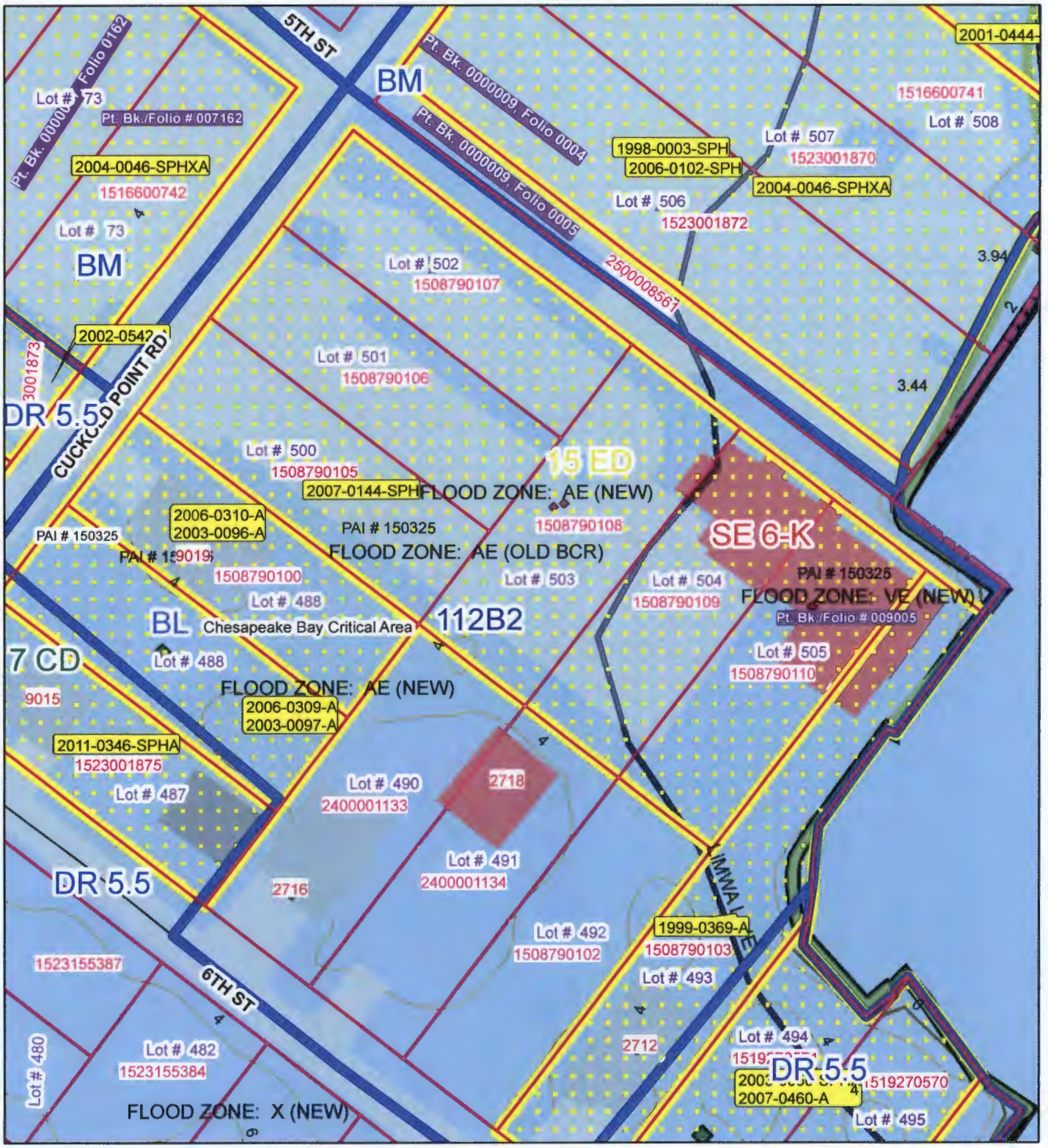
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1 inch = 60 feet

Item #0003

Elevations and Flood Hazards



Publication Date: 7/6/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

0 15 30 60 90 120 Feet

1 inch = 60 feet

Item #0003

Circuit Court for Baltimore City
Case No.: 03-C-16-010551

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 638

September Term, 2017

IN THE MATTER OF BOONE KONDYLAS, LLC

Meredith,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 9, 2018

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Boone Kondylas, LLC ("Boone"), appellee, filed a zoning petition for special hearing in the Baltimore County Office of Administrative Hearings ("OAH"), seeking an amendment to, or rescission of, restrictions previously placed on Boone's waterfront property ("the property"), to permit the use of the property as a restaurant with limited accessory music and entertainment. Following the special hearing, an OAH administrative law judge ("ALJ") denied Boone's zoning petition on the ground that it was barred by *res judicata,* as a result of this Court's 2010 unreported opinion in *Fifth Street, LLC, et al. v. Matthew Ciarpella, et al.*, No. 810, September Term, 2009 (filed July 9, 2010) ("*DOB I*"), wherein we held that the operation by the previous owner comprised a use as both a restaurant and a nightclub, and that use as a nightclub was prohibited by the applicable zoning regulations.

Boone appealed the ALJ's decision to the Board of Appeals of Baltimore County ("Board"), which also denied Boone's petition as barred by *res judicata*. Boone petitioned for judicial review, and the Circuit Court for Baltimore County remanded the matter to the Board for a determination of whether the subject property, under Boone's ownership, currently meets the definition of a nightclub, in light of the factors cited in our opinion in *DOB I.*

Appellants, Charles Wolinski, *et al.* ("Wolinski")—residential neighbors of the property—and People's Counsel of Baltimore County ("People's Counsel"), appealed the decision of the circuit court.

The questions presented, as set forth in Wolinski's brief, are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition?

2. As a matter of law, should the Opinion of the County Board of Appeals in this matter dated September 15, 2016 have been affirmed by the Circuit Court for Baltimore County?

3. Does an administrative agency or on appeal a reviewing Court have the authority to amend the zoning restriction previously granted by the Court of Special Appeals?

The questions as presented by People's Counsel are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition, which alleges essentially a cosmetic change in management style or operation?

2. Is the County Board of Appeals' opinion correct and at least legally sufficient based on the deferential, contextual and interpretive scope of judicial review?

3. Does the Circuit Court remand misapply *res judicata*; exceed the prudential scope of judicial review, fail to exercise judicial self-restraint, and both disrespect and undermine the administrative function[?]

For the reasons that follow, we shall dismiss appellants' appeal as premature.

FACTS AND LEGAL PROCEEDINGS

The waterfront property at the center of the controversy in this matter is located on Cuckold Point Road on Miller's Island in Baltimore County. The 1.27 acre property is improved by a restaurant/bar called Dock of the Bay ("DOB").[1]

In October 2003, shortly after it suffered extensive damage from Hurricane Isabel, Fifth Street, LLC ("FSLLC"), purchased DOB.[2] After a lengthy rebuilding period, FSLLC

[1] A restaurant, under various names and owners, has operated on the property since the 1950s.

[2] For the background of DOB before Boone purchased it, we rely primarily on the factual recitation set forth in *DOB I*.

reopened DOB in March 2004. It was licensed as a restaurant with a capacity of approximately 150-160 patrons and held a Class D liquor license. On an outdoor patio, there was more seating and a bar, along with a children's play area. DOB had an in-house music system to play satellite radio inside and outside, and it offered live entertainment by disc jockeys, bands and karaoke performers.

In 2006, residential neighbors of DOB complained to the Baltimore County Department of Permits and Development Management that the live music was too loud and disruptive and that DOB was operating as a nightclub, which was not permitted in the applicable business zone.[3] DOB was cited three times for: operating a nightclub in a B.L.

[3] DOB is located in a B.L. (Business Local) business zone. Baltimore County Zoning Regulation ("BCZR") §230.1, permits the operation of a "standard restaurant" and a "tavern" in a B.L. zone but does not permit a "nightclub," even by special exception. BCZR §230.3.

BCZR §101.1 defines "standard restaurant" as:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

The same code section defines a "tavern" as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." Finally, "nightclub" is defined by the Code section as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County."

(continued . . .)

zone; erecting a tent without a permit and; failing to cease nightclub operations and to remove the tent.

In August 2006, FSLLC filed a petition for special hearing, seeking a determination of whether DOB was a nightclub in violation of BCZR.[4] The zoning commissioner determined that DOB was a nightclub under BCZR and the International Building Code and ordered DOB to discontinue the playing of music by way of speaker system. On appeal, a majority of the members of the Board affirmed that determination.[5] Upon judicial review, the Circuit Court for Baltimore County also affirmed the determination. In an unreported opinion by a panel of this Court in *DOB I*, we affirmed the circuit court's judgment, concluding that the transcript and record provided substantial evidence to support the Board's finding that DOB was operating as a nightclub. In reaching that

(. . . continued)

The International Building Code, which was adopted as the Building Code of Baltimore County, sets forth advisory characteristics in determining whether an establishment may be characterized as, *e.g.,* a nightclub, dance hall, banquet hall, or cabaret, to include some or all of the following: low lighting levels; entertainment by a live band or recorded music generating above-normal sound levels; no theatrical stage accessories; later than average operating hours; tables and seating arranged or positioned so as to create ill-defined aisles; a specific area designed for dancing; services facilities for alcoholic beverages and food; and high occupant load density.

[4] A "request for special hearing is, in legal effect, a request for a declaratory judgment." *Antwerpen v. Baltimore County*, 163 Md. App. 194, 209 (2005).

[5] One board member dissented, finding that DOB was a restaurant offering some musical entertainment on the side.

conclusion, we analyzed DOB's operation, using the criteria (for determining whether premises are being used as a nightclub) set forth in the International Building Code.

In 2010, Baltimore County filed a petition for contempt alleging that FSLLC continued to operate DOB in violation of the Board's order. At a hearing on the matter, FSLLC argued that DOB was no longer operating as a nightclub because it was not playing music outside the restaurant.

The circuit court, citing the Board's ruling that "the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR," found FSLLC in violation of the Board's order for "continuing to play live and/or recorded entertainment on the premises." The court found FSLLC to be in contempt of court and ordered that FSLLC permanently dismantle any outdoor speaker system at DOB and refrain from allowing "any live band, Disc Jockey, karaoke or any other form of live or recorded entertainment to perform at the Site" for a period of one year beginning November 10, 2010.

DOB closed in 2012. In 2014, Boone purchased the property from FSLLC and reopened DOB. In 2015, Boone filed a petition for special hearing to "amend previous restrictions imposed . . . so as to permit future use of the property as a restaurant with limited accessory music." Before the ALJ, Boone argued that, unlike FSLLC's use of DOB as a nightclub, its business was first and foremost a restaurant, with music to be offered only as a complement to the dining experience.

In his October 22, 2015 written opinion and order, the ALJ concluded that FSLLC's zoning violation and special hearing case had been appealed to the Board, the circuit court, and this Court, all of which had affirmed the agency's finding that DOB was a nightclub, subject to the conditions and restrictions contained in the agency's order. Therefore, the ALJ concluded, "*res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard." In the absence of any evidence of such significant changes by Boone, the ALJ continued, the ruling that DOB was both a restaurant and a nightclub must stand. Boone's petition was therefore denied.

Boone appealed the ALJ's decision to the Board on November 13, 2015. The Board heard argument on the matter on February 17 and April 28, 2016.

At the start of the hearing, People's Counsel argued that the doctrine of *res judicata* permitted the Board to dispose of the matter on a motion to dismiss. Counsel for DOB's residential neighbors agreed and added that amending the zoning restrictions would require a reversal of this Court's 2010 unreported decision, which the Board was not permitted to do. Boone claimed that there had been some significant changes since 2010 that should cause this Board to come to a different conclusion.

Boone's attorney, although acknowledging that FSLLC had operated a nightclub with loud rock music, which was not permitted in the pertinent B.L. zone, argued that Boone was not operating a nightclub, but a restaurant with the occasional "single acoustic guitar player" providing music. With regard to the *res judicata* argument, counsel averred

that *res judicata* did not apply because there had been a significant change in the facts of the case since *DOB I* was decided.

The Board reserved ruling on the *res judicata* issue and heard testimony.

Kenneth Boone ("Mr. Boone") the sole managing member of Boone Kondylas, LLC,[6] testified that DOB is licensed to operate as a restaurant and maintains a Class D liquor license, which Boone purchased from FSLLC. The restaurant averages 80% food / 20% alcohol sales.

Since Mr. Boone's purchase of DOB, his corporation has expanded the restaurant's kitchen to permit the outdoor steaming of crabs and removed the outdoor stage and tent that FSLLC had erected. Indoors, he said, DOB has seating for approximately 125 patrons at dining room tables and the bar, and there is outdoor seating for approximately 100 additional patrons. DOB has no dance floor or stage, and Mr. Boone has no plans to create either one.

DOB is presently open seven days a week, with posted hours of 11:00 a.m. to midnight, but the restaurant generally closes between 9:00 and 10:00 p.m. during winter months when business is slow. The average patron is between 40 and 70 years of age.

Other than a DJ on New Year's Eve 2014, Mr. Boone testified that he had hesitated to book live performers, as he was initially unfamiliar with what the applicable zoning code permitted. His hesitation appears to have been well founded because in 2015, when Mr.

[6] Mike and Donna Kondylas, the "Kondylas" of "Boone Kondylas, LLC" were no longer in partnership with Mr. Boone by the time of the hearing.

Boone scheduled an acoustic guitarist to play on a Saturday night, the neighbors complained about the potential for noise and disruption, and a zoning official threatened to pull DOB's liquor license if the musician played. Mr. Boone cancelled the guitarist, as well as scheduled performances by a Frank Sinatra cover singer and an "oompah" band for Oktoberfest, and he had not scheduled any live music since then.

Boone's petition centered on his desire to "cater to the demographic" and book soloists to play at DOB. Mr. Boone said he was willing to "live within sound restrictions on outside music [and] time restrictions of both indoor and outdoor music" in anticipation of offering live music outdoors on Friday and Saturday nights from 6:00 until 10:00 p.m. (with last call for alcohol at midnight) and on Sunday afternoons from 5:00 until 8:30 p.m.

Several neighborhood residents testified on Boone's behalf, stating that when FSLLC owned DOB, it hired "[v]ery loud, heavy metal" full-sized bands, which played until midnight or 1:00 a.m. on weekends. In contrast, DOB under Boone's ownership has a family atmosphere with an older demographic. The supporters advocated giving Boone a chance to have live music at DOB.

Charles Wolinski, whose house is approximately 200 feet from DOB, testified that he had fought with FSLLC for seven years over the loud music and the disorderly patrons in the parking lot. In his opinion, everything at DOB now that Boone owns it is "exactly the same" as when FSLLC owned it (other than the playing of live music), and the addition of live music would return the establishment to the level of disruption it had created during FSLLC's ownership.

In the opinion of Matthew Ciarpella, who was also a neighborhood protestant in the FSLLC litigation, the playing of any outdoor music at DOB would re-introduce the same noise problems that had been previously litigated. Other neighbors who had heard the loud music played when FSLLC owned DOB also protested the reinstatement of live music outside the restaurant.

The Board issued its written opinion on September 15, 2016. Therein, the Board noted that as the parties, or their privy, and the property had been involved in the previous litigation regarding the same zoning issue of whether live music should be permitted at the DOB, which led to the Board's 2008 opinion, the only manner in which the Board could act upon the new application for special permit previously denied would be if there had been a substantial change in the facts from those previously litigated. The Board found that the restaurant operations and layout and Boone's proposal for live music were substantially the same as when FSLLC owned the premises and litigated the matter. In the Board's view, a change in the restaurant's ownership or management style did not amount to a substantial change. Having previously determined that DOB comprised a nightclub not permitted in a B.L. zone, and having currently determined that no substantial change to the property existed that would support re-litigation of the issue, the Board denied Boone's petition to amend the previous restrictions imposed upon DOB.

Boone filed a petition for judicial review in the circuit court on October 17, 2016. The court heard argument on the petition on June 1, 2017.

Boone initially argued that the Board, in denying his petition on *res judicata* grounds, never decided the merits of the matter, that is, whether DOB can play live music and, if so, under what circumstances. Counsel for Boone said "whether the zoning is the same, the building is the same, the neighbors are the same, that doesn't matter. The Board of Appeals focused on the wrong inquiry" and "got this wrong" in failing to make a determination of the "ultimate issue." Counsel for Boone requested that the court reverse on the *res judicata* issue and remand to the Board for a determination of whether music should be allowed at DOB as an accessory use to the restaurant service and under what circumstances.[7] In the alternative, Boone argued that the court should find that the operative facts had changed since the time of FSLLC's ownership such that *res judicata* should not apply as a bar to the present litigation.

The circuit court observed that the Board had determined that the prior owner played music that was "loud and [performed by] rock bands and the neighbors didn't like it, therefore nobody can do anything different, because it might [move us] back into what the Dock of the Bay was under" the prior owner. The judge went on to say that the panel of this Court, in its *DOB I* decision was "very factually oriented" when it upheld the Board's determination that DOB was a nightclub while owned by FSLLC. In the circuit court's

[7] As the court pointed out, the applicable zoning regulations prohibit a nightclub from operating in a B.L. zone but does not prohibit music from being played. The Board appeared to use "live music" and "nightclub" interchangeably in its ruling.

view, for *res judicata* to apply, "the same analysis has to be done to see and determine whether the proposed use with the current owner would constitute a nightclub." In the court's words, "[i]f the facts were the same, then maybe *res judicata* would apply at this time . . ., but the analysis just was not done in this case."

Although the Board had found no substantial change in the facts as previously litigated, the circuit court observed that the Board did not perform an adequate analysis of the relevant criteria to determine whether DOB is currently a nightclub. Determining that that analysis should be done, the circuit court remanded the matter to the Board for a determination under the facts of this case as to "whether the proposed use would constitute a nightclub under the analysis used by the Court of Special Appeals in that prior case."

The circuit court issued its written order on June 2, 2017. The order remanded the matter to the Board "for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a 'nightclub' as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC)."[8]

[8] *See* footnote 3, *supra*, for the International Business Code criteria.

DISCUSSION

Although not raised by any party, before we may consider appellants' arguments, we must ensure that the appeal has been taken either from a final judgment or from an appealable interlocutory ruling. We shall hold that this appeal is premature.

Pursuant to Maryland Code (2013 Repl. Vol., 2017 Supp.) §12-301 of the Courts and Judicial Proceedings Article ("CJP"), a party may appeal from a final judgment in a civil case. The Court of Appeals has consistently stated that "a judgment or order of a court is final when it determines or concludes the rights of parties or when it denies the parties means of further prosecuting or defending their rights and interests in the subject matter of the proceeding." *Schultz v. Pritts*, 291 Md. 1, 5–6 (1981). We will dismiss an appeal if it is not taken from a final judgment entered in a civil case by a circuit court, or if a non-final judgment does not fit within the statutory exceptions or the collateral order doctrine. *Foy v. Baltimore City Det. Ctr.*, 235 Md. App. 37, 47 (2017), *cert. granted*, 457 Md. 660 (2018).

In general, where, as here, a circuit court orders a remand of the proceeding to an administrative agency, that is an appealable final order because when "a court remands a proceeding to an administrative agency, the matter reverts to the processes of the agency, and there is nothing further for the court to do. Such an order is an appealable final order because it terminates the judicial proceeding and denies the parties means of further prosecuting or defending their rights in the judicial proceeding." *Schultz*, 291 Md. at. 6 (citing *Fred W. Allnutt, Inc. v. Commissioner of Labor and Industry*, 289 Md. 35, 40

(1980)). Nevertheless, a circuit court's remand order in a judicial review action is not always an appealable final judgment. Although a remand after the circuit court has conducted a judicial review of the sole question raised in the administrative action, thereby precluding the parties from further contesting the validity of the agency's decision on the merits of the case, is an appealable final judgment, "a remand that precedes any judicial review is not a final judgment[.]" *Metro Maint. Sys. South, Inc. v. Milburn*, 442 Md. 289, 305, 310 (2015). As we suggested in *Foy*, *supra*, the "lack [of] any discernable conclusions of law or findings of fact" and the circuit court's apparent inability to assess the merits of the Board's decision may render the remand order a non-final judgment. 235 Md. App. at 52-53.

The sole issue before the circuit court in this matter was whether the Board was correct in denying Boone's petition on the ground of *res judicata*, based on the Board's determination that DOB was a nightclub when owned by FSLLC. The circuit court declared itself unable to make a finding on that sole claim because the Board had not determined whether DOB is currently a nightclub, pursuant to the International Business Code factors that were discussed in detail in *DOB I.*

The circuit court did not find any error of law on the part of the Board, nor did it affirm or reverse the Board's decision or decide or conclude the matter in dispute. In other words, the circuit court did not conduct judicial review. As in *Milburn*, the remand was to precede the circuit court's determination of whether there was substantial evidence in the record to support the Board's ruling and whether or not to affirm. 442 Md. at 308. In other

words, although the court did not specifically so state in its order, it deferred its ruling pending the remand, and the matter "contemplates that judicial review awaits the return of the case following the remand." *Id.* at 309. Specifically, once the Board has an opportunity to apply the International Business Code factors to the facts of this case, the circuit court will then determine whether *res judicata* would apply to support the denial of DOB's petition on that basis.

As noted in *Milburn*, 442 Md. at 309, although the parties "have, in a sense, been 'put out of court'. . . there is a strong potential, bordering on certainty, that the issue at hand—the viability of . . . an administrative decision—will be back for determination by the circuit court." The remand order in the subject case does not prevent the parties from continuing to defend or challenge the Board's decision following the remand; once the Board reconsiders its decision, the parties may continue to challenge or defend the Board's decision. All this was made clear in *Milburn*, where the Court said:

> It is true that, on remand, the Board of Appeals retains discretion to reconsider its decision. Finality, however, is not determined by considering what additional proceedings may occur before the agency, but what further proceedings, if any, will occur in the circuit court. *See Brewster* [*v. Woodhaven Bldg. & Dev., Inc.*, 360 Md. 602 (2000)] (proceedings before another forum are irrelevant to finality). Thus, the breadth of the additional proceedings at the agency level do not convert the remand order here into a final, appealable judgment.
>
> After the remand, the parties will have the opportunity to litigate their positions in the circuit court and pursue appellate review of those issues, including any contention that the remand was unlawful or an abuse of discretion. It may be, of course, that the lawfulness of the remand will no longer be at issue and that other issues concerning the validity of the Board's decisions will have become moot as a result of any modifications that the Board makes. In that respect, our holding that a remand that precedes any

> judicial review is not a final judgment is consistent with the purpose of the final judgment rule—to promote judicial efficiency by limiting piecemeal appeals.

Id. at 310-11 (footnotes omitted).

APPEAL DISMISSED; COSTS TO BE PAID BY APPELLANTS.

16-003-SPH

IN THE MATTER OF BOONE KONDYLAS, LLC Petitioner	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-16-010551

* *

ORDER

This matter came before the Court for a hearing on the *Petition for Judicial Review* of the opinion of the Board of Appeals for Baltimore County dated September 15, 206, filed by Petitioner, Boone Kondylas. Upon consideration of the Petitioner's *Memorandum in Support of Petition for Judicial Review*, the *Memorandum of People's Counsel for Baltimore County*, the *Memorandum in Opposition to Petition for Judicial Review* filed by the Protestants, and arguments of counsel, for the reasons stated on the record in open court, it is this 2nd day of June, 2017, by the Circuit Court for Baltimore County, hereby

ORDERED, that this matter is Remanded to the Board of Appeals for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Clarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC).

RECEIVED
JUN 08 2017
BALTIMORE COUNTY
BOARD OF APPEALS

H. Patrick Stringer, Judge

12/15/16
TO WP

RECEIVED
DEC 14 2016
DEPARTMENT OF PERMITS
APPROVALS AND INSPECTIONS

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

December 14, 2016

VIA HAND-DELIVERY
Civil Clerk
Circuit Court for Baltimore County
401 Bosley Avenue
Towson, Maryland 21204

RE: In the matter of: Boone Kondylas, LLC
Civil Action No.: 03-C-16-010551
Board of Appeals Case No.: 16-003-SPH

Dear Clerk:

Enclosed for filing please find the Proceedings before the Administrative Law Judge and the Board of Appeals for Baltimore County. Additionally, please allow this letter to reflect the filing of one accordion folder containing the entire Board of Appeals case file, exhibits, and transcript pursuant to Maryland Rule 7-206.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Enclosures

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE
	*	BOARD OF APPEALS
	*	OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge (the "ALJ") in which the ALJ denied a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music.

A public hearing was held *de novo* on February 17, 2016 and April 28, 2016. The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire of Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation was held on June 14, 2016.

Factual Background

The subject property is water front property located in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" (the "Restaurant"). The Restaurant is open seven (7) days a week and has a total seating capacity of approximately 225 persons (125 persons inside and 100 persons outside). The Property is also

improved with boat slips for patrons to dock their boats and access the Restaurant via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, the Restaurant came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation, music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement actions beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing to request a determination that the Restaurant with its associated live music did not constitute a 'nightclub.' In our June 4, 2008 Opinion, this Board held that Mr. Thanner's operation of the Restaurant along with music played met the definition of "nightclub" in §101 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a 'nightclub' was not permitted in a BL zone, this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (Board Opinion 6/4/08, p. 14). Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. Thereafter, the Restaurant closed.

In or about August of 2014, the Petitioner purchased the Property. In or about October of 2014, the Petitioner reopened the Restaurant under the previous name – Dock of the Bay. At the hearing, Kenneth Boone, owner of Boone Kondylas, LLC, the Petitioner, testified before this Board that his ownership and operation of the Restaurant is one of three businesses he owns. The Restaurant has both a business license and a liquor license. The food menu varies from seafood to sandwiches, hamburgers and pasta.

The Petitioner described the minimal improvements that have been made to the Restaurant since August of 2014. These have included pouring a concrete pad where the customers can eat steamed crabs, expanding the kitchen, and removing the outside stage installed by Mr. Thanner where the musicians formerly played.

In April of 2015, the Petitioner hired Mark Allen, a guitar player, to perform at the Restaurant. Mr. Allen was also a regular performer at the Restaurant during the period that Mr. Thanner owned it. When signs advertising Mr. Allen's performance were put up at the Restaurant, a Baltimore County inspector instructed the Petitioner that the Restaurant would be closed down if music was permitted to play.

Mr. Boone mentioned that 'Row Boat Willie's', a restaurant located next to the Property is permitted to have live music. Row Boat Willie's is located in a BM (Business-major) zone which permits 'nightclubs' to operate. The Petitioner is competing with 8 other restaurants, including the 'The New White Swan' located at 8821 Millers Island Blvd. and 'The Islander' located at 9008 Cuckold Point Rd., on or near the waterfront and all of them have some type of live music. Mr. Boone was certain that the Restaurant would not be able to survive financially without live music.

While not excluding any specific age of customers, the plan is to hire musical performers who cater to a 50 year-old audience, who want to hear music while enjoying lunch or dinner. The Petitioner does not want to cater to a younger crowd as he anticipated the potential problems that might arise with a younger audience. In the summer months, boaters from all over Baltimore County patronize the Restaurant. The types of musical acts envisioned by the Petitioner would range from solo acoustic or electric guitar players to Frank Sinatra and Oompa bands.

The proposed hours for the musical groups would be Friday and Saturday nights from 6:00 p.m. to 10:00 p.m., with the last call at midnight, in hopes that the customers might leave by 12:30

a.m. On Sundays, in the summer, music would be played outdoors from 5:00 p.m. to 8:30 p.m. Also, there would not be a dance floor or stage area.

The Petitioner is amenable to a decibel level restriction for the sound stemming from the music. However, Mr. Boone has not personally operated any type of device to monitor decibel levels at the Restaurant.

On cross examination, the Petitioner conceded that the Restaurant hours of operation are in fact stated on the website. The hours of operation stated in the website are Monday to Thursday 11:00 a.m. to 11:00 p.m.; Friday and Saturday 11:00 a.m. to 1:00 a.m.; and Sunday from 9:00 a.m. to 8:00 p.m. Mr. Boone then changed his testimony on the time period during which musical acts would perform and indicated that the music would end at Friday and Saturday nights at 11:00 p.m., on Sundays at 7:00 p.m.; and, at dusk for outdoor performances in the summer months which would end as late as 9:00 p.m.

The Petitioner acknowledged that it did not want to be restricted to certain types of music but would entertain other types of music such as jazz quartet bands or Reggae bands. The Petitioner was uncertain about normal sound levels or how the proposed music might be regulated.

In support of the Petitioner's proposed business, several Miller's Island residents testified. Cheryl Gowers of 2812 Bay Drive has lived at that address since 1993. At the previous hearing, Ms. Gowers testified against Mr. Thanner's operation. She was familiar with the problems that resulted from Mr. Thanner's operation of the business which, she said permitted very loud music including heavy metal music and played until midnight or 1:00 a.m. on most weekends. Presently, Ms. Gowers works as a waitress in the Restaurant for the Petitioner. Having worked at both The New White Swan and The Islander, she corroborated that live music is played at those establishments.

Russell McClelland, 9011 Miller's Island Blvd. testified that he lives 400 yds. from the Property. Mr. McClelland was familiar with the complaints from neighbors and the level of sound

coming from Mr. Thanner's restaurant. He described music at Mr. Thanner's restaurant as being played from speakers mounted to a stage outside the Restaurant. The music was amplified over the water and would occur all days of the week until midnight. He recalled that Reggae music was played.

Mr. McClelland is in support of the Petitioner's request here because he believes, like Ms. Gowers, that Mr. Boone will not permit the type of problems associated with Mr. Thanner's operation. Mr. McClelland works for the Petitioner by cutting the grass and policing both the parking lots and boat slips. If this request is granted, he is willing to monitor the sound level.

Charles Boland and Jerri Boland, his wife, 2414 Eugene Avenue, Edgemere, MD live 1 ½ miles from the Restaurant. Mr. Boland is a retired Baltimore County police officer whose son is employed by the Petitioner. Mr. Boland frequents the Restaurant 4-5 times per week and testified that the Petitioner's operation is family-oriented. The Bolands have no objection to live music at the Restaurant.

Dorothy Reilly, 2809 3rd Street, Miller's Island, is located 2 blocks from the Restaurant. Ms. Reilly has observed loud music coming from The White Swann and The Islander. She reiterated that the Petitioner's restaurant is family oriented. She does not like loud music but would like to hear softer music while there.

In the Protestants' case in chief, Charles Wolinski, 9019 Cockhold Point Rd. testified that his home is adjacent to the Restaurant. Mr. Wolinski is a high school biology teacher at Sparrow's Point High School. He can see the Restaurant from his house. He has 4 children, ranging in age from 13 yrs. to 3 yrs. Mr. Wolinski described his family's life through the Thanner years as living through a "nightmare." He specifically described the problems with the loud music both indoor and outdoor which occurred every weekend. Disorderly patrons were loud while the music was playing and, after the music ended, the clapping and screaming was just as bad as the music itself.

These patrons would then spillover into the parking lot and would continue with loud, disruptive behavior.

Because of the loud noises made by patrons and the loud music, he can never open the windows in his home in the summer or winter. All the noise from the music and the patrons could still be heard inside the home; even in the shower with the fan running. This situation disrupted his family's sleep and the enjoyment of their home. Due to the configuration of the Restaurant's door leading to the outside, even the music played indoors by a live band can be heard in his home and it is disruptive. He explained that each time the outside door would open, the music and noise from inside the Restaurant would project outdoors. He further stated that the parking would overflow into the neighborhood streets. He described one incident where a Restaurant patron, who was blocked in by another car on the parking lot, drove across Mr. Wolinski's lawn in order to exit the parking lot. That incident forced Mr. Wolinski to incur the cost of erecting a fence. Mr. Wolinski was clear that Mr. Thanner never controlled the crowds that came with playing music at the Restaurant.

Mr. Wolinski is also familiar with Mr. Boone's operation of the Restaurant and explained that the physical layout of the Restaurant has not changed. He is very concerned that the same problems will reoccur whether the music is played inside or outdoors. Mark Allen is the same performer hired by Mr. Thanner. Mr. Allen's guitar is connected to an amplifier which Mr. Wolinski described as so loud that Mr. Allen was no longer permitted to play at Rowboat Willie's. Mr. Wolinski recalled that Mr. Thanner also hired steel drum bands. In his experience and from personal observation, the music from Rowboat Willie's does not impact him or his family. He indicated that The Islander only has karaoke music inside.

Mr. Wolinski stated that the litigation against Mr. Thanner's operation lasted seven (7) years through the various appeals in the Court system and that he and the other Protestants paid

substantial attorney's fees. Toward that end, he was surprised that the new owner could make the identical request for music when that request was previously denied in the various appeals.

Also testifying for the Protestants was Matthew Ciarpella, 2116 6th Street, Miller's Island where he has resided for 11 years. Mr. Ciarpella experienced first-hand Mr. Thanner's operation of the Restaurant and also endured seven (7) years of litigation. He opposes outdoor music at the Restaurant due the proximity of the Restaurant to his house. As such, even if the proposed music ends at 7:00 p.m., rather than 9:00 p.m., it would still be intrusive. His house, similar to others in the neighborhood is built on elevated foundations such that the sound travels upward. When wind blows from the north over the water, the sound travels. He could hear the music and loud patrons while inside his house with the windows closed. Each time the outside door opened, bursts of sound would travel. This problem occurred even with a 6' privacy fence and a wall of Leland Cypress trees.

Mr. Ciarella is convinced that the type of music will not be limited to acoustic or Reggae. He insists that the Petitioner will not repeatedly hire the same musical acts because, economically, the Restaurant will profit from hiring a variety of bands. Moreover, the more popular the band, the more revenue will be generated. Karaoke would not be a better option because a microphone will still be used. He is familiar with Mark Allen's guitar which is connected to an electric amplifier and/or microphone whether he is playing classic rock, 'oldies music' or Reggae.

Mr. Ciarpella added that when the popular rendition of a song was played, he would hear cheering, clapping and hooting for the music to continue. In contrast, this additional noise from cheering and clapping does not occur when a song is being played on a radio. At The Islander, he said that there is a DJ inside and that he cannot hear that from his house.

Mr. Ciarpella was familiar with the layout of Row Boat Willie's as he was involved with constructing the sound proofing of the pavilion where the live music plays. The pavilion consists

of a 32x30 square shape and is opened on north side. The pavilion also has table seating and an elevated deck.

In his view, the proposal presented here is the same one that was previously rejected by this Board and by the courts. He testified that there will be no regulation of decibel levels. During the Thanner years, the neighbors regulated the music levels by filing complaints with Code Enforcement. What he learned through the Thanner litigation is that there is no regulation of noise levels by Baltimore County; rather any nuisance is complaint driven. This puts a burden on the Protestants to seek enforcement against the Restaurant.

He further testified that along with bands comes the followers which he described as a 'different type of crowd' than would normally be expected with music that accompanies dinner. He also stated that the amount of traffic not only increased with the live music but the followers of those bands did not drive civilly.

Mr. Ciarpella anticipates that, if the Petitioner's request is granted, he and his neighbors will endure more litigation monitoring the Petitioner and again when the Restaurant is subsequently sold. Any live music played at this restaurant will negatively affect his property values.

Brad Metheny, 2704 6th Street, Miller's Island, testified that he too lived through the Thanner era. He recalled that the bands would play on Friday and Saturday nights until 1:30 a.m. He also heard all the music and noise while inside his house with the doors and windows closed, with the air conditioning running and the TV playing. He approximated that his home is located 180' from the Restaurant.

Mr. Metheny described the instant hearing as being the same that he heard when Mr. Thanner and his employees previously testified. Granting this request would open the door to the same problems he endured for the last 7 years. Since outside the Restaurant can accommodate 150 people, if outdoor music is combined with alcohol consumption by patrons and boaters who

dock outside the Restaurant, the situation becomes problematic. He does not want to suffer through the same 'constant battle and disruption.' Indeed, Mr. Metheny's son and his family were living at 2712 6th Street which Mr. Metheny also owns. Due to the noise problems, his son was forced to move with his 4 year old granddaughter to Bel Air.

Mr. Metheny's mother-in-law previously owned The Fisherman's Inn in the 1940s and 1950s. Mr. Metheny recalled that when the Restaurant was The Fisherman's Inn there were outdoor dining tables without any problems.

Following Mr. Metheny's testimony was his wife, Bonnie Metheny as well as a neighbor Wayne Waldmann of 9014 Cuckhold Point Road. Both of those neighbors also opposed any type of music at the Restaurant.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. In short, the Petitioner asks this Board to believe that the same problems will not result if live music is now permitted.

In our decision of June 4, 2008, which decision was affirmed by both the Circuit Court and the Court of Special Appeals, we made many findings of fact. We incorporate that Opinion in its entirety herein. We also refer to the facts and holding as set forth in the Court of Special Appeals Opinion dated July 9, 2010.

Specifically, we previously found that the Restaurant could seat 150-160 patrons inside. Outside of the Restaurant was a patio, two television sets, along with an outside bar, and tables for patrons to use. There were also outside speakers connected to a radio which played music both inside and outside. The Restaurant had 14 boat slips for "transient" boat customers.

The Restaurant opened every day from 11:00 a.m. and closed at 2:00 a.m. In the winter, the Restaurant closed early as customers left. The kitchen closed at 11:00 p.m. but the bar stayed

open until 2:00 a.m. as permitted by the liquor license. The food menu was seafood, steaks and sandwiches. We also found that 70% of sales were from food and 30% were in beverages.

On Friday and Saturday nights, we found that live bands played from 9:00 p.m. to 1:00 a.m. We also found that on Saturday and Sunday afternoons, live music played from 4:00 p.m. to 8:00 p.m. (with the caveat that the music stopped after 8:00 because of the code violation complaints).

The type of music were "mostly duos" or "steel bands." There was no charge for live entertainment and the Restaurant stayed open until 2:00 a.m. when live music was played. We also heard testimony that the Restaurant would close without live music being available. In that case, we also heard the testimony against the live music from Matthew Ciarpella, Charles Wolinski, Brad and Bonnie Metheny and Patricia Waldmann.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not even hear the facts before determining whether the doctrine of *res judicata* applies. *Id* at 995 A.2d 1070. The Court also stated that *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett*, 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

This Board's Opinion of June 4, 2008 meets this test. (1) The Board was acting in a judicial capacity by conducting a hearing on the Petition for Special Hearing, where evidence was presented, and rulings were made on disputed factual and legal issues; (2) The issue of whether music should be permitted at this location was actually litigated; and (3) the Board's Opinion of June 4, 2008 was necessary for a resolution of the issue.

Under *Deleon v. Slear*, 328 Md. 569 (1992), the Court of Appeals made clear that in determining whether claims are the same for the purposes of *res judicata*, the Court has in the past applied "same evidence test." However, the *Deleon* Court acknowledged that the concept of "claim" is broad and that "claim" is defined as a "group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from the narrow concept of a 'cause of action.'" *Id.* at 589. The *Deleon* Court, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), emphasized that the most recent test for determining when two claims or causes of action are the same for purposes of *res judicata* is the "transaction" test as set forth in §24 of the Restatement (Second) of Judgments.

The Court of Appeals in *Bilbrough*, recited the transaction test as follows:

> The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 497-498; *Deleon* at 589.

Specifically, with respect to whether the claims are the same, the *Deleon* Court reviewed the facts to see whether they "are related in time, space, origin or motivation." *Id.* at 591. As applied to the instant case, the same parties, or their privy, are involved here as were involved in the Thanner litigation which led to our June 4, 2008 Opinion. We further find that, the same piece

of property has been involved as well as the same zoning issue with respect to whether a music should be permitted on the Property.

With regard to amending previous restrictions or conditions where an earlier application has been denied by a zoning board, the Court of Appeals in *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1936) appropriately explained that:

> The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions..... This rule seems to rest not strictly on the doctrine of res judicata, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.
>
> * * * *
>
> The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County (3) decreased opposition of neighbors and some support by them; and (4) additional conditions attached to the granting of the permit.

Applying the reasoning of *Whittle* here, we find that there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner on the Petition for Special Hearing or before this Board after a *de novo* hearing. The same neighbors who incurred attorney fees and endured the Thanner era of ownership are still protesting both indoor and outdoor music.

The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that, in order to be successful on this request, the changes needed

under *Whittle* must be more than a change in the Restaurant's ownership or management style of the new owner.

We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that it be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

The County Council has determined that 'nightclubs' can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in the BM zone. In contrast, this restaurant is located in a BL zone which is not permitted to have live music. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101. The facts presented by the Petitioner here have not changed that determination.

We also cite our previous holding in *The Belvedere Baptist Church of Baltimore*, Case No. 15-004-SPH, wherein we declined to approve a request to amend a restriction in a previous ALJ Order. In that case, we applied the doctrine of *res judicata* and found that there was no substantial change in circumstances or facts between the first case and the second case to warrant the requested relief. Specifically, we found that: "there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decision." (Board Opinion, p.8).

In the Board's desire to be consistent in its holdings, we find that the facts of this case fit squarely within the relief requested in the *Belevedere Baptist* case. Here, there has been no change in the Property, the Restaurant, the neighborhood, the neighbors or the zoning that might lead to a different result.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Benfred B. Alston

Jane M. Hanley was on the panel and agreed with the majority opinion. She was not reappointed to the Board and her last day with the Board of Appeals was June 30, 2016.

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY	*	
PETITION OF: BOONE KONDYLAS, LLC	*	
FOR JUDICIAL REVIEW OF THE OPINION OF THE BOARD OF APPEALS OF BALTIMORE COUNTY JEFFERSON BUILDING – ROOM 203 105 W. CHESAPEAKE AVENUE TOWSON, MARYLAND 21204	*	CIVIL ACTION NO. : 03-C-16-010551
IN THE MATTER OF: BOONE KONDYLAS, LLC FOR PROPERTY LOCATED AT 9025 CUCKOLD POINT ROAD	*	
15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	
BOARD OF APPEALS CASE NO.: 16-003-SPH		

* * * * * * * * * * * *

PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes the Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the original papers on file in the Department of Permits, Approvals and Inspections and the Board of Appeals of Baltimore County:

ENTRIES FROM THE DOCKET OF THE BOARD OF APPEALS AND DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS OF BALTIMORE COUNTY

July 6, 2015	Petition for Special Hearing filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC under Section 500.7 of the Baltimore County Zoning Regulations to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

February 17, 2016 Board convened for a Hearing, Day 1.

Exhibits submitted at Motion Hearing before the Board of Appeals:

Protestants' Exhibit No.

1 – Opinion and Order of OAH (Case No. 2016-0003-SPH) dated October 22, 2015

2 – Unreported Opinion of Court of Special Appeals No. 810, Sept. Term 2009, filed July 9, 2010

People's Counsel Exhibit No.

1 – Compilation of BCZR, Opinion of OAH (Case No. 2016-0003-SPH), Trial Memorandum from Appellant (Case No. 2016-0003-SPH), definition of anticipate, Unreported Court of Special Appeals of Maryland (No. 810 Sept. Term 2009, filed July 9, 2010), Majority Opinion of Baltimore County Board of Appeals (Case Nos. CBA-06-044 and CBA-07-134)

2 – Zoning Checklist/PAI

February 19, 2016 E-mails between Board and counsel regarding scheduling and witnesses.

March 8, 2016 Notice of Reassignment issued by the Board.

April 28, 2016 Board convened for a Hearing, Day 2.

Exhibits submitted at Hearings before the Board of Appeals:

Petitioner's Exhibit No.

1 – Site Plan

2A – Majority Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2B – Dissenting Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2C – Ruling on Motion for Reconsideration and Clarification (Case Nos. 07-144-SPH, CBA-06-044, and CBA-07-134)

3 – Circuit Court Opinion, Final Order, Case No. 03-C-08-009996

4 – Unreported Opinion, Court of Special Appeals, No. 810, Sept. Term, 2009, Filed July 9, 2010

5 – Memorandum Opinion (Exhibit) Contempt-Circuit Court for Baltimore County, Case No. 03-C-08-009996

6 – My Neighborhood Map/aerial photograph of "Dock of the Bay"

10 – Letter dated June 9, 2008, letter measured decibel levels emanating from the Dock of the Bay
11 – Letter dated October 3, 2007 measuring the decibel levels from Dock of the Bay
12 – Photograph of Row Boat Willie's building
13 – Large map of aerial view of Dock of the Bay and area, 2016 Google Imaging
14 – My Neighborhood Map printed 4/27/2016, aerial view of Dock of the Bay and area
15 – 2015 Alcoholic Beverage License for Dock of the Bay
16 – Baltimore County Police Records, Sgt. Parrish
17 – Summary of Calls from Exhibit 16
18 – Facebook posts for Dock of the Bay 2/17/16 Boone Letter
19 – Facebook posts for Dock of the Bay 2/21/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
20 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
21 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
22 – Facebook post from Dock of the Bay 2/22/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
23 – Facebook posts from Dock of the Bay (ID ONLY/NOT ADMITTED/NOT IN FILE)

People's Counsel Exhibit No.

1 – Website photo showing hours of operation
2A – SDAT record showing 9025 Cuckold Point Road, Lot 504
2B – SDAT record showing Cuckold Point Road, Lot 500
2C – SDAT record showing Cuckold Point Road, Lot 502
2D – SDAT record showing Cuckold Point Road, Lot 501
3 – Deed to 9025 Cuckold Point Road dated September 30, 2014
4 – Deed to 9025 Cuckold Point Road dated March 10, 1999
5 – People's Counsel Sign-In Sheet, 2/17/16
6 – People's Counsel Sign-In Sheet, 4/28/16
7 – Map – Property ID and Zoning, 2014 image
8A – Map
8B – Map (color)
8C – Map
9 – Comprehensive Zoning Map
10 – Website page for Mark Alan date 4/26/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
11A – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.

Tammy A. McDiarmid

Tammy A. McDiarmid, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

Board of Appeals of Baltimore County

JEFFERSON BUILDING
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105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

September 15, 2016

Lawrence E. Schmidt, Esquire
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Towson, Maryland 21204

Francis X. Borgerding, Esquire
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Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Multiple Original Cover Letters

c: Kenneth Boone/Boone Kondylas, LLC
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN RE: **PETITION FOR SPECIAL HEARING** **(9025 Cuckold Point Road)** 15th Election District 7th Council District	*	BEFORE THE
	*	OFFICE OF
	*	ADMINISTRATIVE HEARINGS
Boone Kondylas, LLC *Legal Owner* Petitioner	*	FOR BALTIMORE COUNTY
	*	**Case No. 2016-0003-SPH**

* * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Boone Kondylas, LLC, legal owner. The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

Ken Boone appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioner. Several neighbors, represented by Francis Borgerding, Esq., attended and opposed the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Bureau of Development Plans Review (DPR). Neither agency opposed the request, but suggested certain conditions be imposed if relief is granted.

The subject property is 1.27 acres and zoned B.L. The property is improved with a restaurant known as "Dock of the Bay." The restaurant has new ownership, which proposes to offer limited music and live entertainment as an "accessory" use to the food and beverage service. This property and business have been the subject of protracted litigation concerning loud music and unruly patrons which disturbed the neighborhood. The operation was found by the court of

ORDER RECEIVED FOR FILING
Date 10/22/15
By Den

special appeals to constitute a "nightclub," a use prohibited in the B.L. zone. Protestants contend the petition is barred by *res judicata,* while Petitioner argues that unlike the former operation the current business is first and foremost a restaurant, with music offered to compliment the dining experience.

Under Maryland law, an agency determination affirmed on appeal is entitled to preclusive effect. Esslinger v. Balto. City, 95 Md. App. 607, 621 (1993). This is the case, and *res judicata* will apply, unless there is a significant change in circumstances between the earlier and subsequent action. *See, e.g.*, Alvey v. Hedin, 243 Md. 334, 340 (1966). In light of this authority I believe the doctrine of *res judicata* mandates that the petition in this case be dismissed.

As an initial matter, I do not believe the OAH has the authority to "amend" restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the board of appeals, circuit court and then the court of special appeals. In an unreported opinion (No. 810, September Term, 2009) the appellate court affirmed the agency findings, which necessarily included the conditions and restrictions found in those orders. To amend those restrictions at this juncture would be akin to reversing the appellate court, which an administrative agency cannot do.

I believe the Petition must also be denied based on *res judicata.* As discussed above, *res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard. For example, if the owner of the subject property was now proposing to operate a barbershop or beauty salon at the site, that would constitute a significant change and *res judicata* would not apply. But here, I do not believe there

ORDER RECEIVED FOR FILING
Date 10/22/15
By

have been significant changes; Petitioner is still proposing to operate a restaurant that would offer live and/or recorded music.

The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010).

THEREFORE, IT IS ORDERED this 22nd day of October, 2015 by this Administrative Law Judge, that the Petition for Special Hearing pursuant to B.C.Z.R. § 500.7 to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music, be and is hereby DENIED.

Any appeal of this decision must be filed within thirty (30) days of the date of this Order.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln

ORDER RECEIVED FOR FILING
Date 10/22/15
By sln

CBCA

F100D

PETITION FOR ZONING HEARING(S)

To be filed with the Department of Permits, Approvals and Inspections

To the Office of Administrative Law of Baltimore County for the property located at:

address 9025 Cuckold Point Road **which is presently zoned** BL

Deed Reference 35488/00133 10 Digit Tax Account # 1 5 0 8 7 9 0 1 1 0

Property Owner(s) Printed Name(s) Boone Kondylas, LLC

CASE NUMBER 2016-0003-SPH **Filing Date** 7/6/15 **Estimated Posting Date** __/__/_____ **Reviewer** BD

(SELECT THE HEARING(S) BY MARKING X AT THE APPROPRIATE SELECTION AND PRINT OR TYPE THE PETITION REQUEST)

The undersigned legal owner(s) of the property situate in Baltimore County and which is described in the description and plan attached hereto and made a part hereof, hereby petition for:

1. ✓ **a Special Hearing** under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

Please see attached.

2. ____ **a Special Exception** under the Zoning Regulations of Baltimore County to use the herein described property for

3. ____ **a Variance** from Section(s)

of the zoning regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons: **(Indicate below your hardship or practical difficulty or indicate below "To Be Presented At Hearing". If you need additional space, you may add an attachment to this petition)**

TO BE PRESENTED AT HEARING

Property is to be posted and advertised as prescribed by the zoning regulations.
I, or we, agree to pay expenses of above petition(s), advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.
Legal Owner(s) Affirmation: I / we do so solemnly declare and affirm, under the penalties of perjury, that I / We are the legal owner(s) of the property which is the subject of this / these Petition(s).

ORDER RECEIVED FOR FILING
Date 10/22/15
By BD

Contract Purchaser/Lessee:

Name- Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

Legal Owners:

Boone Kondylas, LLC
Ken Boone

Name #1 – Type or Print Name #2 – Type or Print

Signature #1 Signature # 2

9025 Cuckold Point Road, Sparrows Point, MD

Mailing Address City State

21219 kboone@tidalwaterdirect.com

Zip Code Telephone # Email Address

Attorney for Petitioner:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name- Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

Representative to be contacted:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name – Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

REV. 2/23/11

ATTACHMENT TO PETITION FOR ZONING HEARING

9025 Cuckold Point Road
15th Election District
7th Councilmanic District

Special Hearing:

1. To amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music; and

2. For such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Item #0003

CENTURY ENGINEERING

10710 Gilroy Road
Hunt Valley, MD 21031

Zoning Description for
9025 Cuckold Point Road*

Beginning at a point on the southeast side of Cuckold Point Road which is 30 feet wide, at the distance of fifteen feet southwest of the centerline of Fifth Street which is 30 feet wide. Being Lots 500 through 505 in the subdivision of Swan Point as recorded in Plat Book L.McL.M. # 9, Folio #5. Containing 1.031 acres of land, more or less. Also known as 9025 Cuckold Point Road and located in the 15th Election District and the 7th Councilmanic District.

STATE OF MARYLAND
BRYAN JASON HAYNIE
No. 21139
PROFESSIONAL LAND SURVEYOR

W:\file\login2\ld\ld06\descriptions\9025 Cuckold Point Road-08-17-06
* Legal Description from Case No. 07-144-SPH

IN 144

Item # 0003

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET AND FINANCE
MISCELLANEOUS CASH RECEIPT

No. 127362

Date: 7/6/15

Fund	Dept	Unit	Sub Unit	Rev Source/ Obj	Sub Rev/ Sub Obj	Dept Obj	BS Acct	Amount
001	806	0000		6150				500 00

Total: 500 00

Rec From:

For: Zoning hearing - case # 2016-0003-SPH

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER GOLD - ACCOUNTING
PLEASE PRESS HARD!!!!

PAID RECEIPT
BUSINESS ACTUAL TIME DRN
7/06/2015 7/06/2015 11:19:28 5
REG WS05 WALKIN RB05 LR0
>>RECEIPT # 802508 7/06/2015 OFLN
Dept 5 520 ZONING VERIFICATION
CR NO. 127362
Recpt Tot $500.00
$500.00 CK $.00 CA
Baltimore County, Maryland

CASHIER'S VALIDATION

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

September 15, 2016

Lawrence E. Schmidt, Esquire
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Towson, Maryland 21204

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Multiple Original Cover Letters

c: Kenneth Boone/Boone Kondylas, LLC
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE
	*	BOARD OF APPEALS
	*	OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge (the "ALJ") in which the ALJ denied a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music.

A public hearing was held *de novo* on February 17, 2016 and April 28, 2016. The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire of Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation was held on June 14, 2016.

Factual Background

The subject property is water front property located in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" (the "Restaurant"). The Restaurant is open seven (7) days a week and has a total seating capacity of approximately 225 persons (125 persons inside and 100 persons outside). The Property is also

improved with boat slips for patrons to dock their boats and access the Restaurant via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, the Restaurant came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation, music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement actions beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing to request a determination that the Restaurant with its associated live music did not constitute a 'nightclub.' In our June 4, 2008 Opinion, this Board held that Mr. Thanner's operation of the Restaurant along with music played met the definition of "nightclub" in §101 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a 'nightclub' was not permitted in a BL zone, this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (Board Opinion 6/4/08, p. 14). Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. Thereafter, the Restaurant closed.

In or about August of 2014, the Petitioner purchased the Property. In or about October of 2014, the Petitioner reopened the Restaurant under the previous name – Dock of the Bay. At the hearing, Kenneth Boone, owner of Boone Kondylas, LLC, the Petitioner, testified before this Board that his ownership and operation of the Restaurant is one of three businesses he owns. The Restaurant has both a business license and a liquor license. The food menu varies from seafood to sandwiches, hamburgers and pasta.

The Petitioner described the minimal improvements that have been made to the Restaurant since August of 2014. These have included pouring a concrete pad where the customers can eat steamed crabs, expanding the kitchen, and removing the outside stage installed by Mr. Thanner where the musicians formerly played.

In April of 2015, the Petitioner hired Mark Allen, a guitar player, to perform at the Restaurant. Mr. Allen was also a regular performer at the Restaurant during the period that Mr. Thanner owned it. When signs advertising Mr. Allen's performance were put up at the Restaurant, a Baltimore County inspector instructed the Petitioner that the Restaurant would be closed down if music was permitted to play.

Mr. Boone mentioned that 'Row Boat Willie's', a restaurant located next to the Property is permitted to have live music. Row Boat Willie's is located in a BM (Business-major) zone which permits 'nightclubs' to operate. The Petitioner is competing with 8 other restaurants, including the 'The New White Swan' located at 8821 Millers Island Blvd. and 'The Islander' located at 9008 Cuckold Point Rd., on or near the waterfront and all of them have some type of live music. Mr. Boone was certain that the Restaurant would not be able to survive financially without live music.

While not excluding any specific age of customers, the plan is to hire musical performers who cater to a 50 year-old audience, who want to hear music while enjoying lunch or dinner. The Petitioner does not want to cater to a younger crowd as he anticipated the potential problems that might arise with a younger audience. In the summer months, boaters from all over Baltimore County patronize the Restaurant. The types of musical acts envisioned by the Petitioner would range from solo acoustic or electric guitar players to Frank Sinatra and Oompa bands.

The proposed hours for the musical groups would be Friday and Saturday nights from 6:00 p.m. to 10:00 p.m., with the last call at midnight, in hopes that the customers might leave by 12:30

a.m. On Sundays, in the summer, music would be played outdoors from 5:00 p.m. to 8:30 p.m. Also, there would not be a dance floor or stage area.

The Petitioner is amenable to a decibel level restriction for the sound stemming from the music. However, Mr. Boone has not personally operated any type of device to monitor decibel levels at the Restaurant.

On cross examination, the Petitioner conceded that the Restaurant hours of operation are in fact stated on the website. The hours of operation stated in the website are Monday to Thursday 11:00 a.m. to 11:00 p.m.; Friday and Saturday 11:00 a.m. to 1:00 a.m.; and Sunday from 9:00 a.m. to 8:00 p.m. Mr. Boone then changed his testimony on the time period during which musical acts would perform and indicated that the music would end at Friday and Saturday nights at 11:00 p.m., on Sundays at 7:00 p.m.; and, at dusk for outdoor performances in the summer months which would end as late as 9:00 p.m.

The Petitioner acknowledged that it did not want to be restricted to certain types of music but would entertain other types of music such as jazz quartet bands or Reggae bands. The Petitioner was uncertain about normal sound levels or how the proposed music might be regulated.

In support of the Petitioner's proposed business, several Miller's Island residents testified. Cheryl Gowers of 2812 Bay Drive has lived at that address since 1993. At the previous hearing, Ms. Gowers testified against Mr. Thanner's operation. She was familiar with the problems that resulted from Mr. Thanner's operation of the business which, she said permitted very loud music including heavy metal music and played until midnight or 1:00 a.m. on most weekends. Presently, Ms. Gowers works as a waitress in the Restaurant for the Petitioner. Having worked at both The New White Swan and The Islander, she corroborated that live music is played at those establishments.

Russell McClelland, 9011 Miller's Island Blvd. testified that he lives 400 yds. from the Property. Mr. McClelland was familiar with the complaints from neighbors and the level of sound

coming from Mr. Thanner's restaurant. He described music at Mr. Thanner's restaurant as being played from speakers mounted to a stage outside the Restaurant. The music was amplified over the water and would occur all days of the week until midnight. He recalled that Reggae music was played.

Mr. McClelland is in support of the Petitioner's request here because he believes, like Ms. Gowers, that Mr. Boone will not permit the type of problems associated with Mr. Thanner's operation. Mr. McClelland works for the Petitioner by cutting the grass and policing both the parking lots and boat slips. If this request is granted, he is willing to monitor the sound level.

Charles Boland and Jerri Boland, his wife, 2414 Eugene Avenue, Edgemere, MD live 1 ½ miles from the Restaurant. Mr. Boland is a retired Baltimore County police officer whose son is employed by the Petitioner. Mr. Boland frequents the Restaurant 4-5 times per week and testified that the Petitioner's operation is family-oriented. The Bolands have no objection to live music at the Restaurant.

Dorothy Reilly, 2809 3rd Street, Miller's Island, is located 2 blocks from the Restaurant. Ms. Reilly has observed loud music coming from The White Swann and The Islander. She reiterated that the Petitioner's restaurant is family oriented. She does not like loud music but would like to hear softer music while there.

In the Protestants' case in chief, Charles Wolinski, 9019 Cockhold Point Rd. testified that his home is adjacent to the Restaurant. Mr. Wolinski is a high school biology teacher at Sparrow's Point High School. He can see the Restaurant from his house. He has 4 children, ranging in age from 13 yrs. to 3 yrs. Mr. Wolinski described his family's life through the Thanner years as living through a "nightmare." He specifically described the problems with the loud music both indoor and outdoor which occurred every weekend. Disorderly patrons were loud while the music was playing and, after the music ended, the clapping and screaming was just as bad as the music itself.

These patrons would then spillover into the parking lot and would continue with loud, disruptive behavior.

Because of the loud noises made by patrons and the loud music, he can never open the windows in his home in the summer or winter. All the noise from the music and the patrons could still be heard inside the home; even in the shower with the fan running. This situation disrupted his family's sleep and the enjoyment of their home. Due to the configuration of the Restaurant's door leading to the outside, even the music played indoors by a live band can be heard in his home and it is disruptive. He explained that each time the outside door would open, the music and noise from inside the Restaurant would project outdoors. He further stated that the parking would overflow into the neighborhood streets. He described one incident where a Restaurant patron, who was blocked in by another car on the parking lot, drove across Mr. Wolinski's lawn in order to exit the parking lot. That incident forced Mr. Wolinski to incur the cost of erecting a fence. Mr. Wolinski was clear that Mr. Thanner never controlled the crowds that came with playing music at the Restaurant.

Mr. Wolinski is also familiar with Mr. Boone's operation of the Restaurant and explained that the physical layout of the Restaurant has not changed. He is very concerned that the same problems will reoccur whether the music is played inside or outdoors. Mark Allen is the same performer hired by Mr. Thanner. Mr. Allen's guitar is connected to an amplifier which Mr. Wolinski described as so loud that Mr. Allen was no longer permitted to play at Rowboat Willie's. Mr. Wolinski recalled that Mr. Thanner also hired steel drum bands. In his experience and from personal observation, the music from Rowboat Willie's does not impact him or his family. He indicated that The Islander only has karaoke music inside.

Mr. Wolinski stated that the litigation against Mr. Thanner's operation lasted seven (7) years through the various appeals in the Court system and that he and the other Protestants paid

substantial attorney's fees. Toward that end, he was surprised that the new owner could make the identical request for music when that request was previously denied in the various appeals.

Also testifying for the Protestants was Matthew Ciarpella, 2116 6th Street, Miller's Island where he has resided for 11 years. Mr. Ciarpella experienced first-hand Mr. Thanner's operation of the Restaurant and also endured seven (7) years of litigation. He opposes outdoor music at the Restaurant due the proximity of the Restaurant to his house. As such, even if the proposed music ends at 7:00 p.m., rather than 9:00 p.m., it would still be intrusive. His house, similar to others in the neighborhood is built on elevated foundations such that the sound travels upward. When wind blows from the north over the water, the sound travels. He could hear the music and loud patrons while inside his house with the windows closed. Each time the outside door opened, bursts of sound would travel. This problem occurred even with a 6' privacy fence and a wall of Leland Cypress trees.

Mr. Ciarella is convinced that the type of music will not be limited to acoustic or Reggae. He insists that the Petitioner will not repeatedly hire the same musical acts because, economically, the Restaurant will profit from hiring a variety of bands. Moreover, the more popular the band, the more revenue will be generated. Karaoke would not be a better option because a microphone will still be used. He is familiar with Mark Allen's guitar which is connected to an electric amplifier and/or microphone whether he is playing classic rock, 'oldies music' or Reggae.

Mr. Ciarpella added that when the popular rendition of a song was played, he would hear cheering, clapping and hooting for the music to continue. In contrast, this additional noise from cheering and clapping does not occur when a song is being played on a radio. At The Islander, he said that there is a DJ inside and that he cannot hear that from his house.

Mr. Ciarpella was familiar with the layout of Row Boat Willie's as he was involved with constructing the sound proofing of the pavilion where the live music plays. The pavilion consists

of a 32x30 square shape and is opened on north side. The pavilion also has table seating and an elevated deck.

In his view, the proposal presented here is the same one that was previously rejected by this Board and by the courts. He testified that there will be no regulation of decibel levels. During the Thanner years, the neighbors regulated the music levels by filing complaints with Code Enforcement. What he learned through the Thanner litigation is that there is no regulation of noise levels by Baltimore County; rather any nuisance is complaint driven. This puts a burden on the Protestants to seek enforcement against the Restaurant.

He further testified that along with bands comes the followers which he described as a 'different type of crowd' than would normally be expected with music that accompanies dinner. He also stated that the amount of traffic not only increased with the live music but the followers of those bands did not drive civilly.

Mr. Ciarpella anticipates that, if the Petitioner's request is granted, he and his neighbors will endure more litigation monitoring the Petitioner and again when the Restaurant is subsequently sold. Any live music played at this restaurant will negatively affect his property values.

Brad Metheny, 2704 6th Street, Miller's Island, testified that he too lived through the Thanner era. He recalled that the bands would play on Friday and Saturday nights until 1:30 a.m. He also heard all the music and noise while inside his house with the doors and windows closed, with the air conditioning running and the TV playing. He approximated that his home is located 180' from the Restaurant.

Mr. Metheny described the instant hearing as being the same that he heard when Mr. Thanner and his employees previously testified. Granting this request would open the door to the same problems he endured for the last 7 years. Since outside the Restaurant can accommodate 150 people, if outdoor music is combined with alcohol consumption by patrons and boaters who

dock outside the Restaurant, the situation becomes problematic. He does not want to suffer through the same 'constant battle and disruption.' Indeed, Mr. Metheny's son and his family were living at 2712 6th Street which Mr. Metheny also owns. Due to the noise problems, his son was forced to move with his 4 year old granddaughter to Bel Air.

Mr. Metheny's mother-in-law previously owned The Fisherman's Inn in the 1940s and 1950s. Mr. Metheny recalled that when the Restaurant was The Fisherman's Inn there were outdoor dining tables without any problems.

Following Mr. Metheny's testimony was his wife, Bonnie Metheny as well as a neighbor Wayne Waldmann of 9014 Cuckhold Point Road. Both of those neighbors also opposed any type of music at the Restaurant.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. In short, the Petitioner asks this Board to believe that the same problems will not result if live music is now permitted.

In our decision of June 4, 2008, which decision was affirmed by both the Circuit Court and the Court of Special Appeals, we made many findings of fact. We incorporate that Opinion in its entirety herein. We also refer to the facts and holding as set forth in the Court of Special Appeals Opinion dated July 9, 2010.

Specifically, we previously found that the Restaurant could seat 150-160 patrons inside. Outside of the Restaurant was a patio, two television sets, along with an outside bar, and tables for patrons to use. There were also outside speakers connected to a radio which played music both inside and outside. The Restaurant had 14 boat slips for "transient" boat customers.

The Restaurant opened every day from 11:00 a.m. and closed at 2:00 a.m. In the winter, the Restaurant closed early as customers left. The kitchen closed at 11:00 p.m. but the bar stayed

open until 2:00 a.m. as permitted by the liquor license. The food menu was seafood, steaks and sandwiches. We also found that 70% of sales were from food and 30% were in beverages.

On Friday and Saturday nights, we found that live bands played from 9:00 p.m. to 1:00 a.m. We also found that on Saturday and Sunday afternoons, live music played from 4:00 p.m. to 8:00 p.m. (with the caveat that the music stopped after 8:00 because of the code violation complaints).

The type of music were "mostly duos" or "steel bands." There was no charge for live entertainment and the Restaurant stayed open until 2:00 a.m. when live music was played. We also heard testimony that the Restaurant would close without live music being available. In that case, we also heard the testimony against the live music from Matthew Ciarpella, Charles Wolinski, Brad and Bonnie Metheny and Patricia Waldmann.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not even hear the facts before determining whether the doctrine of *res judicata* applies. *Id* at 995 A.2d 1070. The Court also stated that *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett*, 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

This Board's Opinion of June 4, 2008 meets this test. (1) The Board was acting in a judicial capacity by conducting a hearing on the Petition for Special Hearing, where evidence was presented, and rulings were made on disputed factual and legal issues; (2) The issue of whether music should be permitted at this location was actually litigated; and (3) the Board's Opinion of June 4, 2008 was necessary for a resolution of the issue.

Under *Deleon v. Slear*, 328 Md. 569 (1992), the Court of Appeals made clear that in determining whether claims are the same for the purposes of *res judicata*, the Court has in the past applied "same evidence test." However, the *Deleon* Court acknowledged that the concept of "claim" is broad and that "claim" is defined as a "group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from the narrow concept of a 'cause of action.'" *Id.* at 589. The *Deleon* Court, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), emphasized that the most recent test for determining when two claims or causes of action are the same for purposes of *res judicata* is the "transaction" test as set forth in §24 of the Restatement (Second) of Judgments.

The Court of Appeals in *Bilbrough*, recited the transaction test as follows:

> The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 497-498; *Deleon* at 589.

Specifically, with respect to whether the claims are the same, the *Deleon* Court reviewed the facts to see whether they "are related in time, space, origin or motivation." *Id.* at 591. As applied to the instant case, the same parties, or their privy, are involved here as were involved in the Thanner litigation which led to our June 4, 2008 Opinion. We further find that, the same piece

of property has been involved as well as the same zoning issue with respect to whether a music should be permitted on the Property.

With regard to amending previous restrictions or conditions where an earlier application has been denied by a zoning board, the Court of Appeals in *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1936) appropriately explained that:

> The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions..... This rule seems to rest not strictly on the doctrine of res judicata, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.
>
> * * * *
>
> The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County (3) decreased opposition of neighbors and some support by them; and (4) additional conditions attached to the granting of the permit.

Applying the reasoning of *Whittle* here, we find that there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner on the Petition for Special Hearing or before this Board after a *de novo* hearing. The same neighbors who incurred attorney fees and endured the Thanner era of ownership are still protesting both indoor and outdoor music.

The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that, in order to be successful on this request, the changes needed

under *Whittle* must be more than a change in the Restaurant's ownership or management style of the new owner.

We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that it be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

The County Council has determined that 'nightclubs' can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in the BM zone. In contrast, this restaurant is located in a BL zone which is not permitted to have live music. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101. The facts presented by the Petitioner here have not changed that determination.

We also cite our previous holding in *The Belvedere Baptist Church of Baltimore*, Case No. 15-004-SPH, wherein we declined to approve a request to amend a restriction in a previous ALJ Order. In that case, we applied the doctrine of *res judicata* and found that there was no substantial change in circumstances or facts between the first case and the second case to warrant the requested relief. Specifically, we found that: "there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decision." (Board Opinion, p.8).

In the Board's desire to be consistent in its holdings, we find that the facts of this case fit squarely within the relief requested in the *Belevedere Baptist* case. Here, there has been no change in the Property, the Restaurant, the neighborhood, the neighbors or the zoning that might lead to a different result.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Benfred B. Alston

Jane M. Hanley was on the panel and agreed with the majority opinion. She was not reappointed to the Board and her last day with the Board of Appeals was June 30, 2016.

IN RE: **PETITION FOR SPECIAL HEARING** **(9025 Cuckold Point Road)** 15th Election District 7th Council District	*	BEFORE THE
	*	OFFICE OF
	*	ADMINISTRATIVE HEARINGS
Boone Kondylas, LLC *Legal Owner* Petitioner	*	FOR BALTIMORE COUNTY
	*	**Case No. 2016-0003-SPH**

* * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Boone Kondylas, LLC, legal owner. The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

Ken Boone appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioner. Several neighbors, represented by Francis Borgerding, Esq., attended and opposed the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Bureau of Development Plans Review (DPR). Neither agency opposed the request, but suggested certain conditions be imposed if relief is granted.

The subject property is 1.27 acres and zoned B.L. The property is improved with a restaurant known as "Dock of the Bay." The restaurant has new ownership, which proposes to offer limited music and live entertainment as an "accessory" use to the food and beverage service. This property and business have been the subject of protracted litigation concerning loud music and unruly patrons which disturbed the neighborhood. The operation was found by the court of

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Date 10/22/15
By Den

special appeals to constitute a "nightclub," a use prohibited in the B.L. zone. Protestants contend the petition is barred by *res judicata,* while Petitioner argues that unlike the former operation the current business is first and foremost a restaurant, with music offered to compliment the dining experience.

Under Maryland law, an agency determination affirmed on appeal is entitled to preclusive effect. Esslinger v. Balto. City, 95 Md. App. 607, 621 (1993). This is the case, and *res judicata* will apply, unless there is a significant change in circumstances between the earlier and subsequent action. *See, e.g.*, Alvey v. Hedin, 243 Md. 334, 340 (1966). In light of this authority I believe the doctrine of *res judicata* mandates that the petition in this case be dismissed.

As an initial matter, I do not believe the OAH has the authority to "amend" restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the board of appeals, circuit court and then the court of special appeals. In an unreported opinion (No. 810, September Term, 2009) the appellate court affirmed the agency findings, which necessarily included the conditions and restrictions found in those orders. To amend those restrictions at this juncture would be akin to reversing the appellate court, which an administrative agency cannot do.

I believe the Petition must also be denied based on *res judicata.* As discussed above, *res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard. For example, if the owner of the subject property was now proposing to operate a barbershop or beauty salon at the site, that would constitute a significant change and *res judicata* would not apply. But here, I do not believe there

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have been significant changes; Petitioner is still proposing to operate a restaurant that would offer live and/or recorded music.

The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010).

THEREFORE, IT IS ORDERED this 22nd day of October, 2015 by this Administrative Law Judge, that the Petition for Special Hearing pursuant to B.C.Z.R. § 500.7 to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music, be and is hereby DENIED.

Any appeal of this decision must be filed within thirty (30) days of the date of this Order.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln

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Date 10/22/15
By sln

CBCA

F100D

PETITION FOR ZONING HEARING(S)

To be filed with the Department of Permits, Approvals and Inspections

To the Office of Administrative Law of Baltimore County for the property located at:

address 9025 Cuckold Point Road **which is presently zoned** BL

Deed Reference 35488/00133 10 Digit Tax Account # 1 5 0 8 7 9 0 1 1 0

Property Owner(s) Printed Name(s) Boone Kondylas, LLC

CASE NUMBER 2016-0003-SPH **Filing Date** 7/6/15 **Estimated Posting Date** __/__/_____ **Reviewer** BD

(SELECT THE HEARING(S) BY MARKING X AT THE APPROPRIATE SELECTION AND PRINT OR TYPE THE PETITION REQUEST)

The undersigned legal owner(s) of the property situate in Baltimore County and which is described in the description and plan attached hereto and made a part hereof, hereby petition for:

1. ✓ **a Special Hearing** under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

Please see attached.

2. ____ **a Special Exception** under the Zoning Regulations of Baltimore County to use the herein described property for

3. ____ **a Variance** from Section(s)

of the zoning regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons: **(Indicate below your hardship or practical difficulty or indicate below "To Be Presented At Hearing". If you need additional space, you may add an attachment to this petition)**

TO BE PRESENTED AT HEARING

Property is to be posted and advertised as prescribed by the zoning regulations.
I, or we, agree to pay expenses of above petition(s), advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.
Legal Owner(s) Affirmation: I / we do so solemnly declare and affirm, under the penalties of perjury, that I / We are the legal owner(s) of the property which is the subject of this / these Petition(s).

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Date 10/22/15
By BD

Contract Purchaser/Lessee:

Name- Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

Legal Owners:

Boone Kondylas, LLC
Ken Boone

Name #1 – Type or Print Name #2 – Type or Print

Signature #1 Signature # 2

9025 Cuckold Point Road, Sparrows Point, MD

Mailing Address City State

21219 kboone@tidalwaterdirect.com

Zip Code Telephone # Email Address

Attorney for Petitioner:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name- Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

Representative to be contacted:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name – Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

REV. 2/23/11

ATTACHMENT TO PETITION FOR ZONING HEARING

9025 Cuckold Point Road
15th Election District
7th Councilmanic District

Special Hearing:

1. To amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music; and

2. For such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Item #0003

CENTURY ENGINEERING

10710 Gilroy Road
Hunt Valley, MD 21031

Zoning Description for
9025 Cuckold Point Road*

Beginning at a point on the southeast side of Cuckold Point Road which is 30 feet wide, at the distance of fifteen feet southwest of the centerline of Fifth Street which is 30 feet wide. Being Lots 500 through 505 in the subdivision of Swan Point as recorded in Plat Book L.McL.M. # 9, Folio #5. Containing 1.031 acres of land, more or less. Also known as 9025 Cuckold Point Road and located in the 15th Election District and the 7th Councilmanic District.

STATE OF MARYLAND
BRYAN JASON HAYNIE
No. 21139
PROFESSIONAL LAND SURVEYOR

W:\file\login2\ld\ld06\descriptions\9025 Cuckold Point Road-08-17-06
* Legal Description from Case No. 07-144-SPH

IN 144

Item # 0003

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET AND FINANCE
MISCELLANEOUS CASH RECEIPT

No. 127362

Date: 7/6/15

Fund	Dept	Unit	Sub Unit	Rev Source/ Obj	Sub Rev/ Sub Obj	Dept Obj	BS Acct	Amount
001	806	0000		6150				500 00

Total: 500 00

Rec From:

For: Zoning hearing - case # 2016-0003-SPH

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER GOLD - ACCOUNTING
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Baltimore County, Maryland

CASHIER'S VALIDATION

Circuit Court for Baltimore City
Case No.: 03-C-16-010551

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 638

September Term, 2017

IN THE MATTER OF BOONE KONDYLAS, LLC

Meredith,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 9, 2018

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Boone Kondylas, LLC ("Boone"), appellee, filed a zoning petition for special hearing in the Baltimore County Office of Administrative Hearings ("OAH"), seeking an amendment to, or rescission of, restrictions previously placed on Boone's waterfront property ("the property"), to permit the use of the property as a restaurant with limited accessory music and entertainment. Following the special hearing, an OAH administrative law judge ("ALJ") denied Boone's zoning petition on the ground that it was barred by *res judicata,* as a result of this Court's 2010 unreported opinion in *Fifth Street, LLC, et al. v. Matthew Ciarpella, et al.*, No. 810, September Term, 2009 (filed July 9, 2010) ("*DOB I*"), wherein we held that the operation by the previous owner comprised a use as both a restaurant and a nightclub, and that use as a nightclub was prohibited by the applicable zoning regulations.

Boone appealed the ALJ's decision to the Board of Appeals of Baltimore County ("Board"), which also denied Boone's petition as barred by *res judicata*. Boone petitioned for judicial review, and the Circuit Court for Baltimore County remanded the matter to the Board for a determination of whether the subject property, under Boone's ownership, currently meets the definition of a nightclub, in light of the factors cited in our opinion in *DOB I.*

Appellants, Charles Wolinski, *et al.* ("Wolinski")—residential neighbors of the property—and People's Counsel of Baltimore County ("People's Counsel"), appealed the decision of the circuit court.

The questions presented, as set forth in Wolinski's brief, are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition?

2. As a matter of law, should the Opinion of the County Board of Appeals in this matter dated September 15, 2016 have been affirmed by the Circuit Court for Baltimore County?

3. Does an administrative agency or on appeal a reviewing Court have the authority to amend the zoning restriction previously granted by the Court of Special Appeals?

The questions as presented by People's Counsel are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition, which alleges essentially a cosmetic change in management style or operation?

2. Is the County Board of Appeals' opinion correct and at least legally sufficient based on the deferential, contextual and interpretive scope of judicial review?

3. Does the Circuit Court remand misapply *res judicata*; exceed the prudential scope of judicial review, fail to exercise judicial self-restraint, and both disrespect and undermine the administrative function[?]

For the reasons that follow, we shall dismiss appellants' appeal as premature.

FACTS AND LEGAL PROCEEDINGS

The waterfront property at the center of the controversy in this matter is located on Cuckold Point Road on Miller's Island in Baltimore County. The 1.27 acre property is improved by a restaurant/bar called Dock of the Bay ("DOB").[1]

In October 2003, shortly after it suffered extensive damage from Hurricane Isabel, Fifth Street, LLC ("FSLLC"), purchased DOB.[2] After a lengthy rebuilding period, FSLLC

[1] A restaurant, under various names and owners, has operated on the property since the 1950s.

[2] For the background of DOB before Boone purchased it, we rely primarily on the factual recitation set forth in *DOB I*.

reopened DOB in March 2004. It was licensed as a restaurant with a capacity of approximately 150-160 patrons and held a Class D liquor license. On an outdoor patio, there was more seating and a bar, along with a children's play area. DOB had an in-house music system to play satellite radio inside and outside, and it offered live entertainment by disc jockeys, bands and karaoke performers.

In 2006, residential neighbors of DOB complained to the Baltimore County Department of Permits and Development Management that the live music was too loud and disruptive and that DOB was operating as a nightclub, which was not permitted in the applicable business zone.[3] DOB was cited three times for: operating a nightclub in a B.L.

[3] DOB is located in a B.L. (Business Local) business zone. Baltimore County Zoning Regulation ("BCZR") §230.1, permits the operation of a "standard restaurant" and a "tavern" in a B.L. zone but does not permit a "nightclub," even by special exception. BCZR §230.3.

BCZR §101.1 defines "standard restaurant" as:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

The same code section defines a "tavern" as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." Finally, "nightclub" is defined by the Code section as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County."

(continued . . .)

zone; erecting a tent without a permit and; failing to cease nightclub operations and to remove the tent.

In August 2006, FSLLC filed a petition for special hearing, seeking a determination of whether DOB was a nightclub in violation of BCZR.[4] The zoning commissioner determined that DOB was a nightclub under BCZR and the International Building Code and ordered DOB to discontinue the playing of music by way of speaker system. On appeal, a majority of the members of the Board affirmed that determination.[5] Upon judicial review, the Circuit Court for Baltimore County also affirmed the determination. In an unreported opinion by a panel of this Court in *DOB I*, we affirmed the circuit court's judgment, concluding that the transcript and record provided substantial evidence to support the Board's finding that DOB was operating as a nightclub. In reaching that

(. . . continued)

The International Building Code, which was adopted as the Building Code of Baltimore County, sets forth advisory characteristics in determining whether an establishment may be characterized as, *e.g.,* a nightclub, dance hall, banquet hall, or cabaret, to include some or all of the following: low lighting levels; entertainment by a live band or recorded music generating above-normal sound levels; no theatrical stage accessories; later than average operating hours; tables and seating arranged or positioned so as to create ill-defined aisles; a specific area designed for dancing; services facilities for alcoholic beverages and food; and high occupant load density.

[4] A "request for special hearing is, in legal effect, a request for a declaratory judgment." *Antwerpen v. Baltimore County*, 163 Md. App. 194, 209 (2005).

[5] One board member dissented, finding that DOB was a restaurant offering some musical entertainment on the side.

conclusion, we analyzed DOB's operation, using the criteria (for determining whether premises are being used as a nightclub) set forth in the International Building Code.

In 2010, Baltimore County filed a petition for contempt alleging that FSLLC continued to operate DOB in violation of the Board's order. At a hearing on the matter, FSLLC argued that DOB was no longer operating as a nightclub because it was not playing music outside the restaurant.

The circuit court, citing the Board's ruling that "the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR," found FSLLC in violation of the Board's order for "continuing to play live and/or recorded entertainment on the premises." The court found FSLLC to be in contempt of court and ordered that FSLLC permanently dismantle any outdoor speaker system at DOB and refrain from allowing "any live band, Disc Jockey, karaoke or any other form of live or recorded entertainment to perform at the Site" for a period of one year beginning November 10, 2010.

DOB closed in 2012. In 2014, Boone purchased the property from FSLLC and reopened DOB. In 2015, Boone filed a petition for special hearing to "amend previous restrictions imposed . . . so as to permit future use of the property as a restaurant with limited accessory music." Before the ALJ, Boone argued that, unlike FSLLC's use of DOB as a nightclub, its business was first and foremost a restaurant, with music to be offered only as a complement to the dining experience.

In his October 22, 2015 written opinion and order, the ALJ concluded that FSLLC's zoning violation and special hearing case had been appealed to the Board, the circuit court, and this Court, all of which had affirmed the agency's finding that DOB was a nightclub, subject to the conditions and restrictions contained in the agency's order. Therefore, the ALJ concluded, "*res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard." In the absence of any evidence of such significant changes by Boone, the ALJ continued, the ruling that DOB was both a restaurant and a nightclub must stand. Boone's petition was therefore denied.

Boone appealed the ALJ's decision to the Board on November 13, 2015. The Board heard argument on the matter on February 17 and April 28, 2016.

At the start of the hearing, People's Counsel argued that the doctrine of *res judicata* permitted the Board to dispose of the matter on a motion to dismiss. Counsel for DOB's residential neighbors agreed and added that amending the zoning restrictions would require a reversal of this Court's 2010 unreported decision, which the Board was not permitted to do. Boone claimed that there had been some significant changes since 2010 that should cause this Board to come to a different conclusion.

Boone's attorney, although acknowledging that FSLLC had operated a nightclub with loud rock music, which was not permitted in the pertinent B.L. zone, argued that Boone was not operating a nightclub, but a restaurant with the occasional "single acoustic guitar player" providing music. With regard to the *res judicata* argument, counsel averred

that *res judicata* did not apply because there had been a significant change in the facts of the case since *DOB I* was decided.

The Board reserved ruling on the *res judicata* issue and heard testimony.

Kenneth Boone ("Mr. Boone") the sole managing member of Boone Kondylas, LLC,[6] testified that DOB is licensed to operate as a restaurant and maintains a Class D liquor license, which Boone purchased from FSLLC. The restaurant averages 80% food / 20% alcohol sales.

Since Mr. Boone's purchase of DOB, his corporation has expanded the restaurant's kitchen to permit the outdoor steaming of crabs and removed the outdoor stage and tent that FSLLC had erected. Indoors, he said, DOB has seating for approximately 125 patrons at dining room tables and the bar, and there is outdoor seating for approximately 100 additional patrons. DOB has no dance floor or stage, and Mr. Boone has no plans to create either one.

DOB is presently open seven days a week, with posted hours of 11:00 a.m. to midnight, but the restaurant generally closes between 9:00 and 10:00 p.m. during winter months when business is slow. The average patron is between 40 and 70 years of age.

Other than a DJ on New Year's Eve 2014, Mr. Boone testified that he had hesitated to book live performers, as he was initially unfamiliar with what the applicable zoning code permitted. His hesitation appears to have been well founded because in 2015, when Mr.

[6] Mike and Donna Kondylas, the "Kondylas" of "Boone Kondylas, LLC" were no longer in partnership with Mr. Boone by the time of the hearing.

Boone scheduled an acoustic guitarist to play on a Saturday night, the neighbors complained about the potential for noise and disruption, and a zoning official threatened to pull DOB's liquor license if the musician played. Mr. Boone cancelled the guitarist, as well as scheduled performances by a Frank Sinatra cover singer and an "oompah" band for Oktoberfest, and he had not scheduled any live music since then.

Boone's petition centered on his desire to "cater to the demographic" and book soloists to play at DOB. Mr. Boone said he was willing to "live within sound restrictions on outside music [and] time restrictions of both indoor and outdoor music" in anticipation of offering live music outdoors on Friday and Saturday nights from 6:00 until 10:00 p.m. (with last call for alcohol at midnight) and on Sunday afternoons from 5:00 until 8:30 p.m.

Several neighborhood residents testified on Boone's behalf, stating that when FSLLC owned DOB, it hired "[v]ery loud, heavy metal" full-sized bands, which played until midnight or 1:00 a.m. on weekends. In contrast, DOB under Boone's ownership has a family atmosphere with an older demographic. The supporters advocated giving Boone a chance to have live music at DOB.

Charles Wolinski, whose house is approximately 200 feet from DOB, testified that he had fought with FSLLC for seven years over the loud music and the disorderly patrons in the parking lot. In his opinion, everything at DOB now that Boone owns it is "exactly the same" as when FSLLC owned it (other than the playing of live music), and the addition of live music would return the establishment to the level of disruption it had created during FSLLC's ownership.

In the opinion of Matthew Ciarpella, who was also a neighborhood protestant in the FSLLC litigation, the playing of any outdoor music at DOB would re-introduce the same noise problems that had been previously litigated. Other neighbors who had heard the loud music played when FSLLC owned DOB also protested the reinstatement of live music outside the restaurant.

The Board issued its written opinion on September 15, 2016. Therein, the Board noted that as the parties, or their privy, and the property had been involved in the previous litigation regarding the same zoning issue of whether live music should be permitted at the DOB, which led to the Board's 2008 opinion, the only manner in which the Board could act upon the new application for special permit previously denied would be if there had been a substantial change in the facts from those previously litigated. The Board found that the restaurant operations and layout and Boone's proposal for live music were substantially the same as when FSLLC owned the premises and litigated the matter. In the Board's view, a change in the restaurant's ownership or management style did not amount to a substantial change. Having previously determined that DOB comprised a nightclub not permitted in a B.L. zone, and having currently determined that no substantial change to the property existed that would support re-litigation of the issue, the Board denied Boone's petition to amend the previous restrictions imposed upon DOB.

Boone filed a petition for judicial review in the circuit court on October 17, 2016. The court heard argument on the petition on June 1, 2017.

Boone initially argued that the Board, in denying his petition on *res judicata* grounds, never decided the merits of the matter, that is, whether DOB can play live music and, if so, under what circumstances. Counsel for Boone said "whether the zoning is the same, the building is the same, the neighbors are the same, that doesn't matter. The Board of Appeals focused on the wrong inquiry" and "got this wrong" in failing to make a determination of the "ultimate issue." Counsel for Boone requested that the court reverse on the *res judicata* issue and remand to the Board for a determination of whether music should be allowed at DOB as an accessory use to the restaurant service and under what circumstances.[7] In the alternative, Boone argued that the court should find that the operative facts had changed since the time of FSLLC's ownership such that *res judicata* should not apply as a bar to the present litigation.

The circuit court observed that the Board had determined that the prior owner played music that was "loud and [performed by] rock bands and the neighbors didn't like it, therefore nobody can do anything different, because it might [move us] back into what the Dock of the Bay was under" the prior owner. The judge went on to say that the panel of this Court, in its *DOB I* decision was "very factually oriented" when it upheld the Board's determination that DOB was a nightclub while owned by FSLLC. In the circuit court's

[7] As the court pointed out, the applicable zoning regulations prohibit a nightclub from operating in a B.L. zone but does not prohibit music from being played. The Board appeared to use "live music" and "nightclub" interchangeably in its ruling.

view, for *res judicata* to apply, "the same analysis has to be done to see and determine whether the proposed use with the current owner would constitute a nightclub." In the court's words, "[i]f the facts were the same, then maybe *res judicata* would apply at this time . . ., but the analysis just was not done in this case."

Although the Board had found no substantial change in the facts as previously litigated, the circuit court observed that the Board did not perform an adequate analysis of the relevant criteria to determine whether DOB is currently a nightclub. Determining that that analysis should be done, the circuit court remanded the matter to the Board for a determination under the facts of this case as to "whether the proposed use would constitute a nightclub under the analysis used by the Court of Special Appeals in that prior case."

The circuit court issued its written order on June 2, 2017. The order remanded the matter to the Board "for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a 'nightclub' as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC)."[8]

[8] *See* footnote 3, *supra*, for the International Business Code criteria.

DISCUSSION

Although not raised by any party, before we may consider appellants' arguments, we must ensure that the appeal has been taken either from a final judgment or from an appealable interlocutory ruling. We shall hold that this appeal is premature.

Pursuant to Maryland Code (2013 Repl. Vol., 2017 Supp.) §12-301 of the Courts and Judicial Proceedings Article ("CJP"), a party may appeal from a final judgment in a civil case. The Court of Appeals has consistently stated that "a judgment or order of a court is final when it determines or concludes the rights of parties or when it denies the parties means of further prosecuting or defending their rights and interests in the subject matter of the proceeding." *Schultz v. Pritts*, 291 Md. 1, 5–6 (1981). We will dismiss an appeal if it is not taken from a final judgment entered in a civil case by a circuit court, or if a non-final judgment does not fit within the statutory exceptions or the collateral order doctrine. *Foy v. Baltimore City Det. Ctr.*, 235 Md. App. 37, 47 (2017), *cert. granted*, 457 Md. 660 (2018).

In general, where, as here, a circuit court orders a remand of the proceeding to an administrative agency, that is an appealable final order because when "a court remands a proceeding to an administrative agency, the matter reverts to the processes of the agency, and there is nothing further for the court to do. Such an order is an appealable final order because it terminates the judicial proceeding and denies the parties means of further prosecuting or defending their rights in the judicial proceeding." *Schultz*, 291 Md. at. 6 (citing *Fred W. Allnutt, Inc. v. Commissioner of Labor and Industry*, 289 Md. 35, 40

(1980)). Nevertheless, a circuit court's remand order in a judicial review action is not always an appealable final judgment. Although a remand after the circuit court has conducted a judicial review of the sole question raised in the administrative action, thereby precluding the parties from further contesting the validity of the agency's decision on the merits of the case, is an appealable final judgment, "a remand that precedes any judicial review is not a final judgment[.]" *Metro Maint. Sys. South, Inc. v. Milburn*, 442 Md. 289, 305, 310 (2015). As we suggested in *Foy*, *supra*, the "lack [of] any discernable conclusions of law or findings of fact" and the circuit court's apparent inability to assess the merits of the Board's decision may render the remand order a non-final judgment. 235 Md. App. at 52-53.

The sole issue before the circuit court in this matter was whether the Board was correct in denying Boone's petition on the ground of *res judicata*, based on the Board's determination that DOB was a nightclub when owned by FSLLC. The circuit court declared itself unable to make a finding on that sole claim because the Board had not determined whether DOB is currently a nightclub, pursuant to the International Business Code factors that were discussed in detail in *DOB I.*

The circuit court did not find any error of law on the part of the Board, nor did it affirm or reverse the Board's decision or decide or conclude the matter in dispute. In other words, the circuit court did not conduct judicial review. As in *Milburn*, the remand was to precede the circuit court's determination of whether there was substantial evidence in the record to support the Board's ruling and whether or not to affirm. 442 Md. at 308. In other

words, although the court did not specifically so state in its order, it deferred its ruling pending the remand, and the matter "contemplates that judicial review awaits the return of the case following the remand." *Id.* at 309. Specifically, once the Board has an opportunity to apply the International Business Code factors to the facts of this case, the circuit court will then determine whether *res judicata* would apply to support the denial of DOB's petition on that basis.

As noted in *Milburn*, 442 Md. at 309, although the parties "have, in a sense, been 'put out of court'. . . there is a strong potential, bordering on certainty, that the issue at hand—the viability of . . . an administrative decision—will be back for determination by the circuit court." The remand order in the subject case does not prevent the parties from continuing to defend or challenge the Board's decision following the remand; once the Board reconsiders its decision, the parties may continue to challenge or defend the Board's decision. All this was made clear in *Milburn*, where the Court said:

> It is true that, on remand, the Board of Appeals retains discretion to reconsider its decision. Finality, however, is not determined by considering what additional proceedings may occur before the agency, but what further proceedings, if any, will occur in the circuit court. *See Brewster* [*v. Woodhaven Bldg. & Dev., Inc.*, 360 Md. 602 (2000)] (proceedings before another forum are irrelevant to finality). Thus, the breadth of the additional proceedings at the agency level do not convert the remand order here into a final, appealable judgment.
>
> After the remand, the parties will have the opportunity to litigate their positions in the circuit court and pursue appellate review of those issues, including any contention that the remand was unlawful or an abuse of discretion. It may be, of course, that the lawfulness of the remand will no longer be at issue and that other issues concerning the validity of the Board's decisions will have become moot as a result of any modifications that the Board makes. In that respect, our holding that a remand that precedes any

> judicial review is not a final judgment is consistent with the purpose of the final judgment rule—to promote judicial efficiency by limiting piecemeal appeals.

Id. at 310-11 (footnotes omitted).

APPEAL DISMISSED; COSTS TO BE PAID BY APPELLANTS.

16-003-SPH

IN THE MATTER OF BOONE KONDYLAS, LLC Petitioner	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-16-010551

* *

ORDER

This matter came before the Court for a hearing on the *Petition for Judicial Review* of the opinion of the Board of Appeals for Baltimore County dated September 15, 206, filed by Petitioner, Boone Kondylas. Upon consideration of the Petitioner's *Memorandum in Support of Petition for Judicial Review*, the *Memorandum of People's Counsel for Baltimore County*, the *Memorandum in Opposition to Petition for Judicial Review* filed by the Protestants, and arguments of counsel, for the reasons stated on the record in open court, it is this 2nd day of June, 2017, by the Circuit Court for Baltimore County, hereby

ORDERED, that this matter is Remanded to the Board of Appeals for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Clarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC).

RECEIVED
JUN 08 2017
BALTIMORE COUNTY
BOARD OF APPEALS

H. Patrick Stringer, Judge

12/15/16
TO WP

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DEC 14 2016
DEPARTMENT OF PERMITS
APPROVALS AND INSPECTIONS

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

December 14, 2016

VIA HAND-DELIVERY
Civil Clerk
Circuit Court for Baltimore County
401 Bosley Avenue
Towson, Maryland 21204

RE: In the matter of: Boone Kondylas, LLC
Civil Action No.: 03-C-16-010551
Board of Appeals Case No.: 16-003-SPH

Dear Clerk:

Enclosed for filing please find the Proceedings before the Administrative Law Judge and the Board of Appeals for Baltimore County. Additionally, please allow this letter to reflect the filing of one accordion folder containing the entire Board of Appeals case file, exhibits, and transcript pursuant to Maryland Rule 7-206.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Enclosures

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY	*	
PETITION OF: BOONE KONDYLAS, LLC	*	
FOR JUDICIAL REVIEW OF THE OPINION OF THE BOARD OF APPEALS OF BALTIMORE COUNTY JEFFERSON BUILDING – ROOM 203 105 W. CHESAPEAKE AVENUE TOWSON, MARYLAND 21204	*	CIVIL ACTION NO. : 03-C-16-010551
IN THE MATTER OF: BOONE KONDYLAS, LLC FOR PROPERTY LOCATED AT 9025 CUCKOLD POINT ROAD	*	
15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	
BOARD OF APPEALS CASE NO.: 16-003-SPH		

* * * * * * * * * * * *

PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes the Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the original papers on file in the Department of Permits, Approvals and Inspections and the Board of Appeals of Baltimore County:

ENTRIES FROM THE DOCKET OF THE BOARD OF APPEALS AND DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS OF BALTIMORE COUNTY

July 6, 2015	Petition for Special Hearing filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC under Section 500.7 of the Baltimore County Zoning Regulations to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

February 17, 2016 Board convened for a Hearing, Day 1.

Exhibits submitted at Motion Hearing before the Board of Appeals:

Protestants' Exhibit No.

1 – Opinion and Order of OAH (Case No. 2016-0003-SPH) dated October 22, 2015

2 – Unreported Opinion of Court of Special Appeals No. 810, Sept. Term 2009, filed July 9, 2010

People's Counsel Exhibit No.

1 – Compilation of BCZR, Opinion of OAH (Case No. 2016-0003-SPH), Trial Memorandum from Appellant (Case No. 2016-0003-SPH), definition of anticipate, Unreported Court of Special Appeals of Maryland (No. 810 Sept. Term 2009, filed July 9, 2010), Majority Opinion of Baltimore County Board of Appeals (Case Nos. CBA-06-044 and CBA-07-134)

2 – Zoning Checklist/PAI

February 19, 2016 E-mails between Board and counsel regarding scheduling and witnesses.

March 8, 2016 Notice of Reassignment issued by the Board.

April 28, 2016 Board convened for a Hearing, Day 2.

Exhibits submitted at Hearings before the Board of Appeals:

Petitioner's Exhibit No.

1 – Site Plan

2A – Majority Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2B – Dissenting Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2C – Ruling on Motion for Reconsideration and Clarification (Case Nos. 07-144-SPH, CBA-06-044, and CBA-07-134)

3 – Circuit Court Opinion, Final Order, Case No. 03-C-08-009996

4 – Unreported Opinion, Court of Special Appeals, No. 810, Sept. Term, 2009, Filed July 9, 2010

5 – Memorandum Opinion (Exhibit) Contempt-Circuit Court for Baltimore County, Case No. 03-C-08-009996

6 – My Neighborhood Map/aerial photograph of "Dock of the Bay"

10 – Letter dated June 9, 2008, letter measured decibel levels emanating from the Dock of the Bay
11 – Letter dated October 3, 2007 measuring the decibel levels from Dock of the Bay
12 – Photograph of Row Boat Willie's building
13 – Large map of aerial view of Dock of the Bay and area, 2016 Google Imaging
14 – My Neighborhood Map printed 4/27/2016, aerial view of Dock of the Bay and area
15 – 2015 Alcoholic Beverage License for Dock of the Bay
16 – Baltimore County Police Records, Sgt. Parrish
17 – Summary of Calls from Exhibit 16
18 – Facebook posts for Dock of the Bay 2/17/16 Boone Letter
19 – Facebook posts for Dock of the Bay 2/21/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
20 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
21 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
22 – Facebook post from Dock of the Bay 2/22/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
23 – Facebook posts from Dock of the Bay (ID ONLY/NOT ADMITTED/NOT IN FILE)

People's Counsel Exhibit No.

1 – Website photo showing hours of operation
2A – SDAT record showing 9025 Cuckold Point Road, Lot 504
2B – SDAT record showing Cuckold Point Road, Lot 500
2C – SDAT record showing Cuckold Point Road, Lot 502
2D – SDAT record showing Cuckold Point Road, Lot 501
3 – Deed to 9025 Cuckold Point Road dated September 30, 2014
4 – Deed to 9025 Cuckold Point Road dated March 10, 1999
5 – People's Counsel Sign-In Sheet, 2/17/16
6 – People's Counsel Sign-In Sheet, 4/28/16
7 – Map – Property ID and Zoning, 2014 image
8A – Map
8B – Map (color)
8C – Map
9 – Comprehensive Zoning Map
10 – Website page for Mark Alan date 4/26/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
11A – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.

Tammy A. McDiarmid

Tammy A. McDiarmid, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

12/15/16
to WCR

RECEIVED
DEC 9 2016
DEPARTMENT OF PERMITS
APPROVALS AND INSPECTIONS

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

December 9, 2016

Edward J. Gilliss, Esquire
Royston, Mueller, McLean & Reid, LLP
The Royston Building
102 West Pennsylvania Avenue, Suite 600
Towson, Maryland 21204-4575

RE: In the Matter of: *Community Enterprise, Inc. – Legal Owner*
Case No.: 16-328-SPHA

Dear Mr. Gilliss:

Enclosed please find a copy of the Order of Dismissal issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Sunny Cannington tam

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure

c: Paul Redding, President/Community Enterprise, Inc.
Thomas J. Hoff
Gloria Kelly
Mike Pierce
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF COMMUNITY ENTERPRISE, INC. - LEGAL OWNER AND PETITIONER FOR SPECIAL HEARING AND VARIANCE ON THE PROPERTY LOCATED AT 4217 FITCH AVENUE	*	BEFORE THE BOARD OF APPEALS OF
14TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT	*	BALTIMORE COUNTY CASE NO. 16-328-SPHA

* * * * * * * * * * *

ORDER OF DISMISSAL

This matter comes to the Board of Appeals by way of an appeal filed by Edward J. Gilliss, Esquire on behalf of Community Enterprise, Inc., Legal Owner/Petitioner, from a final decision of the Administrative Law Judge dated August 24, 2016, in which the requested variance relief was denied, and Amended Opinion and Order of the Administrative Law Judge dated September 9, 2016 wherein the requested variance relief was denied and the requested special hearing relief was dismissed as moot.

WHEREAS, the Board is in receipt of a Motion to Dismiss filed on December 1, 2016 by Edward J. Gilliss, Esquire on behalf of Community Enterprise, Inc. requesting that the appeal in this matter be dismissed as of December 1, 2016; and

WHEREAS, the Board is in receipt of People's Counsel for Baltimore County's Response to the Motion to Dismiss, filed December 2, 2016 wherein People's Counsel does not oppose the dismissal of this matter.

IT IS ORDERED this 9th day of December, 2016 by the Board of Appeals of Baltimore County that the appeal taken in Case No. 16-328-SPHA be and the same is hereby **DISMISSED with prejudice.**

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Chairman

12/15/16
TO COCA

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

RECEIVED
DEC 9 2016
DEPARTMENT OF PERMITS
APPROVALS AND INSPECTIONS

December 9, 2016

David H. Karceski, Esquire
Adam M. Rosenblatt, Esquire
Venable, LLP
210 W. Pennsylvania Avenue, Suite 500
Towson, Maryland 21286

RE: In the Matter of: *John and Bernadette Hoffman – Legal Owners*
A & I Realty, LLLP – Petitioner
Case No.: 16-062-SPHA

Dear Counsel:

Enclosed please find a copy of the Order of Dismissal issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Sunny Cannington tam

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure

c: Bernadette Hoffman
A & I Realty, LLLP/Jacob M. Antwerpen, Managing Partner
Klaus Philipsen, President/Westerlee Inc.
Westerlee Community, Inc. c/o Nayna Philipsen, Esquire/Resident Agent
Ann Uebel
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF JOHN AND BERNADETTE HOFFMAN-LEGAL OWNERS AND A & I REALTY, LLLP – PETITIONER FOR SPECIAL HEARING AND VARIANCE ON THE PROPERTY LOCATED AT 1936 POWERS LANE	*	BEFORE THE BOARD OF APPEALS OF
1ST ELECTION DISTRICT 1ST COUNCILMANIC DISTRICT	*	BALTIMORE COUNTY
	*	CASE NO. 16-062-SPHA

* * * * * * * * * * * * *

ORDER OF DISMISSAL

This matter comes to the Board of Appeals by way of an appeal filed by Adam Rosenblatt, Esquire and David Karceski, Esquire of Venable, LLP on behalf of A & I Realty, LLLP, Contract Purchasers/Petitioners and Appellants, from a final decision of the Administrative Law Judge dated November 20, 2015, in which the requested Special Hearing relief was DENIED and the requested Variance relief was DENIED AS MOOT.

WHEREAS, the Board is in receipt of a Notice of Dismissal filed on December 1, 2016 by Adam Rosenblatt, Esquire and David Karceski, Esquire of of Venable, LLP on behalf of A & I Realty, LLLP, Contract Purchasers/Petitioners and Appellants requesting that his matter be dismissed without prejudice (a copy of which is attached hereto and made a part hereof); and

THEREFORE, IT IS ORDERED this 9th day of December, 2016 by the Board of Appeals of Baltimore County that the appeal taken in Case No. 16-062-SPHA be and the same is hereby **DISMISSED without prejudice.**

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Chairman

IN RE: PETITIONS FOR SPECIAL HEARING AND VARIANCE	*	**BEFORE THE**
	*	**BOARD OF APPEALS**
(1936 Powers Lane)	*	**OF BALTIMORE COUNTY**
1st Election District **1st Council District**	*	
John A. & Bernadette S. Hoffman, ***Owners***	*	**Case No. 2016-0062-SPHA**
	*	
A & I Realty, LLLP ***Contract Purchaser/Petitioner***	*	
	*	

* *

NOTICE OF DISMISSAL

Pursuant to Rule 3(b) of the Rules of Practice and Procedure of the Baltimore County Board of Appeals, Contract Purchaser/Petitioner A & I Realty, LLLP respectfully dismisses the above-captioned appeal without prejudice.

Respectfully submitted,

David H. Karceski
Adam M. Rosenblatt
Venable LLP
210 W. Pennsylvania Ave., Suite 500
Towson, Maryland 21204
(410) 494-6200
Attorneys for Petitioner/Appellant

RECEIVED
DEC 1 2016
BALTIMORE COUNTY
BOARD OF APPEALS

CASE NO. 2016-0003-SPH

CHECKLIST

Comment Received	Department	Support/Oppose/ Conditions/ Comments/ No Comment
7/17/15	DEVELOPMENT PLANS REVIEW (if not received, date e-mail sent _____)	C
_____	DEPS (if not received, date e-mail sent _____)	_____
_____	FIRE DEPARTMENT	_____
8/4/15	PLANNING (if not received, date e-mail sent _____)	C
7/14/15	STATE HIGHWAY ADMINISTRATION	no Obj
_____	TRAFFIC ENGINEERING	_____
_____	COMMUNITY ASSOCIATION	_____
_____	ADJACENT PROPERTY OWNERS	_____

ZONING VIOLATION (Case No. _____)

PRIOR ZONING (Case No. 2007-0144-SPH)

NEWSPAPER ADVERTISEMENT Date: 9/8/15

SIGN POSTING Date: 9/6/15 by O'Keefe

PEOPLE'S COUNSEL APPEARANCE Yes ☑ No ☐

PEOPLE'S COUNSEL COMMENT LETTER Yes ☐ No ☐

Comments, if any: _____

Real Property Data Search (w4) Guide to searching the database

Search Result for BALTIMORE COUNTY

View Map View GroundRent Redemption View GroundRent Registration

Account Identifier: District - 15 Account Number - 1508790109

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	9025 CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	9025 CUCKOLD POINT RD SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			504	2015	Plat Ref:	0009/ 0004

Special Tax Areas: **Town:** NONE
Ad Valorem:
Tax Class:

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
1993	6530		7,500 SF	30

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation
		SERVICE GARAGE				

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	225,000	225,000		
Improvements	379,100	379,200		
Total:	604,100	604,200	604,133	604,167
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	**Date:** 10/21/2014	**Price:** $600,000
Type: ARMS LENGTH MULTIPLE	**Deed1:** /35488/ 00133	**Deed2:**
Seller: HRANICKA EDWARD F	**Date:** 04/08/1999	**Price:** $300,000
Type: ARMS LENGTH MULTIPLE	**Deed1:** /13658/ 00354	**Deed2:**
Seller:	**Date:**	**Price:**
Type:	**Deed1:**	**Deed2:**

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:
Exempt Class:
Special Tax Recapture: NONE

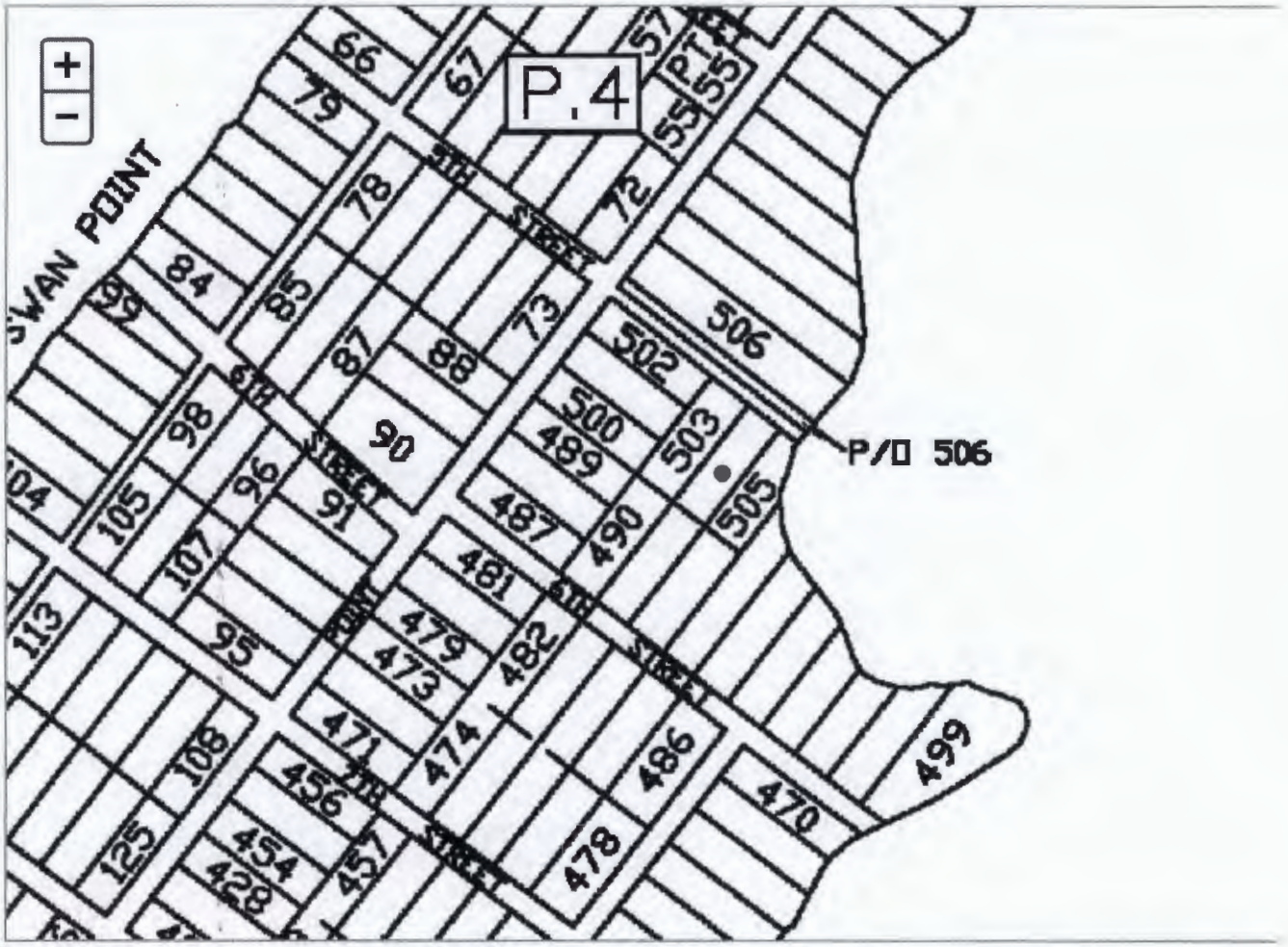
Homestead Application Information

Homestead Application Status: No Application

Baltimore County

New Search (http://sdat.dat.maryland.gov/RealProperty)

District: 15 Account Number: 1508790109



The information shown on this map has been compiled from deed descriptions and plats and is not a property survey. The map should not be used for legal descriptions. Users noting errors are urged to notify the Maryland Department of Planning Mapping, 301 W. Preston Street, Baltimore MD 21201.

If a plat for a property is needed, contact the local Land Records office where the property is located. Plats are also available online through the Maryland State Archives at www.plats.net (http://www.plats.net).

Property maps provided courtesy of the Maryland Department of Planning ©2011.

For more information on electronic mapping applications, visit the Maryland Department of Planning web site at www.mdp.state.md.us/OurProducts/OurProducts.shtml (http://www.mdp.state.md.us/OurProducts/OurProducts.shtml).



(http://imsweb05.mdp.state.md.us/website/mosp/)

Loading... Please Wait. Loading... Please Wait. -->

Larry Hogan, *Governor*
Boyd Rutherford, *Lt. Governor*

SHA State Highway Administration
Maryland Department of Transportation

Pete K. Rahn, *Secretary*
Douglas H. Simmons, *Acting Administrator*

Date: 7/14/15

Ms. Kristen Lewis
Baltimore County Office of
Permits and Development Management
County Office Building, Room 109
Towson, Maryland 21204

RE: Baltimore County
Item No 2016-0003-SPH
Special Hearing
BooneKondylas LLC, Ken Boone.
9025 Cuckold Point Road.

Dear Ms. Lewis:

Thank you for the opportunity to review your referral request on the subject of the above captioned. We have determined that the subject property does not access a State roadway and is not affected by any State Highway Administration projects. Therefore, based upon available information this office has no objection to Baltimore County Zoning Advisory Committee approval of Item No. 2016-0003-SPH

Should you have any questions regarding this matter, please contact Mr. Richard Zeller at 410-229-2332 or 1-866-998-0367 (in Maryland only) extension 2332, or by email at (rzeller@sha.state.md.us).

Sincerely,

David W. Peake
Metropolitan District Engineer
Baltimore & Harford Counties

DWP/RAZ

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon
Deputy Administrative Officer and
Director of Permits, Approvals and Inspections

DATE: August 4, 2015

FROM: Andrea Van Arsdale
Director, Department of Planning

SUBJECT: 9025 Cuckold Point Road

INFORMATION:

Item Number: 16-003

Petitioner: Ken Boone

Zoning: BL

Requested Action: Special Hearing

SUMMARY OF RECOMMENDATIONS:

The Department of Planning has reviewed the Petition for a Special Hearing to determine whether the Administrative Law Judge should approve amendments to previous restrictions imposed in Zoning Cases 07-144-SPH, CBA-06-044, CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music and other and further relief as may be required.

Testimony in the aforementioned cases established the fact of the prior use of the property as a "nightclub" which is not listed as an allowed use in the zone. Upon a site visit and discussions with the petitioner's counsel, the Department understands the future use of the property will be as a permitted restaurant that will have music, both live and reproduced, as an accessory component.

The Department has no objection to the granting of the petitioned zoning relief conditioned upon the following:

There shall be no dance floor, nor shall the restaurant become a "nightclub" as defined in the BCZR Section 101.1 and the Building Code of Baltimore County.

All accessory music shall be limited to reasonable sound levels so as not to disturb adjacent properties.

All accessory music shall be limited to the following hours or as may be otherwise established by the Administrative Law Judge:

a. No outdoor music after 10:00 p.m. Monday thru Saturday.

b. No indoor music after 12:00 a.m. (midnight) Monday thru Saturday.

c. No music after 8:00 p.m. on Sundays.

For further information concerning the matters stated herein, please contact Bill Skibinski at 410-887-3480.

Division Chief: Kathy Schlabach

AVA/KS

C: Bill Skibinski

TO: PATUXENT PUBLISHING COMPANY
Tuesday, September 8, 2015 Issue - Jeffersonian

Please forward billing to:
Lawrence Schmidt 410-821-0070
Smith, Gildea & Schmidt
600 Washington Avenue, Ste. 200
Towson, MD 21204

NOTICE OF ZONING HEARING

The Administrative Law Judge of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 2016-0003-SPH
9025 Cuckold Point Road
SE/s of Cuckold Point Road, 15 ft. SW of the centerline of 5th Avenue
15th Election District – 7th Councilmanic District
Legal Owners: Boone Kondylas, LLC, Ken Boone

Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music; and for such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Hearing: Monday, September 28, 2015 at 10:00 a.m. in Room 205, Jefferson Building, 105 West Chesapeake Avenue, Towson 21204

Arnold Jablon
Director of Permits, Approvals and Inspections for Baltimore County

NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ADMINISTRATIVE HEARINGS OFFICE AT 410-887-3868.
(2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT
ZONING REVIEW

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

The Baltimore County Zoning Regulations (BCZR) require that notice be given to the general public/neighboring property owners relative to property which is the subject of an upcoming zoning hearing. For those petitions which require a public hearing, this notice is accomplished by posting a sign on the property (responsibility of the petitioner) and placement of a notice in a newspaper of general circulation in the County, both at least fifteen (15) days before the hearing.

Zoning Review will ensure that the legal requirements for advertising are satisfied. However, the petitioner is responsible for the costs associated with these requirements. The newspaper will bill the person listed below for the advertising. This advertising is due upon receipt and should be remitted directly to the newspaper.

OPINIONS MAY NOT BE ISSUED UNTIL ALL ADVERTISING COSTS ARE PAID.

For Newspaper Advertising:

Item Number or Case Number: 2016-0003-SPH

Petitioner: Boone Kondylas, LLC

Address or Location: 9025 Cuckold Point Road

PLEASE FORWARD ADVERTISING BILL TO:

Name: Lawrence E. Schmidt, Esquire

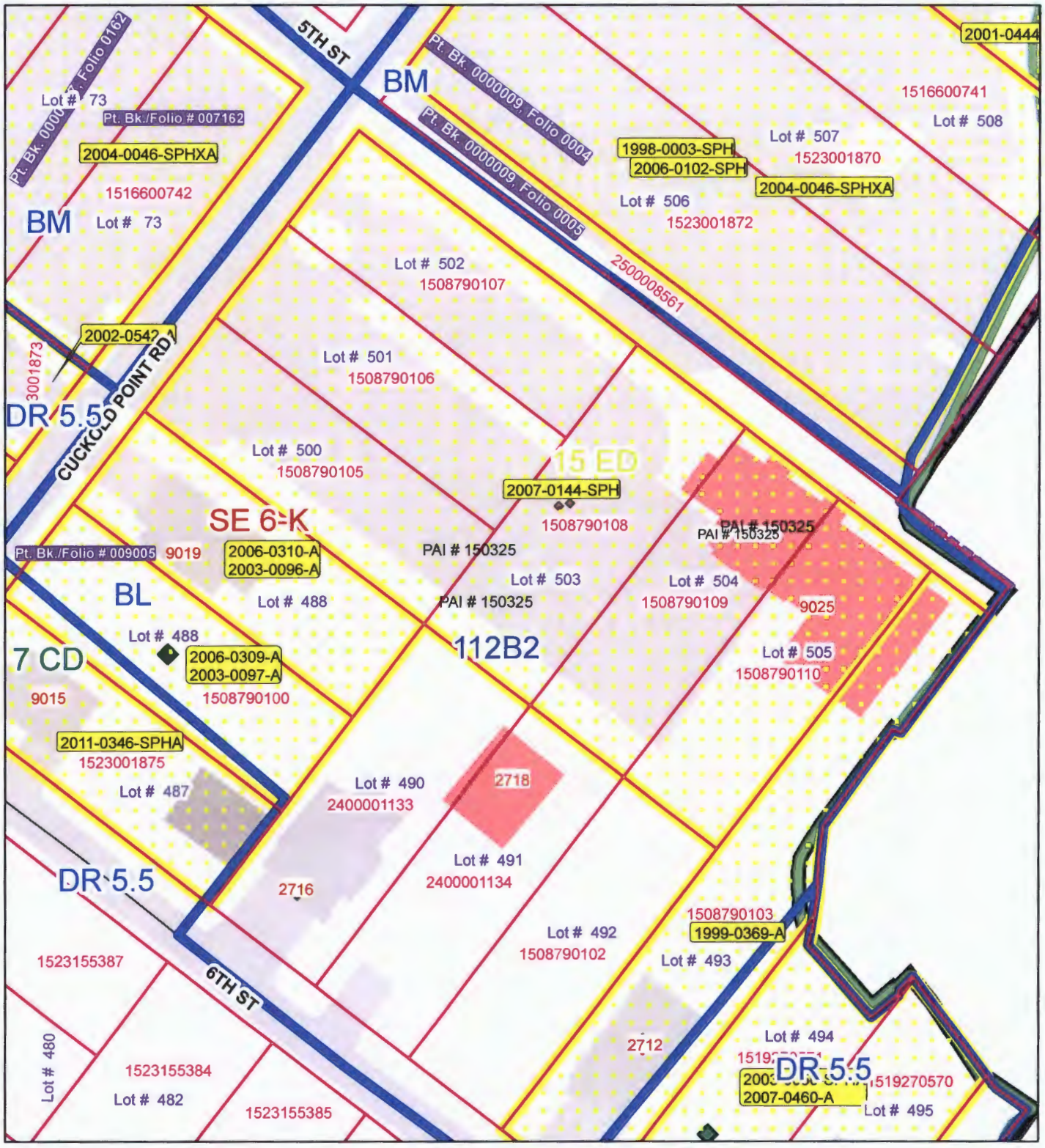
Address: Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Telephone Number: 410-821-0070

Revised 2/20/98 - SCJ


BM
BM
BL
DR 5.5
290'
170'
160'
115'
130'
58'
80'
58'
225'
9019
9025
9015
2718
2716
2712
2708
2704
2711
CUCKOLD POINT RD
61ST ST
SWAN AVE
103 Feet

9025 Cuckold Point Road



Publication Date: 7/2/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

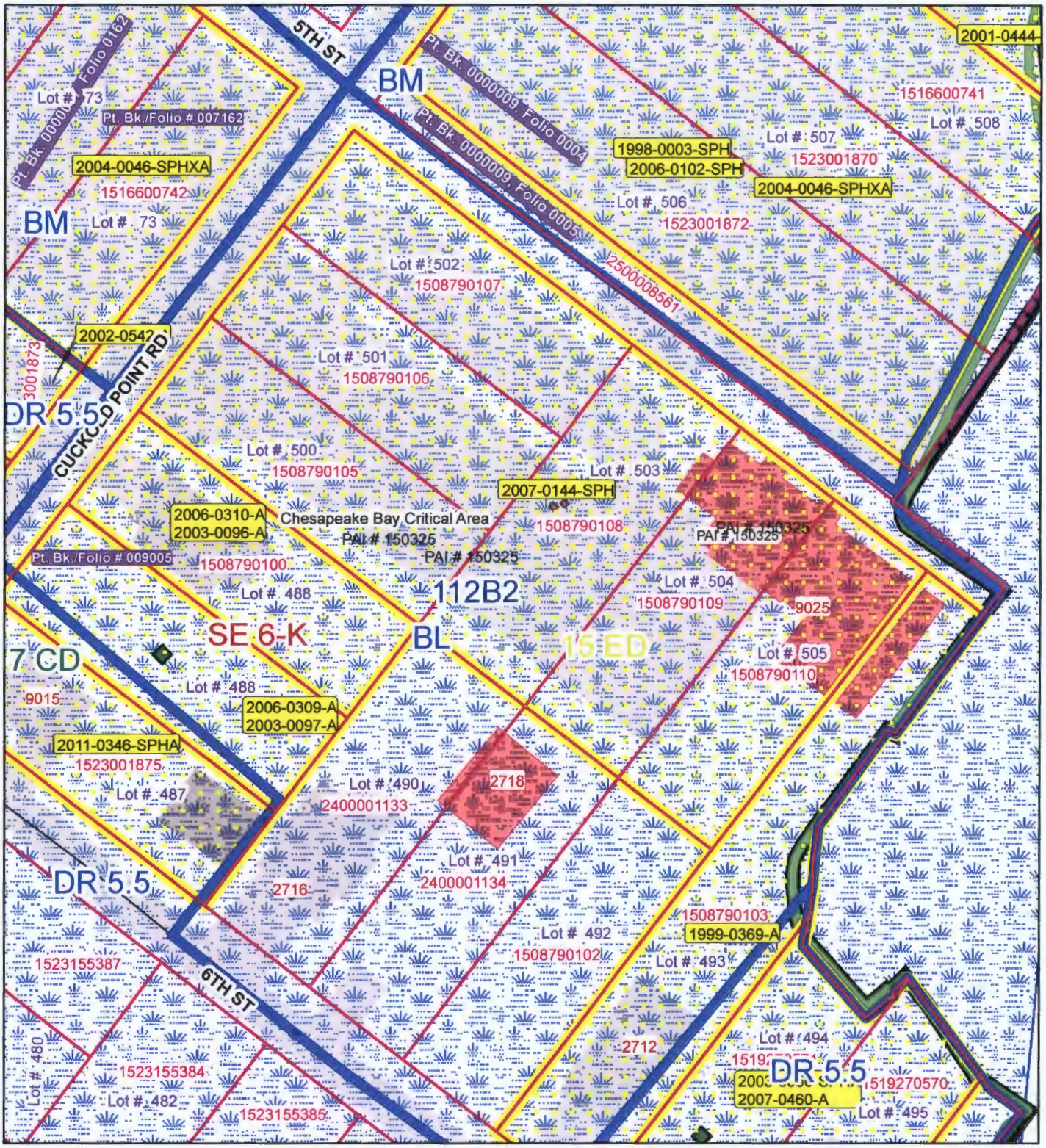
N
W E
S

0 15 30 60 90 120 Feet

1 inch = 60 feet

Item #0003

Chesapeake Bay Critical Area



Publication Date: 7/6/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

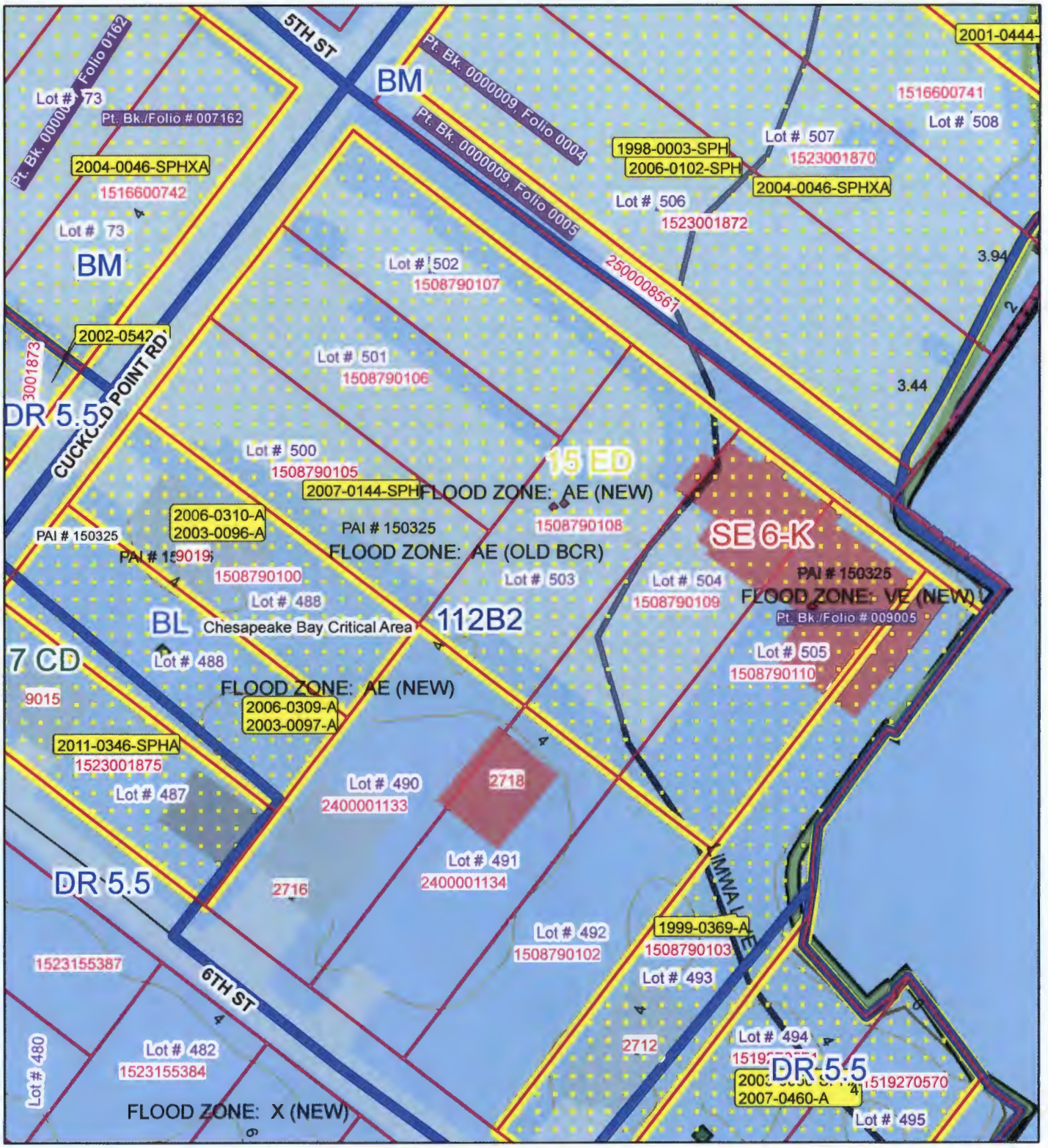
N
W E
S

0 15 30 60 90 120 Feet

1 inch = 60 feet

Item #0003

Elevations and Flood Hazards



Publication Date: 7/6/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

0 15 30 60 90 120 Feet

1 inch = 60 feet

Item #0003

CASE NO. 2016-0003-SPH

CHECKLIST

Comment Received	Department	Support/Oppose/ Conditions/ Comments/ No Comment
7/17/15	DEVELOPMENT PLANS REVIEW (if not received, date e-mail sent _____)	C
_____	DEPS (if not received, date e-mail sent _____)	_____
_____	FIRE DEPARTMENT	_____
8/4/15	PLANNING (if not received, date e-mail sent _____)	C
7/14/15	STATE HIGHWAY ADMINISTRATION	no Obj
_____	TRAFFIC ENGINEERING	_____
_____	COMMUNITY ASSOCIATION	_____
_____	ADJACENT PROPERTY OWNERS	_____

ZONING VIOLATION (Case No. _____)

PRIOR ZONING (Case No. 2007-0144-SPH)

NEWSPAPER ADVERTISEMENT Date: 9/8/15

SIGN POSTING Date: 9/6/15 by O'Keefe

PEOPLE'S COUNSEL APPEARANCE Yes ☑ No ☐

PEOPLE'S COUNSEL COMMENT LETTER Yes ☐ No ☐

Comments, if any: _____

Real Property Data Search (w4) Guide to searching the database

Search Result for BALTIMORE COUNTY

View Map View GroundRent Redemption View GroundRent Registration

Account Identifier: District - 15 Account Number - 1508790109

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	9025 CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	9025 CUCKOLD POINT RD SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			504	2015	Plat Ref:	0009/ 0004

Special Tax Areas: **Town:** NONE
Ad Valorem:
Tax Class:

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
1993	6530		7,500 SF	30

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation
		SERVICE GARAGE				

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	225,000	225,000		
Improvements	379,100	379,200		
Total:	604,100	604,200	604,133	604,167
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	**Date:** 10/21/2014	**Price:** $600,000
Type: ARMS LENGTH MULTIPLE	**Deed1:** /35488/ 00133	**Deed2:**
Seller: HRANICKA EDWARD F	**Date:** 04/08/1999	**Price:** $300,000
Type: ARMS LENGTH MULTIPLE	**Deed1:** /13658/ 00354	**Deed2:**
Seller:	**Date:**	**Price:**
Type:	**Deed1:**	**Deed2:**

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:
Exempt Class:
Special Tax Recapture: NONE

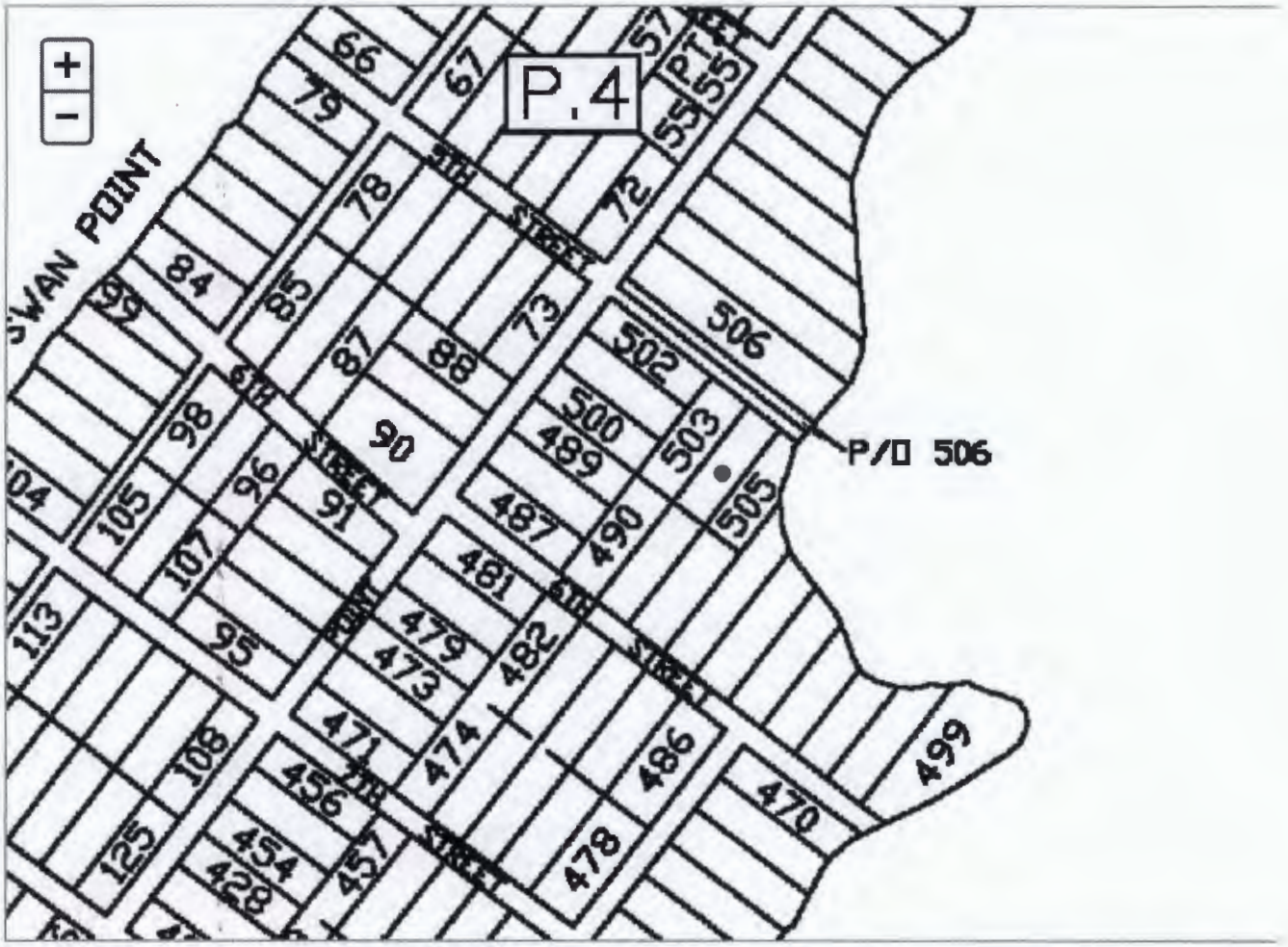
Homestead Application Information

Homestead Application Status: No Application

Baltimore County

New Search (http://sdat.dat.maryland.gov/RealProperty)

District: 15 Account Number: 1508790109



The information shown on this map has been compiled from deed descriptions and plats and is not a property survey. The map should not be used for legal descriptions. Users noting errors are urged to notify the Maryland Department of Planning Mapping, 301 W. Preston Street, Baltimore MD 21201.

If a plat for a property is needed, contact the local Land Records office where the property is located. Plats are also available online through the Maryland State Archives at www.plats.net (http://www.plats.net).

Property maps provided courtesy of the Maryland Department of Planning ©2011.

For more information on electronic mapping applications, visit the Maryland Department of Planning web site at www.mdp.state.md.us/OurProducts/OurProducts.shtml (http://www.mdp.state.md.us/OurProducts/OurProducts.shtml).



(http://imsweb05.mdp.state.md.us/website/mosp/)

Loading... Please Wait. Loading... Please Wait. -->

Larry Hogan, *Governor*
Boyd Rutherford, *Lt. Governor*

SHA State Highway Administration
Maryland Department of Transportation

Pete K. Rahn, *Secretary*
Douglas H. Simmons, *Acting Administrator*

Date: 7/14/15

Ms. Kristen Lewis
Baltimore County Office of
Permits and Development Management
County Office Building, Room 109
Towson, Maryland 21204

RE: Baltimore County
Item No 2016-0003-SPH
Special Hearing
BooneKondylas LLC, Ken Boone.
9025 Cuckold Point Road.

Dear Ms. Lewis:

Thank you for the opportunity to review your referral request on the subject of the above captioned. We have determined that the subject property does not access a State roadway and is not affected by any State Highway Administration projects. Therefore, based upon available information this office has no objection to Baltimore County Zoning Advisory Committee approval of Item No. 2016-0003-SPH

Should you have any questions regarding this matter, please contact Mr. Richard Zeller at 410-229-2332 or 1-866-998-0367 (in Maryland only) extension 2332, or by email at (rzeller@sha.state.md.us).

Sincerely,

David W. Peake
Metropolitan District Engineer
Baltimore & Harford Counties

DWP/RAZ

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon
Deputy Administrative Officer and
Director of Permits, Approvals and Inspections

DATE: August 4, 2015

FROM: Andrea Van Arsdale
Director, Department of Planning

SUBJECT: 9025 Cuckold Point Road

INFORMATION:

Item Number: 16-003

Petitioner: Ken Boone

Zoning: BL

Requested Action: Special Hearing

SUMMARY OF RECOMMENDATIONS:

The Department of Planning has reviewed the Petition for a Special Hearing to determine whether the Administrative Law Judge should approve amendments to previous restrictions imposed in Zoning Cases 07-144-SPH, CBA-06-044, CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music and other and further relief as may be required.

Testimony in the aforementioned cases established the fact of the prior use of the property as a "nightclub" which is not listed as an allowed use in the zone. Upon a site visit and discussions with the petitioner's counsel, the Department understands the future use of the property will be as a permitted restaurant that will have music, both live and reproduced, as an accessory component.

The Department has no objection to the granting of the petitioned zoning relief conditioned upon the following:

There shall be no dance floor, nor shall the restaurant become a "nightclub" as defined in the BCZR Section 101.1 and the Building Code of Baltimore County.

All accessory music shall be limited to reasonable sound levels so as not to disturb adjacent properties.

All accessory music shall be limited to the following hours or as may be otherwise established by the Administrative Law Judge:

a. No outdoor music after 10:00 p.m. Monday thru Saturday.

b. No indoor music after 12:00 a.m. (midnight) Monday thru Saturday.

c. No music after 8:00 p.m. on Sundays.

For further information concerning the matters stated herein, please contact Bill Skibinski at 410-887-3480.

Division Chief: Kathy Schlabach

AVA/KS

C: Bill Skibinski

TO: PATUXENT PUBLISHING COMPANY
Tuesday, September 8, 2015 Issue - Jeffersonian

Please forward billing to:
Lawrence Schmidt 410-821-0070
Smith, Gildea & Schmidt
600 Washington Avenue, Ste. 200
Towson, MD 21204

NOTICE OF ZONING HEARING

The Administrative Law Judge of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 2016-0003-SPH
9025 Cuckold Point Road
SE/s of Cuckold Point Road, 15 ft. SW of the centerline of 5th Avenue
15th Election District – 7th Councilmanic District
Legal Owners: Boone Kondylas, LLC, Ken Boone

Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music; and for such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Hearing: Monday, September 28, 2015 at 10:00 a.m. in Room 205, Jefferson Building, 105 West Chesapeake Avenue, Towson 21204

Arnold Jablon
Director of Permits, Approvals and Inspections for Baltimore County

NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ADMINISTRATIVE HEARINGS OFFICE AT 410-887-3868.
(2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT
ZONING REVIEW

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

The Baltimore County Zoning Regulations (BCZR) require that notice be given to the general public/neighboring property owners relative to property which is the subject of an upcoming zoning hearing. For those petitions which require a public hearing, this notice is accomplished by posting a sign on the property (responsibility of the petitioner) and placement of a notice in a newspaper of general circulation in the County, both at least fifteen (15) days before the hearing.

Zoning Review will ensure that the legal requirements for advertising are satisfied. However, the petitioner is responsible for the costs associated with these requirements. The newspaper will bill the person listed below for the advertising. This advertising is due upon receipt and should be remitted directly to the newspaper.

OPINIONS MAY NOT BE ISSUED UNTIL ALL ADVERTISING COSTS ARE PAID.

For Newspaper Advertising:

Item Number or Case Number: 2016-0003-SPH

Petitioner: Boone Kondylas, LLC

Address or Location: 9025 Cuckold Point Road

PLEASE FORWARD ADVERTISING BILL TO:

Name: Lawrence E. Schmidt, Esquire

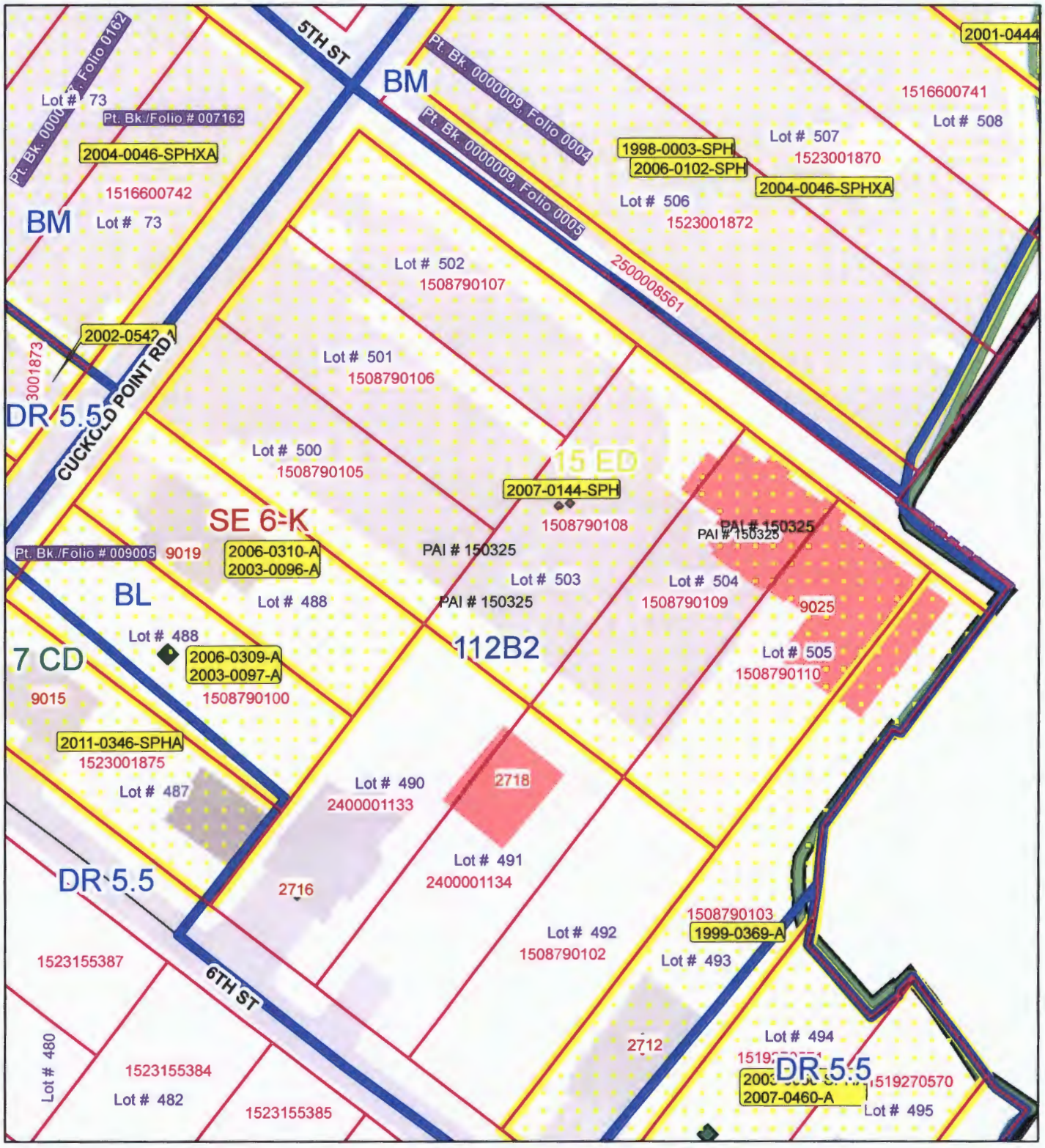
Address: Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Telephone Number: 410-821-0070

Revised 2/20/98 - SCJ


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BM
BL
DR 5.5
290'
170'
160'
115'
130'
58'
80'
58'
225'
9019
9025
9015
2718
2716
2712
2708
2704
2711
CUCKOLD POINT RD
61ST ST
SWAN AVE
103 Feet

9025 Cuckold Point Road



Publication Date: 7/2/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

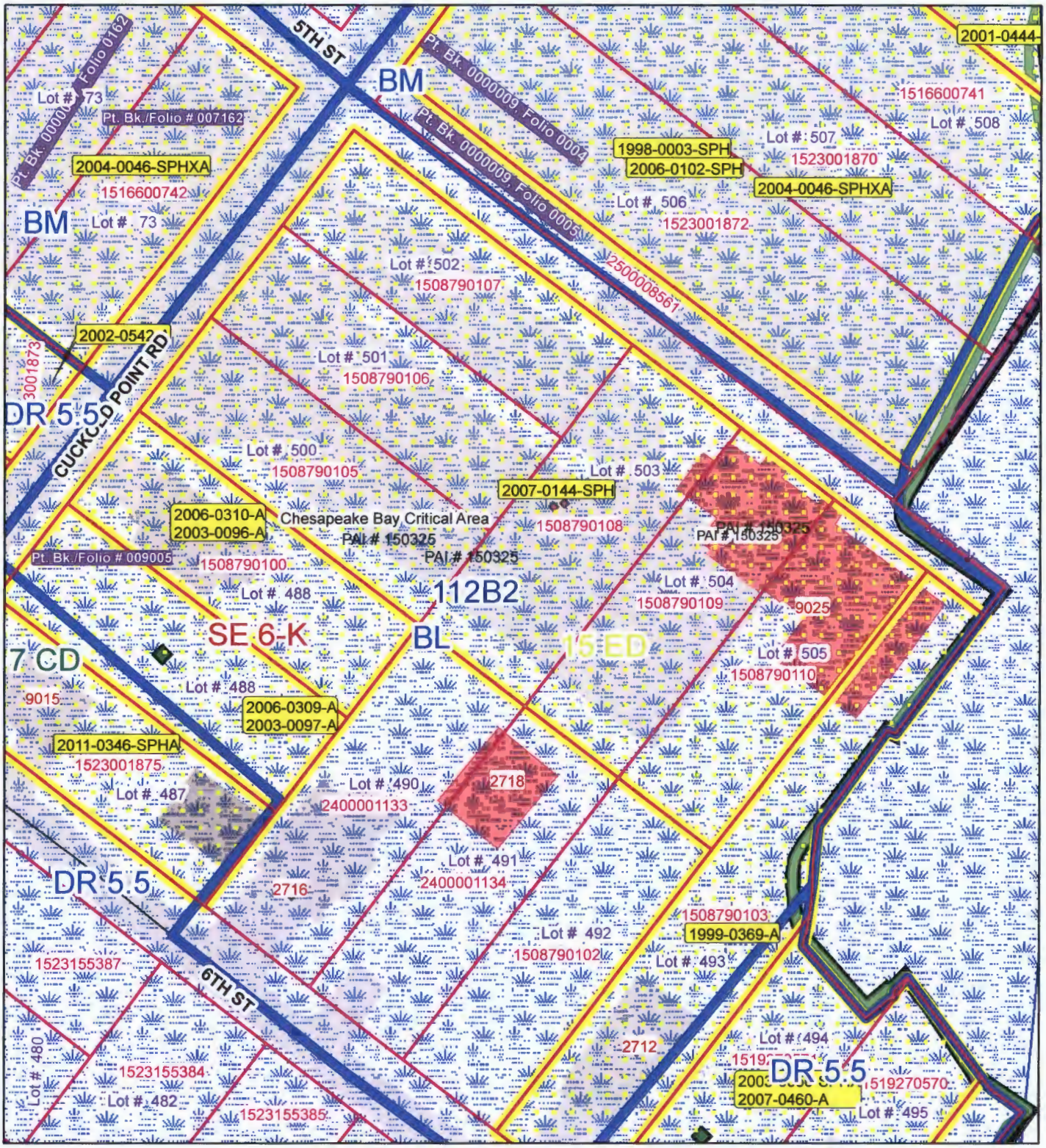
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1 inch = 60 feet

Item #0003

Chesapeake Bay Critical Area



Publication Date: 7/6/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

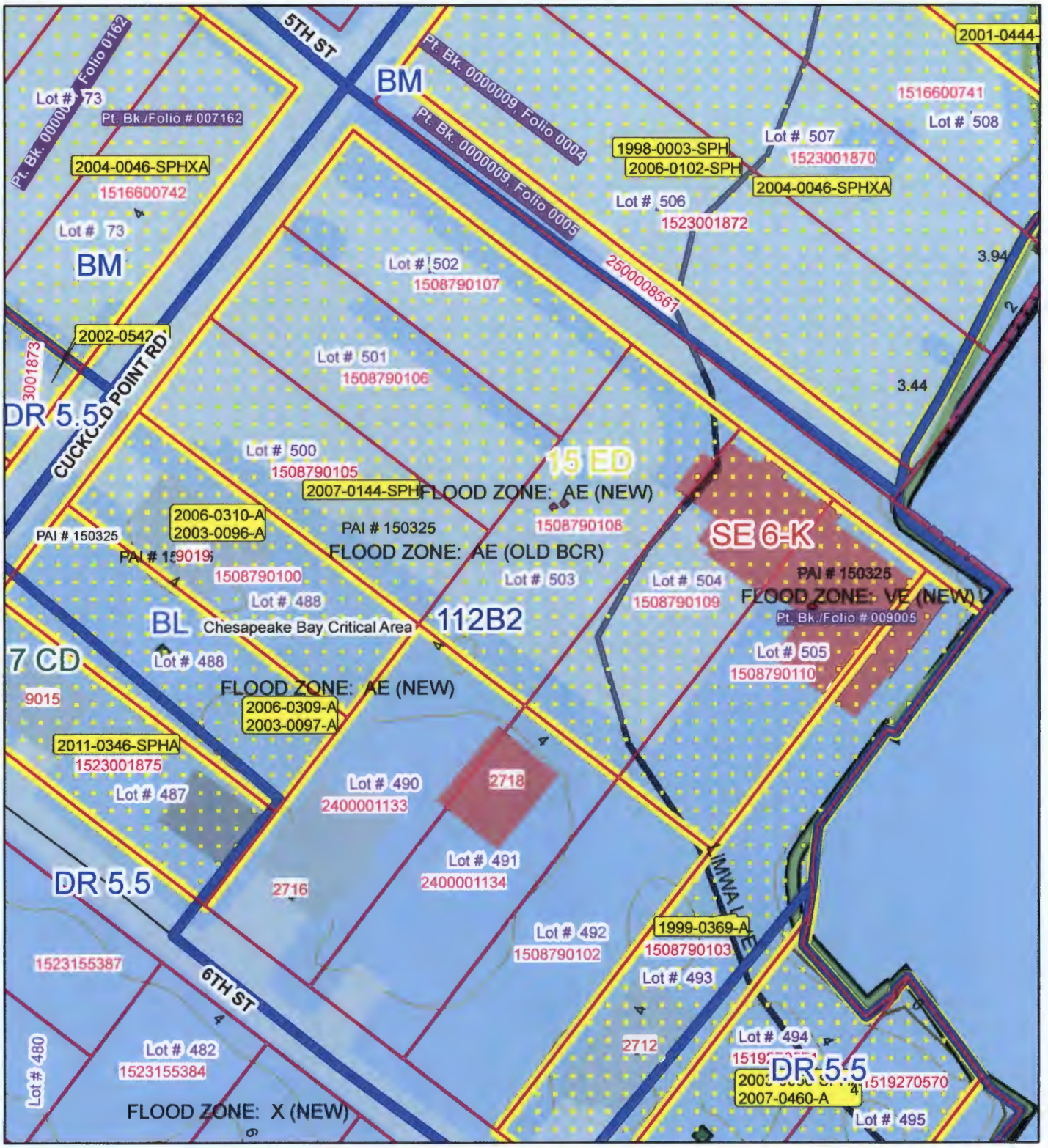
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1 inch = 60 feet

Item #0003

Elevations and Flood Hazards



Publication Date: 7/6/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

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1 inch = 60 feet

Item #0003

16-003-SPH

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

Boone Kondylas, LLC,	*	
Appellant	*	No. 0758, September Term 2020
v.	*	CSA-REG-0758-2020
	*	Circuit Court No. C-03-CV-19-003515
People's Counsel For Baltimore County,	*	
Appellee	*	
	*	
	*	

* * * * * * * * * * * * *

MANDATE

On the 18th day of May, 2021, it was ordered and adjudged by the Court of Special Appeals:

Notice of Dismissal filed by appellant counsel. Appeal Dismissed.

STATE OF MARYLAND, Sct.:
I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this 19th day of May, 2021.

Gregory Hilton

Gregory Hilton, Clerk
Court of Special Appeals

CIRCUIT COURT FOR BALTIMORE COUNTY, MARYLAND
401 Bosley Avenue, P.O. Box 6754
Towson, MD 21285-6754
Main: 410-887-2601 Fax: 410-887-3062

Case Number: **C-03-CV-19-003515**
Other Reference Numbers:

IN THE MATTER OF BOONE KONDYLAS, LLC

ORDER AFFIRMING BOARD OF APPEALS

For the reasons stated in the court's Opinion in this case, issued contemporaneously with this Order, it is this **19th day of August 2020**

ORDERED that the decision of the Board of Appeals of Baltimore County dated August 22, 2019 in County Board of Appeals Case No. 16-003-SPH is AFFIRMED.

Judge Keith R. Truffer

True Copy Test
JULIE L. ENSOR, Clerk
Per
Assistant Clerk

RECEIVED
AUG 24 2020
BALTIMORE COUNTY
BOARD OF APPEALS

Entered: Clerk, Circuit Court for Baltimore County, MD
August 20, 2020

RECEIVED
AUG 24 2020
BALTIMORE COUNTY
BOARD OF APPEALS

PETITION OF:	*	IN THE
BOONE KONDYLAS, LLC	*	CIRCUIT COURT
	*	FOR BALTIMORE COUNTY
FOR JUDICIAL REVIEW OF THE	*	Civil Action No.C-03-CV-19-003515
OPINION OF THE BOARD OF	*	
APPEALS OF BALTIMORE COUNTY	*	
	*	
IN THE MATTER OF:	*	
BOONE KONDYLAS, LLC-Petitioner	*	
RE: Petition for Special Hearing to amend previous Restrictions imposed in Cases 07-144-SPH, CBA-06-044, and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music County Board of Appeals Case No.16-003-SPH	*	

OPINION

This matter is an appeal pursuant to MD. RULE 7-201, *et seq.* from a decision of the Baltimore County Board of Appeals dated August 22, 2019. The lengthy procedural history of this application for zoning approval will not be repeated in full but will be recounted below to the extent necessary to address the issues raised in this appeal.

The petitioner in this matter is Boone Kondylas, LLC (hereinafter the "Petitioner"). The Petitioner owns and operates a restaurant located at 9025 Cuckold Point Road in Baltimore County under the name of Dock of the Bay (hereinafter the "Property"). The Property is zoned BL (Business-Local) which precludes a "nightclub" use. People's Counsel and the Protestants have maintained that the Petitioner's proposed use, including the playing of music, qualifies as an impermissible "nightclub" use.

In 2014, the Petitioner filed a Petition for Special Hearing to permit use of the Property as a restaurant with limited accessory music. A public *de novo* hearing was held before the Board of Appeals of Baltimore County (hereinafter the "Board") on February 17 and April 28, 2016. In an Opinion and Order dated September 15, 2016 (hereinafter the "2016 Opinion") the

Board denied the request to amend the restrictions previously applied to the Property so as to permit its use as a restaurant with limited accessory music.

The 2016 Order was appealed to the Circuit Court for Baltimore County. By order filed on June 7, 2017, the proceedings were remanded to the Board for a clarification and amplification of the 2016 Opinion.[1] on June 20, 2019, the Board held a public deliberation at which no new testimony was requested or admitted. On August 22, 2019, following remand, the Board issued its Opinion and Order (hereinafter the "2019 Opinion") which is now before the court. In the 2019 Opinion, the Board amplified its factual findings and again denied the Petitioner's request.

The court begins its analysis with the June 7, 2017 Circuit Court remand order (J.Stringer). That order directed the Board to make

> ...a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC's v. Ciarpella*, No. 810, September Term, 2009 which includes consideration of the criteria in the International Building Code (IBC).

Judge Stringer, in his oral opinion, concluded that the Board's 2016 Opinion lacked such an analysis which precluded review by the Circuit Court.

In deciding the issues raised in this appeal, the court will review the Board's 2016 Opinion and 2019 Opinion as a single decision, including the evidence presented to the Board at the 2016 hearings.

Necessity of Additional Evidentiary Hearing

The Petitioner raises the predicate issue of whether, on remand, the Board was required to conduct a *de novo* public evidentiary hearing before issuing its 2019 Opinion. The Petitioner argues that two of the three members of the Board issuing the 2019 Opinion were not members of the panel which heard the Petitioner's evidence in 2016. The Petitioner points to assessments of credibility made in the 2016 and 2019 Opinions as reasons why a new hearing

[1] The Circuit Court's decision was appealed to the Court of Special Appeals which, by unreported opinion dated November 9, 2018, dismissed the appeal as premature.

was required.[2] While that concern is understandable, the court finds that the Board was not required to conduct further evidentiary proceedings on remand.

This precise issue was addressed in detail in *People's Counsel for Baltimore County v. Country Ridge Shopping Center Inc. et al.*, 144 Md. App. 580 (2002). Reviewing a similar set of procedural facts, *Country Ridge* held that it was not necessary, in deciding a remanded issue, for a missing member or members of the Board of Appeals of Baltimore County to have personally observed the testimony before the Board "so long as the member had read the transcript and heard the argument." *Id.* at 610 (citing *Younkin v. Boltz*, 241 Md. 339, 345 (1966)). Here, all of the transcripts of the 2016 evidentiary hearings and all briefing containing the parties' arguments were available to the two panel members who were not present at the 2016 hearings. Absent any indication to the contrary, the court will assume that this information was reviewed by the new Board members as part of their consideration of the 2019 Opinion. The court concludes that the Board was not required to conduct an additional *de novo* hearing prior to issuing the 2019 Opinion.[3]

Standard of Review

It is well established that a court's role in reviewing an administrative agency's decision is narrow and "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Maryland Aviation Administration v. Noland,* 386 Md. 556, 571 (2005) (quoting *Board of Physician Quality Assurance v. Banks,* 354 Md. 59, 67–69, (1999)). Generally, agency decisions receive no special deference on questions of law, which we review *de novo*. *Employees' Ret. Sys. of Baltimore Cty. v. Bradford*, 227 Md. App. 75, 82 (2016) (citing *Talbot County v. Miles Point Property, LLC,* 415 Md. 372, 384 (2010)). However, the consistent interpretation and application of a regulation by the agency responsible for administering it is entitled to considerable weight by reviewing courts. *Lussier v. Maryland Racing Com'n*, 343 Md. 681, 697 (1996) (citing *Consumer Protection Div. Office of Atty. Gen. v. Consumer Pub. Co., Inc.*, 304 Md. 731, 759 (1985)).

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[2] It must also be noted that the opportunity to observe "the witness' behavior on the stand and way of testifying" is only one of the criteria which may be applied by the factfinder in assessing a witness' credibility. (See MPJI-Cv 1:3.)
[3] People's Counsel and the Protestants raise the additional objection that the Petitioner did not request an evidentiary hearing in 2019 and, in the absence of that request, waived the right to argue this issue on appeal. While it appears clear that the Petitioner did not request a hearing nor raise an objection to the Board, the court makes no determination of waiver in light of its ruling on the merits of the issue.

An agency decision based on regulatory and statutory interpretation is a conclusion of law. *Carven v. State Ret. & Pension Sys. of Maryland*, 416 Md. 389, 406 (2010). Keeping in mind the deference owed to administrative decisions, the Court shall conduct an independent review of the regulations and statutory provisions upon which the Board rests its decision to determine whether the Board's decision is "plainly erroneous or inconsistent with the regulation." *Id.* (citing *Crofton Convalescent Ctr. v. Dep't of Health & Mental Hygiene*, 413 Md. 201, 215 (2010)).

A decision of an administrative agency must be upheld on judicial review if it is not based upon an erroneous determination of law and if the agency's conclusions reasonably may be based upon the facts proven. *Montgomery County v. Buckman*, 333 Md. 516 (1994). A reviewing court may, and should, examine facts found by the agency, to see if there was substantial evidence to support each fact found. *Commissioner, Baltimore City Police Dep't v. Cason*, 34 Md. App. 487, cert. denied, 280 Md. 728 (1977).

An agency's application of *res judicata* is a question of law which is reviewed by the Circuit Court *de novo*. *Seminary Galleria LLC v. Dulaney Valley Improvement Association, Inc.*, 192 Md. App. 719, 734 (2010).

Issues

In their submitted briefs, the parties have raised and framed the issues in a variety of ways. The court distills and restates the issues as follows:[4]

1. Did the Board err as a matter of law in determining that the doctrine of *res judicata* applied?
2. In determining that that the proposed use of the property qualified as a "nightclub" within the definition of the BCZR 101.1 and the IBC, did the Board err as a matter of law and was there sufficient evidence to support that determination?

Res Judicata

The Protestants and People's Counsel urge the court to affirm the Board's decision that any consideration of the Petition is barred by the principle of *res judicata*, relying on *Seminary Galleria LLC v. Dulaney Valley Improvement Association, Inc.*, 192 Md. App. 719, 734-39 (2010) (petitioner's self-classification of shopping center so as to permit additional parking was

[4] The Board's analysis and conclusions combined these two issues. Because different standards of review apply to each, the court will examine them separately.

insufficient to show substantial change) and *Whittle v. Bd. of Zoning Appeals of Baltimore County*, 211 Md. 36, 42, 125 A.2d 41, 44 (1956) (increased population and change in community opposition was insufficient to show substantial change). They maintain that the use of Dock of the Bay as an impermissible nightclub was conclusively determined as part of earlier proceedings initiated by a prior owner.

Prior Proceedings

In 2006, a prior owner of the Property, Fifth Street LLC, filed a petition for a special hearing to determine whether the restaurant which provides music during the day qualifies as an "nightclub" as defined in the BZCR. Following a *de novo* evidentiary hearing on January 15, 2008, the Board concluded that the Dock of the Bay operated as a nightclub. In an opinion issued on June 4, 2008, the Board ordered that the playing of music be discontinued. The Circuit Court affirmed the Board's decision. The proceedings culminated in an appeal to the Court of Special Appeals in *Fifth Street LLC v. Ciarpella,* No. 810, September Term 2009 which, in an unreported opinion, also affirmed the Board's decision.

Application of Res Judicata

A prior judicial decision between the same parties, or their privies, on the same cause of action may preclude subsequent relitigation of that cause of action. *Alvey v. Alvey* 225 Md. 386, 390 (1961).

In order to determine whether a prior agency decision is entitled to preclusive effect, it must be shown that:

A. The agency was acting in a judicial capacity;
B. The issue subject to review was actually litigated before the agency; and
C. The resolution of that issue was necessary to the agency's decision.

Batson v. Shiflett, 325 Md. 684, 701 (1992).

Here, the Board was acting in a judicial capacity in the 2008 proceedings when it heard evidence and applied law. The issue subject to review - whether the playing of music at the restaurant qualified the use as a "nightclub" was precisely the issue resolved by the Board in 2008. That issue was the sole issue before the Board in the 2008 proceedings, the resolution of which was necessary to the agency's decision

A previously denied zoning decision may nevertheless be reconsidered if there is a showing of "substantial changes in fact and circumstances" occurring since the previous denial. *Seminary Galleria*, 192 Md. App. at 737 (citing *Woodlawn Area Citizen's Association v. Bd. Of County Commissioners for Prince George's County*, 241 Md. 187, 197 (1965)).

In both the 2016 and 2019 Opinions, the Board reviewed the evidence introduced during the 2016 hearings. It determined that "there has been no substantial change in the facts as proposed [in the 2014 Petition] than was previously litigated... before this Board after a *de novo* hearing." 2016 Opinion, p. 12 (bracketed material added). Specifically, it noted at p. 12 of its 2016 Opinion that:

> The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties.

To the extent that the Board applied the doctrine of *res judicata* in reaching its decision, the court finds that the Board did not err as a matter of law in doing so.

Determination of Use as Nightclub

Notwithstanding the Board's application of *res judicata*, the court will review the Board's factual and legal determination that, based on the evidence presented in the 2016 hearing, the proposed use qualified as an impermissible "nightclub" in a BL zone.

As a matter of law, the Board properly applied the eight IBC[5] criteria identified in the Court of Special Appeals *Fifth Street LLC* Opinion and as directed on remand by the Circuit Court. On pages 6 through 13 of its 2019 Opinion, the Board cited the evidence introduced as to each criterion. A review of the 2016 hearing transcripts supports these evidentiary conclusions. The Board found that the Petitioner's proposed use met seven of the eight identified factors to qualify as a "nightclub" and that the playing of music causes the proposed use to be classified as an impermissible "nightclub" as defined in BCZR §101.1.

[5] International Building Code.

The court finds that there was substantial evidence before the Board to support its conclusion that the Petitioner's proposed use qualified as an impermissible "nightclub" in a BL zone and that the Board did not err as a matter of law in doing so.

Conclusion

For the reasons stated, the court will affirm the Board's denial of the Petition for Special Hearing to "to permit future use of the property as a restaurant with limited accessory music." An order to this effect will be issued contemporaneously with this Opinion.

August 19, 2020

Date

Judge Keith R. Truffer

True Copy Test
JULIE L. ENSOR, Clerk
Per
Assistant Clerk

Entered: Clerk, Circuit Court for Baltimore County, MD
August 20, 2020

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE BOARD OF APPEALS OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION AND ORDER ON REMAND
FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY

This case comes to the Board on remand from the Circuit Court for Baltimore County from an appeal of an Order of this Board denying a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music (the "Remand Order").

The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire and Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation on the Remand Order was held on June 20, 2019.

Factual and Procedural Background

The subject property is located on the water front in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" ("DOB"). The Property is also improved with boat slips for patrons to dock their boats and access

DOB via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, DOB came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation (aka the "Thanner Era"), music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement complaints beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing before this Board to request a determination that DOB - with its associated live music - did not constitute a "nightclub." In our June 4, 2008 Opinion (the "2008 Opinion"), we held that Mr. Thanner's operation of DOB, along with music played, met the definition of "nightclub" in §101.1 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a "nightclub" was not permitted in a BL zone (even by special exception), this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (2008 Opinion, p. 14).

Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record before this Board supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. (CSA Opinion, 7/9/2010).

In or about 2014, the Petitioner purchased the Property and reopened DOB. Petitioner filed the instant Petition for Special Hearing to request that the restriction on live music be removed. A public hearing *de novo* was held before this Board on February 17, 2016 and April 28, 2016.

In our Opinion and Order dated September 15, 2016 (the "2016 Opinion"), from which this Remand Order originated, we concluded that the Petitioner's proposal here, would constitute a "nightclub" under BCZR §101, just as it did when Fifth Street, LLC owned and operated DOB. (See 2016 Opinion, p. 13). Succinctly, we stated that: "there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner…or before this Board after a *de novo* hearing." (*Id.*).

In weighing the evidence presented at that time and in issuing our 2016 Opinion, we incorporated - *in its entirety* - our 2008 Opinion. (2016 Opinion, p. 9). In doing so, our 2016 Opinion adopted our 2008 analysis of the facts under the definition of "nightclub" in BCZR, §101.1, as well as the eight (8) characteristics listed in the International Building Code ("IBC") for facilities within the "A-2 classification." According, in our 2016 Opinion, when we decided that the Petitioner's proposed use was the same as the 2008 operation by Thanner, we adopted all factual determinations we previously made.

Additionally, our 2016 Opinion referred to: "the facts and holdings as set forth in the Court of Special Appeals decision dated July 9, 2010" which affirmed our 2008 Opinion. (See 2016 Opinion, p. 9). This is the same appellate decision now referred to by the Circuit Court in the Remand Order as: "*Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009" from which the Circuit Court now requires further analysis.

Issues on Remand

The Remand Order instructs this Board to do the following:

> ….for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC's v. Ciarpella*, No. 810, September

> Term, 2009 which includes consideration of the criteria in the International Building Code (IBC).

Notwithstanding the language of our 2016 Opinion, and in order to comply with the Remand Order, we analyze the facts presented under the BCZR definition of "nightclub" and the criteria in the IBC. As stated by the Court of Special Appeals in *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, a "nightclub" is comprised of three elements under BCZR, §100.1: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor," and 3) "categorized as a nightclub by the Building Code of Baltimore County." (See CSA Opinion, 7/9/2010, p. 16).

The Court of Special Appeals in *Ciarpella*, noted that, in 2005, Baltimore County adopted the IBC as the Building Code of Baltimore County. (See CSA Opinion, 7/9/2010, p. 3). The Appellate Court further stated that IBC, §303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." (*Id.*).

Within Assembly Group A, Subgroup A-2 includes:

Assembly uses intended for food and/or drink consumption including, but not limited to:

> Banquet halls
> Night clubs
> Restaurants
> Taverns and bars

(IBC at 24).

Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g.,

restaurants.) The uniqueness of these occupancies is characterized by some or all of the following:

1) Low lighting levels;
2) Entertainment by a live band or recorded music generating above-normal sound levels;
3) No theatrical stage accessories;
4) Later-than-average operating hours;
5) Tables and seating arranged or positioned so as to create ill-defined aisles;
6) A specific area designated for dancing;
7) Service facilities for alcoholic beverages and food; and
8) High occupant load density.

(IBC at 3-17; 3-18).

The Court of Special Appeals in *Fifth Street* emphasized that the IBC Commentary explained that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. (See CSA Opinion, 7/9/2010, p. 4). The Court further noted that the 8 characteristics listed above "are advisory in determining whether Group A-2 is the appropriate classification." (*Id.*). The Court also stated that these eight (8) characteristics are "non-exclusive." (*Id.* at p. 11).

It is important to highlight that the Appellate Court in *Fifth Street* rejected Thanner's argument that DOB must either be a "standard restaurant" or a "nightclub". Mr. Thanner argued that if the DOB is primarily engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant, and not a "nightclub." (CSA Opinion, 7/9/2010, p. 19). The Appellate Court disagreed and held that the terms "standard restaurant" and "nightclub" are not mutually exclusive. The Court interpreted the phrase "standard restaurant" as being distinguishable from other types of restaurants such as "carry-outs", "fast-food," or "drive-through only." (*Id.*).

The Court added that permissible uses in a BL zone actually included dual uses (*i.e.* combinations of permissible uses). BCZR, §230.1.A.10. As a result, a property located in a BL zone could be operating as a dual use, such that one use is permissible and one use is not. (CSA Opinion, 7/9/2010, p. 20).

Here, in the Petitioner's case on the merits, Mr. Boone was the sole witness who testified about his proposed plan. His testimony only addressed some of the IBC characteristics. The other witnesses who testified on behalf of DOB were character witnesses for Mr. Boone. Each of those character witnesses either worked at Dock of Bay, or were related to someone who worked there. They were collectively of the opinion that live music should be permitted by this Board because Mr. Boone is a good person.

On this point, we repeat what we said in our 2016 Opinion that our decision now and then, does not reflect on Mr. Boone personally:

> We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that [he would] be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

(2016 Opinion, p. 13).

In regard to the eight (8) IBC characteristics, we find as follows:

1) **Low lighting levels**.

Petitioner failed to testify about, or provide any evidence regarding, his proposed plan for lighting levels.

2) **Entertainment by a live band or recorded music generating above-normal sound levels**.

DOB is open 7 days a week. (T. p. 55). Mr. Boone testified that he wants live music to be played every day. (T. pp. 104, 114). He wants live music played both inside and outside DOB at varying times. (T. p. 98). He wants to compete with eight (8) other bars/restaurants which are located on the peninsula and offer live music, even on weekdays. (T. p. 62-63). Mr. Boone testified that those competing businesses offer Sunday afternoon music from 1:00 pm to 5:00 or 6:00 pm. (T. 113-114). According to Mr. Boone, those establishments also have music on Wednesdays, Thursdays and Fridays. (T. p. 103). However, Mr. Boone also acknowledged that his competitors are located in a "business, major (BM) zone," which zone permits live music.

As for "live bands," the Court of Special Appeals reiterated that, during the Thanner era, live entertainment was offered on the following days and times, both inside and outside the restaurant:

> Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.
>
> On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

(CSA Opinion, p. 6).

In April of 2015, Mr. Boone hired Mark Allen as a soloist act to play on a Saturday night. (T. p. 57). While it is more expensive, Mr. Boone indicated that he has the option to hire Mr. Allen along with his band. (T. p. 58). In addition to Mr. Allen, Mr. Boone hired a Frank Sinatra singer and an Oomph band to play for Octoberfest. (T, p. 58). Mr. Boone hired a disc jockey on New Year's Eve. (T. p. 51).

As we stated in our 2016 Opinion, Mr. Boone would not agree to any limitation on the type of live music. (T. p. 104-105). Indeed, when asked in direct examination whether he would agree to a restriction on type of music, Mr. Boone would only agree to time restrictions:

> MR. SCHMIDT: Okay and if the Board proposed limitations on the type of music or the volume of music, you would, you would be amenable to those and follow those limitations?
>
> MR. BOONE: I'd be very happy to live within sound restrictions on outside music, time restrictions on both indoor and outdoor music and I do not want to cater to the young crowd and I'd be happy to live with time restrictions, both inside and outside.

(T. pp. 59-60).

Mr. Boone's concession that he would be amenable to a sound level restriction was not persuasive. Mr. Boone had the burden to prove to the Board what constitutes "above-normal sound levels" and how the proposed live music (whether soloist or band) would stay below those levels.

When asked on cross examination how Mr. Boone would implement his plan, he sarcastically responded that: "I'll have an army of people with sound meters." (T. p. 112). Although appearing to the Board as an after-thought during his direct testimony, Mr. Boone's proposal is to use a decibel monitoring device each time live music is played outside DOB. He testified that there should be an "agreeable" sound level for outside music and that bands would play within that sound level. (T. p. 107). Yet, Mr. Boone could not provide the Board with maximum sound level that he was proposing. (T. p. 111). When pressed for his maximum sound level, Mr. Boone responded that it would "be determined at a later time." (T. p. 113).

Mr. Boone testified on cross examination that he did not know what kind of noise levels would meet decibel levels of 55-65. (T. p. 80). He admitted that he would not personally be at the DOB full time to measure sound levels. (T. p. 97). Indeed, he conceded that he has never

personally operated a decibel monitoring device. (T. p. 120). Mr. Boone is not an expert in music or sound. (T. p. 111). DOB does not employ a sound engineer. (*Id.*).

In addition, Mr. Boone did not dispute that there would be amplification of music as he stated that: "Most of the sound will be controlled by the level of amplification." (T. p. 113). Russell McClelland was a witness who testified that during the Thanner Era, reggae music was played at amplified levels, after dark until 11:00 pm or 12:00 am, all days of the week. (T. p. 134). Mr. Boone candidly revealed that he has no previous experience operating a business where live music is played. (T. p. 116).

The Board finds that Mr. Boone's proposal was not credible. His testimony left unanswered critical aspects as to how he would implement his plan. It is beyond the expertise of this Board to determine what is "above-normal sound levels" or to determine how such sound should be measured. The Board is left to speculate as to what might happen if live music is permitted inside and/or outside DOB. Thus, the proposed plan is both impractical and unenforceable.

As for sound emanating from live music inside the DOB, Mr. Boone did not acknowledge the known problem which occurred during the Thanner era with sound escaping beyond the four (4) walls of the building. We consider this issue in light of Mr. Boone's testimony that, other than the footprint of the kitchen area (which he expanded by pouring a concrete pad), he has not made any changes to the DOB since the Thanner Era. As Mr. Boone said: "...the four walls are still the four walls." (T. pp. 40-41). Thus, there is no additional sound proofing of the building which may alleviate sound levels inside.

Mr. Boone interjected that currently (without live music), his typical customer is between 40-70 years old; average age is 50 years old. (T. 55). While he indicated that he does not intend

to cater to a younger crowd, if the type of live music draws a younger crowd, he would not be able to exclude those customers. (T. pp. 99-100). During boating season, DOB draws customers from all over Baltimore County. (T. p. 68).

Accordingly, while Mr. Boone initially suggested hiring a solo guitarist or a Frank Sinatra singer, Mr. Boone would not agree to a restriction on the type of music which DOB could offer. (T. pp. 104-105). In fact, he testified that he believed the restriction on music at DOB would be lifted when the liquor license was transferred from Thanner to the Petitioner. (T. p. 79).

As for "recorded music," Mr. Boone already offers recorded music by way of radios and televisions inside the DOB. (T. p. 52). The Court of Special Appeals noted that Thanner had: "ten television sets inside the restaurant, and another two at the outside bar. A house music system, connected to speakers inside and outside, played satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered." (CSA Opinion, 7/9/2010, p. 6). According, we find that the use and availability of recorded music has not changed.

Consequently, as to whether proposed live band or recorded music will generate above-normal sound levels, the Board finds that live band or live music will generate above-normal sounds levels and Mr. Boone's testimony did not persuade us otherwise.

3) **No theatrical stage accessories.**

Mr. Boone testified that he has no plans to build a stage from which a live band could perform. (T. p. 63). However, this Board is mindful, that a stage or at least a stage-like area (both inside and outside) would have to be created if live bands were to perform.

4) **Later-than-average operating hours.**

Mr. Boone verified that DOB is open seven (7) days a week. (T. p.55). He testified that during fall, spring, and winter seasons, DOB is opened Monday through Saturday from 11:00 am

until 10:00 pm; on Sundays, DOB closes around 9:00 pm. (T. p.55; p. 63). In the summer, on the weekends, he said DOB opens at 9:00 am for breakfast. (*Id.*). The outside space at DOB is open from April through October. (T. p. 48).

On cross examination, Mr. Boone's direct testimony as to current operating hours was contradicted with the introduction of a copy of the DOB website which confirms that DOB is actually open Monday through Thursday from 11:00 am to 11:00 pm; and Friday and Saturday 11:00 am until 1:00 am. (PC Ex. 1). (T. p. 96). Mr. Boone admitted that he arranged and approved the website, but had forgotten about the hours of operation listed there. (*Id.*).

He initially testified on direct that his plan was to have music on Friday and Saturday nights from 6:00 pm to 10:00 pm with last call for alcohol at midnight; he hopes DOB will then be cleared out by 12:30. (T. p. 60). He then stated that he would like music outside on Sundays: "probably 5:00 til 8:30 outside.....I don't expect to have music outside after dark." (T. p. 61).

Then, on cross examination, he denied that his proposal was to have all music stop on Friday and Saturday nights at 10:00 pm. (T. p. 103). Notwithstanding his direct testimony at the Board hearing, he added hours for both inside and outside music which would apply to all weekdays and weekends:

> What I said is that music inside would stop at 11:00 pm on Fridays and Saturdays, stop at 7:00 pm on Sundays, music outside would stop at dusk.

(T. p. 103). Mr. Boone agreed that, in summer months, "dusk" could be as late as 9:00 pm. (T. p. 104). Even Mr. Thanner's outside music ended at 8:00 pm. (CSA Opinion, 7/9/2010, p. 6).

We find that Mr. Boone's testimony on this factor was not credible. The DOB website, which Mr. Boone arranged and approved, reveals later than average operating hours for a restaurant. Accordingly, DOB hours are akin to those of a nightclub.

5) **Tables and seating arranged or positioned so as to create ill-defined aisles**.

Photographs of the tables and chairs both inside and outside the DOB reveal that neither are fixed or in any way anchored to the floor. (Pet. Ex. 8E, 8F, 8G, 8H, 8K, 8M and 8N). Additionally, Mr. Boone did not testify that the tables and chairs were attached to the floor. Accordingly, while both seating areas have aisles to permit serving food and beverages, nothing prevents such tables and chairs from being moved into ill-defined aisles, to allow for a band or for people to dance as in the Thanner Era. Indeed, this Board can reasonably expect that customers will rearrange tables and chairs so as to permit dancing when live music performs. This factor closely resembles a nightclub, rather than a restaurant.

6) **A specific area designated for dancing**.

Mr. Boone testified that the restaurant does not have a dance floor and that he has no plans to build a dance floor. (T. p. 63). In our 2008 Opinion, we likewise found that there was no specific dance area during the Thanner era. (BOA 2008 Opinion, p. 12; CSA Opinion, 7/9/2010, p. 6). Although the Appellate Court reaffirmed that there was no dance floor, it noted that: "....during live performances patrons often dance in between the tables." (CSA Opinion, 7/9/2010, p. 6).

Ironically, the existence of a dance floor under this IBC factor is a characteristic of a nightclub. Yet, the definition of "nightclub" in BCZR §101.1 is a facility "with or without a dance floor." Given that this is a proposed use, we must consider what is more likely to occur than not if live music is permitted. Based on Mr. Boone's testimony, the seating arrangement and layout of tables and chairs both inside and outside the restaurant is substantially similar to that of the Thanner Era, we find that there is nothing to prohibit patrons from dancing between the tables. It certainly would be reasonable to expect patrons to want to dance if live music is permitted.

Further, if there is no designated dance floor, nothing prevents patrons from moving tables and chairs to create a dance area.

7) **Service facilities for alcoholic beverages and food.**

There is no dispute that DOB serves both alcohol and food. Mr. Boone testified that, without live music, the food/alcohol ratio is consistently 80% food, 20% alcohol. (T. p. 56). During the Thanner Era, approximately 70% of sales was on food, 28% was on alcohol and 2% was on t-shirts and cookbooks. (CSA Opinion, p. 6). As a result, we find that the food/alcohol ratio is substantially similar to those during the Thanner Era. We can also reasonably expect that the sale of alcohol will increase if live music is permitted.

8) **High occupant load density**.

At full capacity, Mr. Boone testified that DOB has the capacity to *seat* over 223 people (98 people at inside seating, plus 25 more people at the inside bar; and an additional 100 people can sit outside). (T. p. 53). The Court of Special Appeals noted that, based on Mr. Thanner's testimony before this Board in 2008, the DOB had the capacity to serve 150-160 people and that, with those numbers, there was a high occupant load density. (CSA Opinion, p.5).

As set forth above, the description in Subgroup A-2 includes "occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants.)." Based on Mr. Boone's testimony of 223 people who can be seated at DOB, and giving consideration to even more people who would be standing and/or dancing, we find that DOB has a high occupant load density.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. The Board finds that DOB meets 7 of the 8 criteria set forth in Group A-2. This would be criteria 2, 3, 4, 5, 6, 7, and 8 (with no evidence presented as to criteria #1). Simply put, as we stated in our 2016 Opinion and based on the IBC characteristics above, we find that music, under the Petitioner's proposal, whether played inside or outside, is a factor in finding that the DOB is classified as a "nightclub" under the definition set forth in BCZR, §101.1.

DOB proposed operations are substantially the same as in 2008. Both Mr. Thanner and Mr. Boone expressed the desire for live music to boost revenue and compete with the neighboring restaurants located in BM zones. Moreover, there has been no change to the physical layout of the building, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of inside live music on the neighboring properties.

The County Council has determined that "nightclubs" can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in that zone. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101.1. The facts presented by the Petitioner here have not changed that determination.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 22nd day of August, 2019, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Deborah C. Dopkin

Jason S. Garber

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
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August 22, 2019

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Towson, Maryland 21204

RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

Dear Counsel:

Enclosed please find a copy of the Opinion and Order on Remand from the Circuit Court for Baltimore County issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Multiple Original Cover Letters

c: Kenneth Boone/Boone Kondylas, LLC
Lawrence M. Stahl, Managing Administrative Law Judge
C. Pete Gutwald, Director/Department of Planning
Michael D. Mallinoff, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

Case-in chief

Board of Appeals

Case No: 16-003-SPH Case Name: Boone/Condy LLC, LLC

Exhibit List

Party: People's Counsel Date: 2-17-16

Exhibit No:	Description:
✓ 1	Website photo showing the hours of operation
✓ 2A	SDAT Record showing 9025 Cuckold point Rd Lot 504
✓ 2B	SDAT Record showing Cockhold Rd Lot 500
✓ 2C	SDAT Record showing Cockhold Road 502
✓ 2D	SDAT Record showing Cockhold Road 501
✓ 3	Deed to 9025 Cockhold Point Rd. dated 9/30/14
✓ 4	Deed to 9025 Cockhold Point Rd. Dated 3/10/1999
✓ 5	P.C. Sign in sheet
	VERIFIED BY KC DATE: 2/19/16

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondy Lots, LLC

Exhibit List

Party: People's Counsel Date: 4-28-16

Exhibit No:	Description:
✓ 6	People's Counsel Sign in sheet
✓ 7	MAP - Property Id + Zoning 2014 Image
✓ 8a	MAP
✓ 8b	MAP (color)
✓ 8c	MAP
✓ 9	Comprehensive Zoning Map.
Not Admitted 10	Website page for Mark Allan date 4-26-2016 Marked for Id only - Not admitted
Not Admitted 11a	Baltimore County Website showing of the Liquor License for Dor of the Bay Tavern 4-27-2016
Not Admitted 11b	Baltimore County Website showing of Liquor License for Dor of the Bay Tavern 4-27-2016
✓ 12	Letter dated april 25, 2016 from Denise Hass,
	VERIFIED BY KC DATE: 4/28/16

not admitted

not admitted

People's Counsel Ex. 1
case-in-chief

DOCK of the BAY

Contact Info: 9025 Cuckold Point Road, Sparrows Point, MD
(410) 477-8100
Hours: Monday - Thursday: 11am - 11pm and Friday - Saturday: 11am - 1am
Sunday: 9am breakfast buffet. Close at 8pm.

Directions

Our Menu

Gallery

2A

Real Property Data Search (w2) **Guide to searching the database**

Search Result for BALTIMORE COUNTY

View Map | View GroundRent Redemption | View GroundRent Registration

Account Identifier: **District - 15 Account Number - 1508790109**

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	9025 CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	9025 CUCKOLD POINT RD SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			504	2015	Plat Ref:	0009/ 0004

Special Tax Areas:		**Town:**	NONE
		Ad Valorem:	
		Tax Class:	

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
1993	6530		7,500 SF	30

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation
		SERVICE GARAGE				

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	225,000	225,000		
Improvements	379,100	379,200		
Total:	604,100	604,200	604,133	604,167
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	Date: 10/21/2014	Price: $600,000
Type: ARMS LENGTH MULTIPLE	Deed1: /35488/ 00133	Deed2:
Seller: HRANICKA EDWARD F	Date: 04/08/1999	Price: $300,000
Type: ARMS LENGTH MULTIPLE	Deed1: /13658/ 00354	Deed2:
Seller:	Date:	Price:
Type:	Deed1:	Deed2:

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:		**Special Tax Recapture:**	
Exempt Class:		NONE	

Homestead Application Information

Homestead Application Status: No Application

People's Counsel Exhibit 2A
cast-in-chief

2B

Real Property Data Search (w2) | Guide to searching the database

Search Result for BALTIMORE COUNTY

View Map | View GroundRent Redemption | View GroundRent Registration

Account Identifier: **District - 15 Account Number -** 1508790105

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			500	2015	Plat Ref:	0009/ 0004

Special Tax Areas:		**Town:**	NONE
		Ad Valorem:	
		Tax Class:	

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
			7,500 SF	31

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	28,100	28,100		
Improvements	0	0		
Total:	28,100	28,100	28,100	28,100
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	Date: 10/21/2014	Price: $600,000
Type: ARMS LENGTH MULTIPLE	Deed1: /35488/ 00133	Deed2:
Seller: HRANICKA EDWARD F	Date: 04/08/1999	Price: $300,000
Type: NON-ARMS LENGTH OTHER	Deed1: /13658/ 00354	Deed2:
Seller:	Date:	Price:
Type:	Deed1:	Deed2:

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:	Special Tax Recapture:
Exempt Class:	NONE

Homestead Application Information

Homestead Application Status: No Application

People's Counsel Exhibit 2B
Case-in-chief

2C

Real Property Data Search (w2) Guide to searching the database

Search Result for BALTIMORE COUNTY

View Map View GroundRent Redemption View GroundRent Registration

Account Identifier: **District - 15 Account Number - 1508790107**

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	SW COR 5TH ST SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			502	2015	Plat Ref:	0009/ 0004

Special Tax Areas:		**Town:**	NONE
		Ad Valorem:	
		Tax Class:	

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
			7,500 SF	31

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	28,100	28,100		
Improvements	0	0		
Total:	28,100	28,100	28,100	28,100
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	Date: 10/21/2014	Price: $600,000
Type: ARMS LENGTH MULTIPLE	Deed1: /35488/ 00133	Deed2:
Seller: HRANICKA EDWARD F	Date: 04/08/1999	Price: $300,000
Type: ARMS LENGTH MULTIPLE	Deed1: /13658/ 00354	Deed2:
Seller:	Date:	Price:
Type:	Deed1:	Deed2:

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:	Special Tax Recapture:
Exempt Class:	NONE

Homestead Application Information

Homestead Application Status: No Application

People's Counsel exhibit 2C
case-in-chief

2D

Real Property Data Search (w2) **Guide to searching the database**

Search Result for BALTIMORE COUNTY

View Map | View GroundRent Redemption | View GroundRent Registration

Account Identifier: **District - 15 Account Number - 1508790106**

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			501	2015	Plat Ref:	0009/ 0004

Special Tax Areas:		**Town:**	NONE
		Ad Valorem:	
		Tax Class:	

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
			7,500 SF	31

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	28,100	28,100		
Improvements	0	0		
Total:	28,100	28,100	28,100	28,100
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	Date: 10/21/2014	Price: $600,000
Type: ARMS LENGTH MULTIPLE	Deed1: /35488/ 00133	Deed2:
Seller: HRANICKA EDWARD F	Date: 04/08/1999	Price: $300,000
Type: ARMS LENGTH MULTIPLE	Deed1: /13658/ 00354	Deed2:
Seller:	Date:	Price:
Type:	Deed1:	Deed2:

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:	Special Tax Recapture:
Exempt Class:	NONE

Homestead Application Information

Homestead Application Status: No Application

people's Counsel Exhibit 2D
Case-in-Chief

BALTIMORE COUNTY CIRCUIT COURT (Land Records) JLE 35488, p. 0133, MSA_CE62_35344. Date available 10/27/2014. Printed 02/17/2016.

This Deed, MADE THIS 30th day of September in the year Two Thousand Fourteen by and between Fifth Street, LLC, a Maryland limited liability company, party of the first part, and Boone Kondylas, LLC, a Maryland limited liability company, party of the second part.

Witnesseth, That in consideration of the sum of Six Hundred Thousand Dollars and NO Cents ($600,000.00), the receipt of which is hereby acknowledged, the said party of the first part does grant and convey to the said party of the second part, in fee simple, that parcel of ground situated in Baltimore County, Maryland and described as follows, that is to say:

BEGINNING for the same and being known and designated as Lots Nos. 500, 501, 502, 503, 504 and 505, as laid out on the revised Plat of Swan Point, which Plat is recorded among the Land Records of Baltimore County in Plat Book L.McL.M. No. 9, folios 4 and 5.

Tax ID Nos. 15-1508790150
15-1508790106
15-1508790107
15-1508790108
15-1508790109
15-1508790110

The improvements thereon being known and designated as 9025 Cuckold Point Road, Baltimore, MD 21219

BEING the same parcel of ground which by deed dated March 10, 1999 and recorded among the Land Records of Baltimore County, Maryland in Liber 13658, folio 354 which was granted and conveyed by Josephine M. Hranicka unto Fifth Street, LLC, the Grantor herein.

This is to certify the within instrument was prepared under the supervision of an Attorney duly admitted to practice before the Court of Appeals of the State of Maryland.

F. Michael Grace

F. Michael Grace, Esquire

TOGETHER with the buildings thereupon, and the rights, alleys, ways, waters, privileges, appurtenances and advantages thereto belonging, or in anywise appertaining.

TO HAVE AND TO HOLD the said described lot of ground and premises to the said party of the second part as sole owner, its successors and/or assigns, in fee simple.

BUYERS INITIAL HERE MK _____

People's Counsel Exhibit 3
Case-in-chief

BALTIMORE COUNTY CIRCUIT COURT (Land Records) JLE 35488, p. 0134, MSA_CE62_35344. Date available 10/27/2014. Printed 02/17/2016.

And the said party of the first part hereby covenants that it has not done or suffered to be done any act, matter or thing whatsoever, to encumber the property hereby conveyed; that it will warrant specially the property hereby granted; and that it will execute such further assurances of the same as may be requisite.

WITNESS the name and seal of said Limited Liability Company and the signature of the sole member thereof and the hand(s) and seal(s) of said Grantee(s).

Attest:

Fifth Street, LLC

By: _____ (SEAL)
Lawrence J. Thanner, Jr., Sole Member

_____ _____ (SEAL)

State of Maryland, County of Baltimore, to wit:

I Hereby Certify, That on this 30th day of September in the year Two Thousand Fourteen, before me, the subscriber, a Notary Public of the State of Maryland, County of Baltimore personally appeared Lawrence J. Thanner, Jr., who acknowledged himself to be the Sole Member of Fifth Street, LLC, a Maryland Limited Liability Company, and that he as such Sole Member being authorized so to do, executed the aforegoing instrument for the purposes therein contained, by signing in my presence, the name of the LLC by himself as such Sole Member.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

_____
Patricia L. Hinkel

My Commission Expires: January 14, 2017

PATRICIA L. HINKEL
Notary Public, State of Maryland
Baltimore County
Commission Expires Jan. 14, 2017

AFTER RECORDING, RETURN TO:
RGS TITLE, LLC
10025 GOVERNOR WARFIELD PARKWAY
SUITE 302
COLUMBIA, MD 21044
FILE NO. 195189MA

0035488 13

2014 MARYLAND FORM

Certification of Exemption from Withholding Upon Disposition of Maryland Real Estate
Affidavit of Residence or Principal Residence

Based on the certification below, Transferor claims exemption from the tax withholding requirements of §10-912 of the Tax-General Article, Annotated Code of Maryland. Section 10-912 provides that certain tax payments must be withheld and paid when a deed or other instrument that effects a change in ownership of real property is presented for recordation. The requirements of §10-912 do not apply when a transferor provides a certification of Maryland residence or certification that the transferred property is the transferor's principal residence.

1. Transferor Information

Name of Transferor

Fifth Street, LLC

2. Reasons for Exemption

Resident Status

☐ I, Transferor, am a resident of the State of Maryland.

☑ Transferor is a resident entity as defined in Code of Maryland Regulations (COMAR) 03.04.12.02B(11), I am an agent of Transferor, and I have authority to sign this document on Transferor's behalf.

Principal Residence

☐ Although I am no longer a resident of the State of Maryland, the Property is my principal residence as defined in IRC 121 and is recorded as such with the State Department of Assessments and Taxation.

Under penalty of perjury, I certify that I have examined this declaration and that, to the best of my knowledge, it is true, correct, and complete.

3a. Individual Transferors

Witness

Name

Signature

3b. Entity Transferors

Witness/Attest

Fifth Street, LLC

Name of Entity

By

Lawrence J. Thanner, Jr.

Name

Sole Member

Title

14-49

BALTIMORE COUNTY CIRCUIT COURT (Land Records) JLE 35488, p. 0135, MSA_CE62_35344. Date available 10/27/2014. Printed 02/17/2016.

0035488 136

State of Maryland Land Instrument Intake Sheet

☐ Baltimore City ☒ County: Baltimore County

Information provided is for the use of the Clerk's Office, State Department of Assessments and Taxation, and County Finance Office only.

(Type or Print in Black Ink Only - All Copies Must Be Legible)

1 Type(s) of Instruments	( ] Check Box if Addendum Intake Form is Attached.)						
	1 Deed	☐ Mortgage	☐ Other _____	☐ Other _____
	2 Deed of Trust	☐ Lease		
2 Conveyance Type Check Box	X Improved Sale Arm-Length[1]	☐ Unimproved Sale Arms-Length[2]	☐ Multiple Account Arms-Length[3]	☐ Not an Arms-Length Sale[9]
3 Tax Exemptions (if applicable) Cite or Explain Authority	Recordation			
	State Transfer			
	County Transfer			

TMP FD SURE 40.00
RECORDING FEE 20.00
TR TAX STATE 3,000.00
TOTAL 3,060.00
Rest BA01 Rcpt # 7393
JLE TD Blk # 1599
Oct 21, 2014 03:55 PM

4 Consideration and Tax Calculations	Consideration Amount		Finance Office Use Only	
	Purchase Price/Consideration	$ 600,000.00	Transfer and Recordation Tax Consideration	
	Any New Mortgage	$ 415,000.00	Transfer Tax Consideration	$
	Balance of Existing Mortgage	$	X( )% =	$
	Other:	$	Less Exemption Amount -	$
			Total Transfer Tax =	$ 9000.00
	Other:	$	Recordation Tax Consideration	$ 3000.00
			X( ) per $500 =	$
	Full Cash Value	$	TOTAL DUE	$

5 Fees	Amount of Fees	Doc. 1	Doc. 2
	Recording Charge	$ 20.00	$ 75.00
	Surcharge	$ 40.00	$ 40.00
	State Recording Tax	$ 3000.00	$
	State Transfer Tax	$ 3000.00	$
	County Transfer Tax	$ 9000.00	$
	Other	$	$
	Other	$	$

Agent: BP
Tax Bill: FY pd
C.B. Credit: _____
A.G. Tax/Other: N

6 Description of Property	District	Property Tax ID No.(1)	Grantor Liber/Folio	Map	Parcel No.	Var. LOG [ ] (5)
SDAT Requires Submission of all applicable information. A maximum of 40 characters will be indexed in accordance with the priority cited in Real Property Article Section 3-10(g)(3)(i).	15	1508790150* 05	13658/0354			

Subdivision Name	Lot (3a)	Block(3b)	Sect/AR(3c)	Plat Ref.	SqFt/Acreage(4)
Plat of Swan Point					

Location/Address of Property Being Conveyed (2): 9025 Cuckold Point Road, Baltimore, MD 21219

Other Property Identifiers (if applicable): *1508790106, 1508790107, 1508790108, 1508790109, & 10

Water Meter Account No.:

Residential [ ] or Non-Residential ☒ | Fee Simple [ ] or Ground Rent [ ] Amount: $

Partial Conveyance? [ ] Yes [X] No | Description/Amt. of SqFt/Acreage Transferred:

If Partial Conveyance, List Improvements Conveyed:

7 Transferred From	Doc. 1 - Grantor(s) Name(s)	Doc. 2 - Grantor(s) Name(s)
	Fifth Street, LLC	Boone Kondylas, LLC
	Doc. 1 - Owner(s) of Record, if Different form Grantor(s)	Doc. 2 - Owner(s) of Record, if Different form Grantor(s)

8 Transferred To	Doc. 1 - Grantee(s) Name(s)	Doc. 2 - Grantee(s) Name(s)
	Boone Kondylas, LLC	Brian Kinnear & Mike Wallace
	New Owner's (Grantee) Mailing Address	
	same as above	

9 Other Names To Be Indexed	Doc. 1 - Additional Name(s) to be Indexed (Optional)	Doc. 2 - Additional Name(s) to be Indexed (Optional)
		M & T Bank

10 Contact/Mail Information	Instrument Submitted By or Contact Person	
	Name: Michelle Baldwin	FILE: 195189MA
	Firm: RGS Title, LLC	
	Address: 10025 Governor Warfield Parkway	
	Suite 302, Columbia, MD 21044 (410) 715-5830	

X Return to Contact Person
☐ Hold for Pickup
☐ Return Address Provided

11 IMPORTANT: BOTH THE ORIGINAL DEED AND A PHOTOCOPY MUST ACCOMPANY EACH TRANSFER

Assessment Information

☐ Yes X No Will the property being conveyed be the grantee's principal residence?
☐ Yes X No Does transfer include personal property? If yes, identity:
☐ Yes X No Was property surveyed? If yes, attach copy of survey (if recorded, no copy required)

Assessment Use Only - Do Not Write Below This Line

[ ] Terminal Verification [ ] Agricultural Verification [ ] Whole [ ] Part [ ] Tran. Process Verification

Transfer Number: Date Received: Deed Reference: Assigned Property No:

Year			Geo	Map	Sub	Block
Recaptured			Zoning	Grid	Plat	Lot
Buildings			Use	Parcel	Section	Occ. Cd.
Total			Town Cd.	Ex.St.Ct./RCATION	EXEMPT REQUIRED	

REMARKS: Dept

Director of Budget and Finance
BALTIMORE COUNTY, MARYLAND
T.P. ART.12-108

Distribution: White - Clerk's Office; Canary - SSDAT; Pink - Office of Finance; Goldenrod - Preparer

AOC-CC-300 (6/95)

DOC # 2 3 4 5 6

Initial: BP

Date 10/21/14

BALTIMORE COUNTY CIRCUIT COURT (Land Records) JLE 35488, p. 0136, MSA_CE62_35344. Date available 10/27/2014. Printed 02/17/2016.

DUPLICATE PAID RECEIPT
ACTUAL TIME DRW
5 10/21/2014 15:04:40
ESO ASOS LWK IN RBOS LRB
RECEIPT # 787985 10/21/2014 OFLN
RECORDATION TAXES
ASSMNT ID 1508790105
$12,000.00
Recaptured
Buildings
Total
CK $.00 CA
County, Maryland

0013658 354

FILE NO. 11925T

Property Address:
9025 Cuckold Point Road
Baltimore, Maryland 21219
Tax I.D. 15-08-790109/15-08-790110/15-08-790108

THIS DEED, made this 10th day of March, 1999, by and between Josephine M. Hranicka, party of the first part, and Fifth Street, LLC, party of the second part.

WITNESSETH, that in consideration of the sum of $300,000.00, the said party of the first part does grant and convey to the said Fifth Street, LLC his/her heirs, personal representatives/successors and assigns, in fee simple, all that piece or parcel of land situate, in BALTIMORE COUNTY, Maryland, and described as follows, to wit;

BEGINNING for the same and being known and designated as Lots Nos. 500, 501, 502, 503, 504 and 505, as laid out on the revised Plat of Swan Point, which Plat is recorded among the Land Records of Baltimore County in Plat Book L.McL.M. No. 9, folios 4 and 5. The improvements thereon being known as No. 9025 Cuckold Point Road.

BEING six of the lots of ground described in a Deed dated November 6, 1968 and recorded among the Land Records of Baltimore County in Liber OTG 4938 folio 60 was granted and conveyed by Property Transfer Co., Inc. unto Edward F. Hranicka and Josephine M. Hranicka, his wife.

BEING also the same six lots of ground as described in a Merger Deed dated November 6, 1968 and recorded among the Land Records of Baltimore County in Liber OTG 4938 folio 62 was granted and conveyed by John H. Herold and Jean L. Herold, his wife unto Edward F. Hranicka and Josephine M. Hranicka, his wife.

The said Edward F. Hranicka having departed this life on or about January 23, 1980.

TOGETHER WITH the buildings thereupon, and the rights, alleys, ways, waters, privileges, appurtenances and advantages thereto belonging or in anywise appertaining.

TO HAVE AND TO HOLD the property hereby conveyed unto the party of the second part, Fifth Street, LLC his/her personal representatives, heirs and assigns, in fee simple, forever.

AND the party of the first part hereby covenants that he/she has not done or suffered to be done any act, matter or thing whatsoever, to encumber the property hereby conveyed; that he/she will warrant specially the property hereby granted; and that he/she will execute such further assurances of the same as may be requisite.

WITNESS the hand and seal the day and year first hereinbefore written.

Witness:

_____ _____(SEAL)
Josephine M. Hranicka

STATE OF MARYLAND
County of Baltimore, TO WIT;

I Hereby Certify, That on this 10th day of March, 1999, before me, the subscriber, a Notary Public of the state and county aforesaid, personally appeared Josephine M. Hranicka, known to me (or satisfactorily proven) to be the person whose name is/are subscribed to the within instrument and acknowledged that he/she executed the same for the purposes therein contained, and signed the same in my presence.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

MELLIE N. OLIVER NOTARY PUBLIC BALTIMORE COUNTY, MD.

My Commission Expires: 3/1/2002

_____
NOTARY PUBLIC - Mellie N. Oliver

People's Counsel Exhibit 4
Case-in-Chief

BALTIMORE COUNTY CIRCUIT COURT (Land Records) SM 13658, p. 0354, MSA_CE62_13513. Date available 03/08/2005. Printed 02/17/2016.

0013658 355

This is to certify that the within instrument has been prepared (i) by or under the supervision of the undersigned Maryland attorney, or (ii) by a party to this instrument.

ARNOLD L. MAZOR, Attorney

MAIL TO: TRUST TITLE COMPANY, INC.
7222 HOLABIRD AVENUE
BALTIMORE, MD 21222

BALTIMORE COUNTY CIRCUIT COURT (Land Records) SM 13658, p. 0355, MSA_CE62_13513. Date available 03/08/2005. Printed 02/17/2016.

016799 APR-88 0013658 056

State of Maryland Land Instrument Intake Sheet

☐ Baltimore City ☒ County: Baltimore

Information provided is for the use of the Clerk's Office, State Department of Assessments and Taxation, and County Finance Office only.

(Type or Print in Black Ink Only—All Copies Must Be Legible)

IMP FD SURE $ 5.00
RECORDING FEE 20.00
RECORDATION T 1,500.00
TR TAX STATE 1,500.00
TOTAL 3,025.00
Rcpt # 6482 Rct # 47581
SM BC Bk # 1627
Apr 08, 1999 11:56 am

1 Type(s) of Instruments (☐ Check Box if Addendum Intake Form is Attached.)

X Deed	X Mortgage	☐ Other	☐ Other
☐ Deed of Trust	☐ Lease		

2 Conveyance Type Check Box

X Improved Sale Arms-Length [1]	☐ Unimproved Sale Arms-Length [2]	☐ Multiple Accounts Arms-Length [3]	☐ Not an Arms-Length Sale [9]

3 Tax Exemptions (If Applicable) Cite or Explain Authority

Recordation
State Transfer
County Transfer

4 Consideration and Tax Calculations

Consideration Amount		Finance Office Use Only — Transfer and Recordation Tax Consideration	
Purchase Price/Consideration	$ 300,000.00	Transfer Tax Consideration	$ 300,000.
Any New Mortgage	$ 300,000.00	X ( ) % =	$ 4500.00
Balance of Existing Mortgage	$	Less Exemption Amount −	$
Other:	$	Total Transfer Tax =	$ 4500.00
Other:	$	Recordation Tax Consideration	$
		X ( ) per $500 =	$
Full Cash Value	$ 300,000.00	TOTAL DUE	$

5 Fees

Amount of Fees	Doc. 1	Doc. 2
Recording Charge	$ 20.00	$ 20.00
Surcharge	$ 5.00	$ 5.00
State Recordation Tax	$	$
State Transfer Tax	$ 1,000.00	$
County Transfer Tax	$ 3,000.00	$
Other Stamps	$ 1,000.00	$
Other	$	$

$ 20 1500 1500

Agent: [illegible]
Tax Bill: no V4
C.B. Credit:
Ag. Tax/Other:

6 Description of Property — SDAT requires submission of all applicable information. A maximum of 40 characters will be indexed in accordance with the priority cited in Real Property Article Section 3-104(g)(3)(i).

District	Property Tax ID No. (1)	Grantor Liber/Folio	Map	Parcel No.	Var. LOG ☐ (5)
15	15-08-790105				

Subdivision Name | Lot (3a) | Block (3b) | Sect/Ar (3c) | Plat Ref. | Sq Ft/Acreage (4)

Location/Address of Property Being Conveyed (2)
9025 Cuckold Point Road, Baltimore, Maryland, 21219

Other Property Identifiers (If applicable) continue.....
15-08-790106 / 15-08-790107 / 15-08-790108 / 15-08-790109 / 15-08-790110

Residential ☐ or Non-Residential ☐ | Fee Simple ☒ or Ground Rent ☐ | Amount:

Partial Conveyance? ☐ Yes ☒ No | Description/Amt. of SqFt/Acreage Transferred:

If Partial Conveyance, List Improvements Conveyed:

7 Transferred From

Doc. 1 - Grantor(s) Name(s)	Doc. 2 - Grantor(s) Name(s)
Josephine M. Hranicka	Fifth Stret, LLC
Doc. 1 - Owner(s) of Record, If Different from Grantor(s)	Doc. 2 - Owner(s) of Record, If Different from Grantor(s)

8 Transferred To

Doc. 1 - Grantee(s) Name(s)	Doc. 2 - Grantee(s) Name(s)
Fifth Street, LLC	Edward Hranicka
	Josephine Hranicka

New Owner's (Grantee) Mailing Address
1824 Elk Road, Baltimore, Md., 21221

9 Other Names to Be Indexed

Doc. 1 - Additional Names to be Indexed (Optional)	Doc. 2 - Additional Names to be Indexed (Optional)

10 Contact/Mail Information

Instrument Submitted By or Contact Person
Name: Krissy L. Hall
Firm: Trust Title Company, Inc.
Address: 7222 Holabird Avenue, Baltimore, Md., 21222
Phone: (410) 285-7330

☐ Return to Contact Person
☒ Hold for Pickup
☐ Return Address Provided

11 IMPORTANT: *BOTH* THE ORIGINAL DEED *AND* A PHOTOCOPY MUST ACCOMPANY EACH TRANSFER

Assessment Information

☐ Yes ☒ No Will the property being conveyed be the grantee's principal residence?
☐ Yes ☒ No Does transfer include personal property? If yes, identify:
☐ Yes ☒ No Was property surveyed? If yes, attach copy of survey (if recorded, no copy required).

Assessment Use Only - Do Not Write Below This Line

☐ Criminal Verification ☐ Agricultural Verification ☐ Water ☐ Part ☐ Trans. Process Verification

Official Number: Date Received: Deed Reference: Assessed Property No.:

Year	19	19	Geo.	Map	Sub	Block
Land			Zoning	Grid	Plat	Lot
Improvements			Use	Parcel	Section	Occ. Cd.
Total # Units			Town Cd.	Ex. St.	Ex. Cd.	

Distribution: White - Clerk's Office
Canary - SDAT
Pink - Office of Finance
Goldenrod - Preparer
AOC-CC-900 (6/98)

BALTIMORE COUNTY CIRCUIT COURT (Land Records) SM 13658, p. 0356, MSA_CE62_13513. Date available 03/08/2005. Printed 02/17/2016.

RECEIPT DATA
DATE 4/08/1999 TIME 11:24:00
ACTUAL
RECEIPT
CLERK 7 TIME
RECEIPT TOT 4,500.00
ACCOUNT 08790105
CK .00 CA
BALTIMORE COUNTY, MARYLAND

People's Counsel Sign-In Sheet

Case Name: BOONE-KONDRIAS, LLC, PETITIONER
Case No.: 2016-003-SPH
Date: 2/17/16

The Office of People's Counsel was created by the County Charter to participate in zoning matters on behalf of the public interest. While it does not actually represent community groups or protestants, it will assist in the presentation of their concerns, whether they have their own attorney or not. If you wish to be assisted by People's Counsel, please sign below.

Check to testify	Name	Address	Phone #	Email	Group you represent	Basis of your concerns
✓	MATT CIARAMELLA	2716 6TH ST 21219	443 677 1130			
	DENISE HAAS	2709 BAY DR. 21219	410 477-2410			
	BONNIE MATHENY	2704 6TH STREET 21219	410-477-4675			
	BRAD MATHENY	2704 6TH STREET 21219	410-477-4675			
	CHARLES WOLINSKI	9019 CUCKOLD POINT RD. 21219	410-477-0053			

People Counsel's Exhibit 5
Case-in-chief

Exhibit 1

People Counsel exhibit 6

People's Counsel Sign-In Sheet

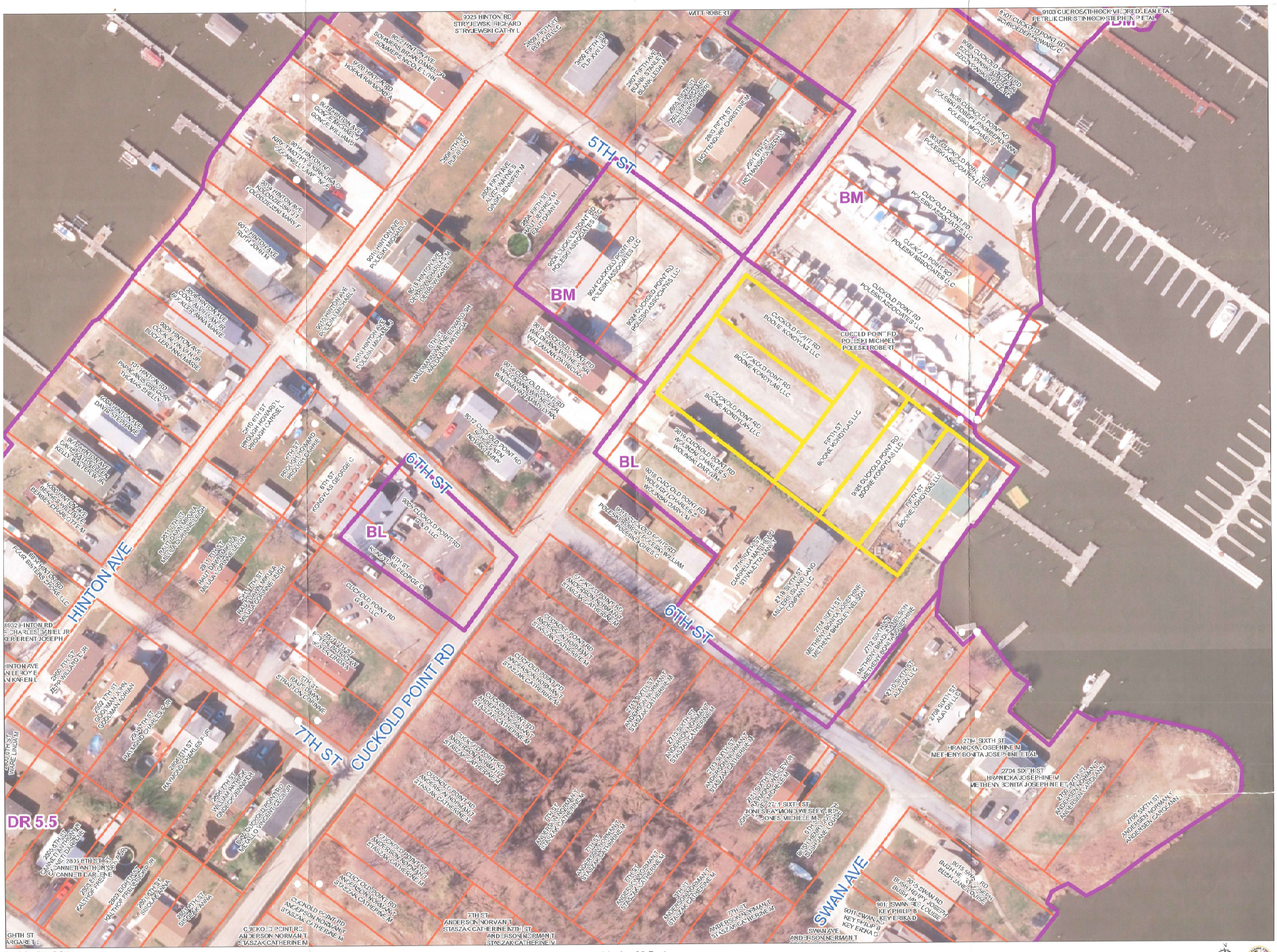
Case Name: Boone - Kondylas, LLC

Case No.: 16-003-SPH Day 2

Date: April 28, 2016

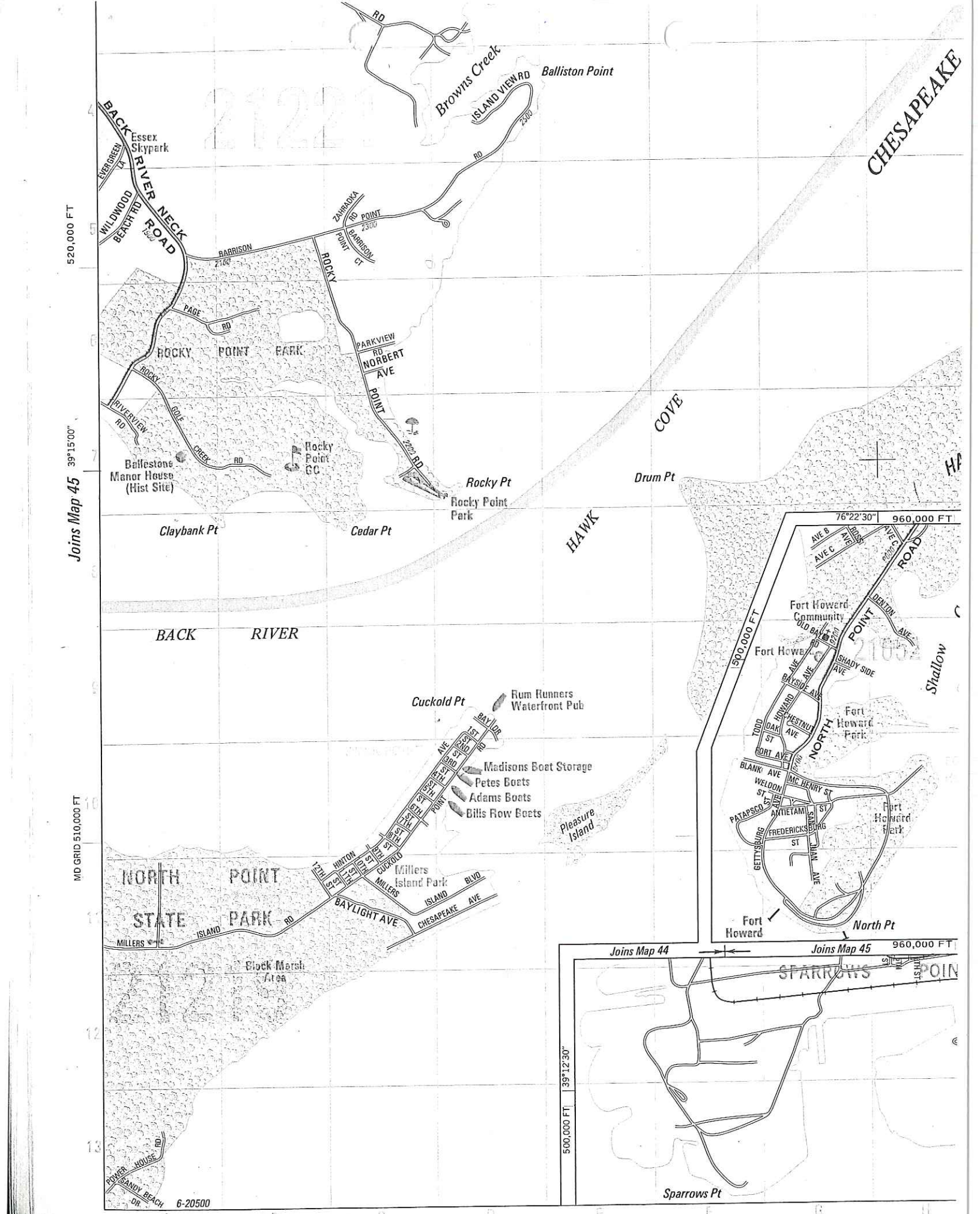
The Office of People's Counsel was created by the County Charter to participate in zoning matters on behalf of the public interest. While it does not actually represent community groups or protestants, it will assist in the presentation of their concerns, whether they have their own attorney or not. If you wish to be assisted by People's Counsel, please sign below.

Check to testify	Name	Address	Phone #	Email	Group you represent	Basis of your concerns
✓	Matt Ciarpella	2716 6th Street	4436771130		Protestants	
	Charles Wolinski	9019 Cuckold Pt Rd	443-850-9431		Protestants	
✓	BRAD Metheny	2704 6TH ST.	410-477-4675		PROTESTANT	
✓	WAYNE WALDMANN	9014 CUCKOLD PT. RD	443 797 9121		PROTESTANT	
	Bonnie Metheny	2704 6th Street	410-477-4675		PROTESTANT	
	Mike Kondylas	8908 Millers Island Rd	410 477 4865		PDC	
	Tami Waldmann	9014 Cuckold Pt Rd	443-	2840	Protestant	



P.C. Exh. 7

2016-053-SPH



© ALEXANDRIA DRAFTING CO.

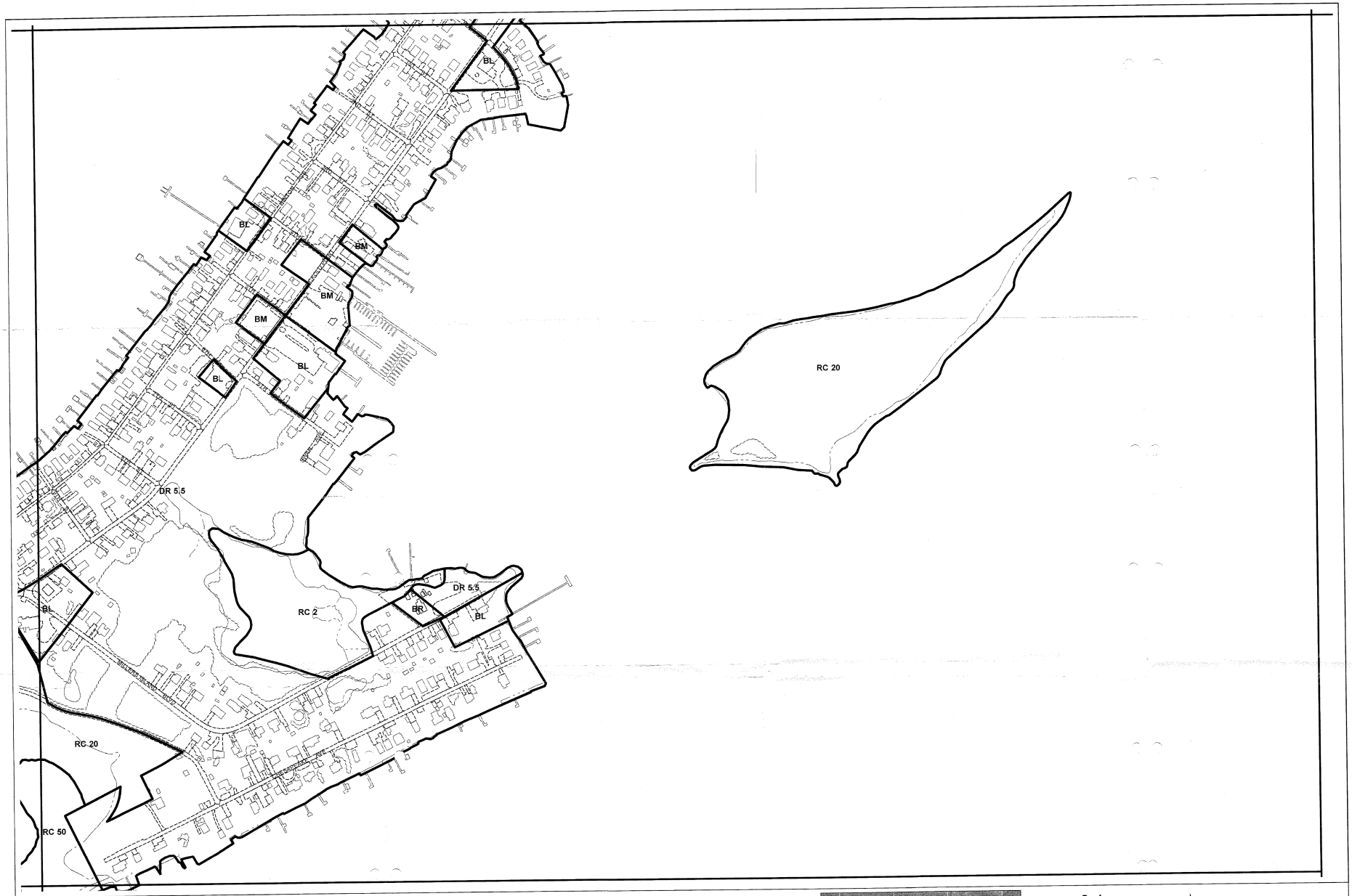
Peoples Counsel 8a Exhibit



People's Counsel 8b Exhibit



People's Counsel / BC Exhibit



Plan Sheet: *112B2*

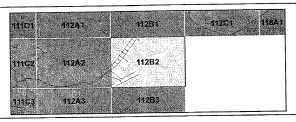
Note:
The zoning depicted in this map incorporates the actions associated with 2012 Comprehensive Zoning Map Process and Baltimore County Board of Appeals actions through December 31, 2012.

2016-003-SPH

Legend

Zoning — Streams — Rail Lines
Buildings — Roads — Vegetation

Baltimore County
Department of Planning
Official Zoning Map



Scale

1" = 200'

0 100 200 400 Feet

Data Sources:
Planimetric Data - Baltimore County
OIT/GIS Services Unit
1:2400, from 2008 photography
Zoning - Baltimore County Office of Planning
1:2400, 2012

P.C. Exh. 9

People's Counsel Exhibit 9

April 25, 2016

Denise Haas, President,
Millers Island Community Association
2703 Bay Drive, Millers Island, MD 21219

Baltimore County Board Of Appeals

Re: Dock of the Bay

Board of Appeal Members,

I had been asked to testify at the hearing on April 28, 2016, however, I will be out of town. I wanted to provide the following information on the Millers Island Community Association's position on the hearing to allow Dock of the Bay to play music. The Millers Island Community Association has, and will continue to remain neutral. Our position is "We want our residents to be happy and our businesses successful but neither at the expense of the other". That being said there are a couple of things that the Board of Appeals may need to be aware of.

Mr. Boone called me in February 2015 and ask if I would set up a meeting between him and the residents who had opposed music at Dock of the Bay under the previous owner. He suggested that he would be agreeable to changing his hours if the residents would agree to allow musical entertainment at Dock of the Bay. I contacted three of the residents who said that they would contact him directly and meet with him. I was told that a meeting did take place and I had no further phone contact with Mr. Boone. At the February 17, 2016 Mr. Boone stated that he was not aware of the music restriction prior to being contacted by the Liquor Board after he advertised live music in April of 2015, however this was not what he spoke of in our February 2015 conversation, he was aware of the restriction.

I attended the February 17, 2016 hearing to see what the final outcome was. The only other Dock of the Bay hearing I had attended was the last hearing under Lawrence Thanner's ownership. Several days after the February 17th hearing Mr. Boone proceeded to post on his Dock of the Bay Face Book page the details of the February 17th hearing. Some of the postings he allowed included the names, addresses and phone numbers of the residents living near Dock of the Bay and myself, it was posted that they were the contact information of those who opposed DOB music restrictions. I also received a harassing message from one of Mr. Boone's employees (copy attached).

My self and the residents of Millers Island would love to see a quality waterfront restaurant in our community, good food, good service and reasonable prices, the kind of place our families can enjoy. Past issues with DOB music had divided our community and created tension among neighbors and friends. Our hope is that this hearing puts this issue to rest so that we can all enjoy the beautiful community we live in.

Regards,

Denise Haas

Denise Haas, President, Millers Island Community Association

People's Counsel exhibit 12

~~Motion Hearing~~
CASE-IN-Chief

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondylas, LLC

Exhibit List

Party: Petitioners/~~Motion Response~~ Date: 2-17-16

Exhibit No:	Description:
✓ 1	Site Plan -
✓ 2A	Majority Opinion ~~Court of Special Appeals~~ Board of appeals (Case No. 07144-SPH) CBA-06-044 CBA-07-134
✓ 2B	Dissenting Opinion Board of appeals 07144-SPH CBA-06-044 CBA-07-134
✓ 2C	Ruling on Motion for reconsideration and clarification Case Nos. 07-144 SPH, CBA-06044, CBA-07-134
✓ 3	Circuit Court Opinion, Final Order, Case No. 03-C-080996
✓ 4	Unreported Opinion Court of Special Appeals No. 810, September Term 2009, File July 9, 2010
✓ 5	Memorandum (Exhibit) Contempt - Circuit Court For Baltimore County Case No. 03-C-08-009996
✓ 6	My Neighborhood Map Photo - Areal Photograph of THE "Dock of the Bay"
✓ 7	Thumb Tack - showing Dock of the Bay photo - Areal Photograph of Millers Island > my neighborhood
✓ 8A	photo Entrance to Dock of the Bay / Boat yard
✓ 8B	photo of Zoning Noted / Dock of Bay
✓ 8C	Photo Boat yard
✓ 8D	Photo - Dock of Bay
✓ 8E	Photo - Dock of the Bay Pier
	VERIFIED BY KC DATE: 2/19/16

Case-in-chief

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondylas

Exhibit List

Party: Petitioner - Date: 2-17-16

Exhibit No:	Description:
✓ 8F	Photo out door Seating for Dock of Bay
✓ 8G	Seating at Dock of Bay photo
✓ 8H	Seating + chairs Dock - photo
✓ 8I	Pier of Dock of the Bay Photo
✓ 8J	(Row Boat Willie) Photo
✓ 8K	Photo Dock of Bay
✓ 8L	Photo of Dock of Bay - Play area for children
✓ 8M	Photo of Seating inside Dock of the Bay
✓ 8N	Photo of Seating at Dock of the Bay
✓ 8O	Photo of Bar w/ Patron at Dock of the Bay
✓ 9	Business license issued by MD + operated Rosland
✓ 10	Photo of Sign viewed as you leave the Dock of the Bay, Neighbor Respect Sign
✓ 11A	Petition of Residents of Miller's Island - Support
✓ 11B	Petition of Non-Residents of Miller's Island Support
	VERIFIED BY KC DATE: 2/19/16

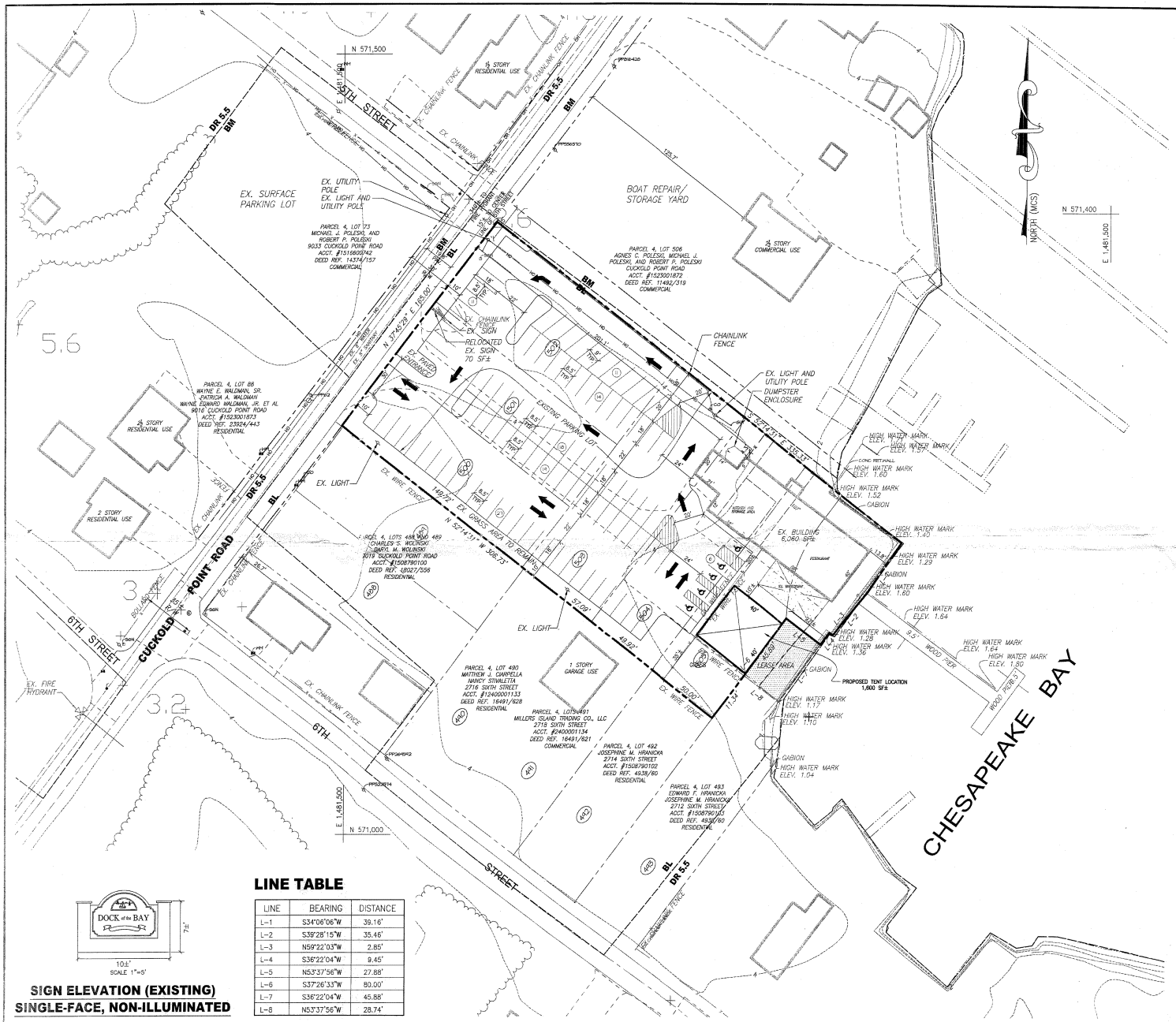
Board of Appeals

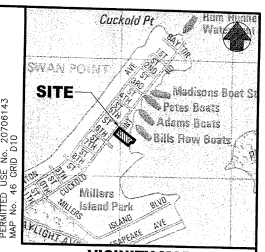
Case No: 16-003-SPH Case Name: Boone - Kond

Exhibit List

Party: Petitioner Date: 4-28-16

Exhibit No:	Description:
✓ 12a	Petition from Customers of Doz of the Bay
✓ 12b	Petition from Customers of Doz of the Bay
✓ 13	Letter from Mark Allan to the Zoning Commission
	VERIFIED BY KC DATE: 4/28/16





VICINITY MAP
SCALE: 1"=1000'

Ref No 1

PROPERTY OWNERSHIP

OWNER: FIFTH STREET, LLC
9025 CUCKOLD POINT ROAD
BALTIMORE, MARYLAND 21219-1635

GENERAL NOTES:

1. ZONING: BL
2. LOT AREA:
   GROSS ACREAGE 1.276 AC± (55,594 SQ. FT.)
   NET ACREAGE 1.219 AC± (53,119 SQ. FT.)
3. ZONING MAP: 112B2
4. PLAT REFERENCE: 9/4
5. CENSUS TRACT: 4519.00
6. WATERSHED: 13
7. SUBSEWERSHED: 43
8. SEWAGE PLAN DESIGNATION: S1
9. WATER SUPPLY PLAN DESIGNATION: W1
10. REGIONAL PLANNING DISTRICT: 331
11. ELECTION DISTRICT: 15TH
    COUNCILMANIC DISTRICT: 7TH
12. EXISTING USE: RESTAURANT
13. PROPOSED USE(S): RESTAURANT AND SEASONAL TENT TO COVER EXISTING OUTDOOR SEATING AREA.
14. BUILDING AREA:
    EXISTING BUILDING:
    1ST FLOOR:
    EXISTING RESTAURANT =2,230 SF±
    KITCHEN/ STORAGE =2,410 SF±
    2ND FLOOR:
    STORAGE/ OFFICE =1,420 SF±
    TOTAL: =6,060 SF±
    PROPOSED:
    SEASONAL TENT TO COVER EXISTING OUTDOOR SEATING =1,600 SF±
    TOTAL BUILDING AREA =7,660 SF±
15. FLOOR AREA RATIO (F.A.R.):
    F.A.R. (7,660 SF±/50,407 SF±) =0.15
    F.A.R.- I PERMITTED =3.0
16. THIS SITE IS SERVICED BY PUBLIC WATER AND SEWER AS SHOWN.
17. THIS SITE IS WITHIN THE 100-YEAR FLOODPLAIN PER FIRM MAP 240010 0445 C.
18. BUILDING CONSTRUCTION SHALL COMPLY WITH BUILDING AND FIRE CODE REQUIREMENTS.
19. SIGNAGE: AS SHOWN
20. PARKING:
    EXISTING BUILDING:
    1ST FLOOR:
    EXISTING RESTAURANT: 2,230 SF±
    KITCHEN/ STORAGE: 2,410 SF±
    TOTAL: 4,640 SF± @ 16 P.S./1,000 =75 P.S.
    2ND FLOOR:
    STORAGE/ OFFICE 1,420 SF± @ 3.3 P.S./1,000 SF =5 P.S
    PROPOSED SEASONAL TENT TO COVER EXISTING SEATING 1,600 SF± @ 16 P.S./ 1,000 SF =26 P.S
    TOTAL REQUIRED PARKING: =106 P.S.
    PROPOSED PARKING: =106 P.S
21. THERE SHALL BE NO BOAT SLIP RENTALS, ONLY TRANSIENT DOCKING IS PERMITTED.
22. LANDSCAPING SHALL COMPLY WITH THE BALTIMORE COUNTY LANDSCAPE MANUAL.
23. EXISTING LIGHTING SHALL REMAIN AS SHOWN ON PLAN.
24. PRIOR ZONING HEARINGS:
    PETITION FOR SPECIAL HEARING 5/30/07 CASE NO. 07-144-SPH
    PETITIONER REQUESTED DETERMINATION AS TO WHETHER THE USE OF THE B.L. ZONED PROPERTY AT 9025 CUCKOLD POINT ROAD IS IN VIOLATION OF THE ZONING REGULATIONS. AND SPECIFICALLY, IS THE RESTAURANT, WHICH PROVIDES MUSIC DURING THE DAY, A "NIGHTCLUB" AS DEFINED IN SECTIONS 101,102.1 AND 230. THE ZONING COMMISSIONER ORDERED THAT THE PLAYING OF OUTDOOR MUSIC EITHER BY WAY OF AN OUTSIDE SPEAKER, LIVE/OR RECORDED ENTERTAINMENT BE DISCONTINUED. DENIED 5/30/07. DECISION APPEALED TO MARYLAND STATE COURT OF SPECIAL APPEALS. AWAITING HEARING.
25. EXISTING CURB STOPS TO REMAIN.
26. EXISTING COMPACTED GRAVEL AND MACADAM TO REMAIN.
27. NO COMMERCIAL PERMITS WERE FOUND.

LINE TABLE

LINE	BEARING	DISTANCE
L-1	S34°06'06"W	39.16'
L-2	S39°28'15"W	35.46'
L-3	N59°22'03"W	2.85'
L-4	S36°22'04"W	9.45'
L-5	N53°37'56"W	27.88'
L-6	S37°26'33"W	80.00'
L-7	S36°22'04"W	45.88'
L-8	N53°37'56"W	28.74'

SCALE 1"=5'

SIGN ELEVATION (EXISTING)
SINGLE-FACE, NON-ILLUMINATED

MORRIS & RITCHIE ASSOCIATES, INC.
ENGINEERS, PLANNERS, SURVEYORS AND LANDSCAPE ARCHITECTS
1220-C EAST JOPPA ROAD, SUITE 505
TOWSON, MARYLAND 21286
(410) 821-1690
FAX: (410) 821-1748
MRAGTA.COM

PLAN TO ACCOMPANY BUILDING PERMIT APPLICATION

9025 CUCKOLD POINT ROAD

'DOCK OF THE BAY'

BALTIMORE COUNTY, MARYLAND

ELECTION DISTRICT 15 COUNCILMANIC DISTRICT 7

DATE	REVISIONS
5/18/2010	SEASONAL TENT WITH REVISIONS TO NOTES

JOB NO.: 15477
SCALE: 1"=30'
DATE: 08/31/07
DRAWN BY: TH
DESIGN BY: WM
REVIEW BY: WM
SHEET: 1 OF 1

J:\Projects\2007\15477-BUILDING-PERMIT-TENT 2010 05 19.dwg, 5/19/2010 5:54:55 PM, Melissa
1:1, Copyright 2009 Morris & Ritchie Associates, Inc.

Pet Ex A

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-07-134

* * * * * * *

MAJORITY OPINION

These cases come to the Board on appeal from two decisions of the Code Enforcement Hearing Officer and a decision of the Zoning Commissioner. The two decisions of the Code Enforcement Hearing Officer found the Petitioner, Fifth Street, LLC, guilty of violations of the County Code and levied fines of $5,000.00 and $1,000.00. The appeal from the decision of the Zoning Commissioner found that the Dock of the Bay, operated by Fifth Street, LLC, was classified as a nightclub under the Baltimore County Zoning Regulations (BCZR) and was in violation of the BCZR for operating a nightclub within a Business Limited (B.L.) zone.

Since the cases basically involved an interpretation of the County zoning regulations and the same sets of circumstances, the Board consolidated the cases for hearing. A hearing on the merits was held on January 15, 2008. Testimony was taken in Case No. 07-144-SPH, and oral

Petitioner: ~~Petitioner~~ Case-in-chief Exhibit 2A

argument was conducted in Cases No. CBA-06-044 and No. CBA-07-134. Petitioner, Fifth Street, LLC, and Lawrence Thanner, Legal Owner, was represented by J. Carroll Holzer, Esquire. Protestants, Matthew J. and Nancy Jean Ciarpella, Phil and Kay Sessa, Charlie and Darrell Wolinski, Michael and Robert Poleski, David and Vena Sheck, Ken Schoyl and Tammy Novak, Doug W. Waldmann, et al, Louis Petrovia, Robert Haas, David Znamirowski, David McWilliams, and Terri Poleski, were represented by Francis X. Borgerding, Jr., Esquire. Baltimore County was represented by Nancy C. West, Assistant County Attorney. The parties were given the opportunity to file briefs on February 19, 2008. A public deliberation was held on March 13, 2008.

Background

Fifth Street, LLC, and Lawrence J. Thanner, its Resident Agent, operates the Dock of the Bay restaurant offering dining facilities and services at its location at 9025 Cuckold Point Road, Millers Island, in Baltimore County, Maryland. On August 8, 2006, the Dock of the Bay was cited for a Code violation, with a proposed penalty of $5,000.00, for operating a nightclub in a B.L. zone. In addition, Fifth Street, LLC, was cited for erecting a tent on the premises without obtaining the required permit from the County. A hearing was held before the Code Enforcement Hearing Officer on August 23, 2006, and a decision was rendered on August 25, 2006, ordering the Respondent to remove the tent and finding that the property "is being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use and continued unabated despite receiving notice of violation on May 12, 2006. A restaurant with dancing and/or live or recorded entertainment is not a permitted use in a B.L. zone."

After that hearing, Fifth Street, LLC, filed a Petition for Special Hearing in Case No. 07-144-SPH. This Petition requested the Zoning Commissioner to interpret the zoning regulations for Baltimore County with respect to the operation of a nightclub.

The decision of the Zoning Commissioner finding that Fifth Street, LLC, and the Dock of the Bay was a restaurant providing music during the day and was a "nightclub" as defined in BCZR § 101, 102.1, and 230, was dated May 30, 2007. Subsequent to that date, Fifth Street, LLC, was again cited for violation of the *Baltimore County Code* (BCC) for failure to obtain a permit for a tent and also for violation of BCZR § 101, 102.1, 230, and 500.6 for failure to cease operation of a nightclub in a B.L. zone. A second hearing was held before the Code Enforcement Hearing Officer and, by decision dated August 16, 2007, the Code Enforcement Hearing Officer again found Dock of the Bay in violation of BCZR for operating a nightclub in a B.L. zone and erecting a tent without obtaining the required permit. The Hearing Officer imposed a $1,000.00 fine in that case.

Testimony and Evidence

Petitioner presented Lawrence J. Thanner, Managing Member of Fifth Street, LLC, as their principal witness. Mr. Thanner stated that the Dock of the Bay has been a restaurant since 1955 and, to his knowledge, always had music and on many occasions, providing live bands. Mr. Thanner opened the new Dock of the Bay restaurant in March of 2004 after refurbishing the building from the effects of Hurricane Isabel. Everything was completely refurbished and new equipment was installed in the restaurant.

Thanner stated that the restaurant has a 2,400 square foot rectangular bar at one end and has tables and chairs on the main floor to accommodate diners. He stated that the restaurant could seat about 150 to 160 patrons inside. In the summertime, he has an outside patio with an outside bar and tables with umbrellas and chairs for patrons to utilize. The restaurant has 14 boat

slips for transient boat customers. The restaurant also has a playground for children, with a wooden pirate ship to allow children to play on the playground. The restaurant opens every day at 11:00 a.m. and closes at 2:00 a.m. In the winter, the restaurant will close early when customers are gone. Thanner testified that the restaurant kitchen closes at 11:00 p.m., but that the bar will stay open until 2:00 a.m. He stated that the restaurant has a full commercial kitchen and provides a full menu of seafood, steaks, sandwiches, etc. He has licenses from the Baltimore County Health Department, which states that he is a restaurant, and a basic license from the State of Maryland, which also states that it is a restaurant.

The restaurant has ten television sets inside and two out on the patio. There is a house music system that plays radio and satellite radio inside and outside. There are outside speakers. The television sets are on all the time except when they have live entertainment.

Mr. Thanner stated that he does have live entertainment at the restaurant with a D.J. playing for karaoke participants and live bands on Friday and Saturday nights. On those occasions, the entertainment goes from 9:00 p.m. to 1:00 a.m. During the previous summer, he stated that he had live music on Saturday afternoon and Sunday afternoon from 4:00 p.m. to 8:00 p.m.

Mr. Thanner stated that he had stopped the music after 8:00 p.m. after the Liquor Board had told him to cease the music. He stated that he had full-scale bands in 2004 with no complaints, but in 2005, a Liquor Board inspector told him to "pipe down" and he still had the bands, but mostly duos or steel bands. He received complaints in May of 2006 from the outside music and wrote a letter to the County asking for clarification on May 14, 2006. This letter was sent to C. Raynor, inspector in the Baltimore County Department of Code Inspections and Enforcement. The letter listed a number of activities, which Mr. Thanner proposed to conduct at the Dock of the Bay and requested clarification as to how these items qualified as a nightclub

under the citation that he had received. This letter was presented as Petitioner's Exhibit #2 to the Board. Thanner stated that he received no response to his letter.

After he sent the letter, he contacted Attorney Carroll Holzer to file for a special hearing. Mr. Thanner stated that 70 percent of the sales at his restaurant were in food and 30 percent are beverages. He indicated that he does not charge for the live entertainment and is open until 2:00 a.m. when the live music is played. Mr. Thanner also stated that, when he has live entertainment, he does lower the lighting level in the restaurant. He stated that the live bands play quite loudly but that he has never been cited for having a noise level about 65 decibels at the property line. He also stated that he does not have any stage accessories for the bands except in the summertime when there is a small stage erected outside on the patio. His operating hours are 11:00 a.m. to 2:00 a.m., which he considered to be normal, but under State law, you cannot sell alcohol past 2:00 a.m. With respect to defined aisles for the tables and chairs, he stated that tables and chairs are set in certain ways to form aisles. He did admit that some time when the bands are playing inside people would move the tables and chairs and dance between the tables. He does have facilities for serving alcoholic beverages and, as previously stated, the restaurant will accommodate 150 to 160 patrons.

Mr. Thanner argued that his operation should not be considered a nightclub based upon the criteria set forth in the International Building Code which has been adopted by the County. It was Mr. Thanner's position that he could not survive in the wintertime without the live music because the restaurant would not pay for itself based solely on food and drinks served during normal times without the music being available.

Mr. James H. Thompson, Supervisor of Code Enforcement, was called by Protestants as a witness and testified that he has worked in Zoning for 31 years, 13 of which as Supervisor of Code Enforcement, and that his office cited Mr. Thanner for being a nightclub operating in a

B.L. zone. Mr. Thompson stated that his office operates on a complaint basis only. He stated that they had had no complaints about the restaurant property before Mr. Thanner took over the property. It was his testimony that his office only reviews a situation based upon a complaint and, if the operation being considered provides live entertainment in a B.L. zone, it would be considered a nightclub and would not be allowed to operate. This would include karaoke, a person playing a piano, and strolling minstrels.

The Protestants presented Matthew Ciarpella, who has resided on Sixth Street adjacent to the Dock of the Bay for 3 years. Mr. Ciarpella complained of hearing the music even though the band was inside and it was wintertime. He stated that Monday through Thursday there were no problems since no music was played, and that when the music was played, it was loud enough for him to hear in his house even though it was not played outside.

Kay Sessa also testified stating that she lived at Sixth Street, which is about 650 feet from the Dock of the Bay. She stated that she heard the karaoke being played and that, although the previous restaurant had live bands, they stopped playing in 1970. She stated that she has been bothered by the live bands of the Dock of the Bay since 2004.

Patricia Waldmann, Charles Wolinski, and Brad Metheny and Bonnie Metheny all testified that they were neighbors living approximately 100 to 250 feet from the Dock of the Bay and that the music played on Friday and Saturday nights was so loud that they could not enjoy a peaceful night's sleep. Wolinski testified that he had gone into the Dock of the Bay and had witnessed that the tables were moved when the bands were playing and that there were not always aisles for the tables.

Finally, George Abendschoen, the Administrator of the Baltimore County Liquor Board, testified that there had been a file opened by his office on the Dock of the Bay. Based upon complaints that were received by the Liquor Board concerning the music that was played, an

inspector, Dan Crockett, had gone to the Dock of the Bay to investigate the matter. There was no determination by the Liquor Board. The report by the inspector, Dan Crockett, was received for identification only but was not admitted as part of the evidence in this matter.

Cases No. CBA-06-044 and No. CBA-07-134

Subsequent to the evidence presented in the special hearing case, the parties argued with respect to the civil citations and the decisions of the Hearing Officer in the above matters. Mr. Holzer contended that, under § 500.6 and 7 of the BCZR, the Hearing Officer had no authority or jurisdiction to interpret the *Baltimore County Zoning Regulations* with respect to whether or not the Dock of the Bay fell under the definition of nightclub. He stated that that was restricted solely to the authority of the Zoning Commissioner. These cases should be determined on the basis of the decision that this Board makes with respect to finding as to whether or not the Dock of the Bay is a nightclub under the BCZR. Mr. Holzer argued that Mr. Thanner had, in good faith, sought clarification in the Baltimore County Department of Code Inspection and Enforcement and received no clarification from that office. He also stated that § 3103 of the *International Building Code*, which has been adopted by the County, applies to structures erected for less than 180 days. He stated that Counsel for the Protestants in his letter claims that, in addition to live music, the tent was up for over 8 months. If that is the case, he felt that his client was cited under the wrong citation. He stated that it was not clear what the fine of $5,000.00 covered and requested a reduction in the fine if the Board finds that the operation is a nightclub. There was no indication as to whether or not there was any evidence presented to the Code Enforcement Hearing Officer with respect to how long the tent was erected at the Dock of the Bay operation.

With respect to the second citation, Mr. Holzer indicated that the second charge should have been given the same file number, even though the first charge was on appeal to the Board.

He stated that the Code Enforcement Hearing Officer in Case No. CBA-07-134 found that the Zoning Commissioner had determined that the playing of outdoor music must be discontinued but did not address the playing of indoor music. The Code Enforcement Hearing Officer found the Dock of the Bay to be a nightclub and therefore in violation of the BCZR. Mr. Holzer wanted further clarification of the fine levied in the second hearing.

In addition, Mr. Holzer indicated that the Zoning Commissioner had received an inquiry from the Liquor Board with respect to his decision. Evidently, the Zoning Commissioner replied to the inquiry, stating that he had determined that the music being played inside and outside the building was prohibited. Mr. Holzer felt that he had to appeal this letter because it was his position that the Zoning Commissioner had not taken any position with respect to the inside music.

Counsel for the Protestants argued to affirm the decision of the Code Enforcement Hearing Officer. He argued that both decisions were affirmed by the decision of the Zoning Commissioner in which he found that the operation was a nightclub. There was no prejudice or reversible error committed and that the Hearing Officer should be affirmed on his findings with respect to the nightclub definition. With respect to the tent, he argued that the tent had been put up on two separate occasions and that the Hearing Officer was correct in finding a violation on both occasions.

Ms. West argued solely with respect to the jurisdictional aspect and it was her position that, under the Code, Article 3, § 6-101, the Hearing Officer had the authority to hear the two cases for finding and was correct in finding the violations.

Decision

There is no question that the Dock of the Bay restaurant is located in a B.L. zone. The B.L. zone uses permitted, as of right, include under § 230.4 a standard restaurant, tea room,

convenience store, and dairy barn. Section 101 of the BCZR defines a standard restaurant as "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment."

The definition of "nightclub" is found in BCZR § 101, List of Definitions, and states:

> A tavern or other establishment which permits live or recorded entertainment with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County.

Section 101 also defines a tavern as:

> An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of a nightclub, as defined in these regulations, shall be considered a nightclub.

A tavern and standard restaurant are allowed in a B.L. zone; a nightclub is not allowed.

The International Building Code, adopted in Bill No. 1-05 by the County Council, includes, in § 303.1:

> 303.1 Assembly Group A:
>
> Assembly Group A occupancy includes, among others, the use of a building or structure or a portion thereof, for the gathering together of persons for purposes such as civic, social, or religious functions, recreation, food or drink consumption, or awaiting transportation....

Following the major assembly group are the five sub-assembly groups. A-2 is the primary group with which we are concerned in this matter.

> A-2. Assembly uses intended for food and/or drink consumption, including but not limited to:
>
> banquet halls
> nightclubs
> restaurants
> taverns and bars

In a discussion of the various groups, the Code states:

> ...In the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high....Darkened spaces in theaters, nightclubs, and the like serve to increase hazards. In emergencies, the congestion caused by large numbers of people rushing to exits can cause panic conditions.

The characteristics for sub-assembly group A2 state:

Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:

- low light levels;
- entertainment by a live band or recorded music generating above-normal sound levels;
- no theatrical stage accessories;
- later than average operating hours;
- tables and seating arranged or positioned so as to create ill-defined aisles;
- a specific area designated for dancing;
- service facilities for alcoholic beverages and food; and
- high occupant load density.

There follows an example which states:

Example: The Downtown Club, a popular local nightclub /dance hall, features a different band every weekend [See figure 303.1(5)]. It is equipped with a bar and basic kitchen facilities so that beverages and appetizers can be served. There is a platform for a band to perform on, a dance floor in front of the platform, and numerous cocktail tables and chairs. The tables and chairs are not fixed, resulting in a haphazard arrangement such that there are no distinct aisles. When the band performs, the houselights are dimmed and spotlights are keyed in on the performers. The club is equipped with a sound system that is used at loud levels. The club is open until 3:00 a.m. – the latest time the local jurisdiction will allow.

From this descript of The Downtown Club, one can readily see that the appropriate classification is Group A-2. Sometimes, however, it is not this easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building.

The Board recognizes that this decision could have far-reaching effects in the County. The definition of "nightclub" in the BCZR is certainly far from being crystal clear. As testified to by the Building Inspector, the inspection department operates solely on a complaint basis. Their criteria for finding a nightclub would be any restaurant, tavern or bar which provides live

entertainment. This could be anything from a piano player playing background music, a strolling minstrel, or a 12-piece orchestra.

In reviewing the characteristics for the group of facilities classified as A-2 in the Building Code, the Board finds as follows:

1. Low light levels.

Mr. Thanner testified that normally the restaurant is lit at what one would consider a normal level. However, when the band is playing, he did admit that the lights were turned down.

2. Entertainment by a live band or recorded music generating above-normal sound levels.

Mr. Thanner indicated that on Fridays, Saturdays, and Sundays, he has live entertainment, be it karaoke, a D.J., or a small band. In fact, this is a major part of his business and he feels that, without the music, the Dock of the Bay cannot survive during the winter months. The question of whether or not the band and the music is played above normal sound levels is one that would probably be determined by the persons listening to it. Certainly, the neighbors surrounding the Dock of the Bay feel that the sound level of the music is above normal, even during the winter months when music is played inside. There has been no indication that the restaurant has been declared to be in violation of noise levels under the Maryland Occupational Safety and Health Act. However, there is no question that the bands do play at sound levels which extend beyond the four walls of the restaurant.

3. No theatrical stage accessories.

Mr. Thanner testified that there are no theatrical stage accessories, particularly during the winter months. He did state that on weekends during the summer time there is a small stage for the bands that play outside until 8:00 p.m.

4. Later than average operating hours.

Mr. Thanner testified that normal operating hours of the restaurant are 11:00 a.m. to 2:00 p.m. He stated that during the winter the restaurant would close early if there were no patrons. He also indicated that his kitchen closes at 11:00 p.m.; however, the facility will stay open until 2:00 a.m., which is the normal closing hour required by the County for facilities serving liquor.

5. Tables and seating arranged or positioned so as to create ill-defined aisles.

Mr. Thanner again testified that the tables and chairs in the restaurant are generally fixed according to aisles for serving. However, he did state that when a band plays it is normal for individuals to move chairs and tables to allow for the band and also to allow people to dance in between the tables.

6. Specific area designated for dancing.

Mr. Thanner testified that there is no specific dance area. However, once again he did indicate that when the bands are playing people would move the tables and dance in the aisles among the tables.

7. Service facilities for alcoholic beverages and food.

There is no question that the Dock of the Bay serves alcohol and food. Mr. Thanner was quite emphatic that 70 percent of his business comes from the food operation and probably 28 to 30 percent from the alcoholic beverages.

8. High occupant load density.

There is no definition of what a high occupant load density is. Mr. Thanner testified that the restaurant would seat 150 to 160 individuals. On nights when there are bands playing, there appears to be a large crowd coming into the restaurant and one would probably find that it is filled to capacity.

The Board finds that the Dock of the Bay meets at least six of the criteria set forth in Group A-2. This would be criteria 1, 2, 3, 4, 7 and 8.

While our dissenting Member would find that there is no violation when the music is played inside the facility, he would find that it is a nightclub when music is played outside. The Majority finds that the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR. The second criterion does not differentiate between inside and outside noise. The fact that the Dock of the Bay does not provide music Monday through Thursday is not controlling in the opinion of this Board. Playing loud music on Friday through Sunday that can be heard by the neighbors makes the operation a nightclub under the present definition of the BCZR.

The Board is not unmindful that the definition of a nightclub, under the BCZR, can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.M. zones, might be considered "nightclubs" under the present criteria of the BCZR. It is not for the Board to change the definition but for the County Council to consider.

Cases No. CBA-06-044 and No. CBA-07-134

The Board has considered the arguments and evidence presented to the Board and the Code Enforcement Hearing Officer in the above matters.

The Board finds that the Code Enforcement Hearing Officer is authorized to interpret the definition of a nightclub under his duties to hold hearings and issue final orders under § 3-6-206 of the BCZR. In any event, the Zoning Commissioner had found the Dock of the Bay to be a nightclub prior to the holding of the second Code Enforcement hearing. Therefore, the Code Enforcement Hearing Officer could rely on that decision to uphold his findings.

The Board will affirm the decision of the Hearing Officer in both matters but will reduce the penalty to a $1,000.00 fine for operating as a nightclub in a B.L. zone and a $1,000.00 for failure to obtain a permit to erect a tent on a temporary basis at the Dock of the Bay restaurant.

ORDER

IT IS THEREFORE this 4th day of June, 2008, by the Board of Appeals for Baltimore County,

ORDERED that the Petition for Special Hearing pursuant to § 500.6 and 500.7 of the Baltimore County Zoning Regulations requesting a determination as to whether the use of the B.L. zoned property at 9025 Cuckold Point Road is in violation of the zoning regulations, and, specifically, as to whether the facility which provides music at this location is a "nightclub" as defined in the BCZR §§ 101, 102.1 and 230 is hereby answered in the affirmative and the playing of music by way of speaker system, live or recorded entertainment must be discontinued; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-06-044 be and is hereby **AFFIRMED;** and further that the fine is reduced to $1,000.00 for operating a nightclub in a B.L. zone; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-07-134 for operating a nightclub in a B.L. zone and for erecting a temporary tent without a permit be and is hereby **AFFIRMED**; and further that the fine of $1,000.00 for the erection of the tent is **AFFIRMED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules.*

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Wendell H. Grier

Pet 23

IN THE MATTER OF THE APPLICATION OF	*	BEFORE THE
FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL	*	COUNTY BOARD OF APPEALS
HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH	*	OF
STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT	*	BALTIMORE COUNTY
7TH COUNCILMANIC DISTRICT	*	Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT	*	Case No. CBA-06-044
9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT	*	
7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF	*	
CODE ENF. HEARING OFFICER	*	
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT	*	Case No. CBA-07-134
9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT	*	
7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF	*	
CODE ENF. HEARING OFFICER	*	

* * * * * * *

DISSENTING OPINION

I respectfully disagree with the opinion of the Majority.

In support thereof, I draw attention to the very arguments and content of the Majority Opinion. Based upon the testimony presented and summarized in the Majority Opinion, we are faced with a commercial enterprise described as follows:

- 150 to 160 seated patrons at tables and chairs with defined aisles
- a playground for children on the premises, including a wooden pirate ship
- operating hours of a commercial kitchen of 11 a.m. to 11 p.m. with a full menu of steaks, seafood, sandwiches, etc.

Case-in-chief
Petitioner: ~~Motion~~ exhibit 23

- Health Department and State of Maryland licenses as a restaurant
- 70% of total receipts related to food service, while only 30% is related to alcohol
- no cover charge or other entrance fee
- no stage accessories inside the premises

On its face, absent further imposed factors, the above would appear to be a common sense discussion of a restaurant.

In this particular care there is no question that there is live and musical entertainment provided on a limited basis at the location. There are TV sets in the premises, and there is karaoke and DJ music on two nights of the week. The definition of a restaurant in § 101 of the Baltimore County Zoning Regulations (BCZR) is a clear statement that "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment." However, the definition of "nightclub" is exceedingly unclear and circuitous. It is quoted on page nine of the Majority Opinion and is based upon the essential definition of a "tavern" which permits music and is further "characterized" as a nightclub by the Building Code.

Unfortunately, this is a situation of law in which Baltimore County has seen fit to adopt a "one size fits all" International Building Code (IBC) as opposed to creating or evolving a Building Code that reflects the particular realities and common sense observations of this jurisdiction. Once again, the Majority has appropriately quoted the salient portions of the adopted International Building Code in an effort to determine whether the subject site is indeed a nightclub. Group A2 is the subgroup of the IBC which is applicable to this discussion. Group A2, while providing a general description of "uses intended for food and/or drink consumption,"

includes such disparate uses as banquet halls, nightclubs, restaurants, taverns, and bars. Common sense cannot but reach the inalterable observation that there are significant differences (or should, in reality, be) between these different uses, notwithstanding the fact that the authors of the "one size fits all" IBC determined to lump them together. In a discussion of the characteristics for the sub-assembly Group A2, the Majority, on page ten of its Opinion, quotes the Code as follows:

> ...Group A2 includes occupancies in which people congregate in high densities for social entertainment such as drinking and dancing (e.g., nightclubs, dancehalls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). **[Emphasis added.]**

Clearly, even the generalists who produced the IBC recognized that facilities utilized for purely social gathering were different than those used primarily for food and drink.

There follows a list of characteristics in which "some or all" would be relevant to a determination of the actual identity of a particular site use. This writer disagrees with the evaluation of the Majority as to these characteristics and would note those disagreements:

1. Low light levels – There is no question that the vast majority of the time the subject site lighting is at a normal level for a restaurant. That the lighting is sometimes reduced as part of its ambience should not negate the general lighting scheme on most occasions.
2. Entertainment by a live band or recorded music generating above-normal sound levels – There is no question that there is live or recorded music both inside and outside the subject business on occasion. There is absolutely no testimony that the owners have ever been cited for allowing music or live entertainment to generate above-normal sound levels either inside or outside the premises of the restaurant. The Majority properly notes that there is no

indication "that the restaurant has been found to be in violation of noise levels under the Maryland Occupation Safety and Health Act." There is anecdotal testimony of neighbors, many of whom came into the area after the activities at this location had continued for many years, that there were levels of music and other sound that adversely affected their enjoyment of their property. None testified to filing complaints with the police, nor was there any information developed that the restaurant had been cited for violation of noise statutes. With all due respect to the neighbors, their determination is subjective to the extreme; nor does the record reflect any action taken regarding the restaurant by governmental enforcement agencies akin to that which has occurred over many years to limit and modulate above-normal generated sound levels at house parties, college fraternity events, and other occasions when the police were summoned for above-normal noise levels. On such occasions, there are recognized decibel levels that are acceptable, the violation of which will result in governmental action immediately. No such evidence of governmental action regarding this restaurant exists here.

3. There are no theatrical stage accessories in the subject premises.
4. Later than average operating hours – There is no testimony of any sort that there are any but normal restaurant and bar hours for this location. The restaurant's commercial kitchen is open 12 hours a day. As noted, the restaurant provides 70 percent of the income at the location. Clearly these activities are the primary purposes of the establishment.

5. Tables and seating arranged or positioned so as to create ill-defined aisles – There is no testimony that there is a special setup of tables or chairs (other then that appropriate to a restaurant) for the purpose of providing entertainment. In fact, it is simply a habit of some patrons to move their chairs and seating arrangements to fit the moment. One might also be able to say that there would probably be any number of occasions when music is played and no one determines to move chairs or tables. There is simply no on-going structural plan by the owner of the establishment to do so.
6. Specific area designated for dancing – There is no specific area designated by the owner for dancing. That occasionally action by customers to do so unofficially does not officially create such an area. Therefore, the absence of that clearly defined plan should indicate just the opposite conclusion.
7. Service facility for alcoholic beverages and food – As noted above, the vast majority of the income derived at the location is as the result of food service to patrons, including families.
8. High-occupant load density – Once again, the "one size fits all" Code gives us no indication as to what "high" means. There is undisputed testimony that the restaurant seats 150 to 160 individuals and that on occasion that maximum is reached. The seating limitation is for restaurant use and is another indicator of Baltimore County's "real life" views of the nature of the business.

It is the opinion of this writer that the criteria applied in the IBC does not clearly indicate that this location in any significant way meets the definition and requirements under the law to be termed a "nightclub." In fact, as is characteristic of most generalized and non-specific

criteria, the IBC itself (as quoted by the Majority on page ten of the Opinion) states that "sometimes however it is not easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building." It essentially tells us that the criteria is so broad and determinedly subjective discussion and conclusion that it should not be utilized in a vacuum. The actual facts of the use and description of the site being addressed must be utilized in order to reach any viable conclusion as to the sites' status under the law. These additional factors and inquiries do not appear to have been utilized by the enforcement authorities or the Zoning Commissioner in their respective determined by in this case.

Baltimore County (as well as most jurisdictions in Maryland) has a history of primarily restaurant and other food related establishments utilizing various music and entertainment accoutrements to enhance both the ambience and experience of the patrons. Whether those accoutrements are physical (such as a playground for children at this location) or television sets or music or piano player, a strolling minstrel, a singing waiter, or a roving "in character" presentation by staff, these activities do not render such an establishment a nightclub but rather a restaurant with some additional entertainment provided. The position of the majority however, would result in a finding of "Nightclub" for any restaurant establishment utilizing these activities. Such a result turns a blind eye to common sense.

This writer believes that the result reached by the Majority, with its admitted, far-reaching effects, is the classic "untended consequences" situation. I believe that the Code Enforcement authorities should at the least have utilized the instruction in the IBC language that other factors, such as those existing here, should have been utilized and therefore the decision by

the Majority, that this is a nightclub as opposed to a restaurant, is incorrect; and, moreover, does not reflect the actual reality of the situation.

As a final note, Mr. Thompson, of the Enforcement agency for the County, testified that their actions in this matter and as to other establishments under this section and scenario would be generated on a "complaint only" basis. While I will not dwell on the point, such selective enforcement appears to me to be contrary to the spirit and intent of any well-written regulation, is arbitrary and capricious, and possibly an "Equal Protection under the laws" violation. I believe that the appellate court should revisit this particular situation in order to confirm that the subject site in this case is indeed a restaurant and not a nightclub; and further, that the criteria for such determinations must include factors in addition to the bare generalities of the IBC. Additionally, I believe that the County Council should, as quickly as possible, revisit the issue and adjust the County Code sections as they relate to the use of entertainment in restaurants and negate now and avoid in the future a result such as this, which is not in the best interests of the citizens or economy of Baltimore County.

For all of the above, I dissent in the Opinion of the Majority.

Lawrence M. Stahl, Board Member

DATE: 6-04-2008

Ref 2C

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-07-134

* * * * * * *

RULING ON MOTION
FOR RECONSIDERATION AND CLARIFICATION

On June 4, 2008, the Board issued its decision in the above cases, finding that the Respondent was in violation of the Baltimore County Code (BCC) and levying a fine of $1,000.00 in lieu of the $3,500.00 that was levied by the Hearing Officer. A timely Motion for Reconsideration was filed by Counsel for the Respondent. The Motion raises five questions or issues.

Question 1 – How many of the criteria set forth in the Building Code can an establishment have before it is considered to be operating a nightclub?

Question 2 – Will the Board amend its Order to state that the Dock of the Bay Restaurant must discontinue its nightclub operations?

Petitioners Motion Exhibit 2C

Question 3 – Should the Petitioners be held liable for not adhering to a law which no one except the Board of Appeals in a split decision could define?

Question 4 – How can the Petitioner be fined for erecting a tent without a permit when the Petitioner was never charged with that violation?

Question 5 – Was the testimony given by neighbors of Dock of the Bay proper testimony?

Decision

The Board held a public deliberation on the Motion on August 12, 2008. The Board finds that the issues raised in questions 1 and 2 request an advisory opinion, which the Board does not render.

With respect to question #3 concerning the $1,000.00 fine, the Board finds that the fine was appropriate and it will stand. The question of whether or not there was a split decision makes no difference with respect to the assessment of the $1,000.00 fine.

As to question #4, the Board finds that the Respondent was charged with failure to obtain a permit for the tent that it erected on the property. The Code Enforcement notice of May 20, 2006, states that the Respondent should obtain a tent permit or remove the structure. The notice of June 7, 2006, states a failure to obtain a permit for the tent. The notice of August 14, 2006, has an amendment, "Remove the tent or obtain permit." The Board finds that the Respondent had adequate notice that it was being charged with respect to failure to obtain a permit for the tent.

In regard to question #5, the Board considers that the testimony which it received from the neighbors was appropriate testimony and it will not grant any review with respect to that testimony. Should the Respondent feel that the testimony is improper, it may contest that in the Circuit Court for Baltimore County.

Therefore, the Board, having considered all of the questions raised by the Respondent, will deny the Motion for Reconsideration. The Board's Opinion and Order issued on June 4, 2008, remains this Board's final decision in this matter.

IT IS THEREFORE ORDERED THIS 12th day of September 2008 that the Motion for Reconsideration filed in this matter is **DENIED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Wendell H. Grier

Lawrence M. Stahl

Ref 3

IN THE PETITION OF **FIFTH STREET, LLC** FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY	*	IN THE
	*	CIRCUIT COURT
IN THE CASE OF **FIFTH STREET, LLC** LEGAL OWNERS/PETITIONERS FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE S/E corner of Cuckold Point Road & Fifth Street (9025 Cuckold Point Road) 15th Election District, 7th Councilmanic District	*	FOR
	*	BALTIMORE COUNTY
Case Nos. 07-144-SPH, CBA-06-044, CBA-07-134 Before the County Board of Appeals	*	Case No.: 03-C-08-09996

* * * * * * * * * * * * * *

FINAL ORDER

Upon judicial review of the record, of memoranda filed by the parties, and of oral argument by counsel in open hearing on May 6, 2009, and for reasons stated at the conclusion of the hearing, it is, this 14th day of May, 2009, **ORDERED by the Circuit Court for Baltimore County, that the Order of the Majority Opinion of the County Board of Appeals of Baltimore County dated June 4, 2008**, as finalized by the September 12, 2008 denial of petitioner Fifth Street, LLC's Motion for Reconsideration, **be and hereby is, AFFIRMED** in its entirety, as to the County Board of Appeals' *de novo* determination upon Fifth Street, LLC's petition for special hearing in Case 07-144-SPH and as to the County Board of Appeals' Orders affirming Code Enforcement Hearing Officer decisions in Case Nos. CBA-06-144 and CBA- 07-134.

True Copy Test
SUZANNE MENSH, Clerk
Per _____
Assistant Clerk

LAWRENCE R. DANIELS, JUDGE
Circuit Court for Baltimore County

APPROVED AS TO FORM:

Francis X. Borgerding, Jr, Esquire, Attorney for Respondents

J. Carroll Holzer, Esquire, Atty for Petitioner

Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County

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FILED JUN 3 2009

Petitioner: Motion Exhibit 3

Ret'd

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 810

September Term, 2009

FIFTH STREET, LLC., ET AL.

v.

MATTHEW CIARPELLA, ET AL.

Eyler, Deborah S.,
Woodward,
Kehoe,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 9, 2010

Petitioners (Exhibit) Motion / Exhibit 4

Fifth Street, LLC, and its managing member, Lawrence J. Thanner, Jr. (collectively "FSLLC"), the appellants, own the Dock of the Bay, a restaurant and bar located at 9025 Cuckold Point Road in Baltimore County.[1] They appeal from the judgment of the Circuit Court for Baltimore County affirming a decision of the Baltimore County Board of Appeals ("Board"), finding them in violation of the Baltimore County Zoning Code ("Zoning Code") for operating a nightclub in a B.L. (Business Local) zone. The appellees are People's Counsel for Baltimore County ("the County") and Matthew Ciarpella, who resides near the restaurant. The FSLLC presents four questions for our review, which we have consolidated and rephrased as follows:

I. Did the Board err in concluding that the Dock of the Bay operates as a nightclub, as defined in the Zoning Code?

II. Is the definition of a "night club" in the Zoning Code so arbitrary and confusing as to deprive the appellants of their due process rights?

III. Did the Code Enforcement Division hearing officer err in concluding that the appellants violated the Zoning Code by erecting a tent without a permit?[2]

---

[1]We will refer to the Dock of the Bay as a restaurant, as all parties seem to agree that it performs this function, but we do not intend this description to be in any way determinative of the central issue in this case.

[2]As framed by FSLLC, the question presented are:

1. In Special Hearing Case No.: CBA-07-144-SPH, the County Board of Appeals erred as a matter of law in determining that the Dock of the Bay restaurant was a night club under the Baltimore County Zoning Regulations definition.

2. In Zoning Violation Case No.: 06-044, the finding of violation was in error as a matter of law.

(continued...)

For the reasons that follow, we shall affirm the judgment of the circuit court.

ZONING REGULATIONS

The Zoning Code establishes three types of business zones: B.L. (Business Local), B.R. (Business Roadside), and B.M. (Business Major). Zoning Code § 100.1.A.2. As noted above, the Dock of the Bay is located in the B.L. zone. The B.L. zone is the most restrictive of the three business zones.

Zoning Code section 230.1.A sets forth the permitted uses in the B.L. zone, which include the operation of a "standard restaurant" and a "tavern." Combinations of permitted uses also are allowed. Zoning Code § 230.1.A.10. A "nightclub" is not among the permitted uses in the B.L. zone, nor is it permitted by special exception. Zoning Code § 230.3.[3]

A "standard restaurant" is defined in the Zoning Code as follows:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term

---

[2](...continued)

3. If the Dock of the Bay is a restaurant, Civil Citation in Case No.: 07-134 and Case No.: 06-044 must be reversed.

4. County's arbitrary and confusing definition of night club violates Appellants' due process rights, violates standards for discretionary enforcement; leaves enforcement to the arbitrary discretion of County officials and constitutes undue favoritism by the County as established in the testimony before the Board of Appeals. Further, that the County's classification of night club must be reasonable and the evidence before the Board and the Board's conclusions established that the use of I.B.C. Group A-2 to define night club is unusable, arbitrary and capricious.

[3]A nightclub is a permitted use in the B.M. zone. Zoning Code § 233.1.

> includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

Id. at § 100.1. A "tavern" is defined as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." *Id.* Lastly, a "nightclub" is defined as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County." *Id.*

In 2005, the Baltimore County Council passed Bill No. 1-05, adopting the ICC International Building Code, 2003 Edition ("IBC"),[4] with some modifications, as the Building Code of Baltimore County. Chapter 3 of the IBC governs "Use and Occupancy Classification." IBC at 23. IBC section 303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." *Id.* at 24. Subgroup A-2 includes:

> Assembly uses intended for food and/or drink consumption including, but not limited to:
>
> Banquet halls
> Night clubs

[4]International Code Council, *International Building Code* (2003).

Restaurants
Taverns and bars

Id.

The commentary to the IBC explains, "[b]ecause of the arrangement and density of the occupant load associated with occupancies classified in the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high." ICC, *IBC Commentary - Vol. 1,* at 3-16 (2003) ("IBC Commentary"). It then provides a description of each subgroup classification. Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - Low lighting levels;
> - Entertainment by a live band or recorded music generating above-normal sound levels;
> - No theatrical stage accessories;
> - Later-than-average operating hours;
> - Tables and seating arranged or positioned so as to create ill-defined aisles;
> - A specific area designated for dancing;
> - Service facilities for alcoholic beverages and food; and
> - High occupant load density.

Id. at 3-17 - 3-18. The IBC Commentary explains that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. *Id.* at 3-18. Finally, it notes that the characteristics listed above "are only advisory in determining whether Group A-2 is the appropriate classification." *Id.*

FACTS AND PROCEEDINGS

The underlying facts are largely undisputed. The Dock of the Bay has been in operation since approximately 1955. It is situated on the Miller's Island peninsula between the Back River, to the west, and the Chesapeake Bay, to the east. To the south are residences that, like the Dock of the Bay, are zoned B.L. To the north and west of the property is a marina with attendant parking facilities. These properties are zoned B.M.

In September 2003, the Dock of the Bay was destroyed by Hurricane Isabel. One month later, FSLLC purchased the restaurant. Thanner then spent five months rebuilding the restaurant before reopening it in March 2004.

The interior of the restaurant is about 2,400 square feet. The first floor consists of a rectangular bar at one end and tables and chairs in most of the remaining open space. The second floor is used only for storage and office space. The business is licenced as a restaurant and is authorized to serve approximately 150-160 people. It also holds a Class-D liquor license.

Outside the restaurant is a patio area with more tables and chairs and an outside bar. Adjacent to the patio is a children's play area with a wooden pirate ship. The patio overlooks the Chesapeake Bay. FSLLC also owns a dock with 14 "transient" boatslips for customer use.

The restaurant is open daily from 11:00 a.m. until 2:00 a.m., although it frequently closes earlier on week nights, especially in the wintertime. It serves a full lunch and dinner

menu, with an emphasis on seafood. It also serves alcohol. Food service ends at 11:00 p.m. Approximately 70% of its sales are food, 28% beverages, including alcohol, and 2% T-shirts and cookbooks.

There are ten television sets inside the restaurant and another two at the outside bar. A house music system, connected to speakers inside and outside, plays satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered.

Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.

On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

Although there is no dance floor, during live performances patrons often dance in between the tables.

On April 21, 2006, a little over two years after the Dock of the Bay reopened under FSLLC's management, the Code Enforcement Division ("CED") of the Baltimore County Department of Permits and Development Management ("DPDM") received a letter of

complaint from Matthew Ciarpella, through counsel, regarding live music at the restaurant.[5] The letter alleged that the Dock of the Bay was operating as a nightclub, which is not a permitted use in the B.L. Zone.

In May, June, and August of 2006, the Dock of the Bay was cited for operating a nightclub in a B.L. zone, erecting a tent without a permit, and failing to cease nightclub operations and to remove the tent.[6]

On August 18, 2006, FSLLC filed a "Petition for Special Hearing," presenting two questions:

> 1. Whether the use of the property at 9025 Cuckold Point Rd., Millers Island 21219 is in violation of the [Zoning Code ?]
> 2. Is the use by Fifth Street, LLC, a restaurant, at 9025 Cuckold Point Rd., which provides music during the day, . . . a "night club" as defined in the [Zoning Code]?

On August 23, 2006, before the petition for special hearing was ruled upon, the case came before a CED Hearing Officer at the DPDM. The hearing officer heard testimony from Thanner, Ciarpella, and another nearby resident, Wayne Walkman, Jr. Evidence consisting of advertisements highlighting the music offered at the Dock of the Bay also were introduced. The hearing officer issued "Findings of Fact and Conclusion[s] of Law." He found that the Dock of the Bay offered live and recorded music, both inside and outside. He

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[5]This was not the first complaint about the property. In the summer of 2005, Ciarpella and other nearby residents made numerous noise complaints.

[6]After the first of the citations, Thanner wrote to the inspector to request clarification as to the nature of his violation. He received no response to his letter.

then referenced the IBC and the IBC Commentary, concluding that the property "exhibits some of the listed characteristics" in the IBC Commentary for Subgroup A-2. He ruled that the Dock of the Bay was "being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use." He imposed a civil penalty of $5,000 and ordered FSLLC to "dismantle the outside speaker system and cease live and/or recorded entertainment immediately." He further concluded that the tent was erected without a permit in violation of IBC sections 3102.1, 3103.1 and 3103.1.1 and ordered it removed.

A two-day, public special hearing was held before the Zoning Commissioner ("Commissioner") to determine if the Dock of the Bay, "which provides music [] during the day, [is] a 'nightclub' as defined in [the Zoning Code]." Thanner testified at the hearing. Three past and present residents of Millers Island testified in support of FSLLC. Twenty-two nearby residents testified as protestants about the loud music, parking overflow, and noisy patrons leaving the property late at night. Finally, the CED officer who had cited the property and James H. Thompson, CED Supervisor, testified.

On May 30, 2007, the Commissioner issued his opinion. After reciting the "relatively simple" facts, the Commissioner addressed the question whether the Dock of the Bay is a "nightclub or simply a restaurant where ancillary entertainment is provided." He looked to the definition of "nightclub" in the Zoning Code and to the IBC and IBC Commentary. He concluded that, under the plain language of the Zoning Code definition, any establishment

that "provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub" under the IBC is an impermissible use in a B.L. zone. He further concluded that the use of the term "categorized" means only that the establishment necessarily falls under the IBC "Use and Occupancy Classification" category that includes "nightclubs." The Commissioner ruled that the Dock of the Bay is a "nightclub" under the Zoning Code and ordered "that the playing of outdoor music either by way of an outside speaker system, live/or recorded entertainment, must be discontinued."

After the special hearing, FSLLC was cited for continuing nightclub and tent violations. A second hearing before a hearing officer was held and the Dock of the Bay again was found in violation.

FSLLC appealed to the Board from the decision of the Commissioner, as well as from the decisions of the hearing officers. The cases were consolidated before the Board.

On January 15, 2008, a three-member panel of the Board took testimony and heard argument.[7] FSLLC called Thanner and also called Thompson, as an adverse witness. In addition to the facts already adduced concerning the nature of his business, Thanner testified that live entertainment was a significant draw for the Dock of the Bay, especially during the

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[7]Pursuant to Zoning Code section 501.6, appeals from the Zoning Commissioner are heard "*de novo*." Accordingly, the Board took testimony on the issues presented at the special hearing. The appeal of the code enforcement rulings, however, were reviewed on the record before the hearing officer pursuant to section 3-6-303 of the Baltimore County Code (2003).

slower winter months, and that he would likely have to close down if forced to discontinue it.

Thompson testified that the CED operates on a "complaint basis only," meaning that it investigates alleged code violations only after receiving a complaint about a property or business. It does not undertake investigations of potential violations on its own initiative. He also testified that, in his opinion, based on his experience enforcing the Zoning Code, a property could operate as a "dual use," meaning that it could fit into multiple categories of use simultaneously. He explained that it was the practice of the CED to treat live music, but not recorded entertainment, as a code violation in the B.L. zone.

Numerous residents also testified. For the most part, their testimony was not relevant to the issues on appeal.[8] There was testimony that music played at the dock of the Bay was loud enough to be heard inside residents' houses.

At the conclusion of testimony and arguments, the Board allowed the parties to submit briefs. On June 4, 2008, a two-member majority of the Board issued an opinion concluding that the Dock of the Bay was operating as a nightclub and affirming the hearing officer's

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[8]FSLLC filed a motion to limit testimony with respect to expected resident testimony concerning noise at the restaurant and related complaints about the establishment. The Board granted the motion, opining that this type of testimony generally was not relevant to the legal issue whether the business was a nightclub under the Zoning Code, the only issue under *de novo* review. Despite that ruling, many residents testified. Their testimony was cut short by relevance objections, however.

An employee of the Liquor Board also testified and counsel for Ciarpella attempted to introduce into evidence records related to prior noise complaints from 2005. The Board granted FSLLC's hearsay objections to this testimony and evidence, however.

rulings. The Board reduced the $5,000 fine imposed for operating as a nightclub to $1,000 and upheld a $1,000 fine imposed by the hearing officer for the tent violation. FSLLC was ordered to discontinue the "playing of music by way of speaker system" and "live or recorded entertainment."

In its opinion, after reciting the facts, the Board majority looked to the definition of "nightclub" in the Zoning Code. Having noted already that the Dock of the Bay offered "live or recorded entertainment," it turned to the IBC and the IBC Commentary to determine if the business was "categorized as a nightclub." Like the Commissioner, it considered whether the eight non-exclusive characteristics of Subgroup A-2 applied to the Dock of the Bay. It found that six of the eight factors were met: low light levels, entertainment by a live band or recorded music generating above normal sound levels, no theatrical stage accessories, later than average operating hours, service facilities for alcoholic beverages and food, and high occupant load density. It found that two factors – tables and seating arranged or positioned so as to create ill-defined aisles and a specific area for dancing – did not apply.

Based on its finding that the Dock of the Bay exhibited six of the eight characteristics of Subgroup A-2, the Board majority concluded that the restaurant was operating as a nightclub. Its decision closed as follows:

> The Board is not unmindful that the definition of a nightclub, under the [Zoning Code], can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.[L.] zones, might be considered "nightclubs" under the present criteria of the [Zoning Code]. It is not for the Board to change the definition but for the County Council to consider.

One of the three Board panel members issued a dissenting opinion. He emphasized the undisputed facts that characterized the Dock of the Bay as a family restaurant, such as the full-service menu, table seating for 150-160 persons, a pirate ship play area, no cover charge, and the vast majority of sales being food related. He described the "nightclub" definition in the Zoning Code as "exceedingly unclear and circuitous" and characterized the IBC as a "'one size fits all'" building code that fails to reflect the "particular realities and common sense observations of this jurisdiction." In particular, the dissenter took issue with the IBC's practice of grouping restaurants together with such "disparate uses" as banquet halls and nightclubs. He noted that the IBC Commentary even distinguishes between buildings in which people congregate for "*drinking and dancing* (e.g., nightclubs, dancehalls, banquet halls, cabarets, etc.)" and buildings in which people congregate for "food and drink consumption (e.g., restaurants)." (Emphasized in dissenting opinion.)

Finally, the dissenter stated that, even if it were appropriate to apply the Subgroup A-2 criteria, the evidence did not support the Board majority's findings with respect to several of the criteria. Specifically, he found from the testimony that the lighting only was dimmed occasionally, for ambiance; that the business never had been cited for allowing the music to generate above-normal sound levels; that there was no evidence that the business hours from 11:00 p.m. to 2:00 a.m. were "later than average operating hours"; and that "high-occupant load density" is too ambiguous a characteristic to be applied.

The dissenter closed by observing that the Board majority was turning "a blind eye to common sense," when, as here, the facts were clear that the Dock of the Bay was a restaurant offering some musical entertainment on the side. He also noted that "selective enforcement" of the Zoning Code, as testified to by Thompson, seem "contrary to the spirit and intent of any well-written regulation, [] arbitrary and capricious, and possibly an 'Equal Protection under the laws' violation."

FSLLC moved for reconsideration of the Board decision, asking the Board to clarify how many of the IBC Commentary criteria must be satisfied before a business is considered a nightclub; to amend its order to direct the Dock of the Bay to "discontinue its nightclub operation" as opposed to discontinuing all music and live or recorded entertainment;[9] to reconsider the imposition of any fine for the nightclub violation, given the difficulty the Board itself had in determining whether a violation had occurred; and to reconsider the finding of a tent violation. FSLLC also argued that testimony of a number of nearby residents should not have been allowed. The motion was denied in its entirety.

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[9]FSLLC suggested certain changes it could make, short of discontinuing all live and recorded music, to reduce the number of Subgroup A-2 characteristics applicable to it. It stated that it would keep lighting levels at medium, use theatrical accessories, not remain open later than average, keep defined aisles, not have a dance area, close the kitchen during live entertainment so that there would not be "service facilities for food and drink," and not exceed the occupant load limit as set forth by the fire department.

FSLLC petitioned the circuit court for judicial review. Oral argument was heard,[10] and the circuit court issued a ruling on the record affirming the Board's decision. FSLLC timely appealed the judgment of the circuit court.

We shall include additional facts in our discussion of the issues.

STANDARD OF REVIEW

The Court of Appeals has described our circumscribed role in reviewing an agency decision as follows:

> A court's role in reviewing an administrative agency adjudicatory decision is narrow, *United Parcel v. People's Counsel*, 336 Md. 569, 576, 650 A.2d 226, 230 (1994); it "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel*, 336 Md. at 577, 650 A.2d at 230. *See also* [Md.] Code (1984, 1995 Repl. Vol.), § 10-222(h) of the State Government Article; *District Council v. Brandywine*, 350 Md. 339, 349, 711 A.2d 1346, 1350-1351 (1998); *Catonsville Nursing v. Loveman*, 349 Md. 560, 568-569, 709 A.2d 749, 753 (1998).
>
> In applying the substantial evidence test, a reviewing court decides """whether a reasoning mind reasonably could have reached the factual conclusion the agency reached."""" *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978). *See Anderson v. Dep't of Public Safety*, 330 Md. 187, 213, 623 A.2d 198, 210 (1993). A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. *CBS v. Comptroller*, 319 Md. 687, 698, 575 A.2d 324, 329 (1990). A reviewing court "'must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence' and to draw inferences from that evidence." *CBS v. Comptroller, supra*, 319 Md.

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[10]The judge indicated to the parties that his main concern was "with the 14th Amendment to the United States Constitution that guarantees every citizen the right of due process."

at 698, 575 A.2d at 329, quoting *Ramsay, Scarlett & Co. v. Comptroller*, 302 Md. 825, 834-835, 490 A.2d 1296, 1301 (1985). *See Catonsville Nursing v. Loveman, supra*, 349 Md. at 569, 709 A.2d at 753 (final agency decisions "are *prima facie* correct and carry with them the presumption of validity").

Despite some unfortunate language that has crept into a few of our opinions, a "court's task on review is *not* to ""'substitute its judgment for the expertise of those persons who constitute the administrative agency,'""" *United Parcel v. People's Counsel, supra*, 336 Md. at 576-577, 650 A.2d at 230, quoting *Bulluck v. Pelham Wood Apts., supra*, 283 Md. at 513, 390 A.2d at 1124. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. *Lussier v. Md. Racing Commission*, 343 Md. 681, 696-697, 684 A.2d 804, 811-812 (1996), and cases there cited; *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881, 886 (1989) ("The interpretation of a statute by those officials charged with administering the statute is . . . entitled to weight"). Furthermore, the expertise of the agency in its own field should be respected. *Fogle v. H & G Restaurant*, 337 Md. 441, 455, 654 A.2d 449, 456 (1995); *Christ v. Department of Natural Resources*, 335 Md. 427, 445, 644 A.2d 34, 42 (1994) (legislative delegations of authority to administrative agencies will often include the authority to make "significant discretionary policy determinations"); *Bd. of Ed. For Dorchester Co. v. Hubbard*, 305 Md. 774, 792, 506 A.2d 625, 634 (1986) ("application of the State Board of Education's expertise would clearly be desirable before a court attempts to resolve the" legal issues).

Bd. of Physician Quality Assurance v. Banks, 354 Md. 59, 67-69 (1999) (footnotes omitted).

In *Marzullo v. Kahl*, 366 Md. 158 (2001), the Court reaffirmed the principle that agencies are owed due deference in their interpretation of the zoning regulations they are tasked with enforcing. In that case, like the instant case, the agency was the Board and the regulations at issue were part of the Baltimore County Zoning Code. The Court opined that the Board's "expertise should be taken into consideration and its decision should be afforded

appropriate deference in our analysis of whether it was 'premised upon an erroneous conclusion of law.'" *Id.* at 173 (quoting *Banks, supra*, 354 Md. at 68) (footnote omitted).

DISCUSSION

I.

FSLLC challenges the legal foundation for the Board's decision and the factual findings supporting it. We begin with the legal contentions. The Zoning Code's definition of "nightclub" is comprised of three elements: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor" and 3) "categorized as a nightclub by the Building Code of Baltimore County." It is undisputed that the Dock of the Bay is a "tavern or other commercial establishment" that offers both live and recorded entertainment in the form of bands, karaoke, DJs, satellite radio, and television. Thus, the central focus of FSLLC's legal argument is that the Board erred in concluding that the Dock of the Bay is "categorized as a nightclub by the Building Code of Baltimore County."

FSLLC points out that the IBC does not define "nightclub." Rather, it groups certain structures, including nightclubs and restaurants, as fitting in Assembly Subgroup A-2. Therefore, according to FSLLC, a finding that the Dock of the Bay meets characteristics of Subgroup A-2 is of no moment because it does not answer the ultimate question: is the Dock of the Bay a nightclub?

Before we address this contention, some history is helpful. Since at least 1956, the Baltimore County Building Code ("BCBC") has adopted the standards of a model building code. *See Metius v. Julio*, 27 Md. App. 491, 497 n.3 (1975). Baltimore County is not unique in this practice. Since the early part of the 20th century, at both the municipal and state levels, building codes around the country have been based on model codes. Three regional model code groups promulgated the codes – the International Conference of Building Officials ("ICBO"), the Building Officials Code Administrators International ("BOCA") and the Southern Building Code Conference International ("SBCCI"). *See* www.iccsafe.org/ABOUTICC/Pages/default.aspx. BOCA, a code designed for the east coast and the midwest, previously had been adopted by the Baltimore County Council. *See Swinson v. Lords Landing Village Condo.*, 360 Md. 462, 479 (2000) (noting that, since at least 1981, most counties in Maryland have had building codes patterned on the BOCA model code); *Metius, supra*, 27 Md. App. at 497 n.3 (noting that Baltimore County adopted the BOCA standards beginning in 1956).

In 1994, these three regional groups consolidated to form the ICC. The first version of the IBC was published in 2000.[11] The IBC does not differ substantially from the BOCA code that it replaced. As relevant to the instant case, however, the category in which a "restaurant" was placed changed. Under the BOCA code, a restaurant was categorized in

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[11]Pursuant to Md. Code (2003, 2009 Supp.), section 12-503 of the Public Safety Article, the Maryland Department of Housing and Community Development is required to adopt the IBC as its model building code, subject to some permitted modifications.

Assembly Subgroup A-3.[12] *See* Building Officials Code Administrators, *The BOCA National Building Code/1999* 18 (14th ed. 1999). As discussed, *supra*, under the IBC, restaurants are categorized in Subgroup A-2. Under both BOCA and IBC, nightclubs are categorized in Subgroup A-2. The IBC Commentary, discussed *supra*, setting forth the eight non-exclusive characteristics of Subgroup A-2, appears to have been lifted verbatim from the BOCA Commentary that preceded it. *See In the Matter of the Application of Rampart Partnership (Club 101)*, Case No. 96-60-XA at 18-19 (Aug. 28, 1998) ("*Club 101*") (quoting from the Commentary to the BOCA Code with respect to Subgroup A-2).

Returning to FSLLC's argument, we agree that the IBC does not define a nightclub. The Zoning Code definition of "nightclub" merely requires that the IBC "categorize" an establishment as a "nightclub." The IBC (and the BOCA Code before it) do exactly that. They categorize structures for purposes of numerous safety regulations. That a restaurant and a nightclub fall into the same sub-category under the IBC "Use and Occupancy Classifications" does not affect the analysis under the Zoning Code, however. The Board correctly looked to the IBC and the characteristics of structures that fall within Subgroup A-2 to determine if the Dock of the Bay property is categorized in that grouping. If it is, then it met the Zoning Code definition of "nightclub."

Moreover, as mentioned above, we accord the Board "a degree of deference . . . in its application of the law." *Banks*, *supra*, 354 Md. at 69. In the instant case, the Board's

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[12]Interestingly, that subgroup included "restaurants other than nightclubs."

decision was informed by its experience applying these characteristics, as evidenced by its *Club 101* decision.[13] In *Club 101*, the Board considered whether, under the Zoning Code, a club was operating as a nightclub or an after-hours club. It applied the eight non-exclusive criteria in the commentary to the then applicable BOCA code in analyzing the issue and determined that the club was operating as an after-hours club, in violation of the Zoning Code.[14] The decision reveals, as discussed *supra*, that the eight criteria applied in the instant case were developed at a time when restaurants were not included in Subgroup A-2, thus adding further support to the Board's conclusion that these factors are relevant to the determination whether a structure is "categorized as a nightclub" under the IBC.

FSLLC also maintains that the Dock of the Bay must be *either* a "nightclub" or a "standard restaurant" as those terms are defined under the Zoning Code. FSLLC focuses on the use of the word "primarily" in the definition of "standard restaurant," arguing that, if the Dock of the Bay is "primarily" engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant. We disagree. Several types of restaurants are defined in the Zoning Code, including "carry-out," "fast-food," and "fast-food, drive-through only." *See* Zoning Code § 101. We read the

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[13]The *Club 101* decision was cited by FSLLC both on appeal and before the Board in support of its argument that the Dock of the Bay must be either a "nightclub" or a "restaurant." We will discuss this argument further, *infra*.

[14]In that case, the property owner actively advocated for a finding that the property met the eight characteristics because a "night club" was a permitted use in the zone in question.

phrase "primarily for serving meals and beverages to persons seated at tables on the premises of the establishment" as being intended to distinguish a "standard restaurant" from the other types of restaurants defined in the Zoning Code. This conclusion is buttressed further by the fact that the definition specifically permits a standard restaurant to "offer a carry-out service, provided that such service is accessory to the principal restaurant operations." *Id.*

We also find support in the Zoning Code for the proposition that a property can operate as a "dual use." Section 230.1.A of the Zoning Code sets forth the permissible uses in a B.L. zone. Section 230.1.A.10 lists as a permissible use "combinations of the above uses." It is implicit in this section that properties may operate with dual permissible uses. It follows that a property also could be operating as a dual use with one use being permissible and one use being impermissible. Thompson also testified to this effect before the Board based on his experience in the CED.

Moreover, the only legal authority FSLLC cites for the proposition that a property cannot operate as a dual use actually supports the opposite position. In *Club 101*, the Board explicitly stated that the club could not be both a "night club" and an "after hours club." The then existing definition of an "after hours club" provided, however, that "[a]n after hours club is not a nightclub as defined in the zoning regulations or the building code of Baltimore

County." No such limitation appears in the definition of a "standard restaurant" in the Zoning Code.[15]

FSLLC also challenges the Board's factual finding that six of the eight characteristics of Subgroup A-2 were met. As discussed, *supra*, we review these findings under the deferential substantial evidence standard. We have reviewed the transcript and the record and are satisfied that there was substantial evidence in the record to support these findings.[16]

Finally, FSLLC echoes the concerns expressed by both the majority and dissenting members of the Board that the definition of a nightclub under the Zoning Code is extremely broad. We agree with the Board majority that this is a matter for the Baltimore County Council to address if it is deemed necessary. "The 'wisdom or expediency' of the [zoning ordinance] in its current form is not a matter for judicial intervention." *Lonaconing Trap*

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[15]Moreover, the Board found that, while Club 101 exhibited most of the eight characteristics in the BOCA Commentary, it nonetheless was an after hours club because of other characteristics that distinguished its operation. This is similar to the finding in this case that, while the Dock of the Bay may have met the definition of a restaurant, it nonetheless was operating as a nightclub because of distinguishing characteristics. We perceive no error in this conclusion.

[16]For example, the FSLLC challenges the finding of "low level lights." Thanner himself testified, however, that the lights were dimmed "every evening" for live entertainment; that they were turned down "for dinners as well"; and that they also were turned down "[o]n nights when we are open and do not have live entertainment."

Similarly, FSLLC challenges the finding of "above-normal sound levels" on the basis that there was no evidence in the agency record of prior noise violations. There was evidence, however, that the music that was being played at the Dock of the Bay was loud enough to be heard inside the homes of nearby residents. That evidence plainly supported a finding of "above-normal sound levels."

Club, Inc. v. Md. Dep't of the Env't, 410 Md. 326, 349 (2009) (quoting *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 48 (1973)).

II.

FSLLC contends the definition of "nightclub" under the Zoning Code is "arbitrary, unreasonable and confusing" and therefore the application of that definition is a violation of its due process rights. It also maintains that the County's practice of "discretionary enforcement" of the Zoning Code is unconstitutional.

FSLLC raises these arguments for the first time on appeal. Accordingly, they are not preserved for review.[17] *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *see also Heft v. Maryland Racing Comm'n,* 323 Md. 257, 273-74 (1991) (party may not obtain judicial review of an issue not raised before administrative agency); *Gonzales v. Ghinger*, 218 Md. 132, 135 (1958) (attack on validity of a section of the Baltimore City Code raised for the first time on appeal would not be

[17]As discussed, *supra*, the dissenting member of the Board suggested the possibility of a due process violation in his opinion. The circuit court judge presiding over this case on judicial review also commented on this issue during oral argument, but ultimately affirmed the Board's decision. FSLLC did not raise this issue in its appeal to the Board in its motion for reconsideration or in its petition for judicial review, however.

heard). Moreover, FSLLC cites to no Maryland authority for its propositions.[18] We decline to consider these arguments on appeal.

III.

Finally, FSLLC contends it was error for the CED to charge it with a violation of IBC section 3103 for erecting a tent without a permit. It follows that it was error for the hearing officer to find the violation and for the Board to affirm the finding. This contention is based on the letter of complaint to the CED from Ciarpella's counsel stating that FSLLC had "constructed a 40 X 60 foot reception tent . . . which has been on the property for approximately eight months." According to FSLLC, section 3103 of the IBC is inapplicable to structures in place for more than 180 days.

FSLLC received two citations related to the tent. On August 14, 2006, it was charged with violating section 3103 and ordered to "remove tent or obtain permit." A hearing before a hearing officer was held nine days later and a violation was found. On July 5, 2007, it was again charged with violating section 3103 for having a "tent erected without permit," in addition to continuing nightclub violations. A little over a month later, a hearing was held and a violation was found. In the first case, FSLLC was fined $5,000 both for the nightclub violation and the tent violation. As discussed, *supra*, the Board reduced this fine to $1,000.

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[18]FSLLC instead relies upon section 18:11 of *The Law of Municipal Corporations* pertaining to the standards for discretionary enforcement. Eugene McQuillin, *The Law of Municipal Corporations* (3d ed. 2004). Our research reveals that this section has never been cited in a reported opinion of this Court or the Court of Appeals.

In the second case, a fine of $1,000 was imposed, again without distinction between the tent and nightclub violations.

FSLLC does not point us to any place in the record where it made the argument raised on appeal before the hearing officer.[19] It was raised before the Board, but the Board only reviewed the issue on the record before the hearing officer and found that the hearing officer's decision was supported by substantial evidence and was not premised on an erroneous conclusion of law.

Even if preserved, we find no error in this decision. IBC section 3103 governs "Temporary Structures." Section 3103.1 explains the applicability of this section as follows:

> The provisions of this section shall apply to structures erected for a period of less than 180 days. Tents and other membrane structures erected for a period of less than 180 days shall comply with the *International Fire Code*. Those erected for a longer period of time shall comply with applicable sections of this code.
>
> > **Exception**: Provisions of the *International Fire Code* shall apply to tents and membrane structures erected for a period of less than 180 days.
> >
> > **3103.1.1 Permit Required.** Temporary structures that cover an area in excess of 120 square feet (11.16 m^2), including connecting areas or spaces with a common means of egress or entrance which are used or intended to be used for the gathering together of 10 or more persons, shall not be erected, operated or maintained for any purpose without obtaining a permit from the building official.

(Underlined emphasis added.)

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[19]No transcript of those proceedings is provided in the record extract.

This provision states that tents erected for less than 180 days must comply with the *International Fire Code*, whereas tents erected for "longer periods of time" must comply with the "applicable sections of this code." In other words, contrary to FSLLC's argument, an exception is carved out of section 3103 for tents erected for less than 180 days, but a tent erected for longer must comply with the permit requirement found either in that section or in section 105.1. Accordingly, we find no merit in FSLLC's contention that it was charged under the wrong section of the IBC.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.

Pet No 5

THANNER ENTERPRISES, LLC

Noted + filed per Board 11/15/10

BALTIMORE COUNTY, MARYLAND	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
FIFTH STREET, LLC	*	BALTIMORE COUNTY
Defendant	*	CASE NO.: 03-C-08-009996

* * * * * * * * * * * * *

MEMORANDUM OPINION

This case arises from allegations by Baltimore County that Defendant, Fifth Street LLC, and Lawrence J. Thanner, its Resident Agent, are operating the Dock of the Bay restaurant in violation of the Baltimore County Code and this Court's Order of May 14, 2009 by continuing to play live or recorded entertainment or music on the premises.

BACKGROUND

This matter came before a Code Enforcement Hearing Officer for the Department of Permits and Development Management on August 23, 2006 for a hearing on a citation for violations of the Baltimore County Zoning Regulations (BCZR) and the International Building Code (IBC) for failure to cease operation of a nightclub in a BL zone, failure to obtain a permit for a tent, and failure to remove a tent on property zoned BL. The Code Enforcement Hearing Officer found that the Dock of the Bay restaurant was improperly being operated as a night club in a BL zone, that the Dock of the Bay is a restaurant with dancing and/or live or recorded entertainment, and that a restaurant with dancing and/or live or recorded entertainment is not a permitted use in a BL zone. The Code Enforcement Hearing Officer also found that a tent had been erected on the property without a permit. As a result, a five thousand dollar ($5,000.00) civil penalty was

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Petitioner Exhibit 5
Case-in-chief

imposed, and Defendant was ordered to remove the tent and dismantle the outside speaker system and cease live and/or recorded entertainment immediately.

This matter then came before the Zoning Commissioner for Baltimore County for a Petitioner for Special Hearing filed by Defendant to determine whether the use of the BL zoned property known as the Dock of the Bay was in violation of the zoning regulations, and specifically, whether the operations conducted at the Dock of the Bay restaurant fell within the definition of a nightclub as defined in the BCZR. On May 30, 2007 the Zoning Commissioner issued an opinion answering that question in the affirmative and ordering that any playing of outdoor music, either by way of an outside speaker system, live/or recorded entertainment, must be discontinued.

On August 14, 2007 this matter came before a Code Enforcement Hearing Officer for a hearing on a second citation for violations under the BCZR and the Baltimore County Code for failure to cease operation of a nightclub in a BL zone, failure to comply with the Zoning Commissioner's Order, and for failure to obtain a permit for a tent or for electrical work on the property. The Code Enforcement Hearing Officer found that the Defendant was in violation of the Zoning Commissioner's Order for continuing to operate the Dock of the Bay restaurant with live outdoor music and for erecting a tent without the required permit or zoning approval. Defendant was ordered to pay a one thousand dollar ($1,000.00) fine and to obtain a building or use permit prior to the erection of any tent or other structure at the Dock of the Bay restaurant.

Defendant appealed both Orders of the Code Enforcement Hearing Officer and the Zoning Commissioner's Order to the Board of Appeals for Baltimore County. The three cases were consolidated. On June 4, 2008 the Board of Appeals issued a Majority

Opinion affirming the prior decisions of the Code Enforcement Hearing Officer and the Zoning Commissioner and ordering that the playing of music by way of speaker system, live or recorded entertainment, must be discontinued. Defendant filed a timely Motion for Reconsideration which the Board denied on September 12, 2008.

Defendant filed a Petition for Judicial Review of the Board's denial of the Motion for Reconsideration. Following a hearing, on May 14, 2009, Judge Daniels executed an Order affirming the Majority Opinion of the County Board of Appeals. Defendant then appealed to the Court of Special Appeals which affirmed the judgment of the Circuit Court upholding the Board of Appeals' findings.

The matter now comes before this Court on Baltimore County's Petition for Contempt alleging that Defendant continues to operate the Dock of the Bay restaurant in violation of the Court's May 14, 2009 Order. A hearing was held before this Court on the Petition for Contempt on October 12, 2010.

ANALYSIS

Defendant contends that the Dock of the Bay restaurant is no longer operating in violation of the Baltimore County Code because music is not being played outside of the restaurant. However, the Majority Opinion of the County Board of Appeals states that "[t]he Majority finds that the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR" and that "[t]he second criterion does not differentiate between inside and outside noise." *See* Majority Opinion of County Board of Appeals of Baltimore County, p. 13. Furthermore, the Board of Appeals ordered that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." *See* Majority Opinion of County Board

of Appeals of Baltimore County, p. 14. Thus, the Board of Appeals made no distinction between outdoor and indoor music when it ruled that the Dock of the Bay was operating as a nightclub in violation of the Baltimore County Code and ordered that the playing of music be discontinued.

At the hearing before this Court, Defendant argued that a recent decision by the Court of Appeals of Maryland involving the Dock of the Bay restaurant controls the instant case. In *Thanner Enterprises v. Baltimore County, Maryland* 414 Md. 265 (2010), the Court of Appeals held that the Board of Liquor License Commissioners for Baltimore County acted outside the scope of its authority when it imposed a sanction on Thanner Enterprises that prohibited it from playing any outdoor music at the Dock of the Bay. However, the instant case arises from Orders of a Code Enforcement Hearing Officer for the Department of Permits and Development Management and the Zoning Commissioner, who are governed by different authority than the Board of Liquor License Commissioners. As such, a sanction imposed by the Liquor Board that is outside the scope of its authority is not necessarily outside the scope of the authority of an Officer of the Department of Permits and Development Management or the Zoning Commissioner.

For these reasons, the Court finds that Defendant Fifth Street, LLC is in violation of the Court's May 14, 2009 Order for continuing to play live and/or recorded entertainment on the premises. However, absent any citation of appropriate authority by Baltimore County, the Court does not believe that it is appropriate for any sanction to be imposed against Mr. Thanner individually as he is not a party to the lawsuit. Service of the Petition for Contempt on Mr. Thanner was in his capacity as a Resident Agent of

Fifth Street, LLC not as a party to the proceeding. As such, he is not the "alleged contemnor" pursuant to the Petition.

> "A civil contempt proceeding is intended to preserve and enforce the rights of private parties to a suit and to compel obedience to orders and decrees primarily made to benefit such parties. These proceedings are generally remedial in nature and are intended to coerce future compliance. Thus, a penalty in a civil contempt must provide for purging." *State v. Roll*, 267 Md. 714, 728 (1973).

Counsel should contact the Court to schedule a hearing for the purpose of determining appropriate sanctions as well as purge provisions against Defendant Fifth Street, LLC.

10/25/10
DATE

JUDGE ROBERT N. DUGAN

cc: Adam Rosenblatt, Esquire
John Nowicki, Esquire
(410) 477-8400

True Copy Test
RICHARD D. ARNOLD, JR., Clerk
By: Assistant Clerk

BALTIMORE COUNTY, MARYLAND	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
FIFTH STREET, LLC	*	BALTIMORE COUNTY
Defendant	*	CASE NO.: 03-C-08-009996

* * * * * * * * * * * * *

ORDER

It is hereby ORDERED this 27th day of October, 2010, by the Circuit Court for Baltimore County, that the Court finds Defendant Fifth Street, LLC to be in violation of the Court's May 14, 2009 Order and that counsel should contact the Court to schedule an additional hearing.

IT IS FURTHER ORDERED that no sanction be imposed against Mr. Thanner individually.

JUDGE ROBERT N. DUGAN

NOV 10 2010

True Copy Test
RICHARD D. ARNOLD JR. Clerk
Per _____ Assistant Clerk

cc: Adam Rosenblatt, Esquire
John Nowicki, Esquire

FILED OCT 27 2010

NOV 10 2010

BALTIMORE COUNTY, MARYLAND Plaintiff v. FIFTH STREET, LLC Defendant	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY Case No. 03-C-08-009996

CONTEMPT ORDER

No pending is the Petition for Constructive Civil Contempt filed by Plaintiff, Baltimore County, Maryland, against the Defendant, Fifth Street, LLC. The Court read and considered said Petition together with the Exhibits attached thereto and heard and considered the arguments advanced in open court by the parties thereto.

On October 25, 2010, the Court issued a Memorandum Opinion finding Defendant in violation of the Court's May 14, 2009 Order for continuing to play live and/or recorded entertainment on the premises.

NOW, THEREFORE, in consideration of the above, the Court finds Defendant in Constructive Civil Contempt of Court. It is therefore:

ORDERED, that within ten (10) days of the issuance of this Order, Defendant Fifth Street, LLC shall be allowed to purge this Contempt as follows:

1. Defendant shall permanently dismantle any outdoor speaker system at the Dock of the Bay restaurant located at 9025 Cuckhold Point Road, Baltimore, MD 21219 ("the Site").

2. Defendant shall permanently refrain from allowing any live band, Disc Jockey, karaoke or any other form of live or recorded entertainment to perform at the Site. This

requirement applies to entertainment both inside and outside of the restaurant, and permanently prohibits Defendant from having any such entertainment performed anywhere on the Site.

IT IS FURTHER ORDERED, that if Defendant fails to comply with any of the aforementioned directives, Defendant shall be immediately subject to the following penalties:

1. Defendant will be fined Ten Thousand Dollars ($10,000.00) for ~~each instance~~ Defendant either plays music via an outdoor speaker system or allows any live or recorded entertainment to take place at the Site. ~~For the purposes of this paragraph, each day such a violation occurs shall constitute a separate incident for which the $10,000 fine will be levied.~~

2. The Dock of the Bay restaurant will not be permitted to operate in any capacity for seven (7) days following each instance where Defendant either plays music via an outdoor speaker system or allows any live or recorded entertainment to take place at the Site. The restaurant must remain closed to the public for the entire seven (7) days and must not reopen until the Defendant fully complies with the terms of this Order.

IT IS FURTHER ORDERED, that failure to comply with any of the aforesaid conditions and directives will constitute a further CONSTRUCTIVE CIVIL CONTEMPT of Court, and Defendant will be brought before the Court, which may impose additional fines, penalties, and other measures against Defendant and its officers to coerce compliance with this Contempt Order.

This Order is hereby issued this 18th day of November, 2010.

JUDGE ROBERT N. DUGAN

Pet No 6



My Neighborhood Map

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Baltimore County
My Neighborhood

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Printed 5/18/2015

Tech No 7



My Neighborhood Map

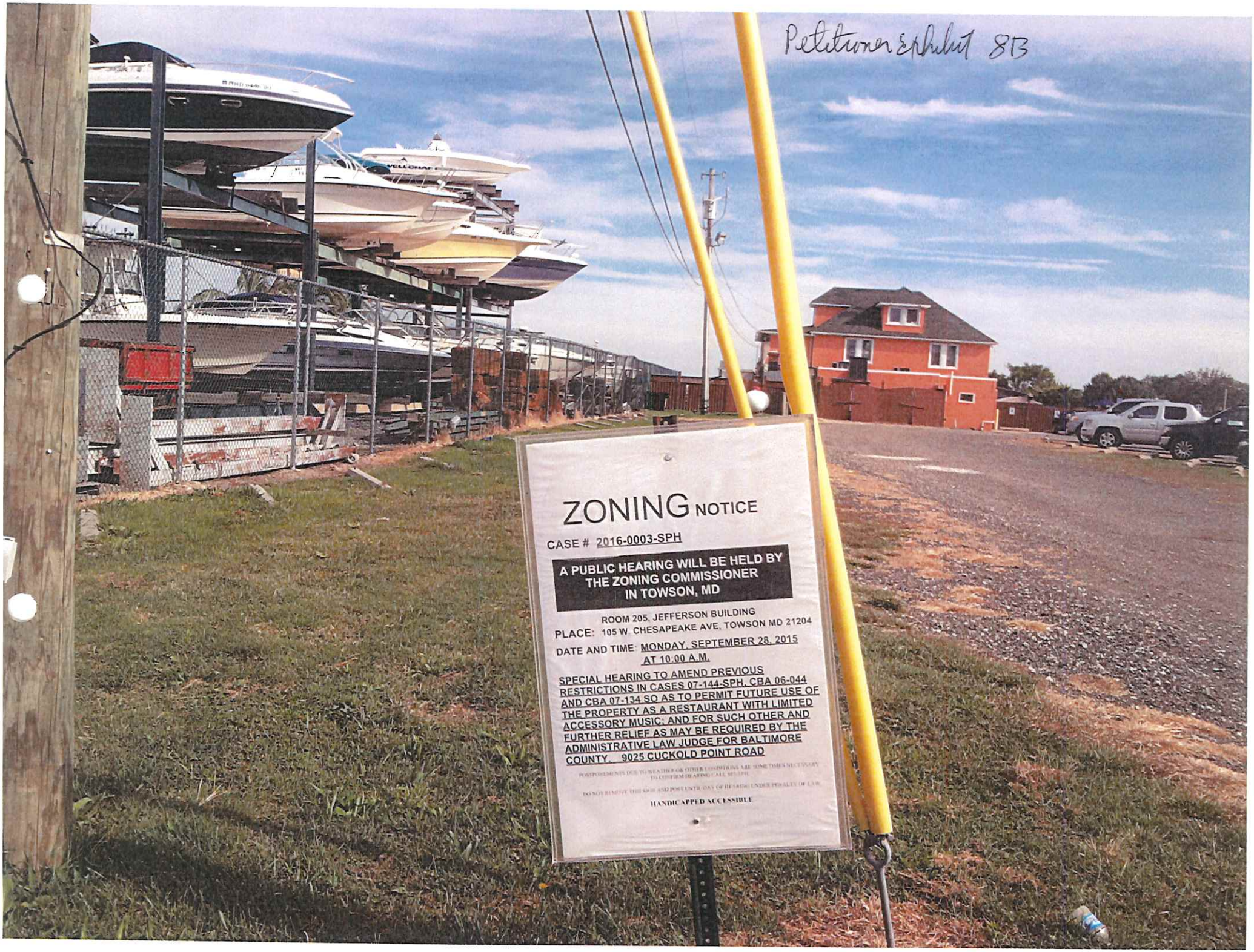
Created By
Baltimore County
My Neighborhood

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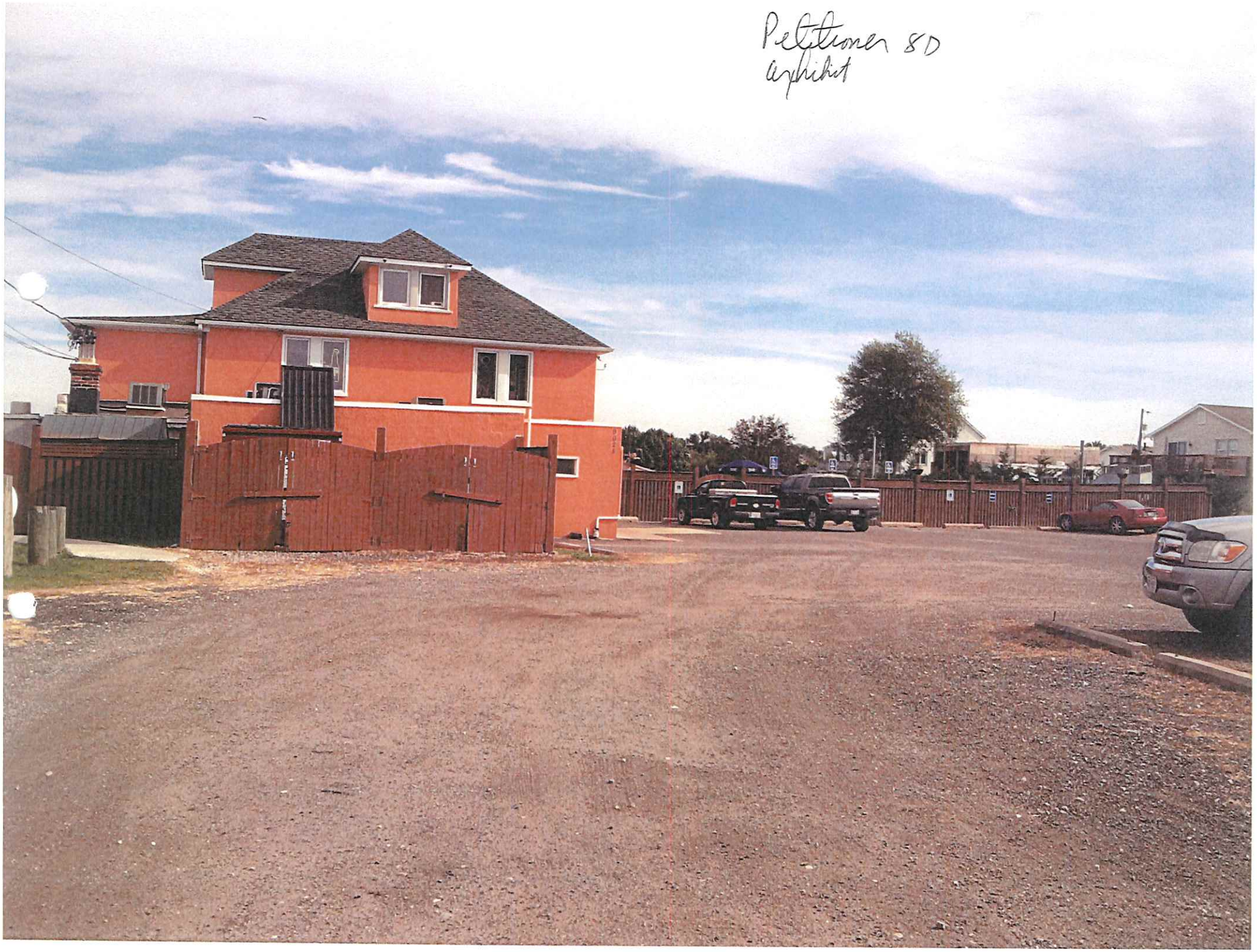
Printed 5/18/2015

Petitioner exhibit 8 & 4

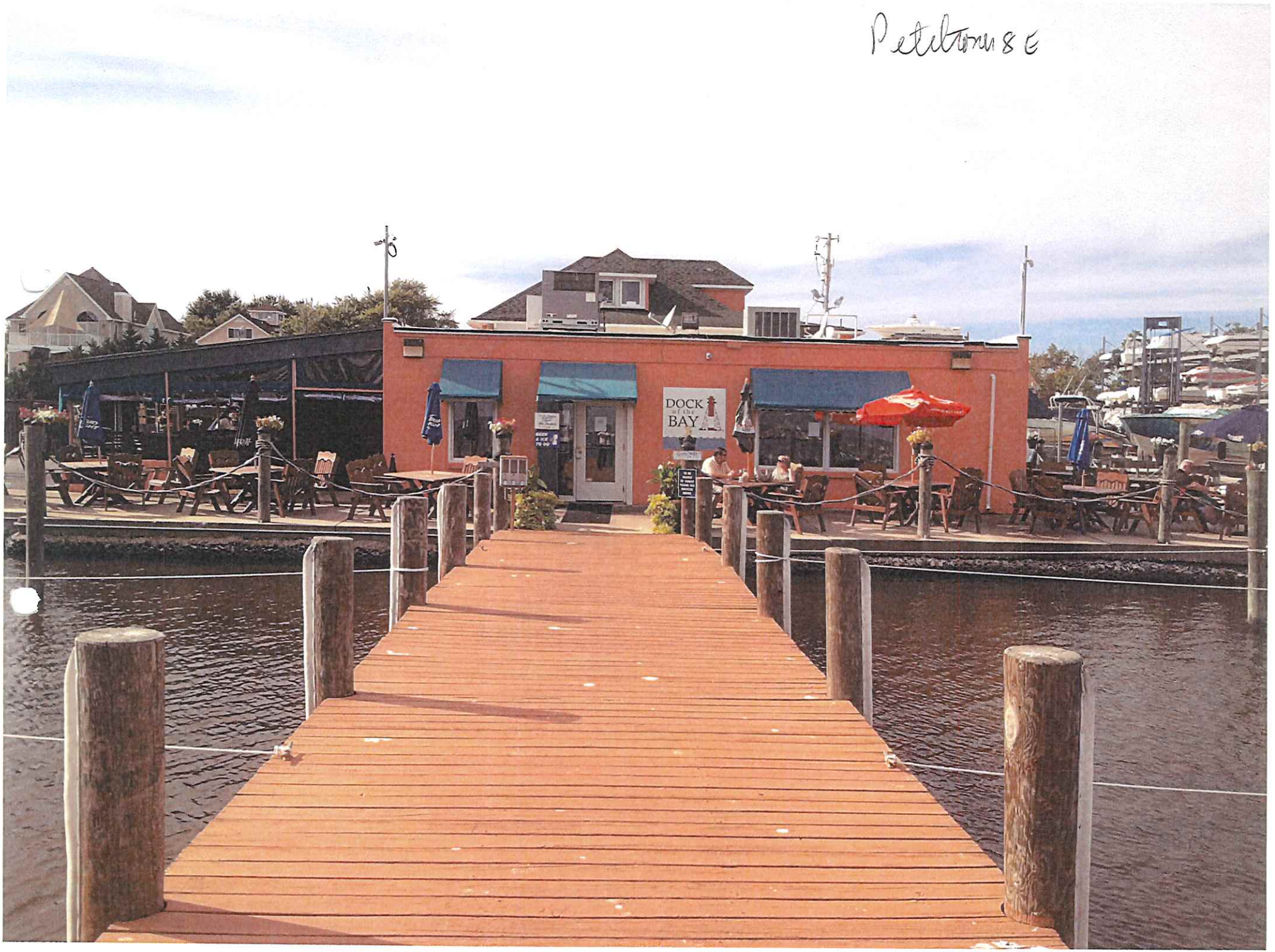



Petitioner's Exhibit 8B
ZONING NOTICE
CASE # 2016-0003-SPH
A PUBLIC HEARING WILL BE HELD BY THE ZONING COMMISSIONER IN TOWSON, MD
ROOM 205, JEFFERSON BUILDING
PLACE: 105 W. CHESAPEAKE AVE, TOWSON MD 21204
DATE AND TIME: MONDAY, SEPTEMBER 28, 2015 AT 10:00 A.M.
SPECIAL HEARING TO AMEND PREVIOUS RESTRICTIONS IN CASES 07-144-SPH, CBA 06-044 AND CBA 07-134 SO AS TO PERMIT FUTURE USE OF THE PROPERTY AS A RESTAURANT WITH LIMITED ACCESSORY MUSIC; AND FOR SUCH OTHER AND FURTHER RELIEF AS MAY BE REQUIRED BY THE ADMINISTRATIVE LAW JUDGE FOR BALTIMORE COUNTY. 9025 CUCKOLD POINT ROAD
HANDICAPPED ACCESSIBLE


Petitioner 8C
KEY WEST

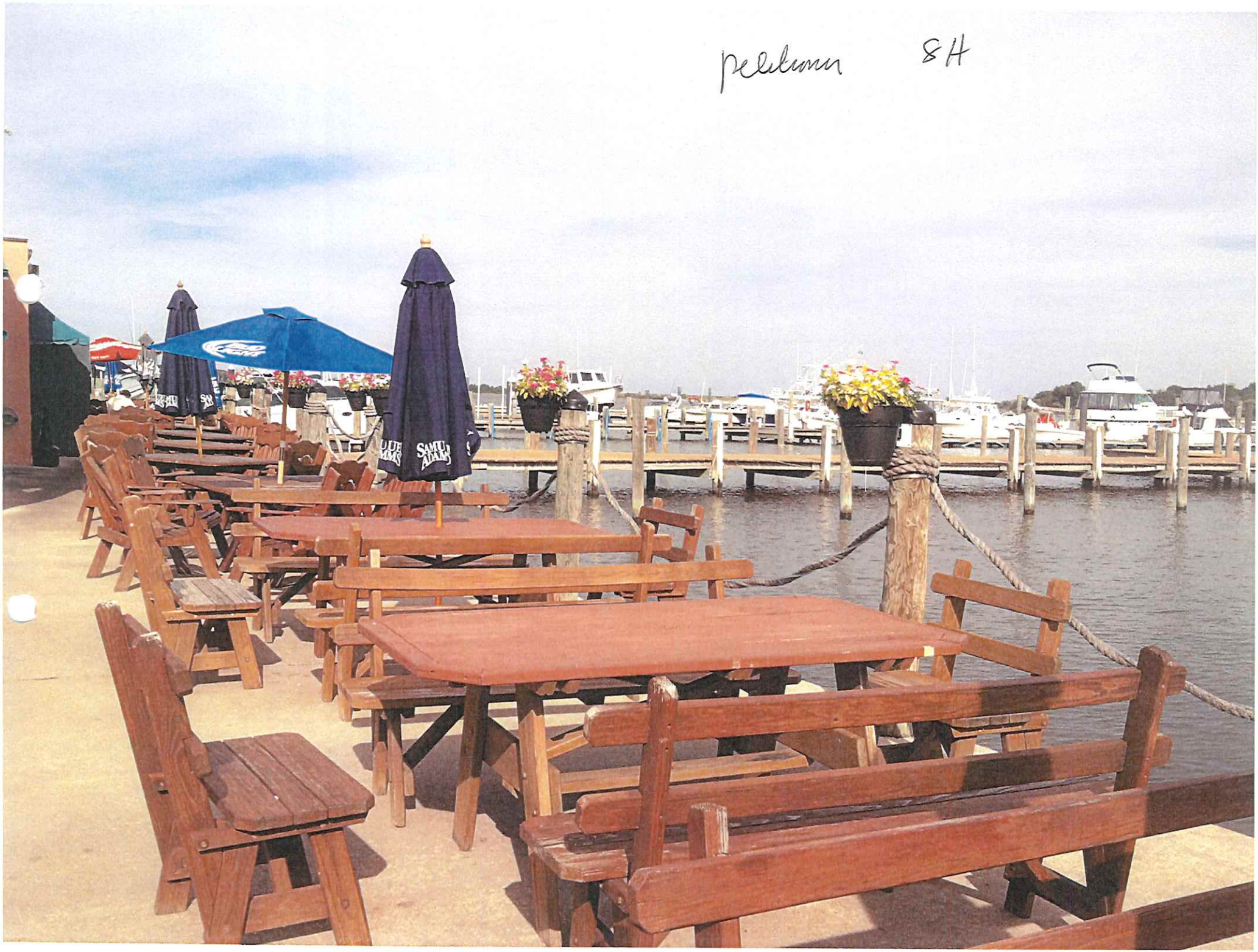

Petitioner 8D
exhibit

Petitioner



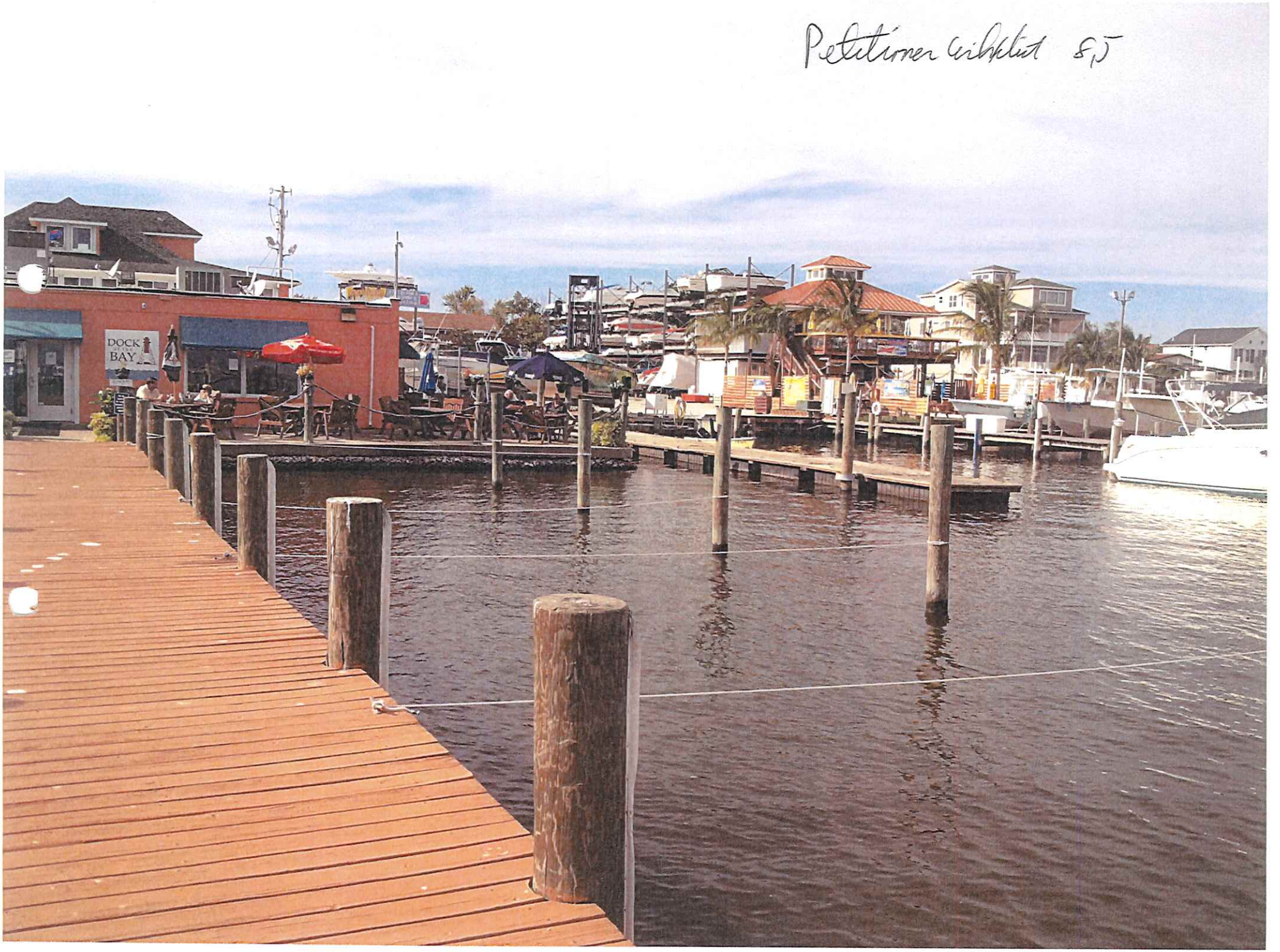

Petitioner 8F
SAMUEL ADAMS
SAMUEL ADAMS


peliteria 86
SAMUEL ADAMS
SAMUEL ADAMS


pelican
S&H


petitioner exhibit 81

Petitioner exhibit 8,5



Petitioner 8K
exhibit



Petitioner Exhibit 8L




Petitioner exhibit 8M


Petitioners exhibit 8N


Peliteres exhibit 80

90 County

State of Maryland
License

03943288
03943288
15716697

15

DOCK OF THE BAY LLC
9025 CUCKOLD POINT ROAD
BALTIMORE MD 21219

DOCK OF THE BAY LLC
9025 CUCKOLD POINT ROAD
BALTIMORE MD 21219

CODE	UNIT	TYPE OF LICENSE	NO OF LIC	COST
87	802	RESTAURANT	1	50.00
71	080	TRADER'S LICENSE	1	80.00
		ISSUING FEES		4.00
		TOTAL		134.00

DATE OF ISSUE
MO DAY YR
06/05/2015

MONTHS PAID
11

AMOUNT PAID
134.00

THIS LICENSE MUST BE PUBLICLY DISPLAYED
AND EXPIRES ON **APRIL 30, 2016**

ISSUED BY
JULIE L. ENSOR, CLERK OF CIRCUIT COURT
401 BOSLEY AVENUE
TOWSON, MARYLAND 21204-6754 (410)887-2607

JMK

The information below is for the Clerk's Office use only, customers can disregard.
These barcodes are for use with the new Cashiering System. When your site is upgraded, you will be given instructions for their use.

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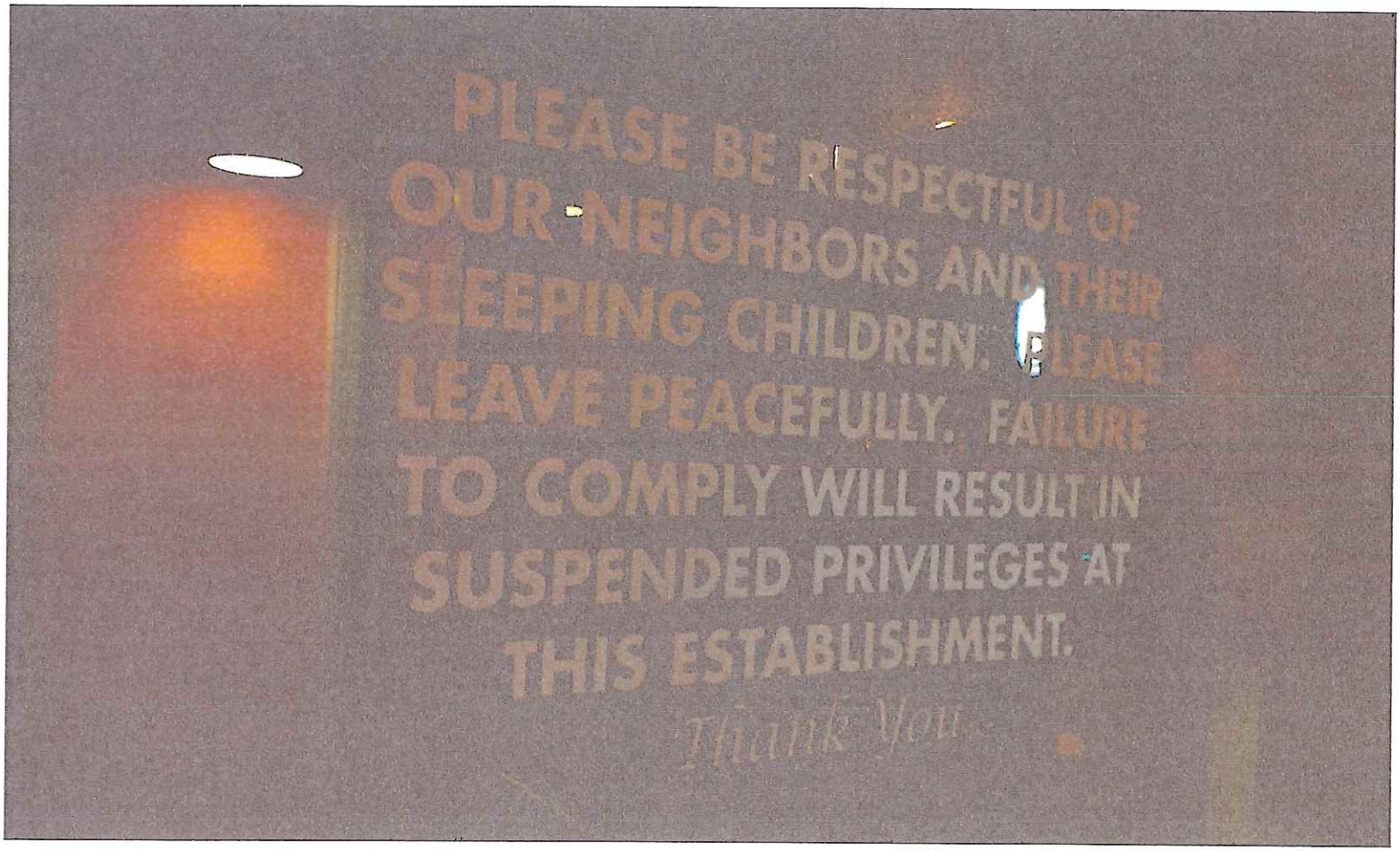
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Pet No 9

Scan this one second

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Petitioners Exhibit 9



Pet No 10

Petitioner exhibit No. 10

Bill A

I am a resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	Meagan Hively	9011 Chesapeake Ave	21219	Meagan Hively
2	Taylor Yeiter	9131 Cuckold Pt Rd	21219	Taylor Yeiter
3	Heather Reilly	2809 3rd ST.	21219	Heather M Reilly
4	Tammi Reeder	9110 Chesapeake Ave	21219	
5	Raymond Jones	2711 6TH ST	21219	Raymond Jones
6	Michele Jones	2711 6th St	21219	Michele Jones
7	WILL ZEPP	2800 7TH ST	21219	
8	Cheryl Gowers	2812 BAY DR	21219	C Gowers
9	Robert Gowers	2812 BAY DR	21219	Robert Gowers
10	Brian Sommers	9022 Hinton Ave	21219	
11	Nicole Sommers	9022 Hinton Ave	21219	
12	Dave Phelps	9211 Cuckold Point Dr	21219	
13	Nicole Kates	9211 Cuckold Point Rd	21219	Nicole Kates
14	Rebecca Reitmeyer	9107 Cuckold Pt	21219	
15	Dave Reitmeyer	9107 Cuckold Pt	21219	
16	Jeannie Rawling	9107 Cuckold Pt	21219	
17	Sheila Yeatman	9004 Millers Island Blvd	21219	
18	Joe Love	1121 Chester RD	21220	
19	Hunter Giangrasso	2828 wells ave	21219	
20				
21	Chrissy Landefeld	3106 River Dr Rd	21219	
22	Anne Dumps	2905 Wells Ave	21219	
23	Matthew Dumps	2905 Wells Ave Stevensville Pt.	21219	
24	Karen Miller	2805 1ST Street	21219	Karen A. Miller
25	Karl Miller	2805 1st Street	21219	Karl Miller

I am a resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay

	Name	address	Zip code	Signature
1	Chrissy Sandefeld	3100 River Drive Rd	21219	Chrissy Sandefeld
2	MICHAEL MILLER	2801 12th STREET	21219	
3	Lanny Williams	8800 Miller Island Rd	21219	
4	Elaine Williams	8800 Millers Island Rd	21219	Elaine L Williams
5	CHRIS HOKNECK	9125 CUCKOLD PT RD	21219	
6	LISA DELFINO	9028 HINTON AVE	21219	
7	Tom Bothe	9028 HINTON AVE	21219	
8	Matt Gowers	2812 Bay drive	21219	Matt Gowers
9	Jane Hottendorf	2803 5th Street	21219	Jane Hottendorf
10	Teresa Hoffman	14370 Beaton Ave	21093	
11	~~Shawn Hoff~~	93		
12	Derrell Prevost	2810 3rd St	21219	
13	Jessica Thomas	2810 3rd St Millers Is.	21219	
14	Ryan Hauck	9032 Millers Island Blvd	21219	
15	Randy Arnold	9111 W Seneca Ave	21219	
16	Carrie Brown	2810 Lorn Street	21219	
17	Howard Brown	2810 Lorn Street	21219	
18	Jeanie Brown	2810 Lorn Street	21219	
19	Donald Brown	2810 Lorn Street	21219	
20	Donald J. Hazen	9125 Hinton	21219	
21	Christine Hollander	2803 5th Street	21219	
22	Ara Daugherty	2803 5th Street	21219	
23	Robert Gowers	2812 Bay Dr	21219	
24	Robert Gowers Jr	9208 Hinton Ave	21219	
25				

I am a resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	Delsa Burke	2505 3rd St	21219	Delsa Burke
2	George Burke	" " "	21219	George Burke
3	[illegible]	2809 Bay Drive	21219	[illegible]
4	Karl A Chalmers	9036 Hinton Ave.	21219	[illegible]
5	Charlene KOTRLA	2822 Bay Drive	21219	C Kotrla
6	Buddy KOTRLA	2822 Bay Drive	21219	B Kotrla
7	Amanda Adair	915 Millers Island Blvd	21219	Amanda Adair
8	Brandon Adair	915 Millers Island Blvd	21219	[illegible]
9	Russ McClellan	9011 Millers Island Blvd	21219	[illegible]
10	RON YEATMAN	9004 MILLERS IS. BLVD.	21219	[illegible]
11	Joseph Krug	2811 7th St	21219	[illegible]
12				
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Pet 113

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	[illegible]	11839 Man O'War Ave	21811	[illegible]
2	[illegible]	2414 Eugene Ave	21219	[illegible]
3	[illegible]	7322 Wildman Av	21219	[illegible]
4	Jodi Meekins	9207 North Point Rd	21052	[illegible]
5	Derek Meekins	9207 North Point Rd	21052	[illegible]
6	[illegible]	2520 Hollingsworth Rd	21136	[illegible]
7	[illegible]	2414 Eugene Ave	21219	[illegible]
8	Joe Lowe	1121 Chestnut Rd	21220	[illegible]
9	[illegible]	3508 Galloway	"	[illegible]
10	Anyce Dumps	2905 Wells Ave	21219	[illegible]
11	Matthew Dumps	2905 Wells Ave	21219	[illegible]
12	DEBRA CAPLAN	6350 Red Cedar Place	21209	[illegible]
13	JERRY STADD	6350 Red Cedar Place	21209	[illegible]
14	Marcie C Law	2702 Moorgate Rd	21222	[illegible]
15	BILL RASMUSSEN	614 KLEES Mill Rd	21157	[illegible]
16	Linda Rasmussen	"	"	[illegible]
17	Verna Patti	3226 Grace Rd	21219	[illegible]
18	[illegible]	7014 River Dr. Rd	21219	[illegible]
19	[illegible]	7718 Dorp Rd	21219	[illegible]
20	Diana Johnson	8141 Bullneck Rd	21222	Diana Johnson
21	SCOTT TAYLOR	7014 RIVER DR RD	21219	[illegible]
22	JOE PIPER	8604 ESQUIRE RD.	21219	[illegible]
23	Allison Ches	7007 Alice Ave	21219	[illegible]
24	BILL SHKOL	8515 Esquire Rd	21219	[illegible]
25	JENNY JONES	1946 HOLBORN RD	21222	[illegible]
26	Matt Myers	2410 oak Manor Rd	21219	[illegible]
27	Stephen Hughes	9305 Todd AVE	21052	[illegible]

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	Bryan Hughes	224 St Helena Ave	21222	
2	Gordon Clifton Jr	8021 Wallace Rd.	21222	
3	Gordon Clifton	2113 Lodge Forest Dr	21219	
4	Hector Vivyra	1646 Manor, Baltimore MD	21222	
5	Karen McCumber	7519 School Avenue	21222	
6	Bill Zuromski Jr.	7519 School Avenue	21222	
7	Brian Herring	4518 Stud wood Rd	21219	
8	David Reitmyer	Visitor		
9	Crissy Reitmyer	Visitor		
10		Moorgate Rd	21222	
11		2113 Lodge Forest Drive	21219	
12	James Bieler	2113 Lodge Forest Dr	21219	
13	Rob Martin	Edgemere	21219	
14	Kevin Cummings SR	1249 Damsel Rd Essex	21221	
15	Amanda Williams	507 Eckhart Drive Joppa	21085	
16	Dou Chaney	7617 Chestnut Ave	21052	
17	Irena Hoffman	14378 Burton Ave	21093	
18	Ray Pfeifer	8122 Stratman Rd	21222	
19	Eric Marvin	7323 Geisc Ave	21219	
20	Kim Marvin	2622 Manor	21219	
21	Shane Wolf	9390 Northpoint	21052	
22	Dawn Miller	7417 Chesapeake Ave	21219	
23	Donna Schaefer	7137 E. Baltimore St	21224	
24	Gordon Smith	8 cw chesta rd	21220	
25	Lynn Buraczynski	964 Aubel Rd	17314	
26	ALICE GRANDT	4111 WEAVER CT	21219	
27	Natalie Boone	250 S. President St	21202	

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	NANCY HONEYCUTT	8311 SAGAMORE RD	21237	Nancy Honeycutt
2	ED WIERZBICKI	1201 NEIGHBORS AVE	21237	Ed Wierzbicki
3	JOHN ICEMRODE	1023 SUMTER AVE	21237	John Icemrode
4	SCOTT WALLACE	1300 ROSEWICK	21237	Scott Wallace
5	Katie Martin	1419 Spring Ave.	21237	Katie Martin
6	Tammy Kesner	Parkville Md	21234	Tammy Kesner
7	WHEELER LOANZER	3 LOWERFIELD CT	21087	Wheeler Loanzer
8	Darlene Gebhart	33 Parkhill Rd	21236	Darlene Gebhart
9	Russell KNESS	4061 FEDERAL HILL RD JARRETTSVILLE MD	21084	Russell Kness
10	Michael LoBiecki	1227 Hillsboro Rd	21222	Michael LoBiecki
11	Janet Bowery	28 Deadeon Ct.	21234	Janet Bowery
12	Derek F. Cox	1214 Berkwood Road	21237	Derek F. Cox
13	Linda Dickerson	4 Yewood	4224	Linda Dickerson
14	David V. Pugh	1604 Cape May Rd	21221	David V. Pugh
15	Gary Westfall	6215 Golden Ring Rd	21237	Gary Westfall
16	Jim Ford	1020 Chesaco Ave	21237	Jim Ford
17	Bernadette Landgraf	8107 Sumter Ave.	21237	Bernadette Landgraf
18	Doris Baker	Balto, MD	21206	Doris Baker
19		Baltimore MD	21206	
20	Kathy Seibert	8604 McDaniel Ave	21237	K. Seibert
21	Theresa McCaf	315 Gooverhorn	21200	T. McCaf
22	Thomas Seibert	8604 McDaniel	21237	Thomas Seibert
23	Dennis Standby	8302 Charles Ave	21237	Dennis Standby
24	TOMMY MARTIN	110 CHOPTANK	21237	TOMMY MARTIN
25	WARREN SMITH	8030 EDGEWATER AVE	21237	Warren Smith
26	HANK PATTILLO	6007 SHADYSPRING	21237	Hank Pattillo
27	MIKE BOTTOM	1026 SUMTER AVE	21237	Mike Bottom

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	Vereneyenco Mgncsym	250 President	21202	
2	Charles Powell	1882 Middletown	21120	C. Powell
3	Janice Dymowski	1965 Sunbury Dr.	21222	J. Dymowski
4	Pam Buermans	3800 Fait Ave	21284	
5	BILL BLANKENSHIP	11907 TARRAGON ROAD	21136	
6	Alison Cummings	1249 Damsel Rd Essex	21221	
7	Stephen Blum	6520 Loch Hill Ct	21239	
8	Thomas Palarcky	1705 Mystic Cir	21221	
9	Terry Ketler	1219 Sharon Acres	21050	Terry Ketler
10	Kevin Ketler	1219 Sharon Acres	21050	
11	Sandy Bentzen	2908 Alden Road	21234	Sandra Bentzen
12	DAN BENTZEN	2908 ALDEN RD	21234	
13	Paul LINDT	2900 Salisbury Rd	21215	
14	Joseph Vrablic	2616 MATTHAY	21219	
15	John Dixon	7047 Solleys Pt. Rd.	21222	
16	Stacey McIntire	6750 Woodley Rd	21222	
17	Vicki Baird	104 Kentway	21222	Vicki Baird
18	Mark Kent Gesic	586 Hopkins Lodge	21220	
19	Lori Kurdziel	586 Hopkins Lodge	21221	
20	Vicki COULSON	1620 Lydich Rd	21222	
21	Ann Borsa	787 Seabrook Rd	21222	
22	Valerie Taylor	9308 Point Rd Sea 21219	21219	
23	Zack Taylor			
24	Lyndsie Taylor			
25	Zachary Taylor			
26	TIMOTHY WOLSKI	7927 34TH ST	21237	
27			21222	

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay

	Name	address	Zip code	Signature
1	Tabatha McNew	POBox 263	21052	
2	Donna McNew	2903 S Sparrows Pt Rd	21219	
3	Nicole Pennington	2711 Lake Forest Dr.	21219	
4	Gabrielle Ignatavich	7726 N Cove	21219	
5	Kate Foulke	2912 Ritchie Ave	21219	
6	Sam Verni	7216 Dony Lane	21219	
7	Michele Dobbs	9110 Ave. C	21219	
8	Tori Marvin	Geise Ave	21219	
9	Kurt Hoffman	1437A Burton Ave	21093	
10	Nicole Mayer	319 Chesapeake Ave	21220	
11	Cierra Nunnery	878 Jeannette Ave	21222	
12	Brian Sommers	15841 York Rd	21152	
13	Nicole Sommers	15841 York Rd	21152	
14	Robert Ritter	280 Artnus Ct.	2013	
15	Jaquan Burks	878 Jeannett Ave	21222	
16	ANDY HAASE	106 W OVERLEA AVE	21206	Andrew Haase
17	Ed Evers	216 Long Cove	21221	
18	Nichole Thomps	910 Runnymede St	21221	
19	Mathew Boland	2414 Eugene Ave	21219	
20				
21	Dave McClelland	9108 Avenue A	21219	
22	Karen McClelland	9108 Avenue A	21219	
23	John O.		21219	
24	Nancy O.		21219	
25	Debbie Jones		21219	
26		7106 Ruth Dr.	21219	
27	Woodrow NASH	1931 Merritt Blvd	21222	

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay				
	Name	address	Zip code	Signature
1	Anthony Malzres	709 Oakleigh Beach Rd	21221	
2	Al Murphy	1923 Kelly Ave	21221	
3	Daniella Parson	906 Grove Ave.	21222	
4	Sarah Pennington	8230 N. Bankory Rd	21222	
5	Shawn Casalia	7316 Geese Ave	21219	
6	Angelina Yeagy	55 highfield rd. Aiyville PA	17302	
7	Bethany Hovard	4533 Sandwood Rd	21219	
8	Michael Sturgill	1914 Maxwell Ave	21222	
9	Charlie Cooke	211 Bayside Dr	21222	
10	Lori Sitko	8001 Shore Rd	21222	
11	Jim Sitko	8001 Shore Rd	21222	
12	Mary Mandley	100 Bayside	21222	
13	J. Wolf	1300 Hopkins Rd	21052	
14	Steve Zink	5042 Springhouse Ct	21237	
15	Justin Kraemer	878 Jeanette Ave	21222	
16	Kenneth Collins	14 Pinecliff Rd Newton NJ	07860	
17	Erin Shroll	14 Pinecliff Rd Newton, NJ	07860	
18	Carmela Coppen	1 Bayside Dr	21222	
19	Bryan Hovard	6814 Bragin	21222	
20	Chris Mayski	3708 N Pt Rd	21222	
21	Amy Repko	3708 N Pt Rd	21222	
22	Dave Matranga	5220 Kingsley Rosedale	21237	
23	Joe Matranga	" "	"	
24				
25				
26				
27				

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay

	Name	address	Zip code	Signature
1	DEBRA MALLONEE	1206 HILLDALE RD	21237	Debra Mallonee
2	Tim MALLonee	1206 Hilldale Rd	21237	Timothy Mallonee
3	Steve Frazier	3108 Moreland Ave	21234	Steve Frazier
4	Kathryn McDade	4417 Kenwood Ave	21206	Kathryn E McDade
5	Harriet Spence	27 MORNING Court	21237	Harriet Spence
6	SHARON RAPPOLD	27 MORNING CT	21237	Sharon Rappold
7	PAMELA WESTAPIL	6215 GOLDEN RING RD	21237	Pamela Westapil
8	Trudy Seubert	1133 Rosedale Ave	21237	Trudy Seubert
9	Christy Sebastianelli	1122 Rosedale Ave	21237	Christy Sebastianelli
10	Marty Braun	5903 Trumps Mill Rd 21206		Marty Braun
11	E-B Taylor	623 Tampa rd	21221	
12	MARY A. TAYLOR	623 TAMPA ROAD	21221	Mary A. Taylor
13	VALERIE WHITE	223 W. Commerce	19977	
14	Gary Forbes	2806 Gray Manor Terrace	21222	
15	MICHAEL T. CANAVAN	20 SYLVANDALE WAY	21236	
16	Rachel Godwin	2424 Wythe Ave	21219	Rachel Godwin
17	Ray Godwin	2424 Wythe Ave	21219	Ray Godwin
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I am a resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay

	Name	address	Zip code	Signature
1	Mattie Wynne	2807 3rd St	21219	Mattie Wynne
2	Jonathan Wynne	2807 3rd St	21219	
3	Leah Wolfe	2811 3rd St.	21219	
4	Tim Wolfe	2811 3rd St.	21219	
5	Matt Gowen	2814 Bay Drive	21219	
6	Ryan Hauck	9032 Millers Island Blvd	21219	
7	Karyn L Wolf	8918 Hinton Ave	21219	Karen L Wolf
8	Jeff Cole	9105 Cuckold Pt Rd	21219	FRANK ROSATI
9	Erin Williams	9105 Cuckold Pt Rd	21219	
10	Andrew Alley	8802 Hinton Ave	21219	
11	Carli Zellers	2805 5th Street	21219	
12	Michelle	410-807-0434		
13	Stefanie Ferguson			
14	Virginia Stewart	410 388-2736	21219	Virginia Stewart
15	Michael Stewart	410 388 2736	21219	
16	Bailey Pratt	8908 Cuckold Pt.	21219	
17	Ben Pratt	8908 Cuckold Pt	21219	
18	JOHN TOYAVE	8921 MILLERS	21219	
19	JAKE HAUCK	2216 MAPLE RD	21219	
20	Melanie Hauck	2216 Maple Rd	21219	
21	Nicholas Shreve	3020 Delmar Ave	21219	
22	Joseph Genovese	8821 Millers Is Rd	21219	
23				
24				
25				

009

Petitioner Exhibit 12A

I am a non-resident of Millers Island and support the repeal of the zoning ordinance that prohibits live entertainment at Dock of the Bay

	Name	address	Zip code	Signature
1	David F. Riesett	8626 Schroeder Ave	21236	David F Riesett
2	Kathleen M. Riesett	8626 Schroeder Ave	21236	Kathleen M Riesett
3	Tim Heiny	307 WYE RD	21221	Tim Heiny Jr.
4	Denise Anderson	1119 Angora Rd	21219	D Anderson
5	Joyce Fellers	251 Hackamore Rd	21009	Joyce Fellers
6	Ruth Harrison	3148 Main Ave	21219	Ruth Harrison
7	Edward Streib	3148 Main Ave	21219	Edward Streib
8	Lisa Wells	218 E Chatsworth Ave	21136	LM
9	Michael Curtis	218A Chatsworth Ave	21136	
10	Angie Smith	2780 Blighthouse Pt	2624	
11	Steven Smith	2780 Blighthouse Pt	21224	
12	Bill Callahan	Blandinsville IL	61420	W Callahan
13	Joy Judge Callahan	Blandinsville, IL	61420	Joy Callahan
14	Shane Schapiro	1929 Stanhope Rd	21222	
15				
16				
17				
18				
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27				

Petitioner exhibit 12B

Pet 12B

Zoning commission,

Baltimore County

111 Chesapeake Av

Towson MD 21204

Dear Commissioners,

I attended the February 17th hearing but delays at that haring caused me not to be able to testify. Unfortunately I will not be able to attend the April 28th hearing but wanted to supply this testimony.

I was told that at the September hearing a neighbor categorized my fan base as loud and rowdy. My fans are generally mature and polite. Through all the years and venues of performing, not once did the police have to be called to break up a fight or deal with underage drinking. In fact two of my biggest fans are the parents of one of the neighbors.

Regarding Dock of the Bay, I was first contacted by Donna Kondylas to perform on New Year's Eve in 2014. We had an agreement for me to perform which was later cancelled. I was later contacted by Ken Boone to perform in April 2015. Ken canceled that agreement also.

I live in Baltimore County. I perform 3-4 times a week, mostly in Baltimore county and mostly at Dock Bars.

Sincerely

Mark Alan

Jodi Lynn Stolba

Petitioner exhibit 13

Case-in-chief

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondylas, LLC

Exhibit List

Party: Protestant Date: 2-17-16

Exhibit No:	Description:
✓ 1	Letter dated 9-24-14 - Borgerding Jr. to Mike Kondylas
~~NOT IN FILE~~ ✓ 2 Not Admitted	Letter dated 9-12-2014 (For Id only) Not admitted Francis Borgerding to Adam Rosenblatt, County Attorney
~~NOT IN FILE~~ ✓ 3	MDE - State Noise pollution - Noise level arrays dated 5/19/2014
NOT IN FILE 4	—
✓ 5	Photo and view of dock of the Bay and other residents closely "My neighborhood
✓ 6	Photo of Dock of the Bay from Balcony
✓ 7	Photo of Dock of the Bay
✓ 8	Photo of seating at Dock of the Bay
✓ 9	Thanner's ownership of Dock of the Bay re: sound and decible levels Letter dated May 13, 2008
✓ 10	Letter dated June 9, 2008, Letter measured Decible levels emanating from the Dock of the Bay
✓ 11	Bass Letter dated 10-3-2008, Letter measuring the decible levels from Dock of the Bay
	VERIFIED BY KC DATE: 2/19/16

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondylas, LLC

Exhibit List

Party: Protestant Date: 4-28-16

Exhibit No:	Description:
✓ 12	photograph of Row boat Willie's building
Large Ex. ✓ 13	large map ariel view of the Dock of the Bay and the area - 2016 Google Imagery
✓ 14	small map My Neighborhood Map 4/27/16 ariel view of Doc of the Bay and area
✓ 15	2015 alcoholic Beverage license for Doc of the Bay
✓ 16	Baltimore County Police Records; Parrish
✓ 17	Summary of Calls from exhibit 16
✓ 18	Facebook posts for Dock of the Bay 2-17-16 Boone Letter
Not Admitted 19 Id only	Facebook posts for Dock of the Bay 2-21-16
✓ 20	Facebook post for Dock of the Bay 4-27-2016 4:57 pm Boone Letter
✓ 21	Facebook posts for Dock of the Bay 4-27-2016 5:24 pm Boone Letter
Not Admitted 22 Id only	Facebook post from Dock of the Bay 2-22-2016 8:06 AM
Not Admitted 23 Id only	Facebook posts from Dock of the Bay
	VERIFIED BY KC DATE: 4/28/16

FRANCIS X. BORGERDING, JR.
ATTORNEY AT LAW

409 WASHINGTON AVENUE, SUITE 600
TOWSON, MARYLAND 21204
(410) 296-6820
FAX: (410) 296-6884

September 24, 2014

Mr. Mike Kondylas
Ms. Donna Kondylas
8909 Miller Island Boulevard
Baltimore, Maryland 21219-1642

RE: Dock of the Bay Restaurant

Dear Mike and Donna Kondylas:

I represent neighbors of the Dock of the Bay who were in long running court battles over the previous use of the Dock of the Bay. It has come to our attention that you may be interested in purchasing the Dock of the Bay. Enclosed please find correspondence from Baltimore County indicating that all previous zoning decisions still apply to the property. This is being sent for your information.

If you have any questions, please contact me. Thank you.

Very truly yours,

FRANCIS X. BORGERDING, JR.

FXBJr:bjk
Enclosure
cc: Mr. Charles Wolinski

Protestant Exhibit 1
case-in chief

Prot. Ex 3

e'mde

MARYLAND Department of the Environment

Martin O'Malley Governor | Anthony G. Brown Lt. Governor | Robert M. Summers Secretary

Volume V, Number 2 May 2012

A sound approach to noise that annoys

By Matthew Rowe, Science Services Administration

To eMDE Cover

A revised framework for enforcing noise standards is designed to lead to swift responses to complaints.

Under House Bill 190, which was signed into law by Governor O'Malley, enforcement authority for state noise pollution standards will rest with local governments starting Oct. 1. This approach mirrors the delegation agreements MDE has had with some local governments – and is designed to allow citizen noise complaints to be addressed more efficiently and cost-effectively.

A 1974 Maryland law set statewide environmental noise standards and established MDE's predecessor, the Office of Environmental Programs in the Department of Health and Mental Hygiene, as the lead for implementing and enforcing noise standards. It also allowed for local jurisdictions to adopt noise control ordinances, rules or regulations and established committees to review noise controls and consider revisions.

Historically, MDE had an inspector on staff to respond to and investigate noise complaints. In 2004, legislative action defunded MDE's noise control program, limiting the Department's enforcement capability. MDE then provided local governments with limited technical support and training to enforce the state noise standards. MDE also entered into delegation agreements with Anne Arundel and Harford counties, providing those jurisdictions with full enforcement authority.

Local governments can respond to noise complaints more rapidly than a state agency. Police or other local government agencies can enforce standards. And local jurisdictions, through planning and zoning provisions, can help prevent noise conflicts from arising. As a result, MDE worked with the General Assembly this year to legally transfer noise enforcement authority to local governments statewide.

The 2012 noise legislation retains Maryland's noise standards. Those standards set limits based on land use and time of day. For instance, the daytime limit for residential areas is 65 decibels.

Maximum Allowable Noise Levels (dBA) for Receiving Land Use Categories

Day/Night	Industrial	Commercial	Residential
Day	75	67	65
Night	75	62	55

The regulation exempts such activities as lawn care, snow removal and the normal use of household tools during the day.

The new law also retains MDE's authority for updating these standards using current scientific and public health data. Local governments no longer need a formal delegation agreement from MDE and may adopt noise standards at least as stringent as existing standards. The law abolishes the state-level noise council and committee that had outlived their purpose.

The changes to Maryland statute are designed to allow citizen noise complaints to be more efficiently and cost-effectively addressed. MDE plans to conduct statewide outreach this summer and continue to provide local jurisdictions with limited technical support and training. Sound measurements and documentation are critical for resolving noise complaints. Citizens can assist during this transition by contacting their local leaders regarding the public health benefit of noise standard enforcement.



Protestant exhibit no. 5
case-in-chief

My Neighborhood Map

Created By
Baltimore County
My Neighborhood

This data is only for general information purposes only. This data may be inaccurate or contain errors or omissions. Baltimore County, Maryland does not warrant the accuracy or reliability of the data and disclaims all warranties with regard to the data, including but not limited to, all warranties, express or implied, of merchantability and fitness for any particular purpose. Baltimore County, Maryland disclaims all obligation and liability for damages, including but not limited to, actual, special, indirect, and consequential damages, attorneys' and experts' fees, and court costs incurred as a result of, arising from or in connection with the use of or reliance upon this data.

Printed 5/18/2015



Protestant Exhibit No. 6
Case-in chief



proletarian exhibit
NO. 8



Protestant exhibit NO. 8

May 13, 2008

To: Jerry Kilduf
Chief Inspector
Baltimore County Liquor Board

From: Donald Crocket
Inspector
Baltimore County Liquor Board

Re: Dock of the Bay

On Saturday May 10, 2008 I received a call from Mrs. Wolinski stating that there was loud music coming from Dock of the Bay. She also informed me that there was no visible security in the parking lot. At 10:10pm I calibrated my sound meter and then proceeded to drive to Dock of the Bay. Upon my arrival, I drove through the parking lot where there was no security present and I witnessed two men urinating in the parking lot. I then visited the Wolinski home where I met with Charlie Wolinski. We stood on his deck for 20 minutes during which time there was no security presence in the parking lot of Dock of the Bay.

I then went to the home of Matt Ciarpella to get some sound readings from his yard. While the band was playing the sound levels varied from 49 decibels to 52 decibels. However, when the side door of the establishment was opened, the sound level rose to 69 decibels. During my 25 minute stay at Mr. Ciarpella's home, the side door of Dock of the Bay was opened and closed approximately 20 times.

After gathering sound readings from Mr. Ciarpella's yard, I then walked over to the Dock of the Bay parking lot. I was approached by a gentleman who identified himself as security. He had recognized me from my previous visits and I told him that I was there to make sure that security was present in the parking lot. After this encounter I left the establishment, the time was approximately 11:30pm.

Sincerely,

Donald Crocket

Donald Crockett

MAY 13 2008
RECEIVED

Protestant Exhibit No. 9
Case-in-chief

June 9, 2008

To: Chief Inspector Jerry Kilduf

Re: Dock of the Bay

Mr. Kilduf,

On Friday June 6, 2008 I received a call from Bonnie Metheny regarding loud patrons and music coming from Dock of the Bay. I calibrated my sound meter and took readings from Ms. Metheny's backyard. Initially, I gathered sound level readings from 63 to 69 decibels. The majority of noise was coming from the patrons that were at the outside bar and tables. When the side doors of the Bar were opened the sound level readings would spike to 73 decibels in response to the band that was playing inside. I took sound level readings from Ms. Metheny's backyard for thirty minutes and the meter readings ranged from 63 to 73 decibels. I then went to the home of Charlie Wolinski and took sound level readings from his back deck for thirty minutes. The meter readings ranged from 61 to 63 decibels. While on Mr. Wolinski's deck I saw security come outside two times for approximately ten seconds at a time. They would not walk further then two feet from the door and there was nobody patrolling the parking lot. Also, I saw a large tent outside of the Bar that was not there the last time I visited. I left at 12:05am.

Sincerely,

Don Crockett
Inspector

HIGHYARD
JUN - 9 2008
RECEIVED

Protestant exhibit No. 10
Case-in-chief

October 3, 2007

To: Chief Inspector Jerry Kilduf

From: Inspector Donald Crockett

Re: Dock of the Bay

Mr. Kilduf,

On Friday September 28, 2007 I received a call from Bonnie Metheny stating that the music and patrons at Dock of the Bay were very loud. I calibrated the sound meter to 114 and drove to Dock of the Bay where I met with Bonnie Metheny, Kay Sessa, and Tammy Waldman. We went to the backyards of Bonnie and Kay which face Dock of the bay and at 10:10 pm I began taking noise level readings from their backyards. Patrons from Dock of the Bay were sitting at the outside bar and the noise level reading was 63 decibels. When the band began to play the noise level reading varied from 45 to 49 decibels. When the back and side door were opened the decibel level spiked to 70.

I witnessed three patrons from Dock of the Bay walking out of the back door and onto the pier in order to access their boat. They were screaming and yelling; the noise level rose to 73 decibels. When they started their boat the noise level spiked to 95 decibels. This went on for 15 minutes until they left in their boat. I also heard loud noises coming from the parking lot and the noise level registered 69 decibels on the sound meter. This lasted for approximately 5 minutes. Lastly, I drove through the parking lot of Dock of the Bay. There were two security people sitting outside, I then left at 11:30pm.

Sincerely,

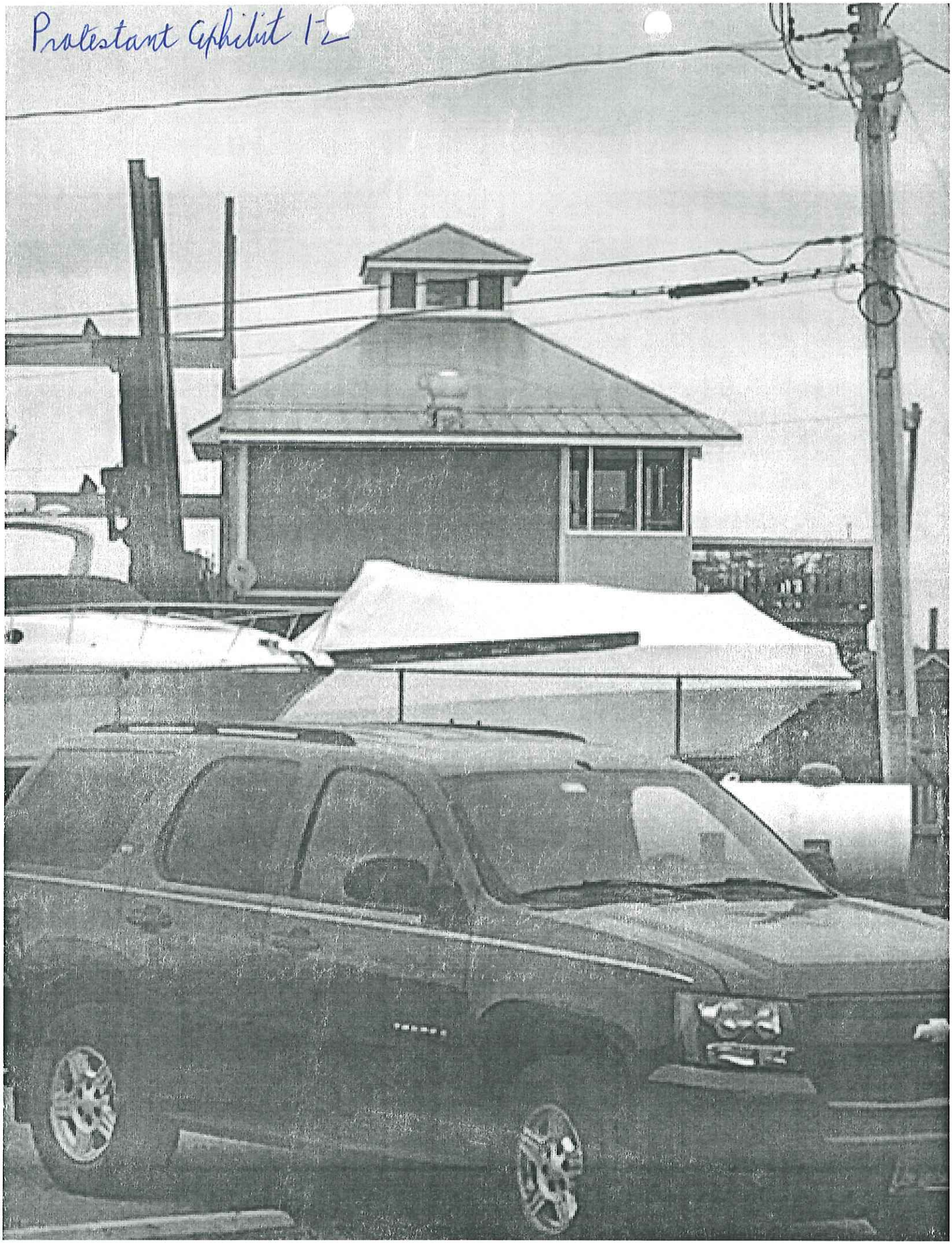
Donald Crockett

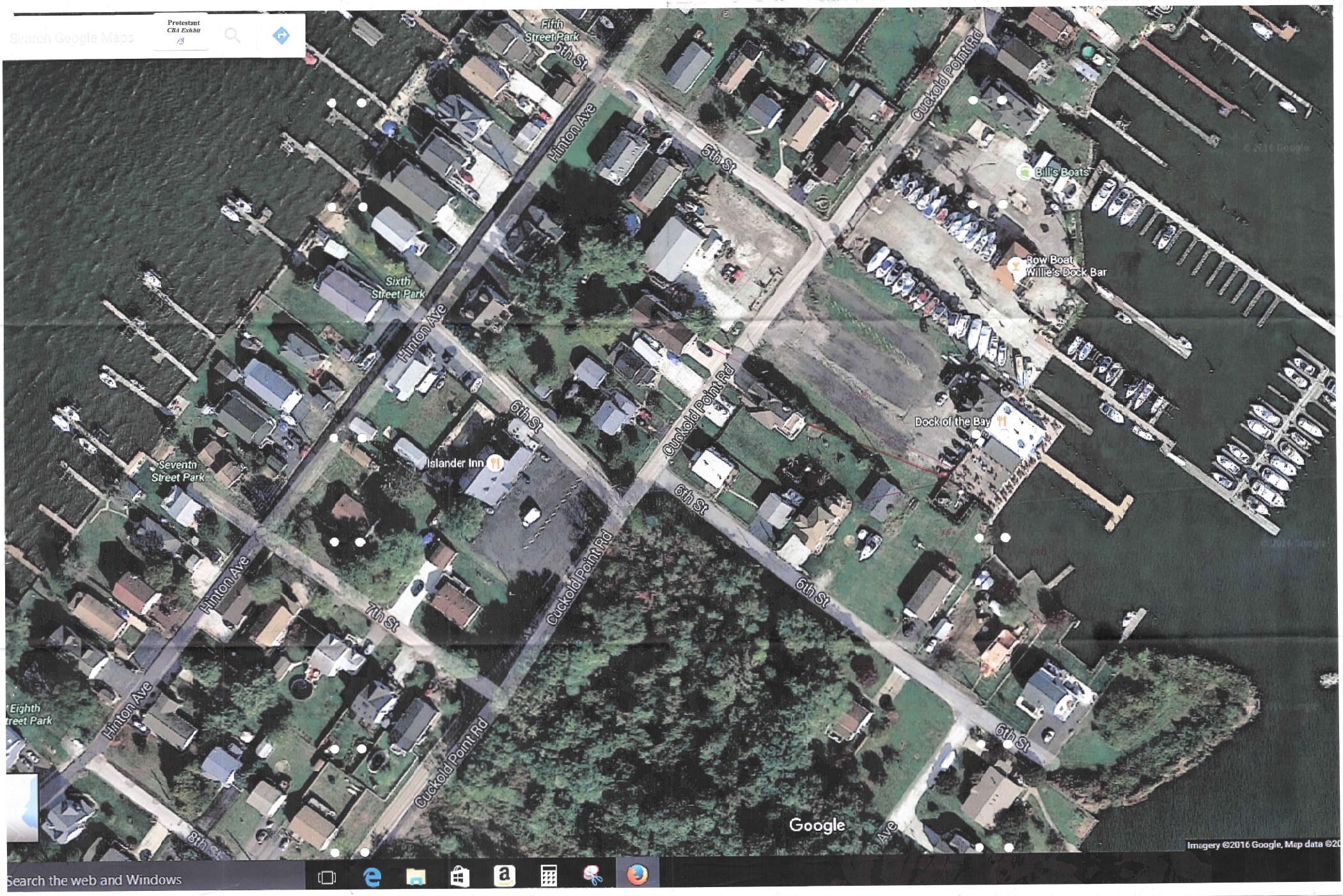
Donald Crockett
Inspector

OCT - 4 2007

Protestants Exhibit No. 11
Case-in-Chief

Protestant Exhibit 12




Protestant
CBA Exhibit
B
Search Google Maps
Fifth Street Park
5th St
Hinton Ave
Cuckold Point Rd
Bill's Boats
Row Boat
Willie's Dock Bar
Sixth Street Park
Hinton Ave
5th St
Cuckold Point Rd
6th St
Dock of the Bay
Islander Inn
Seventh Street Park
6th St
Hinton Ave
7th St
Cuckold Point Rd
6th St
Eighth Street Park
Hinton Ave
Cuckold Point Rd
6th St
8th St
Google
Imagery ©2016 Google, Map data ©20
Search the web and Windows



My Neighborhood Map

Created By
Baltimore County
My Neighborhood

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Printed 4/27/2016

Protestant Exhibit 14

7/2/2015

2015

ALCOHOLIC BEVERAGE

LICENSES

BOARD OF LIQUOR LICENSE COMMISSIONERS
FOR
BALTIMORE COUNTY

Chairman
Charles E. Klein

Member
Leslie M. Pittler

Member
Alexander Page, Jr.

Chief Admin.
Michael Mohler

Protestant exhibit 15

Class D(BWL)

DAMICO PROPERTIES, INC.
J.B.'S BAR & GRILL
6916 NORTH POINT ROAD
BALTIMORE, MD 21219

License: **0**
Class: **D(BWL)**
Phone: **(410) 477-3082**
Election Dist: **15**
Police Precinct: **12**
Council District: **07**
Legislation Dist: **06**

Licensees:
Bethanne Damico
Joseph A. Damico

DEPAOLA'S PUB, LLC
DEPAOLA'S PUB & GRILL
1401 SULPHUR SPRING ROAD
BALTIMORE, MD 21227

License: **20150655**
Class: **D(BWL)**
Phone: **(410) 247-0283**
Election Dist: **13**
Police Precinct: **01**
Council District: **01**
Legislation Dist: **12**

Licensees:
Andrew J. DePaola

DINING OUT ENTERPRISES, INC.
MICHAEL'S 2119
2119 YORK ROAD
TIMONIUM, MD 21093

License: **20150656**
Class: **D(BWL)**
Phone: **(410) 252-2022**
Election Dist: **08**
Police Precinct: **07**
Council District: **03**
Legislation Dist: **42**

Licensees:
Michael S. Dellis
Steven Dellis

Outside patio approved for Dining 6/5/00

DOCK OF THE BAY, LLC
DOCK OF THE BAY
9025 CUCKOLD POINT ROAD
BALTIMORE, MD 21219

License: **20150657**
Class: **D(BWL)**
Phone: **(410) 477-8100**
Election Dist: **15**
Police Precinct: **12**
Council District: **07**
Legislation Dist: **06**

Licensees:
Dorothea M. Reilly
Russell McClelland

Applicant(s):	**Russell McClelland, Dorothea Reilly**
Results:	Approved
Business Name:	Dock of the Bay, LLC
Trading As:	Dock of the Bay
Location:	9025 Cuckold Point Road, Baltimore, Maryland 21219
Election District, Inspector:	(15), Brooks
License Class, Time:	D(BWL), 2:10 p.m.
Hearing Type:	Change of Corporate Officers
Attorney:	David F. Mister, Esquire
Remarks:	Application for change of Corporate Officers of Class D (on sale) Beer, Wine, Liquor License from Donna Kondylas, Michelle Kondylas of Dock of the Bay, LLC trading Dock of the Bay.

CERTIFICATION OF RECORDS CUSTODIAN REGARDING RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY

I, Sergeant Gwendolyn Parrish, custodian of the records of the Baltimore County Police Department, hereby certify that the records attached here to are duplicate copies of the records of regularly-conducted business activity of the Baltimore County Police Department and that the attached records were (A) made at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (B) are made and kept in the course of the regularly-conducted business activity, and (C) were made and kept by the regularly-conducted business activity as a regular practice.

I SOLEMNLY AFFIRM under the penalties of perjury that the above statement is true to the best of my knowledge, information, and belief.

Sgt. Gwendolyn Parrish
Custodian of Records
Baltimore County Police Department

Protestant Exhibit #16

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETAD	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	051700813	6/19/05 1:50 PM	1	Lost or Stolen Property	AMY LUCAS	CELL PHONE..NO SUSP INFO..1017 @ 2301 SPARROWS POINT RD RA120930 CS NORTHPOINT BLVD*MASSETH AV. 1225 DIRECT AND HOLDING DRU 1245 1242 1243 1214 1244
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	051701236	6/19/05 7:20 PM	8	Disturbance	MATTHEW CIARPERLLA	MUSIC,ONGOING PROBLEM
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	051830151	7/2/05 1:49 AM	1	2nd Degree Assault (Not Domestic Abuse)	PC12	??? JUST RECVD HANGUP CALL FRM LOC, VOICE MAIL ON CB. MR THANNER / EMPLY 410 477 8100 ADV FIGHT IN PKING LOT.. ABT 20 INTOX M INV. UNKN WEAPS... 1242 BROWSE: STEVEN BARTON WM
9025 CUCKOLD POINT RD	051860285	7/5/05 4:57 AM	1	Burglary, 2nd Degree	MR.THANNER	JUST DISCOVERED .DOCK OF BAY RESTAURANT .COML WILL WAIT OUT FRT FOR OFC . REQ C/L SEE CC#051860295 FOR C/L CALL
9025 CUCKOLD POINT RD	051970284	7/16/05 4:34 AM	8	Alarm Business - Faulty	UNLIMITED INS/819	DOCK OF THE BAY, AUD, 2ND FLOOR OFFICE MOTION, NOTIFY, NO PERMIT.
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052041395	7/23/05 7:33 PM	7	Disturbance	WAYNE WALDMANN	IN PARKING LOT, UNK WEAPS/INTOX/DRUGS, FIGHT HAS CEASED, SUBJS GOT IN VEHS & FLED UP ROAD, PER COMPL, PD CAN 1022
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052041402	7/23/05 7:37 PM	8	Parking Complaint	DAWN RAUT	VEHS PARKED ON BOTH SIDE OF THE ROAD NEXT TO THE RESTAURANT .IF THERE WERE AN EMERGENCY ,. EMER VEHS WOULD NOT BE ABLE TO GET THRU. NFI
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052111440	7/30/05 8:14 PM	1	Noise Complaint	MATHEW CIARPELLA	LOUD MUSIC COMING FR LOC(CALLER SAID HIS HOUSE BACKS UP TO LOC AND HE WILL SEE OFFICERS) 1242 DIR 76 PC TO FIX RADIO PROBLEM WILL THEN B 76 MS WOLINSKI, 410-477-0053, ADV SAME
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052120989	7/31/05 4:38 PM	1	Noise Complaint	MS SESSA	LIVE MUSIC OUTSIDE
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052180128	8/6/05 1:51 AM	8	Duplicate Call	THE DOCK OF THE BAY	INFO FROM ALI;CNTRX ...H/UP CALL,NO VOICE CONTACT...GOT ANSWER MACHINE ON C/B SEE CC# 129
9025 CUCKOLD POINT RD	052180129	8/6/05 1:51 AM	1	Destruction of Property	ANGELA	THE DOCK OF THE BAY, A FIGHT STARTED INSIDE LOC & NOW IS IN THE PAKING LOT, STARTED 2 SUBJ'S FIGHTING NOW ITS 5, NO WEAPS SEEN, WINDOW OF LOC WAS BUSTED OUT. SEE CC# 128

STREETADD	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052261303	8/14/05 7:14 PM	7	Noise Complaint	MS ANON	LOUD MUSIC
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052320290	8/20/05 4:44 AM	1	2nd Degree Assault (Not Domestic Abuse)	928	CC
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052320300	8/20/05 5:05 AM	8	Duplicate Call	MICHEAL STEIGERWALD	1017 7305 BETZ AV, C/S LINCOLN AV, RA 120940...APPROX 0100HRS, ROB CALANAN DRIVING A GRN ACURA HIT COMPL W/ HIS VEH, AMBO REFUSED
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052400174	8/28/05 2:01 AM	7	Disturbance	WOLINSKI CHARLIE	SUBJS INSIDE MORONE TRACTOR.W/OPEN BEER BOTTLES.ABT TO LEAVE ... CORRECTION NO..... 1017 MAROON SIDEKICK ..GRY CIVIC...LEAVING DOCK OF BAY.. VEH MORNE SIDE KICK & GRAY CIVIC.....SUBJS WERE WALKING TWDS 6TH ST.
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052531832	9/10/05 11:30 PM	7	Check on Location	MR ANON	INTOX SUBJS IN THE PARKIN GLOT, CAUSING A VERBAL DISTURB
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052540093	9/11/05 12:55 AM	5	Noise Complaint	DARYL WOLINSKI	BUD HUMMER IS IN THE PRKING LOT,PLAYING LOUD MUSIC AND GIVING BEER TO PEOPLE WHO ARE DRIVING AND DRINKING W/FREE BEER
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052540227	9/11/05 2:27 AM	5	Traffic Complaint - Other	CIARPERLLA, MATTHEW	M/C ON PRKING LOT BEING LOUD AND DRINKING
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052601494	9/17/05 6:36 PM	8	Noise Complaint	MS ANON	LOUD MUSIC
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052621634	9/19/05 8:42 PM	8	Traffic Complaint - Other	MR WOLINSKI CHARLIE	VEHS IN THE PKG LOT DOING DONUTS.,, WHI PU TRUCK. VW, MAROON VEH POSS UP BY BAYSHORE NOW.. UNK TAGS.. COMPL THINKS THEY ARE INTOX
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052621702	9/19/05 9:30 PM	8	Duplicate Call	CHARLIE WOLINSKI	REF #1634, COMPL STATES OFFICER NEVER SHOWED & WANTED A 1017,1017 9019 CUCKOLD POINT RD, CS 6TH ST, SAME RA, ALOT OF DWI ALWAYS COMING OUT OF LOC AND COMPL WANTS TO TALKE TO OFFICERS ABOUT IT, PC FOR DELAY
9025 CUCKOLD POINT RD	052661977	9/23/05 11:37 PM	7	Noise Complaint	MR WOLINSKI	DOCK OF THE BAY PARKING LOT .. LOUD MUSIC, ROWDY MUSIC, NFI 1242 CANCELLED 1241 FROM RESPONDING, HE WILL HANDLE THIS CALL LAST

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETAD...	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052740239	10/1/05 3:30 AM	8	Check on Subject	MR MATTHEW CIARPERLL	MALE SITTING IN A RED PU, LEANED OVER AND ENGINE IS REVVING
9025 CUCKOLD POINT RD	052800503	10/7/05 9:18 AM	8	Alarm Business - Accidental	UNLIMITED INSTALL 77	DOCK ON THE BAY, NOTIFY AUD NO PERMIT, 2ND FLOOR OFFICE MOTION
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	052890033	10/16/05 12:15 AM	7	Check on Subject	MR WOLINSKI	GRP OF SUBJ ON PKG LOT DRINKING BEING LOUD
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	053021386	10/29/05 7:37 PM	8	Noise Complaint	MATTHEW CIAPERILLA	BANDS OUTSIDE,LOUD MUSIC,1017 2716 6TH ST RA120960 CS CUCKOLD POINT*SWAN
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	053082008	11/4/05 10:51 PM	7	Disturbance	KAY SESSA	LOUD MUSIC
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	053151854	11/11/05 10:44 PM	7	Noise Complaint	MR WOLINSKI CHARLIE	LOUD MUSIC IN PARK LOT OR DOORS OPENED THERE...
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	053311285	11/27/05 8:39 PM	7	Traffic Complaint - Other	MR WOLINSKI	BLU DODGE P/U MD REG# 84E980 DOT TWRDS NORTHPOINT RD,VEH BURNED RUBBER OUT OF LOT AND FISH TAILED THEN SPED DOWN THE RD P.1245
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	053450158	12/11/05 2:13 AM	1	Disturbance	MATT CIARPERLLA	12 SUBJS ON PARKING LOT
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	053641676	12/30/05 11:05 PM	5	Disturbance	MR WOLINSKI	3-5 SUBJS IN PKG LOT BEING VERY LOUD & DISORDERLY
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060202009	1/20/06 11:54 PM	7	Traffic Complaint - Other	MR WOLINSKI CHARLIE	COMPL ADV HAS SEEN AT LEAST 15 VEHS COMING OUT OF LOT SPEEDING AND SUBJS HAVE POSS BEEEN DRINKING... 1240 DIRECT ON HOLD
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060281551	1/28/06 9:56 PM	7	Traffic Complaint - D.W.I.	MR. WOLINSKI CHARLIE	MALE & FEM SUBJS WERE DRINKING AT LOC THEN GOT INTO A SMALL COMPACT CAR AND LEFT..DOT ON CUCKOLD POINT RD TWDS NORTH POINT RD
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060281635	1/28/06 10:55 PM	7	Noise Complaint	KAY SESSA	LOUD MUSIC

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD
MAY 9, 2004 - APRIL 3, 2008

STREETADD	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060281688	1/28/06 11:31 PM	5	Noise Complaint	MR CHARLIE WOLINSKI	6-8 SUBJS IN PKG LOT CARRYING ON & MAKING ALOT OF NOISE. COMPL ALSO ADV THE BAR ITSELF IS MAKING ALOT OF NOISE AND COMPL WANTS OFF TO ASK THEM TO TURN IT DOWN AND ASK THEM TO PAY BETTER ATTENTION TO THE PKG LOT C/L CC1708 23:46HRS...CMPLT C/B...REQ OFCR GO INSIDE & TELL THEM TO PATROL THEIR LOT WANTS OFCR TO STAY THERE TIL AFTER CLOSING
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060481935	2/17/06 11:01 PM	8	Traffic Complaint - Other	WOLINSKI,CHARLIE	WHI ,POSS BMW,UNK TAG ,LEFT LOT,TO MILLERS ISLAND RD,TWDS NORTHPOINT..SPEEDING
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060501847	2/19/06 11:07 PM	7	Narcotics, Citizen Initiated	MATT CIARPERLLA	CARLOAD OF SUBJS IN RED,HONDA CIVIC TYPE CAR,ROLLED,POSS MARIJUANA CIGARETTE & ARE SMOKING & DRINKING ON LOT MAY 1021 IF NEED
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060752050	3/16/06 10:18 PM	7	Disturbance	CHARLIE WOLINSKI	ADV PEOPLE ARE DRINKING IN THE PKG LOT FOR PAST 40 MINS.. ALSO ADV THAT EARLIER A SUBJ URINATED NEAR HIS TRUCK.. TRAFFIC ALSO SPEEDING OUT OF LOT..
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060770169	3/18/06 2:08 AM	7	Traffic Complaint - D.W.I.	DARRYL WOLINSKI	ABT 7-8 VEHS LEAVING THE LOC..SUBJS ARE INTOX..
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060830118	3/24/06 2:12 AM	4	Disturbance	MR ANON	LOUD MUSIC COMPLAINT IN PARKING LOT SEE CC#119
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060830119	3/24/06 2:12 AM	8	Duplicate Call	MR MATTHEW CIARPERLL	COMPL ADV DRINKING AND LOUD MUSIC COMNG FROM VEH ON PKG LOT AT LOC SEE CC#118
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060840149	3/25/06 2:07 AM	1	Disturbance	MS CHARLIE WOLINSKI	1017:9019 CUCKOLD POINT RD..SUBJS IN PKG LOT DRINKING AND MAKING A LOT OF NOISE 2:06HRS....WAYNE WALDMANN..REQ 1017 @ 9014 COCKOLD POINT RD ADVS; SUBJS WERE FIGHTING...NOW ARE RACING VEHS ON LOT

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETAD	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060890079	3/30/06 1:16 AM	1	Disturbance	MR WALDMANN	M & F IN PKING LOT.... 1017 9014 CUCKOLDPOINT RD AFTER GOING TO BAR MS SANDY 443 866 6328 ADV M IN GRN EXPLORER 189M422 WAS STARTING TRBL AT LOC, PULLED OFF.. CLR FOLLOWED & SUBJ BACKED HIS VEH UP & HIT HERS AT 12TH & MILLERSISLAND DOT TWD NORTHPOINT RD MR WALDMANN C/B ADV HE NEEDS THE OFF BACK TO LOC BECAUSE THERE IS A FE MALE ON THE ROOF SCREAMING THAT SHE CANT GET DOWN AND BELIEVES SHE MAY BE TRYING TO BREAK INTO THE BAR
9025 CUCKOLD POINT RD	060920134	4/2/06 1:28 AM	7	Disturbance	MR WOLINSKI CHARLIE	DOCK OF THE BAY, IN THE PARKING LOT, LOTS OF PEOPLE BEING ROWDY, THEY ARE DRINKING, NO WEAPONS SEEN, 1242 DIR TO HANDLE PKING LOT IS EMPTY..AUTH 1209
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	060972099	4/7/06 9:42 PM	8	Disturbance	MR CIARPERLLA	COMPL ADV SUBJ THAT LOOK LIKE THEY ARE IN A BIKE GANG ARE DOING DONUTS IN STREET IFO LOC
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	061120134	4/22/06 2:03 AM	8	Noise Complaint	MS DARYL WOLINSKI	OUTSIDE ON THE PRKING LOT,PATRONS LEAVING BEING LOUD AND DRINKING 1242 DIRECT ON THE CALL AND WILL ADV FOR BACK-UP
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	061271051	5/7/06 4:05 PM	8	Boating Complaint	MR.BRAD METHENEY	BET LOC AND PLEASURE ISLAND IN THE BAY- SEVERAL BOATS AND SEADOOS FLYING BACK AND FORTH THRU AREA GOING VERY FAST..ONLY SUPPOSED TO BE 6MPH AT LOC...
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	061390202	5/19/06 3:31 AM	6	Assistance Request	MS APRIL	24 YOF, FRIEND IS ILL, FOAMING AT THE MOUTH, THINKS SHE WAS SPLIPPED SOMETHING IN HER DRINK- THE OWNER OF THE BAR IS THE POSS SUBJ RESPON SEE CC# 201 F IS THROWING UP , CAN HARDLY MOVE, SHE IS REALLY OUT OF IT SUBJS BROTHER JUST TOOK THE SICK F, SARAH DICKEY - LEFT LOC IN A SILVE R TOYT SCION TC, BRAND NEW, POSS MD TAG FRK327 MEDIC/1228 OUT W/SCION AT MILLERS ISLAND/NORTHPOINT MEDIC'S ATTENDING PATIENT COMPL - MS APRIL IS 1076 TO 1025 THE OFFICERS COMPL ADV SHE AND HER FRIEND WERE DRINKING THE EXACT SAME BEVERAGES & HER FRIEND IS DEATHLY ILL

TO: ALANE FOLTZ

FROM: K. MCCUBBIN

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETADL..	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	061391646	5/19/06 7:54 PM	1	Hit & Run Accident - Property Damage	OFF EMERICK/OFF DUTY	ADV HIS WHI LEXUS RX330... ADV WAS IN LOC FOR ABT 45 MINS..CAME OUT & VEH WAS HIT... NO SUSP INFO...
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	061500441	5/30/06 9:09 AM	1	Lost or Stolen Property	MS KALB	CELL PHONE 443-570-0583 IS MS. KALB'S CELL #, YOU CAN CALL HER ON THAT #
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	062171938	8/5/06 11:50 PM	1	Narcotics, Citizen Initiated	MR. SPRECHER	FEM CUSTOMER FOUND A BAG OF COCAINE IN MENS BATHROOM
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	062451355	9/2/06 7:25 PM	1	Found Property	MR RON	FOUND JET SKI IN WATER HAS IT TIED UP TO PIER MD TAG 881BM COMPL IS IN THE RESTAURANT VIN: KAW80894C101
9025 CUCKOLD POINT RD	062600336	9/17/06 5:52 AM	8	Assist Motorist	HARVEY LEE	THE DOCK OF THE BAY...COMPL IS CLEANING MAN. HAS LOCKED KEYS IN TRUNK,HAS NO MONEY AND NO ONE TO CALL. IS ALONE. ON FRT PRKING LOT INA KIA OPTIMA
9025 CUCKOLD POINT RD	062870035	10/14/06 12:25 AM	8	Check on Location	THE DOCK OF THE BAY	ALI INFORMATION, NO VOICE CONTACT ON CALL BACK MALE ANSWERED AND HUNGUP LINDSEY,EMPLOYEE CANCEL PD 1022, NO NEED. HONEST MISTAKE. 0026HRS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	062880031	10/15/06 12:24 AM	8	Traffic Complaint - D.W.I.	MR. MARK	A M IN A SILVER FORD RANGER, LEAVING LOC, IS VERY INTOX, COMP ADV NO DOT, BECAUSE HE DOESN'T KNOW WHERE HE IS, DID ADV THAT TH E M IN NOW NEAR THE BOAT STORE,NEXT TO LOC, NFI NFD
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	063631734	12/29/06 10:55 PM	8	Traffic Complaint - Other	MELISSA JOYAVE	WM DRIVING WHITE PONTIAC TAG#2BB063 AND WF DRIVING SILVER FORD TAG#1CHL33 SUBJS RACING AT HIGH SPEED PASSING HER TO GET TO THIS LOC.1017 2810 11TH ST CALLER SAYS SUBJS VERY RECKLESS AND SAYS SHE HAD HER BABY IN HER VEH WHEN SUBJS WENT RACING BY. MALE DRIVER WENT INTO DOCK OF THE BAY AND THE FEMALE LEFT PARKING LOT NO DOT. SENT 4 DELAY 1225 DIR HOLDING 1242 PREMPTED FOR FLAGDOWN
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	070110226	1/11/07 6:06 AM	7	Suspicious Condition	MR. DON	BILLS BOAT YARD, DK TRUCK W/O LIGHTS, FOLLOWED BY ANOTHER TRUCK PULLING A BOAT, BILLS IS CLOSED, THE DK TRUCK PULLED INTO DOCK OF BAY PARKING LOT

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETAD	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	070111338	1/11/07 5:39 PM	8	Traffic Complaint - Other	MR. MATT	SEVERAL M/C'S ARE DOING DONUTS AND BURNOUTS IN THE PARKING LOT OF LOC ADV THEY ARE MAKING ALOT OF NOISE
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	070251143	1/25/07 4:34 PM	1	Lost or Stolen Property	MR THANNER	LOST WALLET ON SUNDAY, CREDIT CARDS WERE BEING USED,
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	070550139	2/24/07 1:50 AM	1	Domestic - Spousal Assault	MS. ELIZABETH	OCC 20 MINS AGO, EXHUSBAND,JOHN MICHALSKI,45YO W/M IN A GRY 03 MUSTANG HIT COMPL'S VEH IN PKG LOT. COMPL HAS WITNESSES AT LOC. JENNINGS, KEVIN MARK 011260
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	071601962	6/9/07 11:00 PM	8	Noise Complaint	MR JOHN SESSA	SUBJ'S PLAYING LOUD MUSIC, ADV HE HAS CALLED THEM SEVERAL TIMES & THEY ARE REFUSING TO TURN IT DOWN SUBJ'S PLAYING LOUD MUSIC, ADV HE HAS CALLED THEM SEVERAL TIMES & THEY ARE REFUSING TO TURN IT DOWN
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	071610012	6/10/07 12:05 AM	8	Noise Complaint	MS SESSA	SUBJ ARE OUTSIDE OF LOC BEING LOUD ALSO LOUD MUSIC 2ND CALL SUBJ ARE OUTSIDE OF LOC BEING LOUD ALSO LOUD MUSIC 2ND CALL
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	071662115	6/15/07 11:03 PM	8	Noise Complaint	SESSA,KAY	LIVE BAND,WHICH IS ALSO A CODE VIOL. BAR DOESN'T HAVE ZONING FOR A LIVE BAND. PATRONS ON PRKING LOT BEING LOUD LIVE BAND,WHICH IS ALSO A CODE VIOL. BAR DOESN'T HAVE ZONING FOR A LIVE BAND. PATRONS ON PRKING LOT BEING LOUD 1225 DIR HOLDING
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	071872019	7/6/07 11:05 PM	5	Noise Complaint	MS. KAY SESSA	LOUD MUSIC, COMPL ADV SUBJS PLAYING MUSIC THERE NOT SUPPOSED TO PLAY LOUD MUSIC, COMPL ADV SUBJS PLAYING MUSIC THERE NOT SUPPOSED TO PLAY 1242 PREEMPTED
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	071940428	7/13/07 7:51 AM	1	Hit & Run Accident - Property Damage	MS MURPHY	TO VEH OCC'D LS PM NO SUSP INFO UNK TAG INFO TO VEH OCC'D LS PM NO SUSP INFO UNK TAG INFO
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	072012144	7/20/07 11:32 PM	8	Disturbance	SESSA, MS	& BOAT @ END OF PIER @ BILLS BOAT YARD. LOUD MUSIC & BOAT @ END OF PIER @ BILLS BOAT YARD. LOUD MUSIC & BOAT @ END OF PIER @ BILLS BOAT YARD. LOUD MUSIC MR. BRAD METHINE, C/B 4104774675, ADV LOUD MUSIC COMING FROM BOAT AT BILLS BOAT YARD NEXT TO LOC AND COMING FROM BOATS AT LOC.

TO: ALANE FOLTZ

FROM: K. MCCUBBIN

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETADDR	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	072030085	7/22/07 12:44 AM	7	Noise Complaint	MS. SESSA	SUBJS ON THE BOATS AT THE END OF THE PIER REVVING THE MOTORS THEN TURNING THEM OFF. ONGOING PBLM SUBJS ON THE BOATS AT THE END OF THE PIER REVVING THE MOTORS THEN TURNING THEM OFF. ONGOING PBLM SUBJS ON THE BOATS AT THE END OF THE PIER REVVING THE MOTORS THEN TURNING THEM OFF. ONGOING PBLM
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	072221655	8/10/07 7:43 PM	8	Duplicate Call	MR KEN LANE	TO A GRAY CHRYSLER LHS, VEH RESP STILL AT LOC, BLK DODGE CHARGER, MD/7CGX92 10-17 COMPL IN PARKING LOT, POSS WITNESS AT LOC TO A GRAY CHRYSLER LHS, VEH RESP STILL AT LOC, BLK DODGE CHARGER, MD/7CGX92 10-17 COMPL IN PARKING LOT, POSS WITNESS AT LOC 1240 DIRECT PC ADV DELAY MR KEN LANE C/B ADV THEY HAVE NOW EXCHANGED INFO & WANTS TO CANCEL OFC 19:48HRS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	072310069	8/19/07 12:36 AM	8	Disturbance	DENNIS SPRECHER/SEC	INTOX TALL 20YOWM,BALD..THREW BOTTLE IN BAR,BROKE GLASSES..ON LOT NOW COMPL C/B AND ADV SUBJ GOT INTO CAB AND LEFT TWDS NORTHPOINT RD. COMPL STILL WANTS OFF TO RESPOND.
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	072310172	8/19/07 1:51 AM	8	Disturbance	MR. SPRECHER	W/M WRG GRY TSHIRT, KAHKI SHORTS, IS CAUSING PBLMS AT LOC. SUBJ IS NOW ON THE BOAT YARK PKG LOT. COMPL CALLED PD ON SUBJ EARLIER
9025 CUCKOLD POINT RD	072440041	9/1/07 12:25 AM	5	Check on Location	THE DOCK OF THE B	911 OPENLINE CALL, HEARING VOICES IN BACKGROUND. NOONE TALKING TO 911. 911 OPENLINE CALL, HEARING VOICES IN BACKGROUND. NOONE TALKING TO 911. VOICEMAIL ON C/B
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	072581462	9/15/07 8:00 PM	6	Burning Complaints	MR. BRUCE	IRO LOC, TO RIGHT HAND SIDE, ADV PEOPLE ARE BURNING POSS WOOD, AND ASHES ARE BLOWING AROUND, ***1242 ADV THERE IS A PIT FIRE AT LOC*** IRO LOC, TO RIGHT HAND SIDE, ADV PEOPLE ARE BURNING POSS WOOD, AND ASHES ARE BLOWING AROUND, ***1242 ADV THERE IS A PIT FIRE AT LOC***
9025 CUCKOLD POINT RD	073351643	12/1/07 12:00 AM	1	1st Degree Assault (Not Domestic Abuse)	MR ANON	ABOUT 8 SUBJS FIGHTING, TALKING ABOUT KILLING PEOPLE, NO SEEN WEAPS, LOC :DOCK OF THE BAY IN BAR

TO: ALANE FOLTZ

FROM: K. MCCUBBIN

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

STREETADDR	CFS_NUM	DTG_CALL_RECEIVED	DISPOSITION	CALL TYPE	CALLER_NAME	REMARKS
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	073351646	12/1/07 12:00 AM	8	Duplicate Call	KATHY	4-5 OUTSIDE FIST FIGHTING, NO WEAPONS DUP CC# 1643
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	073351665	12/1/07 12:00 AM	8	Duplicate Call	MS BOWIE	BOUT 6-7 MALE SUBJ FIGHTING, GROUP CAN SEE THEM THRU THE TREES, POSS INTOX, UNK WEAPS, UNK IF AMBO NEEDED. DUP CC# 1643
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	080130065	1/13/08 12:35 AM	8	Noise Complaint	MR BRAD	PLAYING EXTREMELY LOUD MUSIC SINCE 2130HRS, COMPL TRIED TO CALL & ONLY GETS RECORDING, CAN 1017 AT 2704 6TH ST IF NEEDED 1240DIRECT HOLDING
DOCK OF THE BAY; 9025 CUCKOLD POINT RD	080281827	1/28/08 10:26 PM	8	Disturbance	MR. NO NAME	MALE CALLED AND SAID SEND OFFC TO DOCK OF THE BAY, THEN MALE IN BACKGROUND SAID NO, PHONE H/U
9025 CUCKOLD POINT RD	080281883	1/28/08 11:19 PM	1	2nd Degree Assault (Not Domestic Abuse)	MR RODREGIUS	DOCK OF BAY RESTAURANT...LOC HAS SUSP INFO..COMP WAS THERE FOR A POKER TOURNAMENT & THE RESTAURANT HAS SUSP INFO NAME ETC. REFUSED AMBO

TO: ALANE FOLTZ

FROM: K. MCCUBBIN

CALLS FOR SERVICE @ DOCK OF THE BAY 9025 CUCKOLD POINT ROAD

MAY 9, 2004 - APRIL 3, 2008

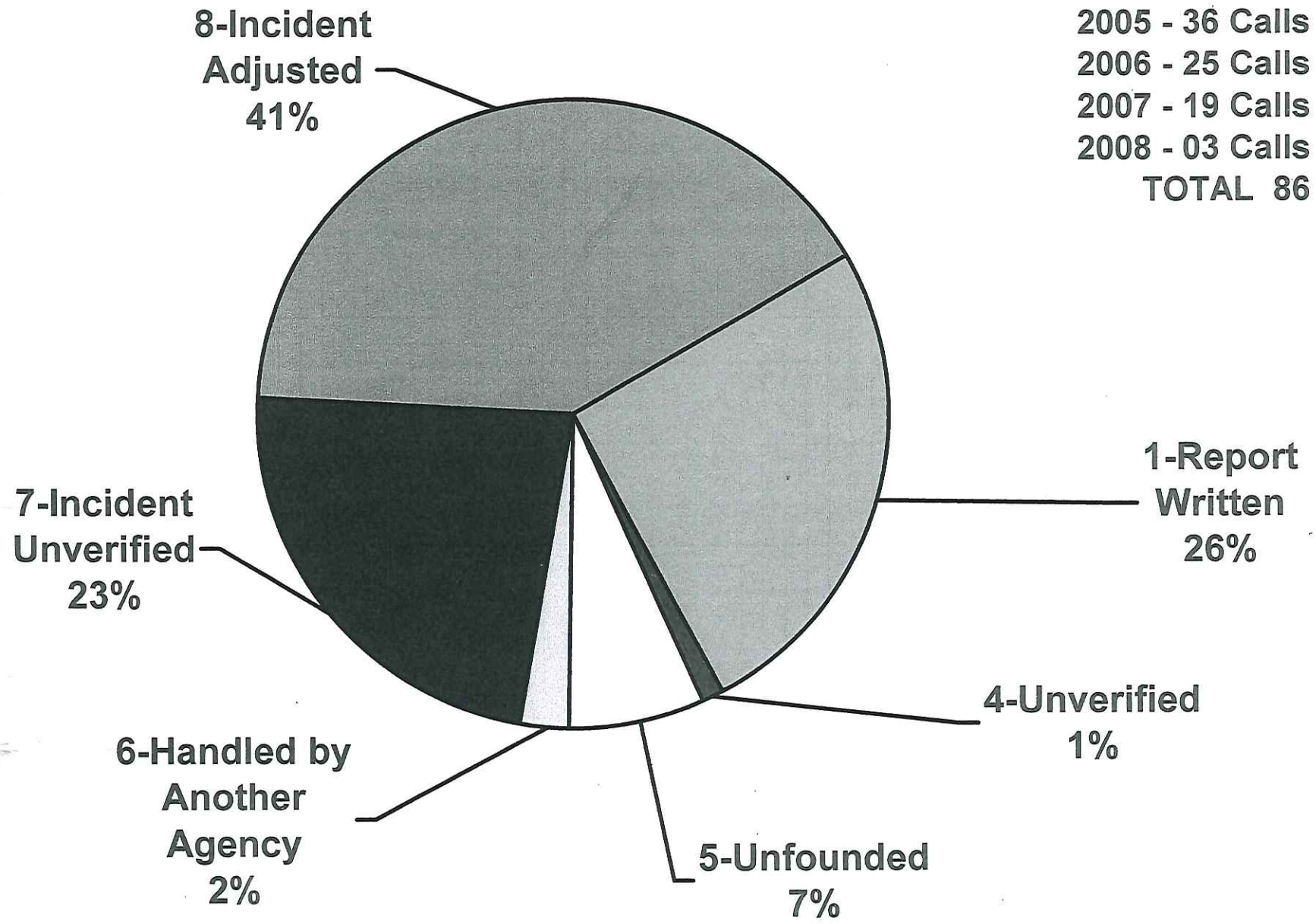
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9025 CUCKOLD POINT RD	080281883	1/28/08 11:19 PM	1	2nd Degree Assault (Not Domestic Abuse)	MR RODREGIUS	DOCK OF BAY RESTAURANT...LOC HAS SUSP INFO..COMP WAS THERE FOR A POKER TOURNAMENT & THE RESTAURANT HAS SUSP INFO NAME ETC. REFUSED AMBO

Protestant exhibit 17

SUMMARY OF CALLS

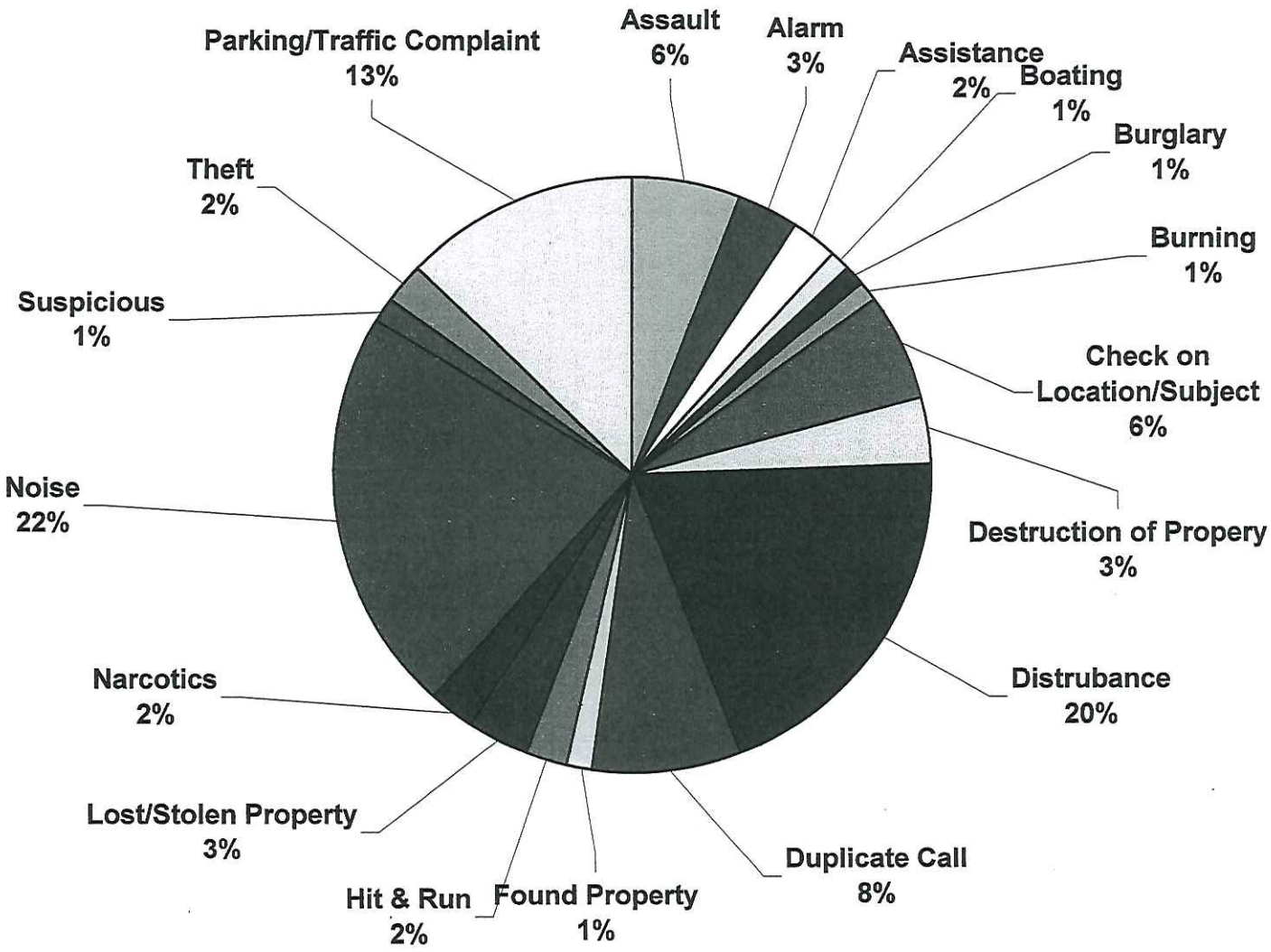
05.04.04-03.04.08

NUMBER OF CALLS
2004 - 03 Calls
2005 - 36 Calls
2006 - 25 Calls
2007 - 19 Calls
2008 - 03 Calls
TOTAL 86



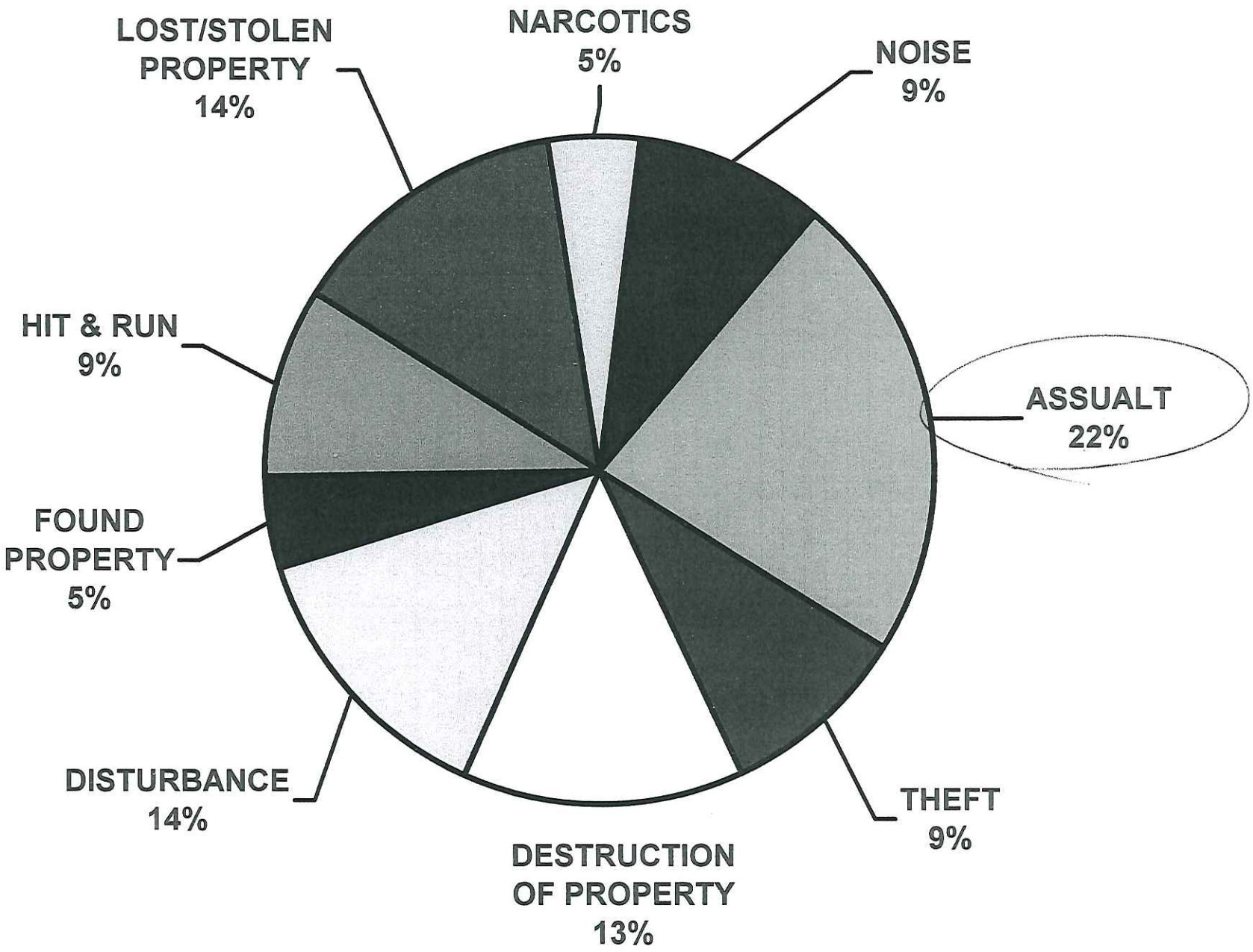
911 SERVICE CALL TYPE

Highest Percentage of Calls by Type
Noise - 22%, Distrubance - 20%, Parking/Traffic - 13%. Duplicate Call - 8%



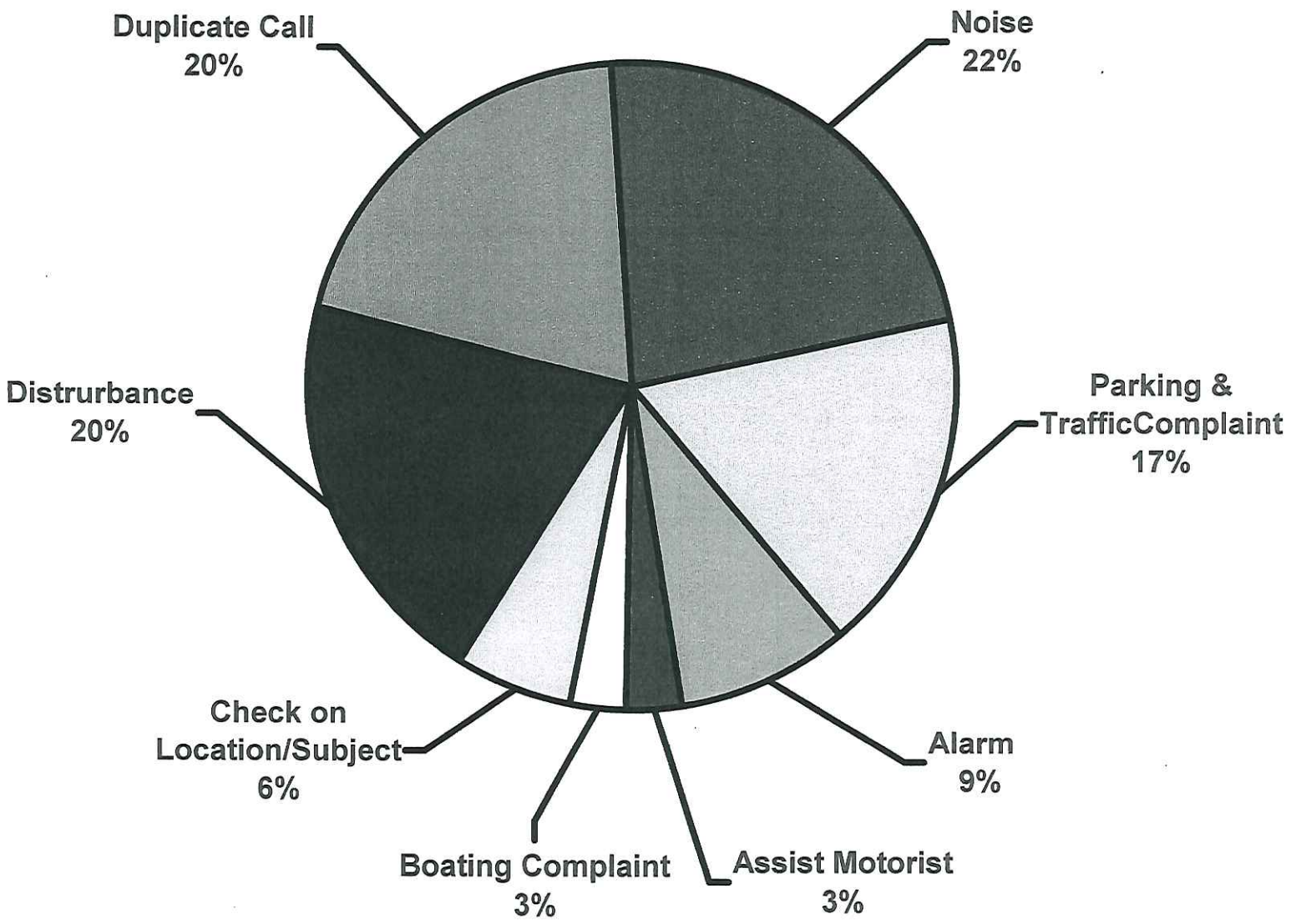
CODE 1 - REPORT WRITTEN

05.04.04 - 04.03.08



CODE 8 - NO REPORT WRITTEN

05.04.04-04.03.08



DEC. 2015

(1)

DOCK of the BAY

December 1 at 2:51pm ·

Dock of the Bay Zoning board hearing set for 10 am February 17, 2016.

When I purchased Dock of the Bay I was advised by the former owner and by a former operating partner that there was a noise restriction placed on the former owner that would vacate when the liquor license was transferred. Upon that transfer I scheduled music to start and was then advised by the zoning commissioner that the sanctions were against the property, not the former owner. While that didn't make any sense to me, I confirmed this with counsel. In April 2015 I hired counsel to appeal the court's decision since the former owner was in fact no longer operating a night club and since I was not operating a night club. I did not ask for any special privileges just asked for the same privileges granted to every other restaurant in Baltimore County.

Since I have owned Dock of the Bay for more than one year, we have not only been a good neighbor, we have been a good and positive resident of Millers Island. We have hosted fund raisers for FEAR, ladies traveling softball team, North Point Edgemere Volunteer fire department, Komen for the Cure and have donated the use of our entire parking lot for fundraisers hosted by others on two occasions. We have expanded our handicap parking and regularly host groups of seniors with mobility concerns. We have been a good neighbor without having a single liquor license violation and not a single incident requiring police assistance. We have been and will be good for the economic and social well-being of Millers Island and Edgemere.

At the first hearing on September 28, 2015, to my great surprise we were greeted in the court room by four neighbors that had banded together and hired an attorney for the purpose of defeating my motion to repeal the restrictions. Their attorney filed a motion of res judicata, which allowed the judge not to rule on the case and pass the case on to a higher court. Therefore we have a hearing set at that higher court for February 17th, 2016.

For the February 17th hearing I will invite all interested parties to participate in the hearing. I will invite both those that feel that The Dock of the Bay should have restrictions as well as those that think that The Dock of the Bay should be granted the same privileges of every other restaurant in Baltimore County. I hope that on that day the court will repeal the restrictions and allow for Dock of the Bay to be a positive influence on the lives of the residents of Millers Island.

Sincerely

Ken Boone

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Top Comments
174 people like this.
55 shares

Commets

DOCK of the BAY Thank you for all of the support! Please join our event page to support MUSIC for DOCK of the BAY https://www.facebook.com/events/974764222561957/

Protestant exhibit 18

DOCK of the BAY

1st post

December 1, 2015 ·

Dock of the Bay Zoning board hearing set for 10 am February 17, 2016.

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Sincerely

Ken Boone



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Comment
Share
Top Comments
177177
55 shares

Comments



Protestant exhibit 20

4/27/2016 4:57 PM

News Feed

RECENT ACTIVITY

DOCK of the BAY

February 17 ·

Thank you to many of the many supporters that showed up at the hearing today. I do appreciate it and will always remember your support.

For those of you that were not that there that have interest in the results I will try to explain what happened.

Because of corruption during Spiro Agnew's tenure as Baltimore County executive, Baltimore County appointed a position of Peoples Counsel. In this case the People's counsel clearly took the position of the neighbors. It was two attorneys against one all day. Unfortunatley this people's counsel, Zimmerman, must have been getting paid by the hour. He turned a two hour hearing into 6 hours at which time only some of the neighbors witnesses had been heard so we had to adjurn to another day. A day when each counsel and People's counsel are available. People's counsel whispered that he may not be available for some time so we are adjourned until further notice.

Leaving the court room I asked People's Consel if he had ever been to Millers Island or Dock of the Bay and he said no. I told him that had he visited once he may have far less attitude toward the restaraunt.

So Unfortunately those of you planning to celebrate a victory on either side of the fence will have to wait now till we can reconvene.

Until then I will continue as I always do to the ordinance in place.

Once again thank you for your support both at the hearing and signing the petition.

Ken

12 Comments
2121
Like
Comment
Share

Comments

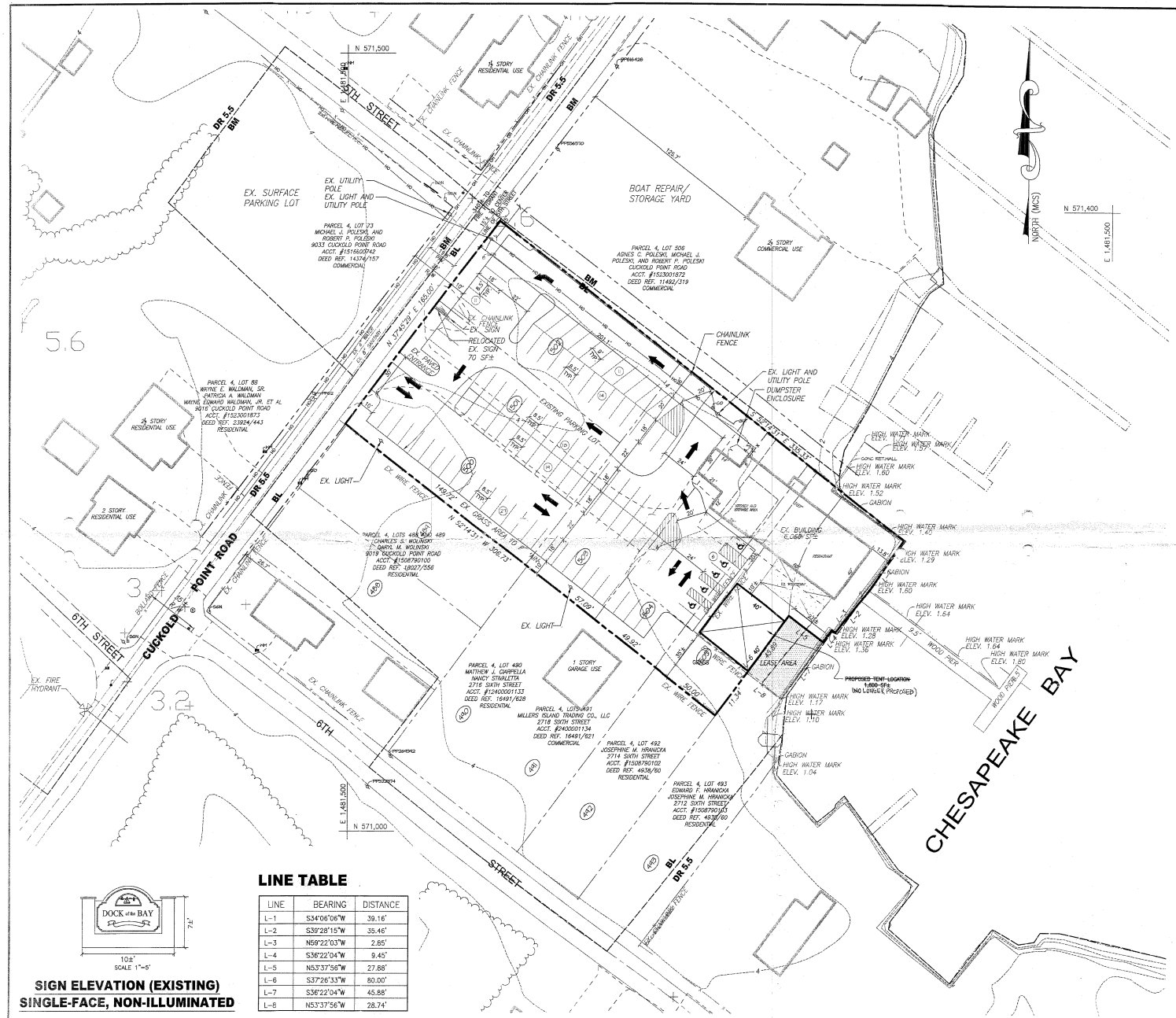
Protestant Exhibit 21

Case No.: 2016-0003-SPH

Exhibit Sheet

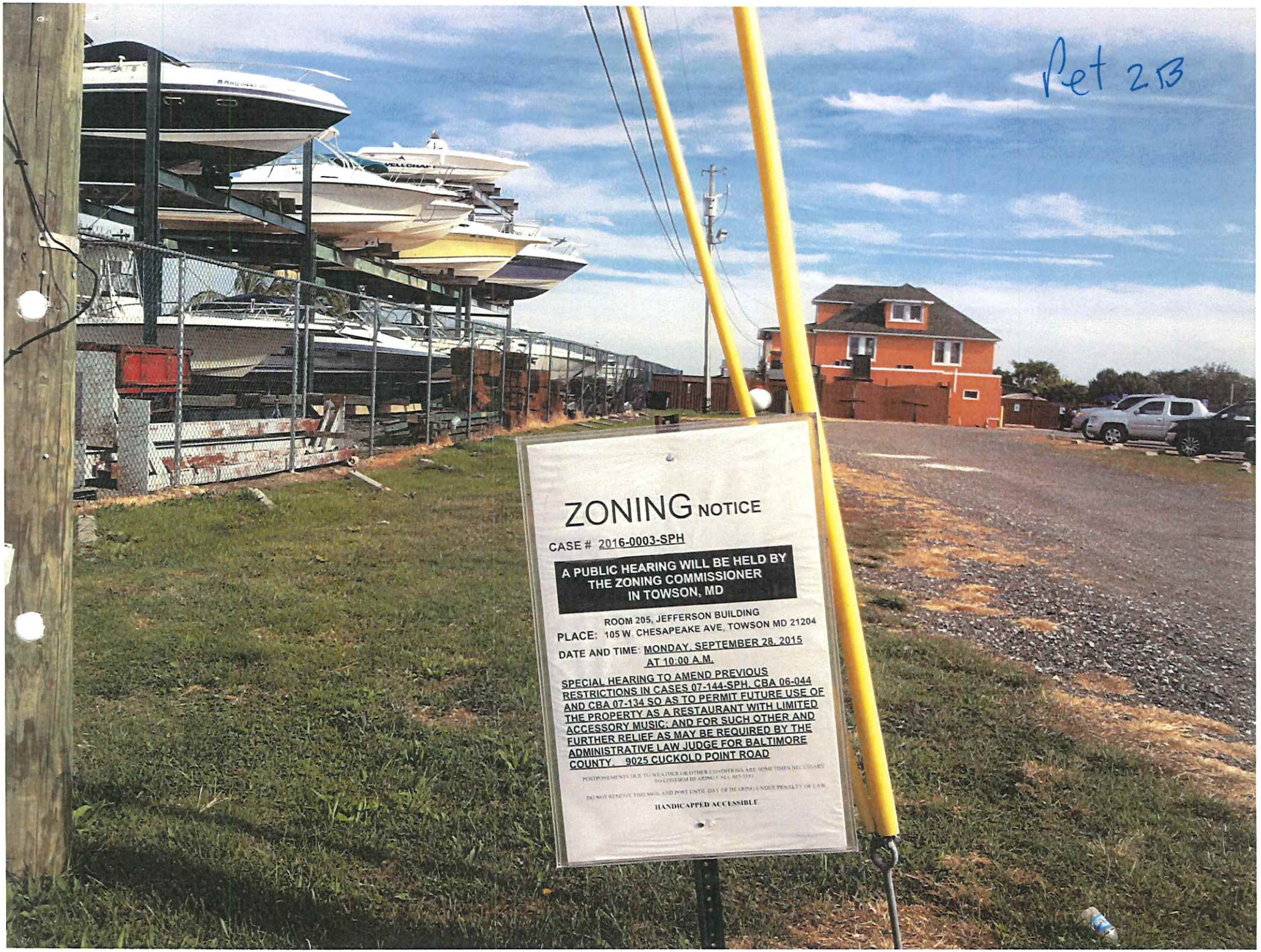
SLN 10-22-15

	Petitioner/Developer	Protestants
No. 1	Site plan	CBA opinion - 07-144 et. al.
No. 2	2A"-2O" Color photos	Circuit Ct. Order 03-C-08-9996
No. 3	3A-3C Aerial photos	Unreported CSA Opinion No. 610
No. 4		Photos
No. 5		
No. 6		
No. 7		
No. 8		
No. 9		
No. 10		
No. 11		
No. 12		


N 571,500
E 1,481,500
6TH STREET
EX. SURFACE PARKING LOT
EX. UTILITY POLE
EX. LIGHT AND UTILITY POLE
BOAT REPAIR/ STORAGE YARD
3½ STORY COMMERCIAL USE
3½ STORY RESIDENTIAL USE
2 STORY RESIDENTIAL USE
1 STORY GARAGE USE
CHAINLINK FENCE
EX. CHAINLINK FENCE
EX. CHAINLINK FENCE & GATE
EX. CHAINLINK FENCE & SIGN
RELOCATED EX. SIGN TO SF±
EX. FENCED ENTRANCE
EX. LIGHT AND UTILITY POLE DUMPSTER ENCLOSURE
EXISTING PARKING LOT
EX. LIGHT
EX. WIRE FENCE
EX. GRASS AREA TO BE PAVED
EX. BUILDING 6,060± SF
GAZEBO
GAZEBO RESTAURANT
HIGH WATER MARK ELEV. 1.60
HIGH WATER MARK ELEV. 1.52
HIGH WATER MARK ELEV. 1.64
HIGH WATER MARK ELEV. 1.28
HIGH WATER MARK ELEV. 1.38
HIGH WATER MARK ELEV. 1.17
HIGH WATER MARK ELEV. 1.10
HIGH WATER MARK ELEV. 1.04
WOOD PIER
LEASE AREA
PROPOSED TENT LOCATION 1,600 SF± (NO LONGER PROPOSED)
CUCKOLD POINT ROAD
CHESAPEAKE BAY
PARCEL 4, LOT 73 MICHAEL J. POLESKI, AND ROBERT P. POLESKI 9033 CUCKOLD POINT ROAD ACCT. #1516000742 DEED REF. 14376/157 COMMERCIAL
PARCEL 4, LOT 506 AGNES C. POLESKI, MICHAEL J. POLESKI, AND ROBERT P. POLESKI CUCKOLD POINT ROAD ACCT. #1523001872 DEED REF. 11492/319 COMMERCIAL
PARCEL 4, LOT 88 WAYNE E. WALDMAN, SR. PATRICIA A. WALDMAN WAYNE EDWARD WALDMAN, JR. ET AL 9016 CUCKOLD POINT ROAD ACCT. #1523001873 DEED REF. 2324/443 RESIDENTIAL
PARCEL 4, LOTS 488 AND 489 CHARLES S. WOLINSKI & DARYL M. WOLINSKI 9019 CUCKOLD POINT ROAD ACCT. #1508790100 DEED REF. 18027/556 RESIDENTIAL
PARCEL 4, LOT 490 MATTHEW J. CAMPELLA NANCY STRALETTA 2716 SIXTH STREET ACCT. #1240001133 DEED REF. 16491/628 RESIDENTIAL
PARCEL 4, LOTS 491, MILLERS ISLAND TRADING CO., LLC 2718 SIXTH STREET ACCT. #2400001134 DEED REF. 16491/621 COMMERCIAL
PARCEL 4, LOT 492 JOSEPHINE M. HRANICKA 2714 SIXTH STREET ACCT. #1508790102 DEED REF. 4938/80 RESIDENTIAL
PARCEL 4, LOT 493 EDWARD F. HRANICKA JOSEPHINE M. HRANICKA 2712 SIXTH STREET ACCT. #1508790103 DEED REF. 4938/80 RESIDENTIAL
EX. FIRE HYDRANT
EX. WATER METER
EX. SEWER MANHOLE
EX. WATER MANHOLE
EX. GAS METER
EX. GAS VALVE
EX. TELEPHONE PEDESTAL
EX. ELECTRIC METER
EX. ELECTRIC MANHOLE
EX. ELECTRIC TRANSFORMER
EX. ELECTRIC VAULT
EX. TELEPHONE MANHOLE
EX. TELEPHONE VAULT
EX. TELEPHONE BOX
EX. TELEPHONE RISER
EX. CABLE TV RISER
EX. CABLE TV VAULT
EX. CABLE TV BOX
EX. CABLE TV PEDESTAL
EX. CABLE TV MANHOLE
EX. CABLE TV TRANSFORMER
EX. CABLE TV METER
EX. CABLE TV VALVE

Pet 2A




Pet 2B
ZONING NOTICE
CASE # 2016-0003-SPH
A PUBLIC HEARING WILL BE HELD BY THE ZONING COMMISSIONER IN TOWSON, MD
ROOM 205, JEFFERSON BUILDING
PLACE: 105 W. CHESAPEAKE AVE, TOWSON MD 21204
DATE AND TIME: MONDAY, SEPTEMBER 28, 2015 AT 10:00 A.M.
SPECIAL HEARING TO AMEND PREVIOUS RESTRICTIONS IN CASES 07-144-SPH, CBA 06-044 AND CBA 07-134 SO AS TO PERMIT FUTURE USE OF THE PROPERTY AS A RESTAURANT WITH LIMITED ACCESSORY MUSIC; AND FOR SUCH OTHER AND FURTHER RELIEF AS MAY BE REQUIRED BY THE ADMINISTRATIVE LAW JUDGE FOR BALTIMORE COUNTY. 9025 CUCKOLD POINT ROAD
POSTPONEMENTS DUE TO WEATHER OR OTHER CONDITIONS ARE SOMETIMES NECESSARY TO CONFIRM HEARING CALL 887-3391
DO NOT REMOVE THIS SIGN AND POST UNTIL DAY OF HEARING UNDER PENALTY OF LAW
HANDICAPPED ACCESSIBLE

Pet 2c



Pet 2 D



Pet 2 E




Pet 2F
SAMUEL ADAMS
SAMUEL ADAMS

Ret 2 G

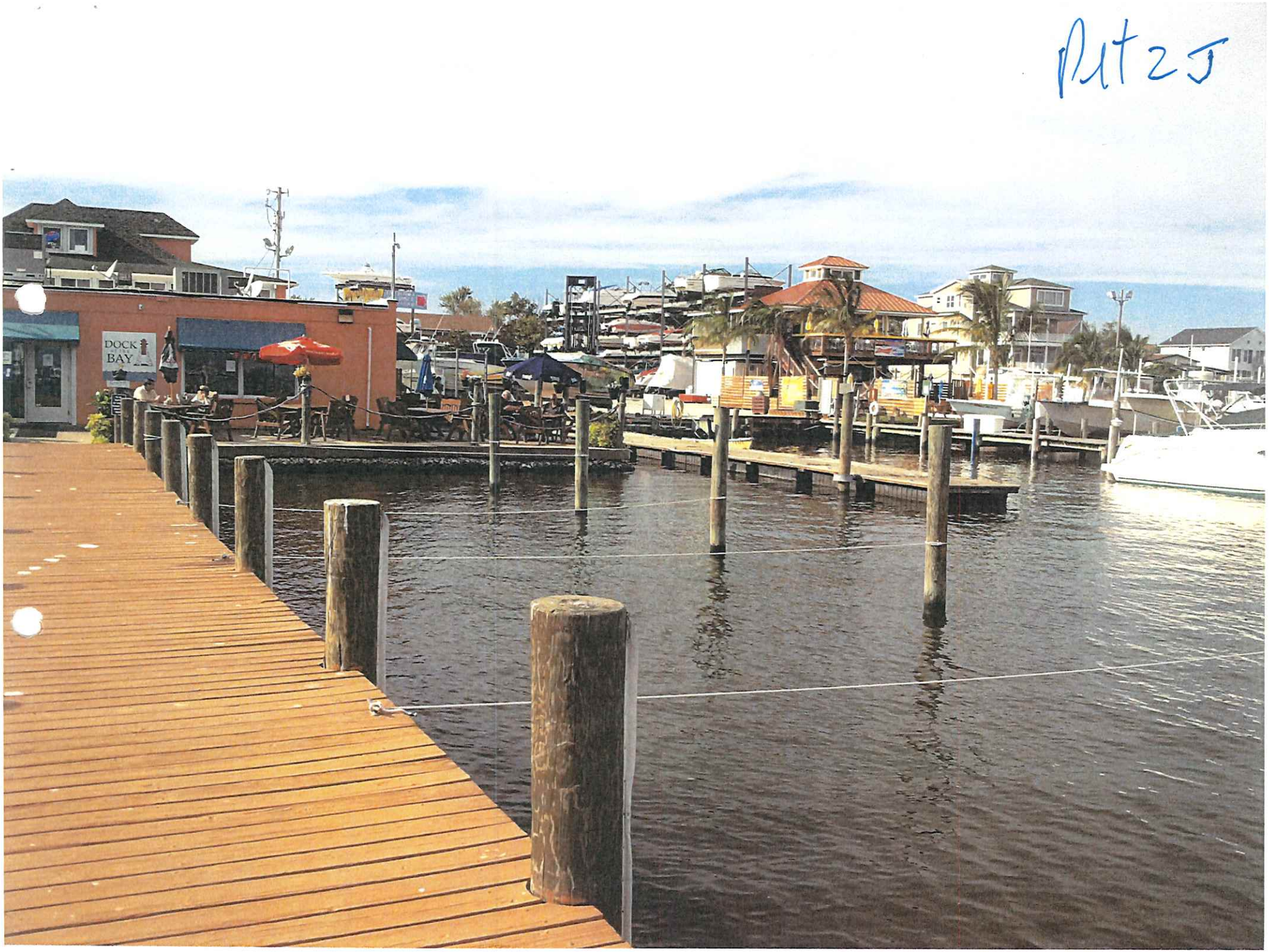




Pet 2.14


Ret 2I

Pt 25



Pet
2K.

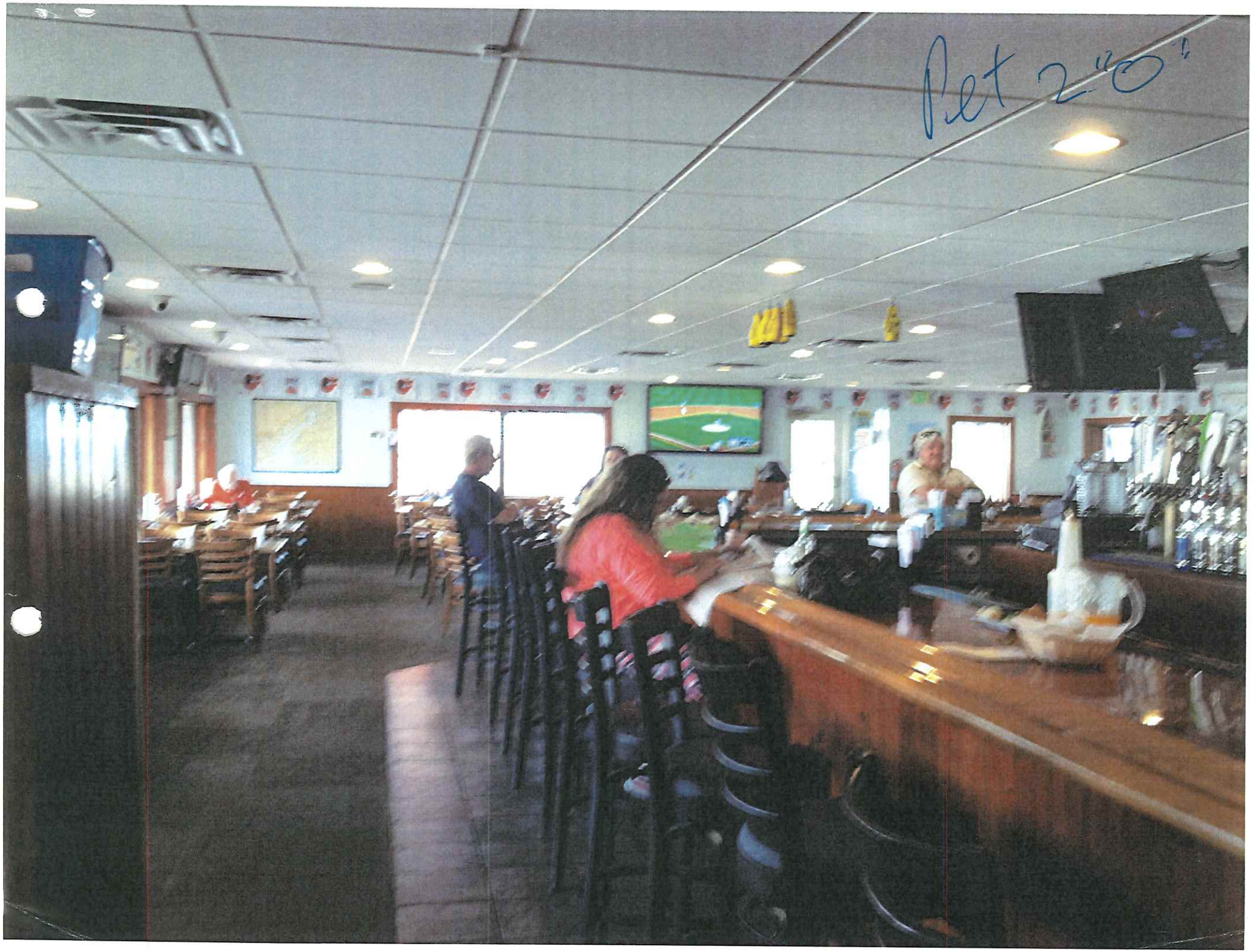

DOCK
of the
BAY
Sorry NO PETS
TO BE SEATED AT TABLES PLEASE SEE HOSTESS INSIDE

Pet 2


DOCK OF THE BAY
PIRATE SHIP RULES
• Children must be supervised by a parent.
• No throwing of any objects.
• No jumping off of the ship.
• Unruly children or children playing in an unsafe manner will be asked to leave the play area.


Pet 2 m


Ret 2 N


Pet 2"0"



Ped 3A

My Neighborhood Map

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Baltimore County
My Neighborhood

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Ref 33

My Neighborhood Map

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My Neighborhood Map

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Baltimore County
My Neighborhood

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Printed 5/18/2015

Plot. 1

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	* * * *	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	* * * *	Case No. CBA-07-134

* * * * * * *

MAJORITY OPINION

These cases come to the Board on appeal from two decisions of the Code Enforcement Hearing Officer and a decision of the Zoning Commissioner. The two decisions of the Code Enforcement Hearing Officer found the Petitioner, Fifth Street, LLC, guilty of violations of the County Code and levied fines of $5,000.00 and $1,000.00. The appeal from the decision of the Zoning Commissioner found that the Dock of the Bay, operated by Fifth Street, LLC, was classified as a nightclub under the Baltimore County Zoning Regulations (BCZR) and was in violation of the BCZR for operating a nightclub within a Business Limited (B.L.) zone.

Since the cases basically involved an interpretation of the County zoning regulations and the same sets of circumstances, the Board consolidated the cases for hearing. A hearing on the merits was held on January 15, 2008. Testimony was taken in Case No. 07-144-SPH, and oral

argument was conducted in Cases No. CBA-06-044 and No. CBA-07-134. Petitioner, Fifth Street, LLC, and Lawrence Thanner, Legal Owner, was represented by J. Carroll Holzer, Esquire. Protestants, Matthew J. and Nancy Jean Ciarpella, Phil and Kay Sessa, Charlie and Darrell Wolinski, Michael and Robert Poleski, David and Vena Sheck, Ken Schoyl and Tammy Novak, Doug W. Waldmann, et al, Louis Petrovia, Robert Haas, David Znamirowski, David McWilliams, and Terri Poleski, were represented by Francis X. Borgerding, Jr., Esquire. Baltimore County was represented by Nancy C. West, Assistant County Attorney. The parties were given the opportunity to file briefs on February 19, 2008. A public deliberation was held on March 13, 2008.

Background

Fifth Street, LLC, and Lawrence J. Thanner, its Resident Agent, operates the Dock of the Bay restaurant offering dining facilities and services at its location at 9025 Cuckold Point Road, Millers Island, in Baltimore County, Maryland. On August 8, 2006, the Dock of the Bay was cited for a Code violation, with a proposed penalty of $5,000.00, for operating a nightclub in a B.L. zone. In addition, Fifth Street, LLC, was cited for erecting a tent on the premises without obtaining the required permit from the County. A hearing was held before the Code Enforcement Hearing Officer on August 23, 2006, and a decision was rendered on August 25, 2006, ordering the Respondent to remove the tent and finding that the property "is being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use and continued unabated despite receiving notice of violation on May 12, 2006. A restaurant with dancing and/or live or recorded entertainment is not a permitted use in a B.L. zone."

After that hearing, Fifth Street, LLC, filed a Petition for Special Hearing in Case No. 07-144-SPH. This Petition requested the Zoning Commissioner to interpret the zoning regulations for Baltimore County with respect to the operation of a nightclub.

The decision of the Zoning Commissioner finding that Fifth Street, LLC, and the Dock of the Bay was a restaurant providing music during the day and was a "nightclub" as defined in BCZR § 101, 102.1, and 230, was dated May 30, 2007. Subsequent to that date, Fifth Street, LLC, was again cited for violation of the *Baltimore County Code* (BCC) for failure to obtain a permit for a tent and also for violation of BCZR § 101, 102.1, 230, and 500.6 for failure to cease operation of a nightclub in a B.L. zone. A second hearing was held before the Code Enforcement Hearing Officer and, by decision dated August 16, 2007, the Code Enforcement Hearing Officer again found Dock of the Bay in violation of BCZR for operating a nightclub in a B.L. zone and erecting a tent without obtaining the required permit. The Hearing Officer imposed a $1,000.00 fine in that case.

Testimony and Evidence

Petitioner presented Lawrence J. Thanner, Managing Member of Fifth Street, LLC, as their principal witness. Mr. Thanner stated that the Dock of the Bay has been a restaurant since 1955 and, to his knowledge, always had music and on many occasions, providing live bands. Mr. Thanner opened the new Dock of the Bay restaurant in March of 2004 after refurbishing the building from the effects of Hurricane Isabel. Everything was completely refurbished and new equipment was installed in the restaurant.

Thanner stated that the restaurant has a 2,400 square foot rectangular bar at one end and has tables and chairs on the main floor to accommodate diners. He stated that the restaurant could seat about 150 to 160 patrons inside. In the summertime, he has an outside patio with an outside bar and tables with umbrellas and chairs for patrons to utilize. The restaurant has 14 boat

slips for transient boat customers. The restaurant also has a playground for children, with a wooden pirate ship to allow children to play on the playground. The restaurant opens every day at 11:00 a.m. and closes at 2:00 a.m. In the winter, the restaurant will close early when customers are gone. Thanner testified that the restaurant kitchen closes at 11:00 p.m., but that the bar will stay open until 2:00 a.m. He stated that the restaurant has a full commercial kitchen and provides a full menu of seafood, steaks, sandwiches, etc. He has licenses from the Baltimore County Health Department, which states that he is a restaurant, and a basic license from the State of Maryland, which also states that it is a restaurant.

The restaurant has ten television sets inside and two out on the patio. There is a house music system that plays radio and satellite radio inside and outside. There are outside speakers. The television sets are on all the time except when they have live entertainment.

Mr. Thanner stated that he does have live entertainment at the restaurant with a D.J. playing for karaoke participants and live bands on Friday and Saturday nights. On those occasions, the entertainment goes from 9:00 p.m. to 1:00 a.m. During the previous summer, he stated that he had live music on Saturday afternoon and Sunday afternoon from 4:00 p.m. to 8:00 p.m.

Mr. Thanner stated that he had stopped the music after 8:00 p.m. after the Liquor Board had told him to cease the music. He stated that he had full-scale bands in 2004 with no complaints, but in 2005, a Liquor Board inspector told him to "pipe down" and he still had the bands, but mostly duos or steel bands. He received complaints in May of 2006 from the outside music and wrote a letter to the County asking for clarification on May 14, 2006. This letter was sent to C. Raynor, inspector in the Baltimore County Department of Code Inspections and Enforcement. The letter listed a number of activities, which Mr. Thanner proposed to conduct at the Dock of the Bay and requested clarification as to how these items qualified as a nightclub

under the citation that he had received. This letter was presented as Petitioner's Exhibit #2 to the Board. Thanner stated that he received no response to his letter.

After he sent the letter, he contacted Attorney Carroll Holzer to file for a special hearing. Mr. Thanner stated that 70 percent of the sales at his restaurant were in food and 30 percent are beverages. He indicated that he does not charge for the live entertainment and is open until 2:00 a.m. when the live music is played. Mr. Thanner also stated that, when he has live entertainment, he does lower the lighting level in the restaurant. He stated that the live bands play quite loudly but that he has never been cited for having a noise level about 65 decibels at the property line. He also stated that he does not have any stage accessories for the bands except in the summertime when there is a small stage erected outside on the patio. His operating hours are 11:00 a.m. to 2:00 a.m., which he considered to be normal, but under State law, you cannot sell alcohol past 2:00 a.m. With respect to defined aisles for the tables and chairs, he stated that tables and chairs are set in certain ways to form aisles. He did admit that some time when the bands are playing inside people would move the tables and chairs and dance between the tables. He does have facilities for serving alcoholic beverages and, as previously stated, the restaurant will accommodate 150 to 160 patrons.

Mr. Thanner argued that his operation should not be considered a nightclub based upon the criteria set forth in the International Building Code which has been adopted by the County. It was Mr. Thanner's position that he could not survive in the wintertime without the live music because the restaurant would not pay for itself based solely on food and drinks served during normal times without the music being available.

Mr. James H. Thompson, Supervisor of Code Enforcement, was called by Protestants as a witness and testified that he has worked in Zoning for 31 years, 13 of which as Supervisor of Code Enforcement, and that his office cited Mr. Thanner for being a nightclub operating in a

B.L. zone. Mr. Thompson stated that his office operates on a complaint basis only. He stated that they had had no complaints about the restaurant property before Mr. Thanner took over the property. It was his testimony that his office only reviews a situation based upon a complaint and, if the operation being considered provides live entertainment in a B.L. zone, it would be considered a nightclub and would not be allowed to operate. This would include karaoke, a person playing a piano, and strolling minstrels.

The Protestants presented Matthew Ciarpella, who has resided on Sixth Street adjacent to the Dock of the Bay for 3 years. Mr. Ciarpella complained of hearing the music even though the band was inside and it was wintertime. He stated that Monday through Thursday there were no problems since no music was played, and that when the music was played, it was loud enough for him to hear in his house even though it was not played outside.

Kay Sessa also testified stating that she lived at Sixth Street, which is about 650 feet from the Dock of the Bay. She stated that she heard the karaoke being played and that, although the previous restaurant had live bands, they stopped playing in 1970. She stated that she has been bothered by the live bands of the Dock of the Bay since 2004.

Patricia Waldmann, Charles Wolinski, and Brad Metheny and Bonnie Metheny all testified that they were neighbors living approximately 100 to 250 feet from the Dock of the Bay and that the music played on Friday and Saturday nights was so loud that they could not enjoy a peaceful night's sleep. Wolinski testified that he had gone into the Dock of the Bay and had witnessed that the tables were moved when the bands were playing and that there were not always aisles for the tables.

Finally, George Abendschoen, the Administrator of the Baltimore County Liquor Board, testified that there had been a file opened by his office on the Dock of the Bay. Based upon complaints that were received by the Liquor Board concerning the music that was played, an

inspector, Dan Crockett, had gone to the Dock of the Bay to investigate the matter. There was no determination by the Liquor Board. The report by the inspector, Dan Crockett, was received for identification only but was not admitted as part of the evidence in this matter.

Cases No. CBA-06-044 and No. CBA-07-134

Subsequent to the evidence presented in the special hearing case, the parties argued with respect to the civil citations and the decisions of the Hearing Officer in the above matters. Mr. Holzer contended that, under § 500.6 and 7 of the BCZR, the Hearing Officer had no authority or jurisdiction to interpret the *Baltimore County Zoning Regulations* with respect to whether or not the Dock of the Bay fell under the definition of nightclub. He stated that that was restricted solely to the authority of the Zoning Commissioner. These cases should be determined on the basis of the decision that this Board makes with respect to finding as to whether or not the Dock of the Bay is a nightclub under the BCZR. Mr. Holzer argued that Mr. Thanner had, in good faith, sought clarification in the Baltimore County Department of Code Inspection and Enforcement and received no clarification from that office. He also stated that § 3103 of the *International Building Code*, which has been adopted by the County, applies to structures erected for less than 180 days. He stated that Counsel for the Protestants in his letter claims that, in addition to live music, the tent was up for over 8 months. If that is the case, he felt that his client was cited under the wrong citation. He stated that it was not clear what the fine of $5,000.00 covered and requested a reduction in the fine if the Board finds that the operation is a nightclub. There was no indication as to whether or not there was any evidence presented to the Code Enforcement Hearing Officer with respect to how long the tent was erected at the Dock of the Bay operation.

With respect to the second citation, Mr. Holzer indicated that the second charge should have been given the same file number, even though the first charge was on appeal to the Board.

He stated that the Code Enforcement Hearing Officer in Case No. CBA-07-134 found that the Zoning Commissioner had determined that the playing of outdoor music must be discontinued but did not address the playing of indoor music. The Code Enforcement Hearing Officer found the Dock of the Bay to be a nightclub and therefore in violation of the BCZR. Mr. Holzer wanted further clarification of the fine levied in the second hearing.

In addition, Mr. Holzer indicated that the Zoning Commissioner had received an inquiry from the Liquor Board with respect to his decision. Evidently, the Zoning Commissioner replied to the inquiry, stating that he had determined that the music being played inside and outside the building was prohibited. Mr. Holzer felt that he had to appeal this letter because it was his position that the Zoning Commissioner had not taken any position with respect to the inside music.

Counsel for the Protestants argued to affirm the decision of the Code Enforcement Hearing Officer. He argued that both decisions were affirmed by the decision of the Zoning Commissioner in which he found that the operation was a nightclub. There was no prejudice or reversible error committed and that the Hearing Officer should be affirmed on his findings with respect to the nightclub definition. With respect to the tent, he argued that the tent had been put up on two separate occasions and that the Hearing Officer was correct in finding a violation on both occasions.

Ms. West argued solely with respect to the jurisdictional aspect and it was her position that, under the Code, Article 3, § 6-101, the Hearing Officer had the authority to hear the two cases for finding and was correct in finding the violations.

Decision

There is no question that the Dock of the Bay restaurant is located in a B.L. zone. The B.L. zone uses permitted, as of right, include under § 230.4 a standard restaurant, tea room,

convenience store, and dairy barn. Section 101 of the BCZR defines a standard restaurant as "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment."

The definition of "nightclub" is found in BCZR § 101, List of Definitions, and states:

> A tavern or other establishment which permits live or recorded entertainment with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County.

Section 101 also defines a tavern as:

> An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of a nightclub, as defined in these regulations, shall be considered a nightclub.

A tavern and standard restaurant are allowed in a B.L. zone; a nightclub is not allowed.

The International Building Code, adopted in Bill No. 1-05 by the County Council, includes, in § 303.1:

> 303.1 Assembly Group A:
>
> Assembly Group A occupancy includes, among others, the use of a building or structure or a portion thereof, for the gathering together of persons for purposes such as civic, social, or religious functions, recreation, food or drink consumption, or awaiting transportation....

Following the major assembly group are the five sub-assembly groups. A-2 is the primary group with which we are concerned in this matter.

> A-2. Assembly uses intended for food and/or drink consumption, including but not limited to:
>
> banquet halls
> nightclubs
> restaurants
> taverns and bars

In a discussion of the various groups, the Code states:

> ...In the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high....Darkened spaces in theaters, nightclubs, and the like serve to increase hazards. In emergencies, the congestion caused by large numbers of people rushing to exits can cause panic conditions.

The characteristics for sub-assembly group A2 state:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - low light levels;
> - entertainment by a live band or recorded music generating above-normal sound levels;
> - no theatrical stage accessories;
> - later than average operating hours;
> - tables and seating arranged or positioned so as to create ill-defined aisles;
> - a specific area designated for dancing;
> - service facilities for alcoholic beverages and food; and
> - high occupant load density.

There follows an example which states:

> Example: The Downtown Club, a popular local nightclub /dance hall, features a different band every weekend [See figure 303.1(5)]. It is equipped with a bar and basic kitchen facilities so that beverages and appetizers can be served. There is a platform for a band to perform on, a dance floor in front of the platform, and numerous cocktail tables and chairs. The tables and chairs are not fixed, resulting in a haphazard arrangement such that there are no distinct aisles. When the band performs, the houselights are dimmed and spotlights are keyed in on the performers. The club is equipped with a sound system that is used at loud levels. The club is open until 3:00 a.m. – the latest time the local jurisdiction will allow.

From this descript of The Downtown Club, one can readily see that the appropriate classification is Group A-2. Sometimes, however, it is not this easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building.

The Board recognizes that this decision could have far-reaching effects in the County. The definition of "nightclub" in the BCZR is certainly far from being crystal clear. As testified to by the Building Inspector, the inspection department operates solely on a complaint basis. Their criteria for finding a nightclub would be any restaurant, tavern or bar which provides live

entertainment. This could be anything from a piano player playing background music, a strolling minstrel, or a 12-piece orchestra.

In reviewing the characteristics for the group of facilities classified as A-2 in the Building Code, the Board finds as follows:

1. Low light levels.

Mr. Thanner testified that normally the restaurant is lit at what one would consider a normal level. However, when the band is playing, he did admit that the lights were turned down.

2. Entertainment by a live band or recorded music generating above-normal sound levels.

Mr. Thanner indicated that on Fridays, Saturdays, and Sundays, he has live entertainment, be it karaoke, a D.J., or a small band. In fact, this is a major part of his business and he feels that, without the music, the Dock of the Bay cannot survive during the winter months. The question of whether or not the band and the music is played above normal sound levels is one that would probably be determined by the persons listening to it. Certainly, the neighbors surrounding the Dock of the Bay feel that the sound level of the music is above normal, even during the winter months when music is played inside. There has been no indication that the restaurant has been declared to be in violation of noise levels under the Maryland Occupational Safety and Health Act. However, there is no question that the bands do play at sound levels which extend beyond the four walls of the restaurant.

3. No theatrical stage accessories.

Mr. Thanner testified that there are no theatrical stage accessories, particularly during the winter months. He did state that on weekends during the summer time there is a small stage for the bands that play outside until 8:00 p.m.

4. Later than average operating hours.

Mr. Thanner testified that normal operating hours of the restaurant are 11:00 a.m. to 2:00 p.m. He stated that during the winter the restaurant would close early if there were no patrons. He also indicated that his kitchen closes at 11:00 p.m.; however, the facility will stay open until 2:00 a.m., which is the normal closing hour required by the County for facilities serving liquor.

5. Tables and seating arranged or positioned so as to create ill-defined aisles.

Mr. Thanner again testified that the tables and chairs in the restaurant are generally fixed according to aisles for serving. However, he did state that when a band plays it is normal for individuals to move chairs and tables to allow for the band and also to allow people to dance in between the tables.

6. Specific area designated for dancing.

Mr. Thanner testified that there is no specific dance area. However, once again he did indicate that when the bands are playing people would move the tables and dance in the aisles among the tables.

7. Service facilities for alcoholic beverages and food.

There is no question that the Dock of the Bay serves alcohol and food. Mr. Thanner was quite emphatic that 70 percent of his business comes from the food operation and probably 28 to 30 percent from the alcoholic beverages.

8. High occupant load density.

There is no definition of what a high occupant load density is. Mr. Thanner testified that the restaurant would seat 150 to 160 individuals. On nights when there are bands playing, there appears to be a large crowd coming into the restaurant and one would probably find that it is filled to capacity.

The Board finds that the Dock of the Bay meets at least six of the criteria set forth in Group A-2. This would be criteria 1, 2, 3, 4, 7 and 8.

While our dissenting Member would find that there is no violation when the music is played inside the facility, he would find that it is a nightclub when music is played outside. The Majority finds that the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR. The second criterion does not differentiate between inside and outside noise. The fact that the Dock of the Bay does not provide music Monday through Thursday is not controlling in the opinion of this Board. Playing loud music on Friday through Sunday that can be heard by the neighbors makes the operation a nightclub under the present definition of the BCZR.

The Board is not unmindful that the definition of a nightclub, under the BCZR, can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.M. zones, might be considered "nightclubs" under the present criteria of the BCZR. It is not for the Board to change the definition but for the County Council to consider.

Cases No. CBA-06-044 and No. CBA-07-134

The Board has considered the arguments and evidence presented to the Board and the Code Enforcement Hearing Officer in the above matters.

The Board finds that the Code Enforcement Hearing Officer is authorized to interpret the definition of a nightclub under his duties to hold hearings and issue final orders under § 3-6-206 of the BCZR. In any event, the Zoning Commissioner had found the Dock of the Bay to be a nightclub prior to the holding of the second Code Enforcement hearing. Therefore, the Code Enforcement Hearing Officer could rely on that decision to uphold his findings.

The Board will affirm the decision of the Hearing Officer in both matters but will reduce the penalty to a $1,000.00 fine for operating as a nightclub in a B.L. zone and a $1,000.00 for failure to obtain a permit to erect a tent on a temporary basis at the Dock of the Bay restaurant.

ORDER

IT IS THEREFORE this 4th day of June, 2008, by the Board of Appeals for Baltimore County,

ORDERED that the Petition for Special Hearing pursuant to § 500.6 and 500.7 of the Baltimore County Zoning Regulations requesting a determination as to whether the use of the B.L. zoned property at 9025 Cuckold Point Road is in violation of the zoning regulations, and, specifically, as to whether the facility which provides music at this location is a "nightclub" as defined in the BCZR §§ 101, 102.1 and 230 is hereby answered in the affirmative and the playing of music by way of speaker system, live or recorded entertainment must be discontinued; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-06-044 be and is hereby **AFFIRMED;** and further that the fine is reduced to $1,000.00 for operating a nightclub in a B.L. zone; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-07-134 for operating a nightclub in a B.L. zone and for erecting a temporary tent without a permit be and is hereby **AFFIRMED**; and further that the fine of $1,000.00 for the erection of the tent is **AFFIRMED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules.*

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Wendell H. Grier

Prot. 2

IN THE PETITION OF **FIFTH STREET, LLC** FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY	*	IN THE
	*	CIRCUIT COURT
IN THE CASE OF **FIFTH STREET, LLC** LEGAL OWNERS/PETITIONERS FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE S/E corner of Cuckold Point Road & Fifth Street (9025 Cuckold Point Road) 15th Election District, 7th Councilmanic District	*	FOR
	*	BALTIMORE COUNTY
Case Nos. 07-144-SPH, CBA-06-044, CBA-07-134 Before the County Board of Appeals	*	Case No.: 03-C-08-09996

* * * * * * * * * * * * * *

FINAL ORDER

Upon judicial review of the record, of memoranda filed by the parties, and of oral argument by counsel in open hearing on May 6, 2009, and for reasons stated at the conclusion of the hearing, it is, this 14th day of May, 2009, **ORDERED by the Circuit Court for Baltimore County, that the Order of the Majority Opinion of the County Board of Appeals of Baltimore County dated June 4, 2008**, as finalized by the September 12, 2008 denial of petitioner Fifth Street, LLC's Motion for Reconsideration, **be and hereby is, AFFIRMED** in its entirety, as to the County Board of Appeals' *de novo* determination upon Fifth Street, LLC's petition for special hearing in Case 07-144-SPH and as to the County Board of Appeals' Orders affirming Code Enforcement Hearing Officer decisions in Case Nos. CBA-06-144 and CBA- 07-134.

True Copy Test
SUZANNE MENSH, Clerk
Per Kathy L. McCabe
Assistant Clerk

Lawrence R. Daniels
LAWRENCE R. DANIELS, JUDGE
Circuit Court for Baltimore County

APPROVED AS TO FORM:

Francis X. Borgerding, Jr, Esquire, Attorney for Respondents

J. Carroll Holzer, Esquire, Atty for Petitioner

Peter Max Zimmerman
Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County

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FILED JUN 3 2009

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UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 810

September Term, 2009

FIFTH STREET, LLC., ET AL.

v.

MATTHEW CIARPELLA, ET AL.

Eyler, Deborah S.,
Woodward,
Kehoe,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 9, 2010

Fifth Street, LLC, and its managing member, Lawrence J. Thanner, Jr. (collectively "FSLLC"), the appellants, own the Dock of the Bay, a restaurant and bar located at 9025 Cuckold Point Road in Baltimore County.[1] They appeal from the judgment of the Circuit Court for Baltimore County affirming a decision of the Baltimore County Board of Appeals ("Board"), finding them in violation of the Baltimore County Zoning Code ("Zoning Code") for operating a nightclub in a B.L. (Business Local) zone. The appellees are People's Counsel for Baltimore County ("the County") and Matthew Ciarpella, who resides near the restaurant. The FSLLC presents four questions for our review, which we have consolidated and rephrased as follows:

I. Did the Board err in concluding that the Dock of the Bay operates as a nightclub, as defined in the Zoning Code?

II. Is the definition of a "night club" in the Zoning Code so arbitrary and confusing as to deprive the appellants of their due process rights?

III. Did the Code Enforcement Division hearing officer err in concluding that the appellants violated the Zoning Code by erecting a tent without a permit?[2]

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[1]We will refer to the Dock of the Bay as a restaurant, as all parties seem to agree that it performs this function, but we do not intend this description to be in any way determinative of the central issue in this case.

[2]As framed by FSLLC, the question presented are:

1. In Special Hearing Case No.: CBA-07-144-SPH, the County Board of Appeals erred as a matter of law in determining that the Dock of the Bay restaurant was a night club under the Baltimore County Zoning Regulations definition.

2. In Zoning Violation Case No.: 06-044, the finding of violation was in error as a matter of law.

(continued...)

For the reasons that follow, we shall affirm the judgment of the circuit court.

ZONING REGULATIONS

The Zoning Code establishes three types of business zones: B.L. (Business Local), B.R. (Business Roadside), and B.M. (Business Major). Zoning Code § 100.1.A.2. As noted above, the Dock of the Bay is located in the B.L. zone. The B.L. zone is the most restrictive of the three business zones.

Zoning Code section 230.1.A sets forth the permitted uses in the B.L. zone, which include the operation of a "standard restaurant" and a "tavern." Combinations of permitted uses also are allowed. Zoning Code § 230.1.A.10. A "nightclub" is not among the permitted uses in the B.L. zone, nor is it permitted by special exception. Zoning Code § 230.3.[3]

A "standard restaurant" is defined in the Zoning Code as follows:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term

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[2](...continued)

3. If the Dock of the Bay is a restaurant, Civil Citation in Case No.: 07-134 and Case No.: 06-044 must be reversed.

4. County's arbitrary and confusing definition of night club violates Appellants' due process rights, violates standards for discretionary enforcement; leaves enforcement to the arbitrary discretion of County officials and constitutes undue favoritism by the County as established in the testimony before the Board of Appeals. Further, that the County's classification of night club must be reasonable and the evidence before the Board and the Board's conclusions established that the use of I.B.C. Group A-2 to define night club is unusable, arbitrary and capricious.

[3]A nightclub is a permitted use in the B.M. zone. Zoning Code § 233.1.

> includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

Id. at § 100.1. A "tavern" is defined as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." *Id.* Lastly, a "nightclub" is defined as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County." *Id.*

In 2005, the Baltimore County Council passed Bill No. 1-05, adopting the ICC International Building Code, 2003 Edition ("IBC"),[4] with some modifications, as the Building Code of Baltimore County. Chapter 3 of the IBC governs "Use and Occupancy Classification." IBC at 23. IBC section 303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." *Id.* at 24. Subgroup A-2 includes:

> Assembly uses intended for food and/or drink consumption including, but not limited to:
>
> Banquet halls
> Night clubs

[4]International Code Council, *International Building Code* (2003).

Restaurants
Taverns and bars

Id.

The commentary to the IBC explains, "[b]ecause of the arrangement and density of the occupant load associated with occupancies classified in the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high." ICC, *IBC Commentary - Vol. 1*, at 3-16 (2003) ("IBC Commentary"). It then provides a description of each subgroup classification. Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - Low lighting levels;
> - Entertainment by a live band or recorded music generating above-normal sound levels;
> - No theatrical stage accessories;
> - Later-than-average operating hours;
> - Tables and seating arranged or positioned so as to create ill-defined aisles;
> - A specific area designated for dancing;
> - Service facilities for alcoholic beverages and food; and
> - High occupant load density.

Id. at 3-17 - 3-18. The IBC Commentary explains that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. *Id.* at 3-18. Finally, it notes that the characteristics listed above "are only advisory in determining whether Group A-2 is the appropriate classification." *Id.*

FACTS AND PROCEEDINGS

The underlying facts are largely undisputed. The Dock of the Bay has been in operation since approximately 1955. It is situated on the Miller's Island peninsula between the Back River, to the west, and the Chesapeake Bay, to the east. To the south are residences that, like the Dock of the Bay, are zoned B.L. To the north and west of the property is a marina with attendant parking facilities. These properties are zoned B.M.

In September 2003, the Dock of the Bay was destroyed by Hurricane Isabel. One month later, FSLLC purchased the restaurant. Thanner then spent five months rebuilding the restaurant before reopening it in March 2004.

The interior of the restaurant is about 2,400 square feet. The first floor consists of a rectangular bar at one end and tables and chairs in most of the remaining open space. The second floor is used only for storage and office space. The business is licenced as a restaurant and is authorized to serve approximately 150-160 people. It also holds a Class-D liquor license.

Outside the restaurant is a patio area with more tables and chairs and an outside bar. Adjacent to the patio is a children's play area with a wooden pirate ship. The patio overlooks the Chesapeake Bay. FSLLC also owns a dock with 14 "transient" boatslips for customer use.

The restaurant is open daily from 11:00 a.m. until 2:00 a.m., although it frequently closes earlier on week nights, especially in the wintertime. It serves a full lunch and dinner

menu, with an emphasis on seafood. It also serves alcohol. Food service ends at 11:00 p.m. Approximately 70% of its sales are food, 28% beverages, including alcohol, and 2% T-shirts and cookbooks.

There are ten television sets inside the restaurant and another two at the outside bar. A house music system, connected to speakers inside and outside, plays satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered.

Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.

On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

Although there is no dance floor, during live performances patrons often dance in between the tables.

On April 21, 2006, a little over two years after the Dock of the Bay reopened under FSLLC's management, the Code Enforcement Division ("CED") of the Baltimore County Department of Permits and Development Management ("DPDM") received a letter of

complaint from Matthew Ciarpella, through counsel, regarding live music at the restaurant.[5] The letter alleged that the Dock of the Bay was operating as a nightclub, which is not a permitted use in the B.L. Zone.

In May, June, and August of 2006, the Dock of the Bay was cited for operating a nightclub in a B.L. zone, erecting a tent without a permit, and failing to cease nightclub operations and to remove the tent.[6]

On August 18, 2006, FSLLC filed a "Petition for Special Hearing," presenting two questions:

> 1.. Whether the use of the property at 9025 Cuckold Point Rd., Millers Island 21219 is in violation of the [Zoning Code ?]
> 2. Is the use by Fifth Street, LLC, a restaurant, at 9025 Cuckold Point Rd., which provides music during the day, . . . a "night club" as defined in the [Zoning Code]?

On August 23, 2006, before the petition for special hearing was ruled upon, the case came before a CED Hearing Officer at the DPDM. The hearing officer heard testimony from Thanner, Ciarpella, and another nearby resident, Wayne Walkman, Jr. Evidence consisting of advertisements highlighting the music offered at the Dock of the Bay also were introduced. The hearing officer issued "Findings of Fact and Conclusion[s] of Law." He found that the Dock of the Bay offered live and recorded music, both inside and outside. He

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[5]This was not the first complaint about the property. In the summer of 2005, Ciarpella and other nearby residents made numerous noise complaints.

[6]After the first of the citations, Thanner wrote to the inspector to request clarification as to the nature of his violation. He received no response to his letter.

then referenced the IBC and the IBC Commentary, concluding that the property "exhibits some of the listed characteristics" in the IBC Commentary for Subgroup A-2. He ruled that the Dock of the Bay was "being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use." He imposed a civil penalty of $5,000 and ordered FSLLC to "dismantle the outside speaker system and cease live and/or recorded entertainment immediately." He further concluded that the tent was erected without a permit in violation of IBC sections 3102.1, 3103.1 and 3103.1.1 and ordered it removed.

A two-day, public special hearing was held before the Zoning Commissioner ("Commissioner") to determine if the Dock of the Bay, "which provides music [] during the day, [is] a 'nightclub' as defined in [the Zoning Code]." Thanner testified at the hearing. Three past and present residents of Millers Island testified in support of FSLLC. Twenty-two nearby residents testified as protestants about the loud music, parking overflow, and noisy patrons leaving the property late at night. Finally, the CED officer who had cited the property and James H. Thompson, CED Supervisor, testified.

On May 30, 2007, the Commissioner issued his opinion. After reciting the "relatively simple" facts, the Commissioner addressed the question whether the Dock of the Bay is a "nightclub or simply a restaurant where ancillary entertainment is provided." He looked to the definition of "nightclub" in the Zoning Code and to the IBC and IBC Commentary. He concluded that, under the plain language of the Zoning Code definition, any establishment

that "provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub" under the IBC is an impermissible use in a B.L. zone. He further concluded that the use of the term "categorized" means only that the establishment necessarily falls under the IBC "Use and Occupancy Classification" category that includes "nightclubs." The Commissioner ruled that the Dock of the Bay is a "nightclub" under the Zoning Code and ordered "that the playing of outdoor music either by way of an outside speaker system, live/or recorded entertainment, must be discontinued."

After the special hearing, FSLLC was cited for continuing nightclub and tent violations. A second hearing before a hearing officer was held and the Dock of the Bay again was found in violation.

FSLLC appealed to the Board from the decision of the Commissioner, as well as from the decisions of the hearing officers. The cases were consolidated before the Board.

On January 15, 2008, a three-member panel of the Board took testimony and heard argument.[7] FSLLC called Thanner and also called Thompson, as an adverse witness. In addition to the facts already adduced concerning the nature of his business, Thanner testified that live entertainment was a significant draw for the Dock of the Bay, especially during the

[7]Pursuant to Zoning Code section 501.6, appeals from the Zoning Commissioner are heard "*de novo*." Accordingly, the Board took testimony on the issues presented at the special hearing. The appeal of the code enforcement rulings, however, were reviewed on the record before the hearing officer pursuant to section 3-6-303 of the Baltimore County Code (2003).

slower winter months, and that he would likely have to close down if forced to discontinue it.

Thompson testified that the CED operates on a "complaint basis only," meaning that it investigates alleged code violations only after receiving a complaint about a property or business. It does not undertake investigations of potential violations on its own initiative. He also testified that, in his opinion, based on his experience enforcing the Zoning Code, a property could operate as a "dual use," meaning that it could fit into multiple categories of use simultaneously. He explained that it was the practice of the CED to treat live music, but not recorded entertainment, as a code violation in the B.L. zone.

Numerous residents also testified. For the most part, their testimony was not relevant to the issues on appeal.[8] There was testimony that music played at the dock of the Bay was loud enough to be heard inside residents' houses.

At the conclusion of testimony and arguments, the Board allowed the parties to submit briefs. On June 4, 2008, a two-member majority of the Board issued an opinion concluding that the Dock of the Bay was operating as a nightclub and affirming the hearing officer's

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[8]FSLLC filed a motion to limit testimony with respect to expected resident testimony concerning noise at the restaurant and related complaints about the establishment. The Board granted the motion, opining that this type of testimony generally was not relevant to the legal issue whether the business was a nightclub under the Zoning Code, the only issue under *de novo* review. Despite that ruling, many residents testified. Their testimony was cut short by relevance objections, however.

An employee of the Liquor Board also testified and counsel for Ciarpella attempted to introduce into evidence records related to prior noise complaints from 2005. The Board granted FSLLC's hearsay objections to this testimony and evidence, however.

rulings. The Board reduced the $5,000 fine imposed for operating as a nightclub to $1,000 and upheld a $1,000 fine imposed by the hearing officer for the tent violation. FSLLC was ordered to discontinue the "playing of music by way of speaker system" and "live or recorded entertainment."

In its opinion, after reciting the facts, the Board majority looked to the definition of "nightclub" in the Zoning Code. Having noted already that the Dock of the Bay offered "live or recorded entertainment," it turned to the IBC and the IBC Commentary to determine if the business was "categorized as a nightclub." Like the Commissioner, it considered whether the eight non-exclusive characteristics of Subgroup A-2 applied to the Dock of the Bay. It found that six of the eight factors were met: low light levels, entertainment by a live band or recorded music generating above normal sound levels, no theatrical stage accessories, later than average operating hours, service facilities for alcoholic beverages and food, and high occupant load density. It found that two factors – tables and seating arranged or positioned so as to create ill-defined aisles and a specific area for dancing – did not apply.

Based on its finding that the Dock of the Bay exhibited six of the eight characteristics of Subgroup A-2, the Board majority concluded that the restaurant was operating as a nightclub. Its decision closed as follows:

> The Board is not unmindful that the definition of a nightclub, under the [Zoning Code], can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.[L.] zones, might be considered "nightclubs" under the present criteria of the [Zoning Code]. It is not for the Board to change the definition but for the County Council to consider.

One of the three Board panel members issued a dissenting opinion. He emphasized the undisputed facts that characterized the Dock of the Bay as a family restaurant, such as the full-service menu, table seating for 150-160 persons, a pirate ship play area, no cover charge, and the vast majority of sales being food related. He described the "nightclub" definition in the Zoning Code as "exceedingly unclear and circuitous" and characterized the IBC as a "'one size fits all'" building code that fails to reflect the "particular realities and common sense observations of this jurisdiction." In particular, the dissenter took issue with the IBC's practice of grouping restaurants together with such "disparate uses" as banquet halls and nightclubs. He noted that the IBC Commentary even distinguishes between buildings in which people congregate for "*drinking and dancing* (e.g., nightclubs, dancehalls, banquet halls, cabarets, etc.)" and buildings in which people congregate for "food and drink consumption (e.g., restaurants)." (Emphasized in dissenting opinion.)

Finally, the dissenter stated that, even if it were appropriate to apply the Subgroup A-2 criteria, the evidence did not support the Board majority's findings with respect to several of the criteria. Specifically, he found from the testimony that the lighting only was dimmed occasionally, for ambiance; that the business never had been cited for allowing the music to generate above-normal sound levels; that there was no evidence that the business hours from 11:00 p.m. to 2:00 a.m. were "later than average operating hours"; and that "high-occupant load density" is too ambiguous a characteristic to be applied.

The dissenter closed by observing that the Board majority was turning "a blind eye to common sense," when, as here, the facts were clear that the Dock of the Bay was a restaurant offering some musical entertainment on the side. He also noted that "selective enforcement" of the Zoning Code, as testified to by Thompson, seem "contrary to the spirit and intent of any well-written regulation, [] arbitrary and capricious, and possibly an 'Equal Protection under the laws' violation."

FSLLC moved for reconsideration of the Board decision, asking the Board to clarify how many of the IBC Commentary criteria must be satisfied before a business is considered a nightclub; to amend its order to direct the Dock of the Bay to "discontinue its nightclub operation" as opposed to discontinuing all music and live or recorded entertainment;[9] to reconsider the imposition of any fine for the nightclub violation, given the difficulty the Board itself had in determining whether a violation had occurred; and to reconsider the finding of a tent violation. FSLLC also argued that testimony of a number of nearby residents should not have been allowed. The motion was denied in its entirety.

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[9]FSLLC suggested certain changes it could make, short of discontinuing all live and recorded music, to reduce the number of Subgroup A-2 characteristics applicable to it. It stated that it would keep lighting levels at medium, use theatrical accessories, not remain open later than average, keep defined aisles, not have a dance area, close the kitchen during live entertainment so that there would not be "service facilities for food and drink," and not exceed the occupant load limit as set forth by the fire department.

FSLLC petitioned the circuit court for judicial review. Oral argument was heard,[10] and the circuit court issued a ruling on the record affirming the Board's decision. FSLLC timely appealed the judgment of the circuit court.

We shall include additional facts in our discussion of the issues.

STANDARD OF REVIEW

The Court of Appeals has described our circumscribed role in reviewing an agency decision as follows:

> A court's role in reviewing an administrative agency adjudicatory decision is narrow, *United Parcel v. People's Counsel*, 336 Md. 569, 576, 650 A.2d 226, 230 (1994); it "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel*, 336 Md. at 577, 650 A.2d at 230. *See also* [Md.] Code (1984, 1995 Repl. Vol.), § 10-222(h) of the State Government Article; *District Council v. Brandywine*, 350 Md. 339, 349, 711 A.2d 1346, 1350-1351 (1998); *Catonsville Nursing v. Loveman*, 349 Md. 560, 568-569, 709 A.2d 749, 753 (1998).
>
> In applying the substantial evidence test, a reviewing court decides """whether a reasoning mind reasonably could have reached the factual conclusion the agency reached."""" *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978). *See Anderson v. Dep't of Public Safety*, 330 Md. 187, 213, 623 A.2d 198, 210 (1993). A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. *CBS v. Comptroller*, 319 Md. 687, 698, 575 A.2d 324, 329 (1990). A reviewing court "'must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence' and to draw inferences from that evidence." *CBS v. Comptroller*, *supra*, 319 Md.

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[10]The judge indicated to the parties that his main concern was "with the 14th Amendment to the United States Constitution that guarantees every citizen the right of due process."

at 698, 575 A.2d at 329, quoting *Ramsay, Scarlett & Co. v. Comptroller*, 302 Md. 825, 834-835, 490 A.2d 1296, 1301 (1985). *See Catonsville Nursing v. Loveman, supra*, 349 Md. at 569, 709 A.2d at 753 (final agency decisions "are *prima facie* correct and carry with them the presumption of validity").

Despite some unfortunate language that has crept into a few of our opinions, a "court's task on review is *not* to ""'substitute its judgment for the expertise of those persons who constitute the administrative agency,'"'" *United Parcel v. People's Counsel, supra*, 336 Md. at 576-577, 650 A.2d at 230, quoting *Bulluck v. Pelham Wood Apts., supra*, 283 Md. at 513, 390 A.2d at 1124. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. *Lussier v. Md. Racing Commission*, 343 Md. 681, 696-697, 684 A.2d 804, 811-812 (1996), and cases there cited; *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881, 886 (1989) ("The interpretation of a statute by those officials charged with administering the statute is . . . entitled to weight"). Furthermore, the expertise of the agency in its own field should be respected. *Fogle v. H & G Restaurant*, 337 Md. 441, 455, 654 A.2d 449, 456 (1995); *Christ v. Department of Natural Resources*, 335 Md. 427, 445, 644 A.2d 34, 42 (1994) (legislative delegations of authority to administrative agencies will often include the authority to make "significant discretionary policy determinations"); *Bd. of Ed. For Dorchester Co. v. Hubbard*, 305 Md. 774, 792, 506 A.2d 625, 634 (1986) ("application of the State Board of Education's expertise would clearly be desirable before a court attempts to resolve the" legal issues).

Bd. of Physician Quality Assurance v. Banks, 354 Md. 59, 67-69 (1999) (footnotes omitted).

In *Marzullo v. Kahl*, 366 Md. 158 (2001), the Court reaffirmed the principle that agencies are owed due deference in their interpretation of the zoning regulations they are tasked with enforcing. In that case, like the instant case, the agency was the Board and the regulations at issue were part of the Baltimore County Zoning Code. The Court opined that the Board's "expertise should be taken into consideration and its decision should be afforded

appropriate deference in our analysis of whether it was 'premised upon an erroneous conclusion of law.'" *Id.* at 173 (quoting *Banks, supra*, 354 Md. at 68) (footnote omitted).

DISCUSSION

I.

FSLLC challenges the legal foundation for the Board's decision and the factual findings supporting it. We begin with the legal contentions. The Zoning Code's definition of "nightclub" is comprised of three elements: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor" and 3) "categorized as a nightclub by the Building Code of Baltimore County." It is undisputed that the Dock of the Bay is a "tavern or other commercial establishment" that offers both live and recorded entertainment in the form of bands, karaoke, DJs, satellite radio, and television. Thus, the central focus of FSLLC's legal argument is that the Board erred in concluding that the Dock of the Bay is "categorized as a nightclub by the Building Code of Baltimore County."

FSLLC points out that the IBC does not define "nightclub." Rather, it groups certain structures, including nightclubs and restaurants, as fitting in Assembly Subgroup A-2. Therefore, according to FSLLC, a finding that the Dock of the Bay meets characteristics of Subgroup A-2 is of no moment because it does not answer the ultimate question: is the Dock of the Bay a nightclub?

Before we address this contention, some history is helpful. Since at least 1956, the Baltimore County Building Code ("BCBC") has adopted the standards of a model building code. *See Metius v. Julio*, 27 Md. App. 491, 497 n.3 (1975). Baltimore County is not unique in this practice. Since the early part of the 20th century, at both the municipal and state levels, building codes around the country have been based on model codes. Three regional model code groups promulgated the codes – the International Conference of Building Officials ("ICBO"), the Building Officials Code Administrators International ("BOCA") and the Southern Building Code Conference International ("SBCCI"). *See* www.iccsafe.org/ABOUTICC/Pages/default.aspx. BOCA, a code designed for the east coast and the midwest, previously had been adopted by the Baltimore County Council. *See Swinson v. Lords Landing Village Condo.*, 360 Md. 462, 479 (2000) (noting that, since at least 1981, most counties in Maryland have had building codes patterned on the BOCA model code); *Metius, supra*, 27 Md. App. at 497 n.3 (noting that Baltimore County adopted the BOCA standards beginning in 1956).

In 1994, these three regional groups consolidated to form the ICC. The first version of the IBC was published in 2000.[11] The IBC does not differ substantially from the BOCA code that it replaced. As relevant to the instant case, however, the category in which a "restaurant" was placed changed. Under the BOCA code, a restaurant was categorized in

[11]Pursuant to Md. Code (2003, 2009 Supp.), section 12-503 of the Public Safety Article, the Maryland Department of Housing and Community Development is required to adopt the IBC as its model building code, subject to some permitted modifications.

Assembly Subgroup A-3.[12] *See* Building Officials Code Administrators, *The BOCA National Building Code/1999* 18 (14th ed. 1999). As discussed, *supra*, under the IBC, restaurants are categorized in Subgroup A-2. Under both BOCA and IBC, nightclubs are categorized in Subgroup A-2. The IBC Commentary, discussed *supra*, setting forth the eight non-exclusive characteristics of Subgroup A-2, appears to have been lifted verbatim from the BOCA Commentary that preceded it. *See In the Matter of the Application of Rampart Partnership (Club 101)*, Case No. 96-60-XA at 18-19 (Aug. 28, 1998) ("*Club 101*") (quoting from the Commentary to the BOCA Code with respect to Subgroup A-2).

Returning to FSLLC's argument, we agree that the IBC does not define a nightclub. The Zoning Code definition of "nightclub" merely requires that the IBC "categorize" an establishment as a "nightclub." The IBC (and the BOCA Code before it) do exactly that. They categorize structures for purposes of numerous safety regulations. That a restaurant and a nightclub fall into the same sub-category under the IBC "Use and Occupancy Classifications" does not affect the analysis under the Zoning Code, however. The Board correctly looked to the IBC and the characteristics of structures that fall within Subgroup A-2 to determine if the Dock of the Bay property is categorized in that grouping. If it is, then it met the Zoning Code definition of "nightclub."

Moreover, as mentioned above, we accord the Board "a degree of deference . . . in its application of the law." *Banks*, *supra*, 354 Md. at 69. In the instant case, the Board's

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[12]Interestingly, that subgroup included "restaurants other than nightclubs."

decision was informed by its experience applying these characteristics, as evidenced by its *Club 101* decision.[13] In *Club 101*, the Board considered whether, under the Zoning Code, a club was operating as a nightclub or an after-hours club. It applied the eight non-exclusive criteria in the commentary to the then applicable BOCA code in analyzing the issue and determined that the club was operating as an after-hours club, in violation of the Zoning Code.[14] The decision reveals, as discussed *supra*, that the eight criteria applied in the instant case were developed at a time when restaurants were not included in Subgroup A-2, thus adding further support to the Board's conclusion that these factors are relevant to the determination whether a structure is "categorized as a nightclub" under the IBC.

FSLLC also maintains that the Dock of the Bay must be *either* a "nightclub" or a "standard restaurant" as those terms are defined under the Zoning Code. FSLLC focuses on the use of the word "primarily" in the definition of "standard restaurant," arguing that, if the Dock of the Bay is "primarily" engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant. We disagree. Several types of restaurants are defined in the Zoning Code, including "carry-out," "fast-food," and "fast-food, drive-through only." *See* Zoning Code § 101. We read the

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[13]The *Club 101* decision was cited by FSLLC both on appeal and before the Board in support of its argument that the Dock of the Bay must be either a "nightclub" or a "restaurant." We will discuss this argument further, *infra*.

[14]In that case, the property owner actively advocated for a finding that the property met the eight characteristics because a "night club" was a permitted use in the zone in question.

phrase "primarily for serving meals and beverages to persons seated at tables on the premises of the establishment" as being intended to distinguish a "standard restaurant" from the other types of restaurants defined in the Zoning Code. This conclusion is buttressed further by the fact that the definition specifically permits a standard restaurant to "offer a carry-out service, provided that such service is accessory to the principal restaurant operations." *Id.*

We also find support in the Zoning Code for the proposition that a property can operate as a "dual use." Section 230.1.A of the Zoning Code sets forth the permissible uses in a B.L. zone. Section 230.1.A.10 lists as a permissible use "combinations of the above uses." It is implicit in this section that properties may operate with dual permissible uses. It follows that a property also could be operating as a dual use with one use being permissible and one use being impermissible. Thompson also testified to this effect before the Board based on his experience in the CED.

Moreover, the only legal authority FSLLC cites for the proposition that a property cannot operate as a dual use actually supports the opposite position. In *Club 101*, the Board explicitly stated that the club could not be both a "night club" and an "after hours club." The then existing definition of an "after hours club" provided, however, that "[a]n after hours club is not a nightclub as defined in the zoning regulations or the building code of Baltimore

County." No such limitation appears in the definition of a "standard restaurant" in the Zoning Code.[15]

FSLLC also challenges the Board's factual finding that six of the eight characteristics of Subgroup A-2 were met. As discussed, *supra*, we review these findings under the deferential substantial evidence standard. We have reviewed the transcript and the record and are satisfied that there was substantial evidence in the record to support these findings.[16]

Finally, FSLLC echoes the concerns expressed by both the majority and dissenting members of the Board that the definition of a nightclub under the Zoning Code is extremely broad. We agree with the Board majority that this is a matter for the Baltimore County Council to address if it is deemed necessary. "The 'wisdom or expediency' of the [zoning ordinance] in its current form is not a matter for judicial intervention." *Lonaconing Trap*

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[15]Moreover, the Board found that, while Club 101 exhibited most of the eight characteristics in the BOCA Commentary, it nonetheless was an after hours club because of other characteristics that distinguished its operation. This is similar to the finding in this case that, while the Dock of the Bay may have met the definition of a restaurant, it nonetheless was operating as a nightclub because of distinguishing characteristics. We perceive no error in this conclusion.

[16]For example, the FSLLC challenges the finding of "low level lights." Thanner himself testified, however, that the lights were dimmed "every evening" for live entertainment; that they were turned down "for dinners as well"; and that they also were turned down "[o]n nights when we are open and do not have live entertainment."

Similarly, FSLLC challenges the finding of "above-normal sound levels" on the basis that there was no evidence in the agency record of prior noise violations. There was evidence, however, that the music that was being played at the Dock of the Bay was loud enough to be heard inside the homes of nearby residents. That evidence plainly supported a finding of "above-normal sound levels."

Club, Inc. v. Md. Dep't of the Env't, 410 Md. 326, 349 (2009) (quoting *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 48 (1973)).

II.

FSLLC contends the definition of "nightclub" under the Zoning Code is "arbitrary, unreasonable and confusing" and therefore the application of that definition is a violation of its due process rights. It also maintains that the County's practice of "discretionary enforcement" of the Zoning Code is unconstitutional.

FSLLC raises these arguments for the first time on appeal. Accordingly, they are not preserved for review.[17] *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *see also Heft v. Maryland Racing Comm'n*, 323 Md. 257, 273-74 (1991) (party may not obtain judicial review of an issue not raised before administrative agency); *Gonzales v. Ghinger*, 218 Md. 132, 135 (1958) (attack on validity of a section of the Baltimore City Code raised for the first time on appeal would not be

[17]As discussed, *supra*, the dissenting member of the Board suggested the possibility of a due process violation in his opinion. The circuit court judge presiding over this case on judicial review also commented on this issue during oral argument, but ultimately affirmed the Board's decision. FSLLC did not raise this issue in its appeal to the Board in its motion for reconsideration or in its petition for judicial review, however.

heard). Moreover, FSLLC cites to no Maryland authority for its propositions.[18] We decline to consider these arguments on appeal.

III.

Finally, FSLLC contends it was error for the CED to charge it with a violation of IBC section 3103 for erecting a tent without a permit. It follows that it was error for the hearing officer to find the violation and for the Board to affirm the finding. This contention is based on the letter of complaint to the CED from Ciarpella's counsel stating that FSLLC had "constructed a 40 X 60 foot reception tent . . . which has been on the property for approximately eight months." According to FSLLC, section 3103 of the IBC is inapplicable to structures in place for more than 180 days.

FSLLC received two citations related to the tent. On August 14, 2006, it was charged with violating section 3103 and ordered to "remove tent or obtain permit." A hearing before a hearing officer was held nine days later and a violation was found. On July 5, 2007, it was again charged with violating section 3103 for having a "tent erected without permit," in addition to continuing nightclub violations. A little over a month later, a hearing was held and a violation was found. In the first case, FSLLC was fined $5,000 both for the nightclub violation and the tent violation. As discussed, *supra*, the Board reduced this fine to $1,000.

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[18]FSLLC instead relies upon section 18:11 of *The Law of Municipal Corporations* pertaining to the standards for discretionary enforcement. Eugene McQuillin, *The Law of Municipal Corporations* (3d ed. 2004). Our research reveals that this section has never been cited in a reported opinion of this Court or the Court of Appeals.

In the second case, a fine of $1,000 was imposed, again without distinction between the tent and nightclub violations.

FSLLC does not point us to any place in the record where it made the argument raised on appeal before the hearing officer.[19] It was raised before the Board, but the Board only reviewed the issue on the record before the hearing officer and found that the hearing officer's decision was supported by substantial evidence and was not premised on an erroneous conclusion of law.

Even if preserved, we find no error in this decision. IBC section 3103 governs "Temporary Structures." Section 3103.1 explains the applicability of this section as follows:

> The provisions of this section shall apply to structures erected for a period of less than 180 days. Tents and other membrane structures erected for a period of less than 180 days shall comply with the *International Fire Code*. Those erected for a longer period of time shall comply with applicable sections of this code.
>
> > **Exception:** Provisions of the *International Fire Code* shall apply to tents and membrane structures erected for a period of less than 180 days.
> >
> > **3103.1.1 Permit Required.** Temporary structures that cover an area in excess of 120 square feet (11.16 m^2), including connecting areas or spaces with a common means of egress or entrance which are used or intended to be used for the gathering together of 10 or more persons, shall not be erected, operated or maintained for any purpose without obtaining a permit from the building official.

(Underlined emphasis added.)

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[19]No transcript of those proceedings is provided in the record extract.

This provision states that tents erected for less than 180 days must comply with the *International Fire Code*, whereas tents erected for "longer periods of time" must comply with the "applicable sections of this code." In other words, contrary to FSLLC's argument, an exception is carved out of section 3103 for tents erected for less than 180 days, but a tent erected for longer must comply with the permit requirement found either in that section or in section 105.1. Accordingly, we find no merit in FSLLC's contention that it was charged under the wrong section of the IBC.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.

Prot. 4



DOB PARKING LOT - ~~AERIAL~~ TAKEN FROM TAMMY'S DECK.



PARKING LOT + DOB - TAKEN FROM WOCINSKI'S DECK
LOT 489


08/09/200



TAKEN FROM LOT 494, SESSA.

DOB PIER, PATIO, BACK DOOR


METHADY
approx. 106'
HRANICKA
SESSA
approx. 40' PIER
CAPPELLA
WOLINSKI'S
DECK
DOCK BAR
DOB PIER
08/11/2007



DOB + PARKING LOT - TAKEN FROM MATT'S

MAIN ENTRANCE

LOT 490 -


Dock
Shuttle
07/12/2007



TAKEN FROM LOT 493 - HRANICKA; -> OUTSIDE DECK, BAR, PIER AREA

Motion's Hearing

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondylas, LLC

Exhibit List

Party: People's Counsel/Motion Date: 2-17-16

Exhibit No:	Description:
✓ Motion 1	compilation of BCZR, opinion of OAH (Case No. 2016-0003-SPH), Trial Memorandum from appellant (Case No. 2016-003-SPH), definition of anticipate, unreported Court of Special appeals of Maryland (No. 810 September Term 2009, filed July 9, 2010), Majority Opinion of Baltimore County Board of appeals (Case No.s CBA-06-044 and CBA No. 07-134)
✓ 2	Zoning checklist/ Department of
	VERIFIED BY KC DATE: 2/19/16

Martin exhibit 1

People's Counsel exhibit 1

MUSEUM

A building or buildings serving as a repository for a collection of natural, scientific, historic, artistic, or literary objects designed to be viewed by members of the public, which collection has an appraised value in excess of $20,000,000. The following activities are included in the definition of a museum: acquisition, conservation, documentation, study, exhibition, and educational interpretation of such objects.
[Bill No. 6-2008]

NANOBREWERY

An establishment that produces and bottles, on site, no more than 3,000 barrels of malt beverages annually for self-distribution, and no more than 500 barrels annually for on-site consumption.
[Bill No. 19-2015]

NEIGHBORHOOD CAR RENTAL AGENCY

The principal use of land for the rental of motor vehicles weighing 7,000 pounds (GVW) or less, including the parking of no more than 25 such vehicles on the premises. The term does not include a business that rents or leases motor vehicles as an accessory use, or rents or leases trailers, or trucks weighing over 7,000 pounds (GVW), or supplies limousines for hire, or that is a taxicab service. (See also "garage, service.")
[Bill No. 122-2005]

NIGHTCLUB

A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County.
[Bill No. 110-1993]

NONCONFORMING USE

A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use.
[Bill No. 18-1976]

NONINDUSTRIAL USE

Any use other than an industrial, quasi-industrial or industry-related use.
[Bill No. 178-1979]

NUDITY

A state of dress in which a human buttock, anus, genitalia or female breast is completely bared.
[Bill No. 137-1990]

NUDITY, PARTIAL

A state of dress in which clothing covers no more than the genitals, pubic region and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.
[Bill No. 137-1990]

NURSERY, HORTICULTURAL

An agricultural operation primarily engaged in the production and marketing of trees, shrubs and plants. The plant materials may be produced on the premises and may be purchased elsewhere at any stage of maturity for further production. Horticultural nurseries may engage in accessory uses such as storage of plant materials, sale of products necessary for the health of the nursery stock, and provision of limited landscape services. A nursery which sells plant materials grown exclusively on-site and which does not offer any of the accessory services permitted at horticultural nurseries shall be considered a farm.
[Bill No. 41-1992]

convenience store, and dairy barn. Section 101 of the BCZR defines a standard restaurant as "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment."

The definition of "nightclub" is found in BCZR § 101, List of Definitions, and states:

> A tavern or other establishment which permits live or recorded entertainment with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County.

Section 101 also defines a tavern as:

> An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of a nightclub, as defined in these regulations, shall be considered a nightclub.

A tavern and standard restaurant are allowed in a B.L. zone; a nightclub is not allowed.

The International Building Code, adopted in Bill No. 1-05 by the County Council, includes, in § 303.1:

> 303.1 Assembly Group A:
>
> Assembly Group A occupancy includes, among others, the use of a building or structure or a portion thereof, for the gathering together of persons for purposes such as civic, social, or religious functions, recreation, food or drink consumption, or awaiting transportation....

Following the major assembly group are the five sub-assembly groups. A-2 is the primary group with which we are concerned in this matter.

> A-2. Assembly uses intended for food and/or drink consumption, including but not limited to:
>
> banquet halls
> nightclubs
> restaurants
> taverns and bars

In a discussion of the various groups, the Code states:

> ...In the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high....Darkened spaces in theaters, nightclubs, and the like serve to increase hazards. In emergencies, the congestion caused by large numbers of people rushing to exits can cause panic conditions.

The characteristics for sub-assembly group A2 state:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - low light levels;
> - entertainment by a live band or recorded music generating above-normal sound levels;
> - no theatrical stage accessories;
> - later than average operating hours;
> - tables and seating arranged or positioned so as to create ill-defined aisles;
> - a specific area designated for dancing;
> - service facilities for alcoholic beverages and food; and
> - high occupant load density.

There follows an example which states:

> Example: The Downtown Club, a popular local nightclub /dance hall, features a different band every weekend [See figure 303.1(5)]. It is equipped with a bar and basic kitchen facilities so that beverages and appetizers can be served. There is a platform for a band to perform on, a dance floor in front of the platform, and numerous cocktail tables and chairs. The tables and chairs are not fixed, resulting in a haphazard arrangement such that there are no distinct aisles. When the band performs, the houselights are dimmed and spotlights are keyed in on the performers. The club is equipped with a sound system that is used at loud levels. The club is open until 3:00 a.m. – the latest time the local jurisdiction will allow.

From this descript of The Downtown Club, one can readily see that the appropriate classification is Group A-2. Sometimes, however, it is not this easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building.

The Board recognizes that this decision could have far-reaching effects in the County. The definition of "nightclub" in the BCZR is certainly far from being crystal clear. As testified to by the Building Inspector, the inspection department operates solely on a complaint basis. Their criteria for finding a nightclub would be any restaurant, tavern or bar which provides live

IN THE MATTER OF: Boone Kondylas, LLC 9025 Cuckold Point Road	*	BEFORE THE
	*	BOARD OF APPEALS
	*	FOR
15th Election District 7th Councilmanic Districts	*	BALTIMORE COUNTY
	*	Case No. 2016-003-SPH

RECEIVED BY
FEB 01 2016
PEOPLE'S COUNSEL FOR
BALTIMORE COUNTY

* * * * * * * * * * * * *

TRIAL MEMORANDUM

Boone Kondylas LLC, Petitioner/Appellant, through Lawrence E. Schmidt and Smith, Gildea and Schmidt, its attorneys, submits this Trial Memorandum and respectfully states the following.

Facts

This matter comes before the Board of Appeals ("Board") as an appeal by Boone Kondylas, LLC (property owner) of the denial of a Petition For Special Hearing by the County Administrative Law Judge ("ALJ"). By written decision dated October 22, 2015 ALJ John E. Beverungen denied the Petitioner's Petition for Special Hearing, holding that consideration of the same was barred by the doctrine of res judicata. Petitioner avers that such decision is erroneous and offers the following in support of its contention.

The relevant facts related to this case are largely not in dispute. The subject property is a water front property in the Millers' Island community of eastern Baltimore County. The property is zoned BL. The property is 55,594 square feet (1.276 acres) in area. The property is improved with a commercial building and associated parking

without incident. The primary focus of the business is to serve meals to its patrons. Indeed, more than three quarters of the restaurant's revenue is derived from food sales, the rest from sales of alcohol.

It is proffered that the current operation of the restaurant is different from Fifth Street's operation, including but not limited insofar as to the following characteristics:

- Lighting levels do not change when entertainment will be provided.
- The nature of the entertainment is markedly different. The owner anticipates "solo acts" of adult contemporary music geared towards a mature crowd and not live rock and roll bands.
- There will be no stage or stage accessories.
- The restaurant typically stays open until midnight and closes earlier on weekdays. The restaurant operates year round.
- The tables and seating are laid out to create defined aisles.
- There is no dance floor or dancing.
- The primary focus of the business is to serve meals, not provide entertainment.
- The restaurant is typically not over crowded or even at capacity.

In April 2015, the operator of the Dock of the Bay arranged for a solo acoustic guitar solo player to provide music one weekend night to enhance the patrons dining experience. Shortly thereafter, an inspector from the Department of Permits, Approvals and Inspections (Code Citation Division) appeared at the restaurant and advised the manager that the playing of any music was not allowed and that "you'll be shut down"

anticipate

see definition of anticipate

show all

verb expect; predict *verb* act in advance of

assun

33 Synonyms found for anticipate

Relevance A-Z Complexity Length

Synonyms for anticipate

Common Informal

verb expect; predict

assume	conjecture	suppose	foretaste
await	divine	visualize	have a hunch
count on	entertain	wait	hope for
forecast	figure	bargain for	jump the gun
foresee	foretell	be afraid	look for
prepare for	prognosticate	count chickens	look forward to
see	prophesy	cross the bridge	plan on
prevision			
promise oneself			
see coming			
see in the cards			
wait for			

Antonyms for anticipate

doubt	be surprised	be unready
be amazed		

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Word Origin & History

anticipate 1530s, "to cause to happen sooner," from L. anticipatus, pp. of anticipare "take (care of) ahead of time," lit. "taking into possession beforehand," from ante "before" (see ante) + capere "to take" (see capable). Later "to be aware of (something) coming at a future time" (1640s). Used in the sense of "expect, look forward to" since 1749, but anticipate has an element of "prepare for, forestall" that should prevent its being used as a synonym for expect. Related: Anticipatory (1660s).

Usage Notes

Despite claims that **anticipate** should only be used to mean "to perform (an action) or respond to (a question, etc.) in advance" or "to forestall," it has been used widely since the 18th century as a synonym for *expect*, often with an implication of pleasure: We **anticipate** a large turnout at the next meeting. This use is standard in all types of speech and writing.

More words related to **anticipate**

abide
verb. stop temporarily and wait for

anticipate	linger	rest	stick around
bide	pause	sojourn	stop
expect	remain	stay	tarry
wait			

Example Sentences for anticipate

"I do not **anticipate** much difficulty as to that," answered the professor.

This was indeed an honour I had scarcely dared to **anticipate**.

It was hoped to **anticipate** the demands of the Conference by a scheme of reform wider than they were likely to advise.

He looked for a minute as if he were trying to **anticipate** that day by the exercise of his reason.

EXPAND

await
verb. wait with expectation

anticipate	be ready for	hang around	hope
attend	cool one's heels	hang in	look for
be prepared for	count on	hang out	look forward to
stay			
sweat			
sweat it out			

bargain for
verb. expect

aim for	contemplate	foresee	look for
anticipate	count on	imagine	plan on
reckon on			

calculate
verb. plan on

aim	build	intend	rely on
anticipate	count on	judge	suppose
assume	depend on	plan	think likely
bank on	design	reckon	trust

discern
verb. catch sight of; recognize and understand

anticipate	discover	focus	note
apprehend	discrepate	foresee	notice
ascertain	discriminate	get a load of	observe
behold	distinguish	get the picture	perceive
descry	divine	get wise to	pick out
detect	espy	judge	read
determine	extricate	know	remark
difference	figure out	make distinction	rubberneck
differentiate	find out	make out	secern
see the light			
see through			
separate			
severalize			
spot			
take in			
view			

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synonyms typical

My Synonyms (0)

anticipate typical

typical

see definition of typical

show all

classi

adj **usual, conventional**

42 Synonyms found for typical

Relevance A-Z Complexity Length

Common Informal

Synonyms for typical

adj **usual, conventional**

classic	regular	expected	model
common	symbolic	general	old hat
commonplace	archetypal	habitual	orthodox
emblematic	archetypical	ideal	paradigmatic
exemplary	average	illustrative	patterned
natural	characteristic	in character	prevalent
normal	classical	in keeping	prototypal
ordinary	essential	indicative	prototypical
quintessential	everyday	matter-of-course	representative
standard			
standardized			
stock			
suggestive			
typic			
unexceptional			

Word Origin & History

typical c.1600, "symbolic, emblematic," from M.L. typicalis "symbolic," from L.L. typicus "of or pertaining to a type," from Gk. typikos, from typos "impression" (see type). Sense of "characteristic" is first recorded 1850. Related: Typically.

Antonyms for typical

abnormal	extraordinary	rare	unusual
different	infrequent	refined	atypical
eccentric	irregular	uncommon	unconventional
unorthodox			

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More words related to **typical**

accustomed
adj. normal, usual

accepted	customary	general	regular
chronic	established	habitual	routine
common	everyday	ordinary	set
conventional	expected	orthodox	traditional
typical			

Example Sentences for typical

In him you may see a typical and beautiful example of the Survival of the Fittest.

This single example is, as we may be sure, typical of a whole series of actions.

It is an habitual way of reacting to a definite and typical situation.

They were more your idea of typical Americans, weren't they?

EXPAND

classic
adj. characteristic, regular

prototypal
prototypical
representative
simple
standard
time-honored
typical
usual
vintage

common
adj. average, ordinary

accepted
banal
bourgeois
casual
characteristic
colloquial
comformable
commonplace
conventional
current
customary
daily
everyday
familiar
frequent
general
habitual
hackneyed
homely
humdrum
informal
mediocre
monotonous
natural
passable
plain
prevailing
prevalent
probable
prosaic
regular
routine
run-of-the-mill
simple
stale
standard
stereotyped
stock
trite
trivial
typical
undistinguished
universal
unvaried
usual
wearisome
workaday
worn-out

commonplace
adj. usual, everyday

boiler plate
characterless
clichéd
colorless
conventional
corny
customary
dime-a-dozen
familiar
familiar tune
garden variety
hackneyed
humdrum
lowly
mainstream
matter-of-course
mediocre
middle-of-the-road
middling
mundane
natural
normal
obvious
ordinary
pedestrian
plebeian
prevalent
prosaic
run-of-the-mill
stale
starch
stereotyped
threadbare
trite
typical
uneventful
unexceptional
uninteresting
unnoteworthy
vanilla
widespread
workaday
worn-out

conventional
adj. common, normal

accepted
accustomed
button-down
commonplace
everyday
expected
fashionable
formal
orthodox
plain
popular
predominant
ritual
routine
square
standard

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-07-134

* * * * * * *

MAJORITY OPINION

These cases come to the Board on appeal from two decisions of the Code Enforcement Hearing Officer and a decision of the Zoning Commissioner. The two decisions of the Code Enforcement Hearing Officer found the Petitioner, Fifth Street, LLC, guilty of violations of the County Code and levied fines of $5,000.00 and $1,000.00. The appeal from the decision of the Zoning Commissioner found that the Dock of the Bay, operated by Fifth Street, LLC, was classified as a nightclub under the Baltimore County Zoning Regulations (BCZR) and was in violation of the BCZR for operating a nightclub within a Business Limited (B.L.) zone.

Since the cases basically involved an interpretation of the County zoning regulations and the same sets of circumstances, the Board consolidated the cases for hearing. A hearing on the merits was held on January 15, 2008. Testimony was taken in Case No. 07-144-SPH, and oral

argument was conducted in Cases No. CBA-06-044 and No. CBA-07-134. Petitioner, Fifth Street, LLC, and Lawrence Thanner, Legal Owner, was represented by J. Carroll Holzer, Esquire. Protestants, Matthew J. and Nancy Jean Ciarpella, Phil and Kay Sessa, Charlie and Darrell Wolinski, Michael and Robert Poleski, David and Vena Sheck, Ken Schoyl and Tammy Novak, Doug W. Waldmann, et al, Louis Petrovia, Robert Haas, David Znamirowski, David McWilliams, and Terri Poleski, were represented by Francis X. Borgerding, Jr., Esquire. Baltimore County was represented by Nancy C. West, Assistant County Attorney. The parties were given the opportunity to file briefs on February 19, 2008. A public deliberation was held on March 13, 2008.

Background

Fifth Street, LLC, and Lawrence J. Thanner, its Resident Agent, operates the Dock of the Bay restaurant offering dining facilities and services at its location at 9025 Cuckold Point Road, Millers Island, in Baltimore County, Maryland. On August 8, 2006, the Dock of the Bay was cited for a Code violation, with a proposed penalty of $5,000.00, for operating a nightclub in a B.L. zone. In addition, Fifth Street, LLC, was cited for erecting a tent on the premises without obtaining the required permit from the County. A hearing was held before the Code Enforcement Hearing Officer on August 23, 2006, and a decision was rendered on August 25, 2006, ordering the Respondent to remove the tent and finding that the property "is being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use and continued unabated despite receiving notice of violation on May 12, 2006. A restaurant with dancing and/or live or recorded entertainment is not a permitted use in a B.L. zone."

After that hearing, Fifth Street, LLC, filed a Petition for Special Hearing in Case No. 07-144-SPH. This Petition requested the Zoning Commissioner to interpret the zoning regulations for Baltimore County with respect to the operation of a nightclub.

The decision of the Zoning Commissioner finding that Fifth Street, LLC, and the Dock of the Bay was a restaurant providing music during the day and was a "nightclub" as defined in BCZR § 101, 102.1, and 230, was dated May 30, 2007. Subsequent to that date, Fifth Street, LLC, was again cited for violation of the *Baltimore County Code* (BCC) for failure to obtain a permit for a tent and also for violation of BCZR § 101, 102.1, 230, and 500.6 for failure to cease operation of a nightclub in a B.L. zone. A second hearing was held before the Code Enforcement Hearing Officer and, by decision dated August 16, 2007, the Code Enforcement Hearing Officer again found Dock of the Bay in violation of BCZR for operating a nightclub in a B.L. zone and erecting a tent without obtaining the required permit. The Hearing Officer imposed a $1,000.00 fine in that case.

Testimony and Evidence

Petitioner presented Lawrence J. Thanner, Managing Member of Fifth Street, LLC, as their principal witness. Mr. Thanner stated that the Dock of the Bay has been a restaurant since 1955 and, to his knowledge, always had music and on many occasions, providing live bands. Mr. Thanner opened the new Dock of the Bay restaurant in March of 2004 after refurbishing the building from the effects of Hurricane Isabel. Everything was completely refurbished and new equipment was installed in the restaurant.

Thanner stated that the restaurant has a 2,400 square foot rectangular bar at one end and has tables and chairs on the main floor to accommodate diners. He stated that the restaurant could seat about 150 to 160 patrons inside. In the summertime, he has an outside patio with an outside bar and tables with umbrellas and chairs for patrons to utilize. The restaurant has 14 boat

slips for transient boat customers. The restaurant also has a playground for children, with a wooden pirate ship to allow children to play on the playground. The restaurant opens every day at 11:00 a.m. and closes at 2:00 a.m. In the winter, the restaurant will close early when customers are gone. Thanner testified that the restaurant kitchen closes at 11:00 p.m., but that the bar will stay open until 2:00 a.m. He stated that the restaurant has a full commercial kitchen and provides a full menu of seafood, steaks, sandwiches, etc. He has licenses from the Baltimore County Health Department, which states that he is a restaurant, and a basic license from the State of Maryland, which also states that it is a restaurant.

The restaurant has ten television sets inside and two out on the patio. There is a house music system that plays radio and satellite radio inside and outside. There are outside speakers. The television sets are on all the time except when they have live entertainment.

Mr. Thanner stated that he does have live entertainment at the restaurant with a D.J. playing for karaoke participants and live bands on Friday and Saturday nights. On those occasions, the entertainment goes from 9:00 p.m. to 1:00 a.m. During the previous summer, he stated that he had live music on Saturday afternoon and Sunday afternoon from 4:00 p.m. to 8:00 p.m.

Mr. Thanner stated that he had stopped the music after 8:00 p.m. after the Liquor Board had told him to cease the music. He stated that he had full-scale bands in 2004 with no complaints, but in 2005, a Liquor Board inspector told him to "pipe down" and he still had the bands, but mostly duos or steel bands. He received complaints in May of 2006 from the outside music and wrote a letter to the County asking for clarification on May 14, 2006. This letter was sent to C. Raynor, inspector in the Baltimore County Department of Code Inspections and Enforcement. The letter listed a number of activities, which Mr. Thanner proposed to conduct at the Dock of the Bay and requested clarification as to how these items qualified as a nightclub

under the citation that he had received. This letter was presented as Petitioner's Exhibit #2 to the Board. Thanner stated that he received no response to his letter.

After he sent the letter, he contacted Attorney Carroll Holzer to file for a special hearing. Mr. Thanner stated that 70 percent of the sales at his restaurant were in food and 30 percent are beverages. He indicated that he does not charge for the live entertainment and is open until 2:00 a.m. when the live music is played. Mr. Thanner also stated that, when he has live entertainment, he does lower the lighting level in the restaurant. He stated that the live bands play quite loudly but that he has never been cited for having a noise level about 65 decibels at the property line. He also stated that he does not have any stage accessories for the bands except in the summertime when there is a small stage erected outside on the patio. His operating hours are 11:00 a.m. to 2:00 a.m., which he considered to be normal, but under State law, you cannot sell alcohol past 2:00 a.m. With respect to defined aisles for the tables and chairs, he stated that tables and chairs are set in certain ways to form aisles. He did admit that some time when the bands are playing inside people would move the tables and chairs and dance between the tables. He does have facilities for serving alcoholic beverages and, as previously stated, the restaurant will accommodate 150 to 160 patrons.

Mr. Thanner argued that his operation should not be considered a nightclub based upon the criteria set forth in the International Building Code which has been adopted by the County. It was Mr. Thanner's position that he could not survive in the wintertime without the live music because the restaurant would not pay for itself based solely on food and drinks served during normal times without the music being available.

Mr. James H. Thompson, Supervisor of Code Enforcement, was called by Protestants as a witness and testified that he has worked in Zoning for 31 years, 13 of which as Supervisor of Code Enforcement, and that his office cited Mr. Thanner for being a nightclub operating in a

B.L. zone. Mr. Thompson stated that his office operates on a complaint basis only. He stated that they had had no complaints about the restaurant property before Mr. Thanner took over the property. It was his testimony that his office only reviews a situation based upon a complaint and, if the operation being considered provides live entertainment in a B.L. zone, it would be considered a nightclub and would not be allowed to operate. This would include karaoke, a person playing a piano, and strolling minstrels.

The Protestants presented Matthew Ciarpella, who has resided on Sixth Street adjacent to the Dock of the Bay for 3 years. Mr. Ciarpella complained of hearing the music even though the band was inside and it was wintertime. He stated that Monday through Thursday there were no problems since no music was played, and that when the music was played, it was loud enough for him to hear in his house even though it was not played outside.

Kay Sessa also testified stating that she lived at Sixth Street, which is about 650 feet from the Dock of the Bay. She stated that she heard the karaoke being played and that, although the previous restaurant had live bands, they stopped playing in 1970. She stated that she has been bothered by the live bands of the Dock of the Bay since 2004.

Patricia Waldmann, Charles Wolinski, and Brad Metheny and Bonnie Metheny all testified that they were neighbors living approximately 100 to 250 feet from the Dock of the Bay and that the music played on Friday and Saturday nights was so loud that they could not enjoy a peaceful night's sleep. Wolinski testified that he had gone into the Dock of the Bay and had witnessed that the tables were moved when the bands were playing and that there were not always aisles for the tables.

Finally, George Abendschoen, the Administrator of the Baltimore County Liquor Board, testified that there had been a file opened by his office on the Dock of the Bay. Based upon complaints that were received by the Liquor Board concerning the music that was played, an

inspector, Dan Crockett, had gone to the Dock of the Bay to investigate the matter. There was no determination by the Liquor Board. The report by the inspector, Dan Crockett, was received for identification only but was not admitted as part of the evidence in this matter.

Cases No. CBA-06-044 and No. CBA-07-134

Subsequent to the evidence presented in the special hearing case, the parties argued with respect to the civil citations and the decisions of the Hearing Officer in the above matters. Mr. Holzer contended that, under § 500.6 and 7 of the BCZR, the Hearing Officer had no authority or jurisdiction to interpret the *Baltimore County Zoning Regulations* with respect to whether or not the Dock of the Bay fell under the definition of nightclub. He stated that that was restricted solely to the authority of the Zoning Commissioner. These cases should be determined on the basis of the decision that this Board makes with respect to finding as to whether or not the Dock of the Bay is a nightclub under the BCZR. Mr. Holzer argued that Mr. Thanner had, in good faith, sought clarification in the Baltimore County Department of Code Inspection and Enforcement and received no clarification from that office. He also stated that § 3103 of the *International Building Code*, which has been adopted by the County, applies to structures erected for less than 180 days. He stated that Counsel for the Protestants in his letter claims that, in addition to live music, the tent was up for over 8 months. If that is the case, he felt that his client was cited under the wrong citation. He stated that it was not clear what the fine of $5,000.00 covered and requested a reduction in the fine if the Board finds that the operation is a nightclub. There was no indication as to whether or not there was any evidence presented to the Code Enforcement Hearing Officer with respect to how long the tent was erected at the Dock of the Bay operation.

With respect to the second citation, Mr. Holzer indicated that the second charge should have been given the same file number, even though the first charge was on appeal to the Board.

He stated that the Code Enforcement Hearing Officer in Case No. CBA-07-134 found that the Zoning Commissioner had determined that the playing of outdoor music must be discontinued but did not address the playing of indoor music. The Code Enforcement Hearing Officer found the Dock of the Bay to be a nightclub and therefore in violation of the BCZR. Mr. Holzer wanted further clarification of the fine levied in the second hearing.

In addition, Mr. Holzer indicated that the Zoning Commissioner had received an inquiry from the Liquor Board with respect to his decision. Evidently, the Zoning Commissioner replied to the inquiry, stating that he had determined that the music being played inside and outside the building was prohibited. Mr. Holzer felt that he had to appeal this letter because it was his position that the Zoning Commissioner had not taken any position with respect to the inside music.

Counsel for the Protestants argued to affirm the decision of the Code Enforcement Hearing Officer. He argued that both decisions were affirmed by the decision of the Zoning Commissioner in which he found that the operation was a nightclub. There was no prejudice or reversible error committed and that the Hearing Officer should be affirmed on his findings with respect to the nightclub definition. With respect to the tent, he argued that the tent had been put up on two separate occasions and that the Hearing Officer was correct in finding a violation on both occasions.

Ms. West argued solely with respect to the jurisdictional aspect and it was her position that, under the Code, Article 3, § 6-101, the Hearing Officer had the authority to hear the two cases for finding and was correct in finding the violations.

Decision

There is no question that the Dock of the Bay restaurant is located in a B.L. zone. The B.L. zone uses permitted, as of right, include under § 230.4 a standard restaurant, tea room,

convenience store, and dairy barn. Section 101 of the BCZR defines a standard restaurant as "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment."

The definition of "nightclub" is found in BCZR § 101, List of Definitions, and states:

> A tavern or other establishment which permits live or recorded entertainment with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County.

Section 101 also defines a tavern as:

> An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of a nightclub, as defined in these regulations, shall be considered a nightclub.

A tavern and standard restaurant are allowed in a B.L. zone; a nightclub is not allowed.

The International Building Code, adopted in Bill No. 1-05 by the County Council, includes, in § 303.1:

> 303.1 Assembly Group A:
>
> Assembly Group A occupancy includes, among others, the use of a building or structure or a portion thereof, for the gathering together of persons for purposes such as civic, social, or religious functions, recreation, food or drink consumption, or awaiting transportation....

Following the major assembly group are the five sub-assembly groups. A-2 is the primary group with which we are concerned in this matter.

> A-2. Assembly uses intended for food and/or drink consumption, including but not limited to:
>
> banquet halls
> nightclubs
> restaurants
> taverns and bars

In a discussion of the various groups, the Code states:

> ...In the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high....Darkened spaces in theaters, nightclubs, and the like serve to increase hazards. In emergencies, the congestion caused by large numbers of people rushing to exits can cause panic conditions.

The characteristics for sub-assembly group A2 state:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - low light levels;
> - entertainment by a live band or recorded music generating above-normal sound levels;
> - no theatrical stage accessories;
> - later than average operating hours;
> - tables and seating arranged or positioned so as to create ill-defined aisles;
> - a specific area designated for dancing;
> - service facilities for alcoholic beverages and food; and
> - high occupant load density.

There follows an example which states:

> Example: The Downtown Club, a popular local nightclub /dance hall, features a different band every weekend [See figure 303.1(5)]. It is equipped with a bar and basic kitchen facilities so that beverages and appetizers can be served. There is a platform for a band to perform on, a dance floor in front of the platform, and numerous cocktail tables and chairs. The tables and chairs are not fixed, resulting in a haphazard arrangement such that there are no distinct aisles. When the band performs, the houselights are dimmed and spotlights are keyed in on the performers. The club is equipped with a sound system that is used at loud levels. The club is open until 3:00 a.m. – the latest time the local jurisdiction will allow.

From this descript of The Downtown Club, one can readily see that the appropriate classification is Group A-2. Sometimes, however, it is not this easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building.

The Board recognizes that this decision could have far-reaching effects in the County. The definition of "nightclub" in the BCZR is certainly far from being crystal clear. As testified to by the Building Inspector, the inspection department operates solely on a complaint basis. Their criteria for finding a nightclub would be any restaurant, tavern or bar which provides live

entertainment. This could be anything from a piano player playing background music, a strolling minstrel, or a 12-piece orchestra.

In reviewing the characteristics for the group of facilities classified as A-2 in the Building Code, the Board finds as follows:

1. Low light levels.

Mr. Thanner testified that normally the restaurant is lit at what one would consider a normal level. However, when the band is playing, he did admit that the lights were turned down.

2. Entertainment by a live band or recorded music generating above-normal sound levels.

Mr. Thanner indicated that on Fridays, Saturdays, and Sundays, he has live entertainment, be it karaoke, a D.J., or a small band. In fact, this is a major part of his business and he feels that, without the music, the Dock of the Bay cannot survive during the winter months. The question of whether or not the band and the music is played above normal sound levels is one that would probably be determined by the persons listening to it. Certainly, the neighbors surrounding the Dock of the Bay feel that the sound level of the music is above normal, even during the winter months when music is played inside. There has been no indication that the restaurant has been declared to be in violation of noise levels under the Maryland Occupational Safety and Health Act. However, there is no question that the bands do play at sound levels which extend beyond the four walls of the restaurant.

3. No theatrical stage accessories.

Mr. Thanner testified that there are no theatrical stage accessories, particularly during the winter months. He did state that on weekends during the summer time there is a small stage for the bands that play outside until 8:00 p.m.

4. Later than average operating hours.

Mr. Thanner testified that normal operating hours of the restaurant are 11:00 a.m. to 2:00 p.m. He stated that during the winter the restaurant would close early if there were no patrons. He also indicated that his kitchen closes at 11:00 p.m.; however, the facility will stay open until 2:00 a.m., which is the normal closing hour required by the County for facilities serving liquor.

5. Tables and seating arranged or positioned so as to create ill-defined aisles.

Mr. Thanner again testified that the tables and chairs in the restaurant are generally fixed according to aisles for serving. However, he did state that when a band plays it is normal for individuals to move chairs and tables to allow for the band and also to allow people to dance in between the tables.

6. Specific area designated for dancing.

Mr. Thanner testified that there is no specific dance area. However, once again he did indicate that when the bands are playing people would move the tables and dance in the aisles among the tables.

7. Service facilities for alcoholic beverages and food.

There is no question that the Dock of the Bay serves alcohol and food. Mr. Thanner was quite emphatic that 70 percent of his business comes from the food operation and probably 28 to 30 percent from the alcoholic beverages.

8. High occupant load density.

There is no definition of what a high occupant load density is. Mr. Thanner testified that the restaurant would seat 150 to 160 individuals. On nights when there are bands playing, there appears to be a large crowd coming into the restaurant and one would probably find that it is filled to capacity.

The Board finds that the Dock of the Bay meets at least six of the criteria set forth in Group A-2. This would be criteria 1, 2, 3, 4, 7 and 8.

While our dissenting Member would find that there is no violation when the music is played inside the facility, he would find that it is a nightclub when music is played outside. The Majority finds that the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR. The second criterion does not differentiate between inside and outside noise. The fact that the Dock of the Bay does not provide music Monday through Thursday is not controlling in the opinion of this Board. Playing loud music on Friday through Sunday that can be heard by the neighbors makes the operation a nightclub under the present definition of the BCZR.

The Board is not unmindful that the definition of a nightclub, under the BCZR, can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.M. zones, might be considered "nightclubs" under the present criteria of the BCZR. It is not for the Board to change the definition but for the County Council to consider.

Cases No. CBA-06-044 and No. CBA-07-134

The Board has considered the arguments and evidence presented to the Board and the Code Enforcement Hearing Officer in the above matters.

The Board finds that the Code Enforcement Hearing Officer is authorized to interpret the definition of a nightclub under his duties to hold hearings and issue final orders under § 3-6-206 of the BCZR. In any event, the Zoning Commissioner had found the Dock of the Bay to be a nightclub prior to the holding of the second Code Enforcement hearing. Therefore, the Code Enforcement Hearing Officer could rely on that decision to uphold his findings.

The Board will affirm the decision of the Hearing Officer in both matters but will reduce the penalty to a $1,000.00 fine for operating as a nightclub in a B.L. zone and a $1,000.00 for failure to obtain a permit to erect a tent on a temporary basis at the Dock of the Bay restaurant.

ORDER

IT IS THEREFORE this 4th day of June, 2008, by the Board of Appeals for Baltimore County,

ORDERED that the Petition for Special Hearing pursuant to § 500.6 and 500.7 of the Baltimore County Zoning Regulations requesting a determination as to whether the use of the B.L. zoned property at 9025 Cuckold Point Road is in violation of the zoning regulations, and, specifically, as to whether the facility which provides music at this location is a "nightclub" as defined in the BCZR §§ 101, 102.1 and 230 is hereby answered in the affirmative and the playing of music by way of speaker system, live or recorded entertainment must be discontinued; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-06-044 be and is hereby **AFFIRMED;** and further that the fine is reduced to $1,000.00 for operating a nightclub in a B.L. zone; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-07-134 for operating a nightclub in a B.L. zone and for erecting a temporary tent without a permit be and is hereby **AFFIRMED**; and further that the fine of $1,000.00 for the erection of the tent is **AFFIRMED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules.*

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Wendell H. Grier

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 810

September Term, 2009

FIFTH STREET, LLC., ET AL.

v.

MATTHEW CIARPELLA, ET AL.

Eyler, Deborah S.,
Woodward,
Kehoe,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 9, 2010

Fifth Street, LLC, and its managing member, Lawrence J. Thanner, Jr. (collectively "FSLLC"), the appellants, own the Dock of the Bay, a restaurant and bar located at 9025 Cuckold Point Road in Baltimore County.[1] They appeal from the judgment of the Circuit Court for Baltimore County affirming a decision of the Baltimore County Board of Appeals ("Board"), finding them in violation of the Baltimore County Zoning Code ("Zoning Code") for operating a nightclub in a B.L. (Business Local) zone. The appellees are People's Counsel for Baltimore County ("the County") and Matthew Ciarpella, who resides near the restaurant. The FSLLC presents four questions for our review, which we have consolidated and rephrased as follows:

I. Did the Board err in concluding that the Dock of the Bay operates as a nightclub, as defined in the Zoning Code?

II. Is the definition of a "night club" in the Zoning Code so arbitrary and confusing as to deprive the appellants of their due process rights?

III. Did the Code Enforcement Division hearing officer err in concluding that the appellants violated the Zoning Code by erecting a tent without a permit?[2]

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[1]We will refer to the Dock of the Bay as a restaurant, as all parties seem to agree that it performs this function, but we do not intend this description to be in any way determinative of the central issue in this case.

[2]As framed by FSLLC, the question presented are:

1. In Special Hearing Case No.: CBA-07-144-SPH, the County Board of Appeals erred as a matter of law in determining that the Dock of the Bay restaurant was a night club under the Baltimore County Zoning Regulations definition.

2. In Zoning Violation Case No.: 06-044, the finding of violation was in error as a matter of law.

(continued...)

Assembly Subgroup A-3.[12] *See* Building Officials Code Administrators, *The BOCA National Building Code/1999* 18 (14th ed. 1999). As discussed, *supra*, under the IBC, restaurants are categorized in Subgroup A-2. Under both BOCA and IBC, nightclubs are categorized in Subgroup A-2. The IBC Commentary, discussed *supra*, setting forth the eight non-exclusive characteristics of Subgroup A-2, appears to have been lifted verbatim from the BOCA Commentary that preceded it. *See In the Matter of the Application of Rampart Partnership (Club 101)*, Case No. 96-60-XA at 18-19 (Aug. 28, 1998) ("*Club 101*") (quoting from the Commentary to the BOCA Code with respect to Subgroup A-2).

Returning to FSLLC's argument, we agree that the IBC does not define a nightclub. The Zoning Code definition of "nightclub" merely requires that the IBC "categorize" an establishment as a "nightclub." The IBC (and the BOCA Code before it) do exactly that. They categorize structures for purposes of numerous safety regulations. That a restaurant and a nightclub fall into the same sub-category under the IBC "Use and Occupancy Classifications" does not affect the analysis under the Zoning Code, however. The Board correctly looked to the IBC and the characteristics of structures that fall within Subgroup A-2 to determine if the Dock of the Bay property is categorized in that grouping. If it is, then it met the Zoning Code definition of "nightclub."

Moreover, as mentioned above, we accord the Board "a degree of deference . . . in its application of the law." *Banks*, *supra*, 354 Md. at 69. In the instant case, the Board's

[12]Interestingly, that subgroup included "restaurants other than nightclubs."

decision was informed by its experience applying these characteristics, as evidenced by its *Club 101* decision.[13] In *Club 101*, the Board considered whether, under the Zoning Code, a club was operating as a nightclub or an after-hours club. It applied the eight non-exclusive criteria in the commentary to the then applicable BOCA code in analyzing the issue and determined that the club was operating as an after-hours club, in violation of the Zoning Code.[14] The decision reveals, as discussed *supra*, that the eight criteria applied in the instant case were developed at a time when restaurants were not included in Subgroup A-2, thus adding further support to the Board's conclusion that these factors are relevant to the determination whether a structure is "categorized as a nightclub" under the IBC.

FSLLC also maintains that the Dock of the Bay must be *either* a "nightclub" or a "standard restaurant" as those terms are defined under the Zoning Code. FSLLC focuses on the use of the word "primarily" in the definition of "standard restaurant," arguing that, if the Dock of the Bay is "primarily" engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant. We disagree. Several types of restaurants are defined in the Zoning Code, including "carry-out," "fast-food," and "fast-food, drive-through only." *See* Zoning Code § 101. We read the

[13]The *Club 101* decision was cited by FSLLC both on appeal and before the Board in support of its argument that the Dock of the Bay must be either a "nightclub" or a "restaurant." We will discuss this argument further, *infra*.

[14]In that case, the property owner actively advocated for a finding that the property met the eight characteristics because a "night club" was a permitted use in the zone in question.

phrase "primarily for serving meals and beverages to persons seated at tables on the premises of the establishment" as being intended to distinguish a "standard restaurant" from the other types of restaurants defined in the Zoning Code. This conclusion is buttressed further by the fact that the definition specifically permits a standard restaurant to "offer a carry-out service, provided that such service is accessory to the principal restaurant operations." *Id.*

We also find support in the Zoning Code for the proposition that a property can operate as a "dual use." Section 230.1.A of the Zoning Code sets forth the permissible uses in a B.L. zone. Section 230.1.A.10 lists as a permissible use "combinations of the above uses." It is implicit in this section that properties may operate with dual permissible uses. It follows that a property also could be operating as a dual use with one use being permissible and one use being impermissible. Thompson also testified to this effect before the Board based on his experience in the CED.

Moreover, the only legal authority FSLLC cites for the proposition that a property cannot operate as a dual use actually supports the opposite position. In *Club 101*, the Board explicitly stated that the club could not be both a "night club" and an "after hours club." The then existing definition of an "after hours club" provided, however, that "[a]n after hours club is not a nightclub as defined in the zoning regulations or the building code of Baltimore

County." No such limitation appears in the definition of a "standard restaurant" in the Zoning Code.[15]

FSLLC also challenges the Board's factual finding that six of the eight characteristics of Subgroup A-2 were met. As discussed, *supra*, we review these findings under the deferential substantial evidence standard. We have reviewed the transcript and the record and are satisfied that there was substantial evidence in the record to support these findings.[16]

Finally, FSLLC echoes the concerns expressed by both the majority and dissenting members of the Board that the definition of a nightclub under the Zoning Code is extremely broad. We agree with the Board majority that this is a matter for the Baltimore County Council to address if it is deemed necessary. "The 'wisdom or expediency' of the [zoning ordinance] in its current form is not a matter for judicial intervention." *Lonaconing Trap*

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[15]Moreover, the Board found that, while Club 101 exhibited most of the eight characteristics in the BOCA Commentary, it nonetheless was an after hours club because of other characteristics that distinguished its operation. This is similar to the finding in this case that, while the Dock of the Bay may have met the definition of a restaurant, it nonetheless was operating as a nightclub because of distinguishing characteristics. We perceive no error in this conclusion.

[16]For example, the FSLLC challenges the finding of "low level lights." Thanner himself testified, however, that the lights were dimmed "every evening" for live entertainment; that they were turned down "for dinners as well"; and that they also were turned down "[o]n nights when we are open and do not have live entertainment."

Similarly, FSLLC challenges the finding of "above-normal sound levels" on the basis that there was no evidence in the agency record of prior noise violations. There was evidence, however, that the music that was being played at the Dock of the Bay was loud enough to be heard inside the homes of nearby residents. That evidence plainly supported a finding of "above-normal sound levels."

Club, Inc. v. Md. Dep't of the Env't, 410 Md. 326, 349 (2009) (quoting *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 48 (1973)).

II.

FSLLC contends the definition of "nightclub" under the Zoning Code is "arbitrary, unreasonable and confusing" and therefore the application of that definition is a violation of its due process rights. It also maintains that the County's practice of "discretionary enforcement" of the Zoning Code is unconstitutional.

FSLLC raises these arguments for the first time on appeal. Accordingly, they are not preserved for review.[17] *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *see also Heft v. Maryland Racing Comm'n*, 323 Md. 257, 273-74 (1991) (party may not obtain judicial review of an issue not raised before administrative agency); *Gonzales v. Ghinger*, 218 Md. 132, 135 (1958) (attack on validity of a section of the Baltimore City Code raised for the first time on appeal would not be heard). Moreover, FSLLC cites to no Maryland authority for its propositions.[18] We decline to consider these arguments on appeal.

[17]As discussed, *supra*, the dissenting member of the Board suggested the possibility of a due process violation in his opinion. The circuit court judge presiding over this case on judicial review also commented on this issue during oral argument, but ultimately affirmed the Board's decision. FSLLC did not raise this issue in its appeal to the Board in its motion for reconsideration or in its petition for judicial review, however.

III.

Finally, FSLLC contends it was error for the CED to charge it with a violation of IBC section 3103 for erecting a tent without a permit. It follows that it was error for the hearing officer to find the violation and for the Board to affirm the finding. This contention is based on the letter of complaint to the CED from Ciarpella's counsel stating that FSLLC had "constructed a 40 X 60 foot reception tent . . . which has been on the property for approximately eight months." According to FSLLC, section 3103 of the IBC is inapplicable to structures in place for more than 180 days.

FSLLC received two citations related to the tent. On August 14, 2006, it was charged with violating section 3103 and ordered to "remove tent or obtain permit." A hearing before a hearing officer was held nine days later and a violation was found. On July 5, 2007, it was again charged with violating section 3103 for having a "tent erected without permit," in addition to continuing nightclub violations. A little over a month later, a hearing was held and a violation was found. In the first case, FSLLC was fined $5,000 both for the nightclub violation and the tent violation. As discussed, *supra*, the Board reduced this fine to $1,000.

[18]FSLLC instead relies upon section 18:11 of *The Law of Municipal Corporations* pertaining to the standards for discretionary enforcement. Eugene McQuillin, *The Law of Municipal Corporations* (3d ed. 2004). Our research reveals that this section has never been cited in a reported opinion of this Court or the Court of Appeals.

10/22/15

IN RE: **PETITION FOR SPECIAL HEARING** **(9025 Cuckold Point Road)** 15th Election District 7th Council District	*	BEFORE THE
	*	OFFICE OF
	*	ADMINISTRATIVE HEARINGS
Boone Kondylas, LLC *Legal Owner* Petitioner	*	FOR BALTIMORE COUNTY
	*	**Case No. 2016-0003-SPH**

* * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Boone Kondylas, LLC, legal owner. The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

Ken Boone appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioner. Several neighbors, represented by Francis Borgerding, Esq., attended and opposed the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Bureau of Development Plans Review (DPR). Neither agency opposed the request, but suggested certain conditions be imposed if relief is granted.

The subject property is 1.27 acres and zoned B.L. The property is improved with a restaurant known as "Dock of the Bay." The restaurant has new ownership, which proposes to offer limited music and live entertainment as an "accessory" use to the food and beverage service. This property and business have been the subject of protracted litigation concerning loud music and unruly patrons which disturbed the neighborhood. The operation was found by the court of

special appeals to constitute a "nightclub," a use prohibited in the B.L. zone. Protestants contend the petition is barred by *res judicata,* while Petitioner argues that unlike the former operation the current business is first and foremost a restaurant, with music offered to compliment the dining experience.

Under Maryland law, an agency determination affirmed on appeal is entitled to preclusive effect. Esslinger v. Balto. City, 95 Md. App. 607, 621 (1993). This is the case, and *res judicata* will apply, unless there is a significant change in circumstances between the earlier and subsequent action. *See, e.g.*, Alvey v. Hedin, 243 Md. 334, 340 (1966). In light of this authority I believe the doctrine of *res judicata* mandates that the petition in this case be dismissed.

As an initial matter, I do not believe the OAH has the authority to "amend" restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the board of appeals, circuit court and then the court of special appeals. In an unreported opinion (No. 810, September Term, 2009) the appellate court affirmed the agency findings, which necessarily included the conditions and restrictions found in those orders. To amend those restrictions at this juncture would be akin to reversing the appellate court, which an administrative agency cannot do.

I believe the Petition must also be denied based on *res judicata.* As discussed above, *res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard. For example, if the owner of the subject property was now proposing to operate a barbershop or beauty salon at the site, that would constitute a significant change and *res judicata* would not apply. But here, I do not believe there

have been significant changes; Petitioner is still proposing to operate a restaurant that would offer live and/or recorded music.

The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010).

THEREFORE, IT IS ORDERED this **22nd** day of October, **2015** by this Administrative Law Judge, that the Petition for Special Hearing pursuant to B.C.Z.R. § 500.7 to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music, be and is hereby DENIED.

Any appeal of this decision must be filed within thirty (30) days of the date of this Order.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln

DOCK of the BAY

Contact Info: 9025 Cuckold Point Road, Sparrows Point, MD
(410) 477-8100
Hours: Monday - Thursday: 11am - 11pm and Friday - Saturday: 11am - 1am
Sunday: 9am breakfast buffet. Close at 8pm.

Directions

Our Menu

Gallery

Plat
PC. Motion
Ex. 2

Zoning Review
Department of Permits, Approvals and Inspections
Baltimore County Office Building
Towson, MD 21204

ZONING CHECKLIST

PART I: NON-RESIDENTIAL BUILDING PERMITS AND/OR PART II: ZONING PUBLIC HEARING APPLICATIONS

Please be aware that this checklist is for your information only and **it is not intended to offer, or to be considered, legal advice.**

Revised 5/21/14

This checklist is a guide in preparing plans and information for building permit (PART I) and/or zoning public hearing (PARTS I and II) applicarions. Ten (10) copies of the site plan must accompany an application for a building permit, while for zoning hearings twelve (12), or fourteen (14) if in or near a floodplain, are needed. TO AVOID TIME-CONSUMING AND COSTLY DELAYS, ALL CHECKLIST INFORMATION MUST BE INCLUDED ON THE PLAN AND/OR IN THE HEARING APPLICATION.

1. ____ NORTH ARROW, ELECTION DISTRICT, COUNTY COUNCIL DISTRICT, ZONING MAP NUMBER(S) AND TITLE PLAN "PLAN TO ACCOMPANY _____ PERMIT", (OR HEARING TYPE(S) AS APPLICABLE) AND THE DATE. Zoning Hearing Plans and Descriptions **must be sealed by a MD registered Professional Engineer, Surveyor or Landscape Architect.**

2. ____ SCALE OF DRAWING: Use Engineers Scale of 1" = 10', 1" = 20', 1" = 30', 1" = 40', 1" = 50', or 1" = 60'. If acreage exceeds 40 acres, use 1" = 100' scale.

3. ____ OUTLINE OF PROPERTY: Indicated by a **heavy bold line** and bearings, distances, gross and net area (acres and square feet) of parcel(s). This also applies to zoning hearing areas on the site with the POB and intersecting street name and distance shown and matching the sealed zoning description(s) required for all zoning hearing applications.

4. ____ VICINITY MAP: A vicinity map must be included on all site plans with the scales of 1" = 200', 1" = 500', or 1" = 1,000' WITH THE SITE AND HEARING LOCATIONS CLEARLY AND ACCURATELY OUTLINED AND LABELED.

5. ____ PREVIOUS COMMERCIAL PERMIT: Number(s) and the work on the same property and the approximate date of the last improvement listed on the plan or if very old, age of building and parking spaces.

6. ____ ZONING HEARINGS, CRG, DRC, WAIVERS: The case number(s), date of the order(s), what was granted or denied, and any restrictions must be listed and addressed in detail on the plan.List any CRG, DRC, or waiver approval dates and file numbers and dates on the plan, along with the type granted. Also reference any authorized changes on a previously approved plan. State if or not the property is under active zoning violation(s), state the reason for citation, and add the case number and the inspectors name.

7. ____ ZONING: Zone lines on and adjacent to the site must be clearly shown and labeled on the plan. Copies of the GIS zoning map may be obtained from PAI, room 111, County Office Building.

8. ____ OWNERSHIP: Of parcel(s) and relation of parcel(s) to adjacent property including tax account number (10 digits), deed reference numbers, lot numbers, and subdivision name.

9. ____ LOCATION: Street address and name of adjoining street(s) and distance from property corner to the nearest intersecting public street centerline. For hearing plans, match it to zoning description.

10. ____ STREETS, WIDENING, RIGHT-OF-WAY, EASEMENTS: Include all existing public boundary streets with the existing right-of-way width and paving width. ALSO INCLUDE ANY RIGHT-OF-WAY WIDENING REQUIRED, EITHER BY BALTIMORE COUNTY DEPARTMENT OF PUBLIC WORKS OR THE STATE OF MARYLAND. Include any existing or proposed easements or right(s)-of-way and indicate public or private. (For Baltimore County roads, Room 200 and Room 206, County Office Building; State Highways: phone number 410-545-5600.)

11. ____ USES, BUILDINGS: Existing location and proposed use of all buildings (or additions) and property, show building locations, orientations and uses on adjacent properties. Note height and number of stories.

12. ____ DIMENSIONS, SETBACKS: Dimensions and orientation of buildings and setbacks from property lines, include all setbacks between buildings.

13. ____ STREET SETBACKS: And use of all permanent commercial buildings within 100 feet of each side property line to establish average street setbacks an BL, BM, and BR zones per Section 303.2, BCZR, and Policy 3-2.1. Also see average setback requirements if in a CR District in 259.3.C.2.

14. ____ ENTRANCES: Location and width of existing and/or proposed entrances (traffic channelization) and their relation to entrances on adjacent properties and properties across the street. Indicate method - curbing, R/R ties. (For County requirements, Developers Engineering at 887-3751 or State Highways at 410-545-5600.)

15. ____ SIGNS: All existing and proposed, location, height, square footage, illumination, setback from existing or proposed right-of-way, and note if single or double-faced. See Permit Drawing/Detail Checklist on the County Website at the Zoning Forms Summary under Permits, Approvals and Inspections. Note all signs will comply with Section 450 BCZR or list the required relief and BCZR Section references for the zoning hearing.

16. ____ UTILITIES: Show location and size of public utilities and the right-of-way both adjacent to and on-site. In the event that no public water or sewer exist, the means for providing proper well and septic system must be indicated. (Public utilities, room 206, County Office Building.)

17. ____ FEATURES: Location of streams, storm water management systems, drainage, and pipe systems on or within 50 feet of the property and the 100-year floodplain, if any. State flood plain status.

18. ____ FLOOR AREA, GROSS (Floor Area Ratio) CALCULATIONS: . (Used for parking calculations.)The floor area ratio is the total gross floor area of all the floor areas of all the buildings on a site, divided by the gross site area. The gross site area includes up to one-half of the boundary streets to which the property has right of access, up to a maximum of 30 feet.

19. ____ HEIGHT DETERMINATION: Tent must be included for buildings above 40 feet (see Section 231, BCZR). Where a building height determination is required and Section 231 does not apply, use Zoning Policy 1-8 and show a scaled detailed drawing on the plan.

20. ____ AMENITY OPEN SPACE (AOS): Location and square foot calculations in the following zones: R.A.E.-1, R.A.E.-2, R.O., OR-1, OR-2, O.T., S-E, B.L.-C.C.C., B.L.-C.T., B.M.-C.C.C., B.M.-C.T., B.R.-C.C.C., and B.R.-C.T. The qualifying AOS areas within the net lot area must be shaded, dimensioned and separate areas subtotaled in square feet on the plan print and included in the AOS calculations in the notes.

21. ____ FIRE HYDRANTS: Location of fire hydrants and distance to the property.

22. ____ SITE PLANS: Must be trimmed to a neat 8-1/2" x 11" or, where larger prints are necessary, they shall be folded to that size with the title block showing. THEY MUST BE LEGIBLE, AND NO LARGER THAN 24" X 36" (unless authorized by the intake review Planner).

23. ____ REQUIRED OFF-STREET PARKING AND CALCULATIONS: On the site plan for all uses on the property pursuant to Section 409, BCZR, and the attached standards and samples.

24. ____ SPECIAL USE REQUIREMENTS: Must show compliance on the plan with the applicable zoning regulations and BCZR Sections, to include, but not limited to the following: Farm and agricultural operations (S. 404); waterfront construction / facilities (S. 417); car wash (S. 419 and 409.10); amusement devices (S. 422 and 423); child care (S. 424); assisted living (S. 432); truck facilities (S. 410, also see online chklst.) ; service stations (S. 405); damaged or disabled vehicles and parts (S. 405.A); uses with automotive stacking such as banks, drive-through restaurants, etc. (S. 409.10); business / industrial parking in a residential zone (S. 409.8.B.2); In DR zones, RTA requirements (1B01.1.B.1).

25. ____ BASIC SERVICES MAPS: State if the site is, or is not, in any failed Basic Services Map areas. If in a failed area, identify it and state what action is being taken to resolve the issue.

26. ____ ZERO SETBACK BUILDINGS: Must meet building code, as well as fire code requirements, with regard to type of construction, windows, etc.

27. ____ FEES: For the permit filing fees contact Permits and Licenses at (410-887-3900). For all required development review fees contact Development Management at (410-887- 3335). Zoning Hearing fees vary; contact Zoning Review at (410-887-3391) to confirm filing costs.

RESERVED SPACE FOR FUTURE REVISIONS

REQUIRED NUMBER OF OFF-STREET PARKING SPACES

THIS CHART IS ONLY A GUIDE AND IT DOES NOT SUPERCEDE SECTION 409 BCZR

RETAIL/BEAUTY OR BARBER SHOP/SKATING RINK.....5/1,000

SHOPPING CENTER 100,000 SQ. FT. G.L.A. **.....5/1,000

HOTEL/MOTEL/ROOMING&BOARDING/TOURIST HOME...1/RM / SUITE

NURSING HOME OR ASSISTED LIVING FACILITY (ALF)*.....1/3 BEDS

MANUFACTURING/WAREHOUSE.....1/EMP

POOL(community).....1/7 PERSONS (capacity per Health Dept.)

RESTAURANT (standard, ie; with seating (no CLASS "D" LIC).....16/1,000

TAVERN/NIGHT CLUB/DANCE HALL/CATERING HALL.....20/1,000

ATHLETIC CLUB/HEALTH SPA (3/COURT) OTHERWISE.....10/1,000

HOUSING FOR THE ELDERLY.. CLASS A..1/1.5DWU,,CLASS B.. 1/DWU

BOWLING ALLEY.....4/LANE

AUTO SALES..DISPLAY/OFFICES/PARTS..5/1,000.. SERVICE..3.3/1,000

FURNITURE/CARPET STORE..RESEARCH & LAB USES.....2.5/1,000

DORMITORY...1/4BEDS...FRAT OR SORORITY HOUSE.....1/2BEDS

CAR WASH.....SEE SECTION 419

TOWSON (C.T.) DISTRICT PARKING**,..... SEE SECTION 409

OFFICE (GENERAL) / PERSONAL SERVICE.....3.3/1,000

GROUP CHILD CARE/NURSERY SCHOOL...1/Emp. (Minimum 2)

HOSPITAL 1.5/BED

MARINA/BOAT YD.....0.5/SLIP / STORAGE SPACE ON LAND

POOL HALL/ARCADE.....4/1,000

SCHOOLS (ALL)...1/EMP ..VISITOR/STUDENT.....PER REVIEW

POOL (commercial).....1/4 PERSONS (capacity per Health Dept.)

RESTAURANT (carry-out only).....5/1,000

CLASS "D" LIQUOR. LIC. USES (ALL) 20/1000

CONTINUING CARE FACILITY.....1/DWU..ALF/NURSING SEE*

GOLF COURSE..8/HOLE...DRIVE RANGE/MINI GOLF...1.5/TEE

RELIGIOUS ASSEMBLY/THEATRE/AUDITORIUM.....1/4SEATS

SERVICE GARAGE (no fuel sales).....3.3/1,000

FUNERAL HOME..... 10/1,000...1/2EMP...1/BUSINESS VEHICLE

FUEL (AUTO) SERVICE STATION.....SEE SECTION 405

TRUCKING FACILITIES**...SEE SECTIONS 410 /409/TF CHKLST

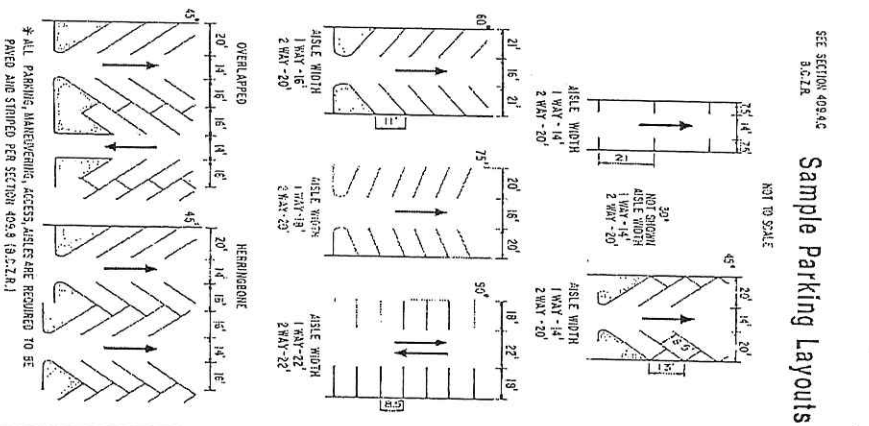
HISTORIC BUILDINGS**.....SEE SECTION 409

OFFICE (MED)/CLINIC..VETS OFFICE/VETERINARIUM..4.5/1,000

NOTES:

CONTACT ZONING REVIEW FOR PARKING CALCULATIONS NOT LISTED
MIXED USES MEANS MIXED CALCULATIONS SUBTOTALED AND OVERALL
ROUND EACH FRACTIONAL CALCULATION TO THE HIGHER WHOLE NUMBER
Example: 5 parking space per 1,000 sq. ft. of gross floor area is written as 5/1,000
Employee: 1 parking space per employee is written as 1/Emp.
** = see Section 409 for details/exeptions'special regulations
DWU = Dwelling Unit

Sample: required / provided parking space calculations:
Proposed general office: 6,000 sq. ft. @ 3.3/1,000 = 19.8 or 20
Proposed retail space: 3,500 sq. ft @ 5/1,000 = 17.5 or 18
Total required parking spaces = 38
Total parking provided (on-site parking spaces) = ##



OFF-STREET PARKING REQUIREMENTS

1. ____ PAVING (type and extent), STRIPING, AND 10-FOOT SETBACK TO A STREET R/W (8 feet if existing on 5/26/88 and documented) and must be clearly indicated on the plan and notes.

2. ____ DESIGN STANDARDS, SCREENING, AND LANDSCAPING must be provided in accordance with the Landscape Manual and all other manuals adopted pursuant to Section 32-4-404 of the Baltimore County Code. (See Section 409.8.A.1, BCZR.) Contact County Landscape Architect at 410-887-3751.

3. ____ CURBING or anchored wheel stops must be provided around parking lots and must be located not to interfere with the required landscaping and screening. Show a detail for wheel stops.

4. ____ DEAD-END PARKING BAYS require a back-around or turn-around. Traffic circulation must be shown by the use of arrows on the plan. (See Section 409.8.A.5, BCZR.)

5. ____ LIGHTING: Add note: "Any fixture used to illuminate an off-street parking area shall be so arranged as to reflect the light away from adjacent residential site and public streets." Indicate placement, height, and direction on the plan and show protected by curbing or landscaping. If no lighting, state so. (See Section 409.8.A.3, BCZR.)

6. ____ ENTRANCES on County roads for one-way traffic; 17 feet wide. Two-way traffic; not less than 24 feet nor more than 30 feet wide. Monumental entrances shall be provided with a minimum 2-foot wide median. Traffic lanes; not less than 17 feet nor more than 24 feet wide. Inbound lane not less than 18 feet the nor more than 36 feet wide for outbound. Entrances minimum 7.5 ft to property line. (Contact Developers Engineering, 410-887-3751)

7. ____ ENTRANCES on State roads are subject to the approval of the State Highway Administration. (Contact: Bureau of Access Permits at 410-545-5600.)

8. ____ DRIVE-THROUGH STACKING REQUIRED: BANK - 5 for first station, 2 for each additional station; RESTAURANT - 7 per station and 5 behind order board; CAR WASH - see Section 419, BCZR; OTHER USES - as determined by Zoning Review. *NOTE:* Do not count the space(s) at the service window(s). Drive-through lanes must be clearly marked by striping or pavement markings, may not block parking spaces, manuevering aisles or cross the (clearly shown) principal pedestrian access.

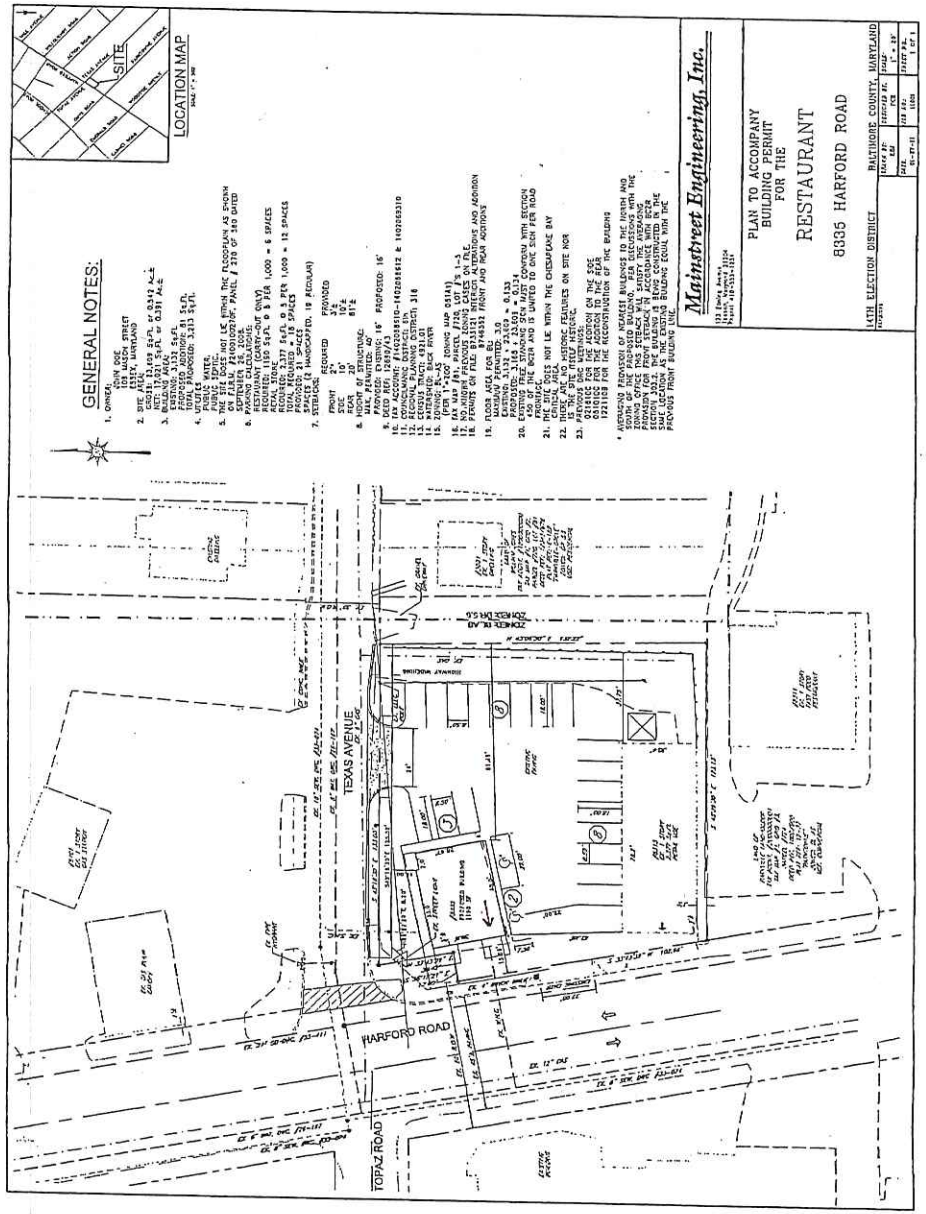
9. ____ COMPACT OR SMALL CAR SPACES: When more than 50 spaces are provided in office and industrial uses and parking structures for residential and lodging uses only. Space size 7.5 x 16 feet (angled) and 7.5 x 18 feet (parallel) are permitted up to 40% maximum of the required spaces. All dimensions, calculations, and typical spaces must be on the plan.(Section 409.5)

10. ____ LOADING: (commercial or Industrial) must be shown on the plan and be adequate to accommodate the size and use of the building in addition to all other parking requirements. Loading spaces may not impede normal vehicle circulation or block required spaces.

11. ____ HANDICAPPED: For parking space requirements, (Contact: Plans Review 410-887-3987).

12. ____ ADJUSTMENTS (allowed in office and industrial): TRANSIT - 5% reduction; RIDESHARING - 10% reduction; SHARED PARKING - see Section 409.6.B.3, BCZR.

13. ____ BUSINESS OR INDUSTRIAL PARKING IN A RESIDENTIAL ZONE may be granted by the Office Of Administrative Law after a 15 day posting procedure. If a request for a public hearing is filed within this time period, a Special Hearing is required (see Section 409.8.B, BCZR). *NOTE:* In the D.R.zone,within a residential transition area, all RTA requirements must be met or a variance must be granted. (see Section 1B01.1.B.1, BCZR)



ZONING CHECKLIST PART II:

ADDITIONAL INFORMATION FOR NON-RESIDENTIAL ZONING PUBLIC HEARING APPLICATIONS (to be included with PART I / Checklist site plans when filing a petition)

FOR NON- RESIDENTIAL VARIANCES, SPECIAL HEARINGS, SPECIAL EXCEPTIONS, WAIVERS AND USE PERMITS

First, and most importantly: You must understand that the relief you have requested is a quasi-judicial decision and you are responsible for meeting the burden of law required by the Baltimore County Zoning Regulations (BCZR). A judicial hearing is an adversary process and, therefore, there may be opposition to your request. During a judicial hearing, the parties will be permitted to testify, present evidence, and cross-examine witnesses. The Office of Administrative Law will rule on the evidence and testimony to determine whether or not the petition will be granted.

Second: You must understand that if a hearing is required, you are permitted to have representation by an attorney of your choice. Unless incorporated, you are not required to have an attorney, but it is strongly recommended that you consider obtaining legal representation. If you are incorporated, it is a requirement that you be represented by an attorney.

Third: It is strongly recommended that you read and understand the requirements of the BCZR.

Fourth: No employee of the Department of Permits, Approvals and Inspections (PAI) may provide legal advice to anyone. The representations and opinions of any employee are not to be construed as definitive in any case. Only the decision of the Administrative Law Judge rendered after the statutory required public hearing is considered dispositive in matters relating to the interpretation of the BCZR. Even though there may not be opposition in a given case, your request may be denied.

YOU MUST MAKE AN APPOINTMENT TO FILE A PETITION

When you have completed the following steps, call 410-887-3391 to make an appointment. Due to the exacting review necessary for petition filing, **petitions or revisions will not be processed or accepted if they are just delivered or mailed. Revisions must be filed with the original intake Planner.**

AUTHORITY AND PETITIONER'S BURDEN:

INFORMATION ONLY, NOT LEGAL ADVICE

All requests for non-residential variances, special hearings, special exceptions, and use permits are handled by the Department of Permits, Approvals and Inspections (PAI). *Applications are obtained from and filed with the Zoning Review section of PAI* and all hearings are scheduled before an Office of Administrative Law Judge (**ALJ**). The enabling legislation providing the Administrative Law Judge (**ALJ**) with this authority is in Sections 307 and 500 of the Baltimore County Zoning Regulations (BCZR). The Director of PAI interprets and enforces the BCZR. Any disagreement with said interpretation may be taken to the Office of Administrative Law per Section 500.7 (BCZR). If the site in question is to be approved by the Administrative Law Judge (**ALJ**) as part of the development process, the public zoning requests will be considered concurrently with the development proposal.

Legal representation is recommended in all cases, but in the case of a corporation, it is a requirement. The information that proceeds is provided to give the petitioner a basic understanding of the legal burden of proof that must be satisfied prior to the granting of the petition. It is not a substitute for private legal counsel nor should it be construed as legal advice.

VARIANCES:

Under the authority of Section 307.1 (BCZR), the Administrative Law Judge, (**ALJ**) applying the two-step test set forth in Cromwell v. Ward, 100 Md. App. 691 (1995), has the authority to grant variance from the height, area, parking, and sign regulations.

A. The first step requires the petitioner to prove, to the satisfaction of the ALJ, that the property whereon structures are to be placed (or uses conducted) is unique, unusual, and different from the surrounding properties such that the uniqueness causes the zoning provision to impact more on the subject property than on the surrounding properties.

B. The second step of the test requires that the petitoner must demonstrate that strict compliance with the BCZR would result in either practical difficulty or unreasonable hardship. The Court of Special Appeals in Anderson v. Board of Appeals, Town of Chesapeake Beach, 22 Md. App. 28, stated:

1. "To prove undue hardship for a use variance, the following three criteria must be met:
   (i) Applicant must be unable to secure a reasonable return or make any reasonable use of his property (mere financial hardship or opportunity for greater profit is not enough).
   (ii) The difficulties or hardship is peculiar to the subject property in contrast with other properties in the zoning district.
   (iii) Hardship was not the result of applican'ts own actions.

To provide practical difficulty for an area variance, the following criteria must be met:

Whether strict compliance with requirement would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome.
   (i) Whether the grant would be substanial injustice to applicant, as well as other property owners in district, or whether a lesser realization than that applied for would give substantial relief.
   (ii) Whether relief can be granted in such fashion that the spirit of the ordiance will be observed and public safety and welfare secured."

C. No increase in residential density beyond that allowed by the zoning regulations shall be permitted.

D. The relief requested must be in strict harmony with the spirit and intent of height, area, off-street parking, or sign regulations.

E. And only in such manner as to grant relief without substantial injury to public health, safety, and general welfare.

SPECIAL HEARINGS:

Under the authority of Section 500.6 (BCZR), the Office of Administrative Law has the power, upon notice to the parties in interest, to conduct hearings involving any violation or alleged violation or noncompliance with any zoning regulations, or the proper interpretation thereof, and to pass his order regarding this matter.

Under the authority of Section 500.7 (BCZR), any person can petition the Office of Administrative Law to hold a public hearing to determine the existence of any purported nonconforming use on any premises or to determine any rights whatsoever of such a person in any property insofar as they are effected by the BCZR.

USE PERMITS AND WAIVERS:

Certain uses have singular, individual characteristics which make it necessary, in the public interest (even though other County permits may not be required), to specify regulations for each zoning classification. Under the authority of Section 500.4 (BCZR), the Director of PAI has the power to issue certain use permits (certain others are issued under the authority of the Office of Administrative Law) provided that all of the conditions for that particular use specified in the BCZR are met. Under the authority of Section 500.7 (BCZR), the Director has the right to require a public hearing whenever the Director deems it in the public interest. Waivers, such as for flood plain construction also require a public hearing and must follow the zoning hearing intake and filing procedures.

SPECIAL EXCEPTIONS:

Because not all uses fit neatly into permitted categories or zones, and under certain conditions various uses could be detrimental; the uses listed as special exceptions in the BCZR are permitted only if granted by the Office of Administrative Law, under the authority of Section 500.5 (BCZR). In cases of petitions for special exceptions under Section 502 of these regulations, the Office of Administrative Law shall hold a public hearing. After the hearing, the ALJ shall pass his order granting or refusing the special exception. In granting any special exception, the Administrative Law Judge must find that the use for which the special exception is requested will not:

A. be detrimental to the health, safety, or general welfare of the area;
B. create congestion in roads, streets, or alleys;
C. create a potential hazard from fire, panic, or other dangers;
D. overcrowd land and cause undue concentration of population;
E. interfere with adequate provisions for schools, parks, water, sewerage, transporation, or other public requirements, conveniences, or improvements;
F. interfere with adequate light and air;
G. be inconsistent with the spirit and intent of the BCZR;
H. be inconsistent with the impermeable surface and vegetative retention provisions of the BCZR.

In granting any special exception, the ALJ may impose such conditions, restrictions, or regulations as he deems necessary or advisable for the protection of surrounding and neighboring properties.

GENERAL APPLICATION PROCEDURE:

A zoning hearing can only address issues as regulated by the BCZR. (Certain hearings, such as flood plain waiver public hearings are an exception to this.) You must contact other county/state agencies to determine if your plan meets their requirements!

Normally before granting any relief, the Office of Administrative Law shall require advertising and posting of the property and shall require, as applicable, a public hearing. All orders of an ALJ shall contain a finding of fact specifying the reason or reasons for granting or denying each request.

The normal time period from time of filing a petition until the time of receipt of the written order is usually somewhere between 45 and 60 days. Also, in addition to filing fees, costs are incurred for posting the property and advertising the hearing in area newspapers.

At the time of petition filing, petitioners will pay the filing costs. The petitioner will also receive a list of approved sign posters and the petitioner is responsible for hiring one of these approved posters to properly post the subject property. The posting sign must remain *visible* on the property for a period of at least 15 days before the hearing and/or closing date.

Zoning petitions may be filed with PAI **by appointment only**. Applications/forms are available from Zoning Review **or online****. All information on the forms must be typed or printed and they must be signed by the legal owner(s) or a corporate officer, with his/her title, the address, zip code, work and home telephone numbers and Email address provided. While the planner will assist the petitioner in interpreting those provisions of the BCZR applicable to the particular case, the final wording of the request and other information submitted, as set forth in the application, shall be the sole responsibility of the petitioner(s).

** http://www.baltimorecountymd.gov/Agencies/permits/pdm_zoning/zonforms.html#forms

THE APPLICATION MUST CONTAIN:

- **Petition** -- 3 (three) original petition forms signed and filled out as indicated. Any person signing as an authorized agent of the petitioner or contract purchaser must be able to bind the petitioner or contract purchaser to a legal contract. Their position must be indicated and where any doubt as to the person's authority may exist, a letter of authorization is required.
- **Plats** -- 12 (twelve) or 14 (fourteen) for flood zone properties, copies of a **sealed** hearing plan with all information as indicated in this checklist.
- **Description** -- 3 (three) separate copies of a **sealed description** of the property, beginning with the distance to the nearest improved intersecting street centerline, **as indicated in this checklist.**
- **Zoning Map** -- 1 (one) copy of the GIS zoning map with the location and boundaries of the property accurately depicted (matching the sealed description) and the official 5 digit zoning map number (example: 070A2). See Example 4.
- **Fee** -- 1 (one) filing fee of $385.00 for variance or special hearing and $450.00 for special exception for each separate request (maximum charge of $950.00 for one property/lot). Checks must be made payable to Baltimore County, Maryland. (Be aware that fees are subject to change without notice)
- **Advertising Form** -- 1 (one) completed copy of the advertising form. You will be billed directly by the newspapers.
- **Posting** -- Applicant is responsible for the posting (securing and paying an approved sign poster). The current list of approved sign posters is available in the Zoning Review Office.

REVIEW AGENCIES:

Prior to preparing the required plans, the petitioner or the engineer should contact the following agencies for pertinent data that may be required.

1. Assessments (SDAT) 410-512-4906
2. Development Plans Review (traffic issues) 410-887-3751
3. Fire Department 410-887-3998
4. State Highway Administration 410-545-5600
5. County Roads 410-887-3739
6. Planning (design, screening, landscaping, historic) 410-887-3211
7. Plans Review (construction/fire/floodplain plans) 410-887-3987
8. Department of Environmental Protection and Sustainability (DEPS) (see note) 410-887-3980
9. If *floodplain*, Department of Natural Resources 410-631-3902
10. If *critical area*, Maryland Office of Planning 410-767-4485

NOTE: For CBCA (Critical Area) sites: Without **DEPS comments** the ALJ will not write an order. **Floodplains and historic buildings should be identified and addressed as needed. Flood Plain** determination/issues call the Dept.of Public Works at 410-887-3300. **Historic** issues/questions call the Office of Planning at 410-887-3480.

THE ZONING HEARING PROPERTY DESCRIPTION:

Three (3) typed copies (separate pages) of the **zoning description of the property** is required. Standard 8-1/2" x 11" sheets are acceptable. Most property descriptions, as stated on a deed, are too wordy but some of the information must be used. (Note: Old deed information such as perches or a stone, etc. cannot be used as is.) Read your deed, your location survey and your State Assessment record to determine which of the three options you should use. DO NOT PHOTOCOPY THE DESCRIPTION IN THE DEED. The zoning property description must comply with Part A and Part B:

PART A (START DESCRIPTION WITH THE FOLLOWING):

ZONING PROPERTY DESCRIPTION FOR_____
(address or location)

*Beginning at a point on the (north, south, east or west) side of (name of street on which property fronts) which is (number of feet of right-of-way width) wide at the distance of (number of feet) (north, south, east or west) of the centerline of the nearest improved intersecting street (name of street) which is (number of feet of right-of-way width) wide.

ALERT!
*Be aware that the Beginning Point and the distance in feet to the street centerline intersection, as stated in the zoning property description, must be shown and labeled on the hearing plan. The lot area (total square feet or acres) on the hearing plan and the zoning description must agree.

PART B (CONTINUE DESCRIPTION WITH ONE OF THE FOLLOWING 3 OPTIONS):

OPTION 1 (Metes and Bounds Sample – lot not part of record plat or minor subdivision):

THIS IS A SAMPLE ONLY: Thence the following courses and distances: (1st Point of Call-"POC") N.87 12' 13" E. 321.1', (2nd POC) S.18 27' 03" E. 87.2', (3rd POC) S.62 19' 00" W. 318', and (4th POC) N.08 15' 22" W. 80', back to the point of beginning as recorded in Deed Liber (__), Folio (___), containing (number of total square feet or acres in lot). Located in the (__) Election District and (___) Council District.

OPTION 2 (Subdivision Lot – lot is part of record plat):

Being Lot #(__), Block (__), Section #(__) in the subdivision of (name of subdivision) as recorded in Baltimore County Plat Book #(___), Folio #(___), containing (number of total square feet or acres in lot). Located in the (__) Election District and (___) Council District.

OPTION 3 (Minor Subdivision Lot Sample):

THIS IS A SAMPLE ONLY: Thence the following courses and distances: (1st Point of Call-"POC") N.87 12' 13" E. 321.1', (2nd POC) S.18 27' 03" E. 87.2', (3rd POC) S.62 19' 00" W. 318', and (4th POC) N.08 15' 22" W. 80' back to the point of beginning, as recorded in Deed Liber (____), Folio (____), containing (number of total square feet or acres in lot). Located in the (__) Election District and (___) Council District. Also known as Lot #(___) in the minor subdivision of (name of minor subdivision), minor subdivision # (_ _-_ _ _-M), as maintained by the Development Management Division of the Department of Permits, Approvals and Inspections.

EXAMPLE 4 – ZONING MAP

This is available from the Zoning Review Counter.
A GIS System color copy zoning map is required for filing a petition.
This black and white sample is keyed to the map information.
Mark your site clearly on the map.



DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS
ZONING REVIEW OFFICE

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

The Baltimore County Zoning Regulations (BCZR) require that notice be given to the general public/neighboring property owners relative to property which is the subject of an upcoming zoning hearing. For those petitions which require a public hearing, this notice is accomplished by posting a sign on the property (responsibility of the legal owner/petitioner) and placement of a notice in a newspaper of general circulation in the County, both at least fifteen (15) days before the hearing.

Zoning Review will ensure that the legal requirements for advertising are satisfied. However, the legal owner/petitioner is responsible for the costs associated with these requirements. The newspaper will bill the person listed below for the advertising. This advertising is due upon receipt and should be remitted directly to the newspaper.

OPINIONS MAY NOT BE ISSUED UNTIL ALL ADVERTISING COSTS ARE PAID.

For Newspaper Advertising:

Case Number: _____

Property Address: _____

Property Description: _____

_____

Legal Owners (Petitioners): _____

Contract Purchaser/Lessee: _____

PLEASE FORWARD ADVERTISING BILL TO:

Name: _____

Company/Firm (if applicable): _____

Address: _____

_____

_____

Telephone Number: _____

Revised 5/20/2014

PETITION FOR ZONING HEARING(S)

To be filed with the Department of Permits, Approvals and Inspections

To the Office of Administrative Law of Baltimore County for the property located at:

Address _____ which is presently zoned _____

Deed References: _____ 10 Digit Tax Account # _ _ _ _ _ _ _ _ _ _

Property Owner(s) Printed Name(s) _____

(SELECT THE HEARING(S) BY MARKING X AT THE APPROPRIATE SELECTION AND PRINT OR TYPE THE PETITION REQUEST)

The undersigned legal owner(s) of the property situate in Baltimore County and which is described in the description and plan attached hereto and made a part hereof, hereby petition for:

1.____ a **Special Hearing** under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

2.____ a **Special Exception** under the Zoning Regulations of Baltimore County to use the herein described property for

3.____ a **Variance** from Section(s)

of the zoning regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons: **(Indicate below your hardship or practical difficulty or indicate below "TO BE PRESENTED AT HEARING". If you need additional space, you may add an attachment to this petition)**

Property is to be posted and advertised as prescribed by the zoning regulations.
I, or we, agree to pay expenses of above petition(s), advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.
Legal Owner(s) Affirmation: I / we do so solemnly declare and affirm, under the penalties of perjury, that I / We are the legal owner(s) of the property which is the subject of this / these Petition(s).

Contract Purchaser/Lessee:

Name- Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

Legal Owners (Petitioners):

Name #1 – Type or Print / Name #2 – Type or Print

Signature #1 / Signature # 2

Mailing Address City State

Zip Code Telephone # Email Address

Attorney for Petitioner:

Name- Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

Representative to be contacted:

Name – Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

CASE NUMBER_____ **Filing Date** ___/___/_____ **Do Not Schedule Dates:** _____ **Reviewer**_____

REV. 10/4/11

Motion's Hearing

03C-16-10551

Board of Appeals

Case No: 16-003-SPH Case Name: Boone Kondylas, LLC

Exhibit List

Party: Protestant / motion Date: 2-17-16

Exhibit No:	Description:
✓ 1	Opinion and Order OAH (Case No. 2016-003-SPH) dated October 22, 2015
✓ 2	Unreported opinion Court of Special Appeals No: 810, September Term 2009, Filed July 2010
	VERIFIED BY KC DATE: 2/19/16

10/22/15

IN RE: **PETITION FOR SPECIAL HEARING** **(9025 Cuckold Point Road)** 15th Election District 7th Council District	*	BEFORE THE
	*	OFFICE OF
	*	ADMINISTRATIVE HEARINGS
Boone Kondylas, LLC *Legal Owner* Petitioner	*	FOR BALTIMORE COUNTY
	*	**Case No. 2016-0003-SPH**

* * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Boone Kondylas, LLC, legal owner. The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

Ken Boone appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioner. Several neighbors, represented by Francis Borgerding, Esq., attended and opposed the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Bureau of Development Plans Review (DPR). Neither agency opposed the request, but suggested certain conditions be imposed if relief is granted.

The subject property is 1.27 acres and zoned B.L. The property is improved with a restaurant known as "Dock of the Bay." The restaurant has new ownership, which proposes to offer limited music and live entertainment as an "accessory" use to the food and beverage service. This property and business have been the subject of protracted litigation concerning loud music and unruly patrons which disturbed the neighborhood. The operation was found by the court of

Protestant motion exhibit 1

special appeals to constitute a "nightclub," a use prohibited in the B.L. zone. Protestants contend the petition is barred by *res judicata,* while Petitioner argues that unlike the former operation the current business is first and foremost a restaurant, with music offered to compliment the dining experience.

Under Maryland law, an agency determination affirmed on appeal is entitled to preclusive effect. Esslinger v. Balto. City, 95 Md. App. 607, 621 (1993). This is the case, and *res judicata* will apply, unless there is a significant change in circumstances between the earlier and subsequent action. *See, e.g.*, Alvey v. Hedin, 243 Md. 334, 340 (1966). In light of this authority I believe the doctrine of *res judicata* mandates that the petition in this case be dismissed.

As an initial matter, I do not believe the OAH has the authority to "amend" restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the board of appeals, circuit court and then the court of special appeals. In an unreported opinion (No. 810, September Term, 2009) the appellate court affirmed the agency findings, which necessarily included the conditions and restrictions found in those orders. To amend those restrictions at this juncture would be akin to reversing the appellate court, which an administrative agency cannot do.

I believe the Petition must also be denied based on *res judicata.* As discussed above, *res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard. For example, if the owner of the subject property was now proposing to operate a barbershop or beauty salon at the site, that would constitute a significant change and *res judicata* would not apply. But here, I do not believe there

have been significant changes; Petitioner is still proposing to operate a restaurant that would offer live and/or recorded music.

The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010).

THEREFORE, IT IS ORDERED this 22nd day of October, 2015 by this Administrative Law Judge, that the Petition for Special Hearing pursuant to B.C.Z.R. § 500.7 to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music, be and is hereby DENIED.

Any appeal of this decision must be filed within thirty (30) days of the date of this Order.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln

Protestant exhibit 2 (Motion)

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 810

September Term, 2009

FIFTH STREET, LLC., ET AL.

v.

MATTHEW CIARPELLA, ET AL.

Eyler, Deborah S.,
Woodward,
Kehoe,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 9, 2010

Fifth Street, LLC, and its managing member, Lawrence J. Thanner, Jr. (collectively "FSLLC"), the appellants, own the Dock of the Bay, a restaurant and bar located at 9025 Cuckold Point Road in Baltimore County.[1] They appeal from the judgment of the Circuit Court for Baltimore County affirming a decision of the Baltimore County Board of Appeals ("Board"), finding them in violation of the Baltimore County Zoning Code ("Zoning Code") for operating a nightclub in a B.L. (Business Local) zone. The appellees are People's Counsel for Baltimore County ("the County") and Matthew Ciarpella, who resides near the restaurant. The FSLLC presents four questions for our review, which we have consolidated and rephrased as follows:

I. Did the Board err in concluding that the Dock of the Bay operates as a nightclub, as defined in the Zoning Code?

II. Is the definition of a "night club" in the Zoning Code so arbitrary and confusing as to deprive the appellants of their due process rights?

III. Did the Code Enforcement Division hearing officer err in concluding that the appellants violated the Zoning Code by erecting a tent without a permit?[2]

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[1]We will refer to the Dock of the Bay as a restaurant, as all parties seem to agree that it performs this function, but we do not intend this description to be in any way determinative of the central issue in this case.

[2]As framed by FSLLC, the question presented are:

1. In Special Hearing Case No.: CBA-07-144-SPH, the County Board of Appeals erred as a matter of law in determining that the Dock of the Bay restaurant was a night club under the Baltimore County Zoning Regulations definition.

2. In Zoning Violation Case No.: 06-044, the finding of violation was in error as a matter of law.

(continued...)

For the reasons that follow, we shall affirm the judgment of the circuit court.

ZONING REGULATIONS

The Zoning Code establishes three types of business zones: B.L. (Business Local), B.R. (Business Roadside), and B.M. (Business Major). Zoning Code § 100.1.A.2. As noted above, the Dock of the Bay is located in the B.L. zone. The B.L. zone is the most restrictive of the three business zones.

Zoning Code section 230.1.A sets forth the permitted uses in the B.L. zone, which include the operation of a "standard restaurant" and a "tavern." Combinations of permitted uses also are allowed. Zoning Code § 230.1.A.10. A "nightclub" is not among the permitted uses in the B.L. zone, nor is it permitted by special exception. Zoning Code § 230.3.[3]

A "standard restaurant" is defined in the Zoning Code as follows:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term

---

[2](...continued)

3. If the Dock of the Bay is a restaurant, Civil Citation in Case No.: 07-134 and Case No.: 06-044 must be reversed.

4. County's arbitrary and confusing definition of night club violates Appellants' due process rights, violates standards for discretionary enforcement; leaves enforcement to the arbitrary discretion of County officials and constitutes undue favoritism by the County as established in the testimony before the Board of Appeals. Further, that the County's classification of night club must be reasonable and the evidence before the Board and the Board's conclusions established that the use of I.B.C. Group A-2 to define night club is unusable, arbitrary and capricious.

[3]A nightclub is a permitted use in the B.M. zone. Zoning Code § 233.1.

> includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

Id. at § 100.1. A "tavern" is defined as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." *Id.* Lastly, a "nightclub" is defined as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County." *Id.*

In 2005, the Baltimore County Council passed Bill No. 1-05, adopting the ICC International Building Code, 2003 Edition ("IBC"),[4] with some modifications, as the Building Code of Baltimore County. Chapter 3 of the IBC governs "Use and Occupancy Classification." IBC at 23. IBC section 303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." *Id.* at 24. Subgroup A-2 includes:

> Assembly uses intended for food and/or drink consumption including, but not limited to:
>
> Banquet halls
> Night clubs

[4]International Code Council, *International Building Code* (2003).

Restaurants
Taverns and bars

Id.

The commentary to the IBC explains, "[b]ecause of the arrangement and density of the occupant load associated with occupancies classified in the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high." ICC, *IBC Commentary - Vol. 1,* at 3-16 (2003) ("IBC Commentary"). It then provides a description of each subgroup classification. Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - Low lighting levels;
> - Entertainment by a live band or recorded music generating above-normal sound levels;
> - No theatrical stage accessories;
> - Later-than-average operating hours;
> - Tables and seating arranged or positioned so as to create ill-defined aisles;
> - A specific area designated for dancing;
> - Service facilities for alcoholic beverages and food; and
> - High occupant load density.

Id. at 3-17 - 3-18. The IBC Commentary explains that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. *Id.* at 3-18. Finally, it notes that the characteristics listed above "are only advisory in determining whether Group A-2 is the appropriate classification." *Id.*

FACTS AND PROCEEDINGS

The underlying facts are largely undisputed. The Dock of the Bay has been in operation since approximately 1955. It is situated on the Miller's Island peninsula between the Back River, to the west, and the Chesapeake Bay, to the east. To the south are residences that, like the Dock of the Bay, are zoned B.L. To the north and west of the property is a marina with attendant parking facilities. These properties are zoned B.M.

In September 2003, the Dock of the Bay was destroyed by Hurricane Isabel. One month later, FSLLC purchased the restaurant. Thanner then spent five months rebuilding the restaurant before reopening it in March 2004.

The interior of the restaurant is about 2,400 square feet. The first floor consists of a rectangular bar at one end and tables and chairs in most of the remaining open space. The second floor is used only for storage and office space. The business is licenced as a restaurant and is authorized to serve approximately 150-160 people. It also holds a Class-D liquor license.

Outside the restaurant is a patio area with more tables and chairs and an outside bar. Adjacent to the patio is a children's play area with a wooden pirate ship. The patio overlooks the Chesapeake Bay. FSLLC also owns a dock with 14 "transient" boatslips for customer use.

The restaurant is open daily from 11:00 a.m. until 2:00 a.m., although it frequently closes earlier on week nights, especially in the wintertime. It serves a full lunch and dinner

menu, with an emphasis on seafood. It also serves alcohol. Food service ends at 11:00 p.m. Approximately 70% of its sales are food, 28% beverages, including alcohol, and 2% T-shirts and cookbooks.

There are ten television sets inside the restaurant and another two at the outside bar. A house music system, connected to speakers inside and outside, plays satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered.

Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.

On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

Although there is no dance floor, during live performances patrons often dance in between the tables.

On April 21, 2006, a little over two years after the Dock of the Bay reopened under FSLLC's management, the Code Enforcement Division ("CED") of the Baltimore County Department of Permits and Development Management ("DPDM") received a letter of

complaint from Matthew Ciarpella, through counsel, regarding live music at the restaurant.[5] The letter alleged that the Dock of the Bay was operating as a nightclub, which is not a permitted use in the B.L. Zone.

In May, June, and August of 2006, the Dock of the Bay was cited for operating a nightclub in a B.L. zone, erecting a tent without a permit, and failing to cease nightclub operations and to remove the tent.[6]

On August 18, 2006, FSLLC filed a "Petition for Special Hearing," presenting two questions:

> 1. Whether the use of the property at 9025 Cuckold Point Rd., Millers Island 21219 is in violation of the [Zoning Code ?]
> 2. Is the use by Fifth Street, LLC, a restaurant, at 9025 Cuckold Point Rd., which provides music during the day, . . . a "night club" as defined in the [Zoning Code]?

On August 23, 2006, before the petition for special hearing was ruled upon, the case came before a CED Hearing Officer at the DPDM. The hearing officer heard testimony from Thanner, Ciarpella, and another nearby resident, Wayne Walkman, Jr. Evidence consisting of advertisements highlighting the music offered at the Dock of the Bay also were introduced. The hearing officer issued "Findings of Fact and Conclusion[s] of Law." He found that the Dock of the Bay offered live and recorded music, both inside and outside. He

---

[5]This was not the first complaint about the property. In the summer of 2005, Ciarpella and other nearby residents made numerous noise complaints.

[6]After the first of the citations, Thanner wrote to the inspector to request clarification as to the nature of his violation. He received no response to his letter.

then referenced the IBC and the IBC Commentary, concluding that the property "exhibits some of the listed characteristics" in the IBC Commentary for Subgroup A-2. He ruled that the Dock of the Bay was "being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use." He imposed a civil penalty of $5,000 and ordered FSLLC to "dismantle the outside speaker system and cease live and/or recorded entertainment immediately." He further concluded that the tent was erected without a permit in violation of IBC sections 3102.1, 3103.1 and 3103.1.1 and ordered it removed.

A two-day, public special hearing was held before the Zoning Commissioner ("Commissioner") to determine if the Dock of the Bay, "which provides music [] during the day, [is] a 'nightclub' as defined in [the Zoning Code]." Thanner testified at the hearing. Three past and present residents of Millers Island testified in support of FSLLC. Twenty-two nearby residents testified as protestants about the loud music, parking overflow, and noisy patrons leaving the property late at night. Finally, the CED officer who had cited the property and James H. Thompson, CED Supervisor, testified.

On May 30, 2007, the Commissioner issued his opinion. After reciting the "relatively simple" facts, the Commissioner addressed the question whether the Dock of the Bay is a "nightclub or simply a restaurant where ancillary entertainment is provided." He looked to the definition of "nightclub" in the Zoning Code and to the IBC and IBC Commentary. He concluded that, under the plain language of the Zoning Code definition, any establishment

that "provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub" under the IBC is an impermissible use in a B.L. zone. He further concluded that the use of the term "categorized" means only that the establishment necessarily falls under the IBC "Use and Occupancy Classification" category that includes "nightclubs." The Commissioner ruled that the Dock of the Bay is a "nightclub" under the Zoning Code and ordered "that the playing of outdoor music either by way of an outside speaker system, live/or recorded entertainment, must be discontinued."

After the special hearing, FSLLC was cited for continuing nightclub and tent violations. A second hearing before a hearing officer was held and the Dock of the Bay again was found in violation.

FSLLC appealed to the Board from the decision of the Commissioner, as well as from the decisions of the hearing officers. The cases were consolidated before the Board.

On January 15, 2008, a three-member panel of the Board took testimony and heard argument.[7] FSLLC called Thanner and also called Thompson, as an adverse witness. In addition to the facts already adduced concerning the nature of his business, Thanner testified that live entertainment was a significant draw for the Dock of the Bay, especially during the

[7]Pursuant to Zoning Code section 501.6, appeals from the Zoning Commissioner are heard "*de novo*." Accordingly, the Board took testimony on the issues presented at the special hearing. The appeal of the code enforcement rulings, however, were reviewed on the record before the hearing officer pursuant to section 3-6-303 of the Baltimore County Code (2003).

slower winter months, and that he would likely have to close down if forced to discontinue it.

Thompson testified that the CED operates on a "complaint basis only," meaning that it investigates alleged code violations only after receiving a complaint about a property or business. It does not undertake investigations of potential violations on its own initiative. He also testified that, in his opinion, based on his experience enforcing the Zoning Code, a property could operate as a "dual use," meaning that it could fit into multiple categories of use simultaneously. He explained that it was the practice of the CED to treat live music, but not recorded entertainment, as a code violation in the B.L. zone.

Numerous residents also testified. For the most part, their testimony was not relevant to the issues on appeal.[8] There was testimony that music played at the dock of the Bay was loud enough to be heard inside residents' houses.

At the conclusion of testimony and arguments, the Board allowed the parties to submit briefs. On June 4, 2008, a two-member majority of the Board issued an opinion concluding that the Dock of the Bay was operating as a nightclub and affirming the hearing officer's

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[8]FSLLC filed a motion to limit testimony with respect to expected resident testimony concerning noise at the restaurant and related complaints about the establishment. The Board granted the motion, opining that this type of testimony generally was not relevant to the legal issue whether the business was a nightclub under the Zoning Code, the only issue under *de novo* review. Despite that ruling, many residents testified. Their testimony was cut short by relevance objections, however.

An employee of the Liquor Board also testified and counsel for Ciarpella attempted to introduce into evidence records related to prior noise complaints from 2005. The Board granted FSLLC's hearsay objections to this testimony and evidence, however.

rulings. The Board reduced the $5,000 fine imposed for operating as a nightclub to $1,000 and upheld a $1,000 fine imposed by the hearing officer for the tent violation. FSLLC was ordered to discontinue the "playing of music by way of speaker system" and "live or recorded entertainment."

In its opinion, after reciting the facts, the Board majority looked to the definition of "nightclub" in the Zoning Code. Having noted already that the Dock of the Bay offered "live or recorded entertainment," it turned to the IBC and the IBC Commentary to determine if the business was "categorized as a nightclub." Like the Commissioner, it considered whether the eight non-exclusive characteristics of Subgroup A-2 applied to the Dock of the Bay. It found that six of the eight factors were met: low light levels, entertainment by a live band or recorded music generating above normal sound levels, no theatrical stage accessories, later than average operating hours, service facilities for alcoholic beverages and food, and high occupant load density. It found that two factors – tables and seating arranged or positioned so as to create ill-defined aisles and a specific area for dancing – did not apply.

Based on its finding that the Dock of the Bay exhibited six of the eight characteristics of Subgroup A-2, the Board majority concluded that the restaurant was operating as a nightclub. Its decision closed as follows:

> The Board is not unmindful that the definition of a nightclub, under the [Zoning Code], can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.[L.] zones, might be considered "nightclubs" under the present criteria of the [Zoning Code]. It is not for the Board to change the definition but for the County Council to consider.

One of the three Board panel members issued a dissenting opinion. He emphasized the undisputed facts that characterized the Dock of the Bay as a family restaurant, such as the full-service menu, table seating for 150-160 persons, a pirate ship play area, no cover charge, and the vast majority of sales being food related. He described the "nightclub" definition in the Zoning Code as "exceedingly unclear and circuitous" and characterized the IBC as a "'one size fits all'" building code that fails to reflect the "particular realities and common sense observations of this jurisdiction." In particular, the dissenter took issue with the IBC's practice of grouping restaurants together with such "disparate uses" as banquet halls and nightclubs. He noted that the IBC Commentary even distinguishes between buildings in which people congregate for "*drinking and dancing* (e.g., nightclubs, dancehalls, banquet halls, cabarets, etc.)" and buildings in which people congregate for "food and drink consumption (e.g., restaurants)." (Emphasized in dissenting opinion.)

Finally, the dissenter stated that, even if it were appropriate to apply the Subgroup A-2 criteria, the evidence did not support the Board majority's findings with respect to several of the criteria. Specifically, he found from the testimony that the lighting only was dimmed occasionally, for ambiance; that the business never had been cited for allowing the music to generate above-normal sound levels; that there was no evidence that the business hours from 11:00 p.m. to 2:00 a.m. were "later than average operating hours"; and that "high-occupant load density" is too ambiguous a characteristic to be applied.

The dissenter closed by observing that the Board majority was turning "a blind eye to common sense," when, as here, the facts were clear that the Dock of the Bay was a restaurant offering some musical entertainment on the side. He also noted that "selective enforcement" of the Zoning Code, as testified to by Thompson, seem "contrary to the spirit and intent of any well-written regulation, [] arbitrary and capricious, and possibly an 'Equal Protection under the laws' violation."

FSLLC moved for reconsideration of the Board decision, asking the Board to clarify how many of the IBC Commentary criteria must be satisfied before a business is considered a nightclub; to amend its order to direct the Dock of the Bay to "discontinue its nightclub operation" as opposed to discontinuing all music and live or recorded entertainment;[9] to reconsider the imposition of any fine for the nightclub violation, given the difficulty the Board itself had in determining whether a violation had occurred; and to reconsider the finding of a tent violation. FSLLC also argued that testimony of a number of nearby residents should not have been allowed. The motion was denied in its entirety.

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[9]FSLLC suggested certain changes it could make, short of discontinuing all live and recorded music, to reduce the number of Subgroup A-2 characteristics applicable to it. It stated that it would keep lighting levels at medium, use theatrical accessories, not remain open later than average, keep defined aisles, not have a dance area, close the kitchen during live entertainment so that there would not be "service facilities for food and drink," and not exceed the occupant load limit as set forth by the fire department.

FSLLC petitioned the circuit court for judicial review. Oral argument was heard,[10] and the circuit court issued a ruling on the record affirming the Board's decision. FSLLC timely appealed the judgment of the circuit court.

We shall include additional facts in our discussion of the issues.

STANDARD OF REVIEW

The Court of Appeals has described our circumscribed role in reviewing an agency decision as follows:

> A court's role in reviewing an administrative agency adjudicatory decision is narrow, *United Parcel v. People's Counsel*, 336 Md. 569, 576, 650 A.2d 226, 230 (1994); it "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel*, 336 Md. at 577, 650 A.2d at 230. *See also* [Md.] Code (1984, 1995 Repl. Vol.), § 10-222(h) of the State Government Article; *District Council v. Brandywine*, 350 Md. 339, 349, 711 A.2d 1346, 1350-1351 (1998); *Catonsville Nursing v. Loveman*, 349 Md. 560, 568-569, 709 A.2d 749, 753 (1998).
>
> In applying the substantial evidence test, a reviewing court decides ""'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'"" *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978). *See Anderson v. Dep't of Public Safety*, 330 Md. 187, 213, 623 A.2d 198, 210 (1993). A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. *CBS v. Comptroller*, 319 Md. 687, 698, 575 A.2d 324, 329 (1990). A reviewing court "'must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence' and to draw inferences from that evidence." *CBS v. Comptroller, supra*, 319 Md.

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[10]The judge indicated to the parties that his main concern was "with the 14th Amendment to the United States Constitution that guarantees every citizen the right of due process."

> at 698, 575 A.2d at 329, quoting *Ramsay, Scarlett & Co. v. Comptroller*, 302 Md. 825, 834-835, 490 A.2d 1296, 1301 (1985). *See Catonsville Nursing v. Loveman, supra*, 349 Md. at 569, 709 A.2d at 753 (final agency decisions "are *prima facie* correct and carry with them the presumption of validity").
>
> Despite some unfortunate language that has crept into a few of our opinions, a "court's task on review is *not* to ""'substitute its judgment for the expertise of those persons who constitute the administrative agency,'""" *United Parcel v. People's Counsel, supra*, 336 Md. at 576-577, 650 A.2d at 230, quoting *Bulluck v. Pelham Wood Apts., supra*, 283 Md. at 513, 390 A.2d at 1124. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. *Lussier v. Md. Racing Commission*, 343 Md. 681, 696-697, 684 A.2d 804, 811-812 (1996), and cases there cited; *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881, 886 (1989) ("The interpretation of a statute by those officials charged with administering the statute is . . . entitled to weight"). Furthermore, the expertise of the agency in its own field should be respected. *Fogle v. H & G Restaurant*, 337 Md. 441, 455, 654 A.2d 449, 456 (1995); *Christ v. Department of Natural Resources*, 335 Md. 427, 445, 644 A.2d 34, 42 (1994) (legislative delegations of authority to administrative agencies will often include the authority to make "significant discretionary policy determinations"); *Bd. of Ed. For Dorchester Co. v. Hubbard*, 305 Md. 774, 792, 506 A.2d 625, 634 (1986) ("application of the State Board of Education's expertise would clearly be desirable before a court attempts to resolve the" legal issues).

Bd. of Physician Quality Assurance v. Banks, 354 Md. 59, 67-69 (1999) (footnotes omitted).

In *Marzullo v. Kahl*, 366 Md. 158 (2001), the Court reaffirmed the principle that agencies are owed due deference in their interpretation of the zoning regulations they are tasked with enforcing. In that case, like the instant case, the agency was the Board and the regulations at issue were part of the Baltimore County Zoning Code. The Court opined that the Board's "expertise should be taken into consideration and its decision should be afforded

appropriate deference in our analysis of whether it was 'premised upon an erroneous conclusion of law.'" *Id.* at 173 (quoting *Banks, supra*, 354 Md. at 68) (footnote omitted).

DISCUSSION

I.

FSLLC challenges the legal foundation for the Board's decision and the factual findings supporting it. We begin with the legal contentions. The Zoning Code's definition of "nightclub" is comprised of three elements: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor" and 3) "categorized as a nightclub by the Building Code of Baltimore County." It is undisputed that the Dock of the Bay is a "tavern or other commercial establishment" that offers both live and recorded entertainment in the form of bands, karaoke, DJs, satellite radio, and television. Thus, the central focus of FSLLC's legal argument is that the Board erred in concluding that the Dock of the Bay is "categorized as a nightclub by the Building Code of Baltimore County."

FSLLC points out that the IBC does not define "nightclub." Rather, it groups certain structures, including nightclubs and restaurants, as fitting in Assembly Subgroup A-2. Therefore, according to FSLLC, a finding that the Dock of the Bay meets characteristics of Subgroup A-2 is of no moment because it does not answer the ultimate question: is the Dock of the Bay a nightclub?

Before we address this contention, some history is helpful. Since at least 1956, the Baltimore County Building Code ("BCBC") has adopted the standards of a model building code. *See Metius v. Julio*, 27 Md. App. 491, 497 n.3 (1975). Baltimore County is not unique in this practice. Since the early part of the 20th century, at both the municipal and state levels, building codes around the country have been based on model codes. Three regional model code groups promulgated the codes – the International Conference of Building Officials ("ICBO"), the Building Officials Code Administrators International ("BOCA") and the Southern Building Code Conference International ("SBCCI"). *See* www.iccsafe.org/ABOUTICC/Pages/default.aspx. BOCA, a code designed for the east coast and the midwest, previously had been adopted by the Baltimore County Council. *See Swinson v. Lords Landing Village Condo.*, 360 Md. 462, 479 (2000) (noting that, since at least 1981, most counties in Maryland have had building codes patterned on the BOCA model code); *Metius, supra*, 27 Md. App. at 497 n.3 (noting that Baltimore County adopted the BOCA standards beginning in 1956).

In 1994, these three regional groups consolidated to form the ICC. The first version of the IBC was published in 2000.[11] The IBC does not differ substantially from the BOCA code that it replaced. As relevant to the instant case, however, the category in which a "restaurant" was placed changed. Under the BOCA code, a restaurant was categorized in

[11]Pursuant to Md. Code (2003, 2009 Supp.), section 12-503 of the Public Safety Article, the Maryland Department of Housing and Community Development is required to adopt the IBC as its model building code, subject to some permitted modifications.

Assembly Subgroup A-3.[12] *See* Building Officials Code Administrators, *The BOCA National Building Code/1999* 18 (14th ed. 1999). As discussed, *supra*, under the IBC, restaurants are categorized in Subgroup A-2. Under both BOCA and IBC, nightclubs are categorized in Subgroup A-2. The IBC Commentary, discussed *supra*, setting forth the eight non-exclusive characteristics of Subgroup A-2, appears to have been lifted verbatim from the BOCA Commentary that preceded it. *See In the Matter of the Application of Rampart Partnership (Club 101)*, Case No. 96-60-XA at 18-19 (Aug. 28, 1998) ("*Club 101*") (quoting from the Commentary to the BOCA Code with respect to Subgroup A-2).

Returning to FSLLC's argument, we agree that the IBC does not define a nightclub. The Zoning Code definition of "nightclub" merely requires that the IBC "categorize" an establishment as a "nightclub." The IBC (and the BOCA Code before it) do exactly that. They categorize structures for purposes of numerous safety regulations. That a restaurant and a nightclub fall into the same sub-category under the IBC "Use and Occupancy Classifications" does not affect the analysis under the Zoning Code, however. The Board correctly looked to the IBC and the characteristics of structures that fall within Subgroup A-2 to determine if the Dock of the Bay property is categorized in that grouping. If it is, then it met the Zoning Code definition of "nightclub."

Moreover, as mentioned above, we accord the Board "a degree of deference . . . in its application of the law." *Banks*, *supra*, 354 Md. at 69. In the instant case, the Board's

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[12]Interestingly, that subgroup included "restaurants other than nightclubs."

decision was informed by its experience applying these characteristics, as evidenced by its *Club 101* decision.[13] In *Club 101*, the Board considered whether, under the Zoning Code, a club was operating as a nightclub or an after-hours club. It applied the eight non-exclusive criteria in the commentary to the then applicable BOCA code in analyzing the issue and determined that the club was operating as an after-hours club, in violation of the Zoning Code.[14] The decision reveals, as discussed *supra*, that the eight criteria applied in the instant case were developed at a time when restaurants were not included in Subgroup A-2, thus adding further support to the Board's conclusion that these factors are relevant to the determination whether a structure is "categorized as a nightclub" under the IBC.

FSLLC also maintains that the Dock of the Bay must be *either* a "nightclub" or a "standard restaurant" as those terms are defined under the Zoning Code. FSLLC focuses on the use of the word "primarily" in the definition of "standard restaurant," arguing that, if the Dock of the Bay is "primarily" engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant. We disagree. Several types of restaurants are defined in the Zoning Code, including "carry-out," "fast-food," and "fast-food, drive-through only." *See* Zoning Code § 101. We read the

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[13]The *Club 101* decision was cited by FSLLC both on appeal and before the Board in support of its argument that the Dock of the Bay must be either a "nightclub" or a "restaurant." We will discuss this argument further, *infra*.

[14]In that case, the property owner actively advocated for a finding that the property met the eight characteristics because a "night club" was a permitted use in the zone in question.

phrase "primarily for serving meals and beverages to persons seated at tables on the premises of the establishment" as being intended to distinguish a "standard restaurant" from the other types of restaurants defined in the Zoning Code. This conclusion is buttressed further by the fact that the definition specifically permits a standard restaurant to "offer a carry-out service, provided that such service is accessory to the principal restaurant operations." *Id.*

We also find support in the Zoning Code for the proposition that a property can operate as a "dual use." Section 230.1.A of the Zoning Code sets forth the permissible uses in a B.L. zone. Section 230.1.A.10 lists as a permissible use "combinations of the above uses." It is implicit in this section that properties may operate with dual permissible uses. It follows that a property also could be operating as a dual use with one use being permissible and one use being impermissible. Thompson also testified to this effect before the Board based on his experience in the CED.

Moreover, the only legal authority FSLLC cites for the proposition that a property cannot operate as a dual use actually supports the opposite position. In *Club 101*, the Board explicitly stated that the club could not be both a "night club" and an "after hours club." The then existing definition of an "after hours club" provided, however, that "[a]n after hours club is not a nightclub as defined in the zoning regulations or the building code of Baltimore

County." No such limitation appears in the definition of a "standard restaurant" in the Zoning Code.[15]

FSLLC also challenges the Board's factual finding that six of the eight characteristics of Subgroup A-2 were met. As discussed, *supra*, we review these findings under the deferential substantial evidence standard. We have reviewed the transcript and the record and are satisfied that there was substantial evidence in the record to support these findings.[16]

Finally, FSLLC echoes the concerns expressed by both the majority and dissenting members of the Board that the definition of a nightclub under the Zoning Code is extremely broad. We agree with the Board majority that this is a matter for the Baltimore County Council to address if it is deemed necessary. "The 'wisdom or expediency' of the [zoning ordinance] in its current form is not a matter for judicial intervention." *Lonaconing Trap*

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[15]Moreover, the Board found that, while Club 101 exhibited most of the eight characteristics in the BOCA Commentary, it nonetheless was an after hours club because of other characteristics that distinguished its operation. This is similar to the finding in this case that, while the Dock of the Bay may have met the definition of a restaurant, it nonetheless was operating as a nightclub because of distinguishing characteristics. We perceive no error in this conclusion.

[16]For example, the FSLLC challenges the finding of "low level lights." Thanner himself testified, however, that the lights were dimmed "every evening" for live entertainment; that they were turned down "for dinners as well"; and that they also were turned down "[o]n nights when we are open and do not have live entertainment."

Similarly, FSLLC challenges the finding of "above-normal sound levels" on the basis that there was no evidence in the agency record of prior noise violations. There was evidence, however, that the music that was being played at the Dock of the Bay was loud enough to be heard inside the homes of nearby residents. That evidence plainly supported a finding of "above-normal sound levels."

Club, Inc. v. Md. Dep't of the Env't, 410 Md. 326, 349 (2009) (quoting *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 48 (1973)).

II.

FSLLC contends the definition of "nightclub" under the Zoning Code is "arbitrary, unreasonable and confusing" and therefore the application of that definition is a violation of its due process rights. It also maintains that the County's practice of "discretionary enforcement" of the Zoning Code is unconstitutional.

FSLLC raises these arguments for the first time on appeal. Accordingly, they are not preserved for review.[17] *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *see also Heft v. Maryland Racing Comm'n,* 323 Md. 257, 273-74 (1991) (party may not obtain judicial review of an issue not raised before administrative agency); *Gonzales v. Ghinger*, 218 Md. 132, 135 (1958) (attack on validity of a section of the Baltimore City Code raised for the first time on appeal would not be

[17]As discussed, *supra*, the dissenting member of the Board suggested the possibility of a due process violation in his opinion. The circuit court judge presiding over this case on judicial review also commented on this issue during oral argument, but ultimately affirmed the Board's decision. FSLLC did not raise this issue in its appeal to the Board in its motion for reconsideration or in its petition for judicial review, however.

heard). Moreover, FSLLC cites to no Maryland authority for its propositions.[18] We decline to consider these arguments on appeal.

III.

Finally, FSLLC contends it was error for the CED to charge it with a violation of IBC section 3103 for erecting a tent without a permit. It follows that it was error for the hearing officer to find the violation and for the Board to affirm the finding. This contention is based on the letter of complaint to the CED from Ciarpella's counsel stating that FSLLC had "constructed a 40 X 60 foot reception tent . . . which has been on the property for approximately eight months." According to FSLLC, section 3103 of the IBC is inapplicable to structures in place for more than 180 days.

FSLLC received two citations related to the tent. On August 14, 2006, it was charged with violating section 3103 and ordered to "remove tent or obtain permit." A hearing before a hearing officer was held nine days later and a violation was found. On July 5, 2007, it was again charged with violating section 3103 for having a "tent erected without permit," in addition to continuing nightclub violations. A little over a month later, a hearing was held and a violation was found. In the first case, FSLLC was fined $5,000 both for the nightclub violation and the tent violation. As discussed, *supra*, the Board reduced this fine to $1,000.

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[18]FSLLC instead relies upon section 18:11 of *The Law of Municipal Corporations* pertaining to the standards for discretionary enforcement. Eugene McQuillin, *The Law of Municipal Corporations* (3d ed. 2004). Our research reveals that this section has never been cited in a reported opinion of this Court or the Court of Appeals.

In the second case, a fine of $1,000 was imposed, again without distinction between the tent and nightclub violations.

FSLLC does not point us to any place in the record where it made the argument raised on appeal before the hearing officer.[19] It was raised before the Board, but the Board only reviewed the issue on the record before the hearing officer and found that the hearing officer's decision was supported by substantial evidence and was not premised on an erroneous conclusion of law.

Even if preserved, we find no error in this decision. IBC section 3103 governs "Temporary Structures." Section 3103.1 explains the applicability of this section as follows:

> The provisions of this section shall apply to structures erected for a period of less than 180 days. Tents and other membrane structures erected for a period of less than 180 days shall comply with the *International Fire Code*. Those erected for a longer period of time shall comply with applicable sections of this code.
>
> > **Exception:** Provisions of the *International Fire Code* shall apply to tents and membrane structures erected for a period of less than 180 days.
> >
> > **3103.1.1 Permit Required.** Temporary structures that cover an area in excess of 120 square feet (11.16 m^2), including connecting areas or spaces with a common means of egress or entrance which are used or intended to be used for the gathering together of 10 or more persons, shall not be erected, operated or maintained for any purpose without obtaining a permit from the building official.

(Underlined emphasis added.)

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[19]No transcript of those proceedings is provided in the record extract.

This provision states that tents erected for less than 180 days must comply with the *International Fire Code*, whereas tents erected for "longer periods of time" must comply with the "applicable sections of this code." In other words, contrary to FSLLC's argument, an exception is carved out of section 3103 for tents erected for less than 180 days, but a tent erected for longer must comply with the permit requirement found either in that section or in section 105.1. Accordingly, we find no merit in FSLLC's contention that it was charged under the wrong section of the IBC.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.

Board of Appeals of Baltimore County

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December 30, 2019

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RE: Petition for Judicial Review
Circuit Court Civil Action No.: C-03-CV-19-003515
In the Matter of: Boone Kondylas, LLC
Board of Appeals Case No.: 16-003-SPH

Dear Counsel:

Kindly note that the Proceedings before the Administrative Law Judge and the Board of Appeals of Baltimore County have been filed with the Circuit Court for Baltimore County via the Maryland Electronic Courts and E-filing system. Enclosed is a copy for your records.

If you have any questions, please do not hesitate to contact us.

Sincerely,

Tammy A. Zahner

Tammy A. Zahner
Legal Secretary

Multiple Original Letters
Enclosure

c: Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY	*	
	*	
PETITION OF: BOONE KONDYLAS, LLC	*	
FOR JUDICIAL REVIEW OF THE OPINION OF THE BOARD OF APPEALS OF BALTIMORE COUNTY Jefferson Building, Suite 203 105 W. Chesapeake Avenue Towson, Maryland 21204	*	CIVIL ACTION NO.: C-03-CV-19-003515
	*	
IN THE MATTER OF: BOONE KONDYLAS, LLC - Petitioner	*	
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	
	*	
County Board of Appeals Case No.: 16-003-SPH		

* * * * * * * * * * * * *

PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes the Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the original papers on file in the Department of Permits, Approvals and Inspections and the Board of Appeals of Baltimore County:

ENTRIES FROM THE DOCKET OF THE BOARD OF APPEALS AND DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS OF BALTIMORE COUNTY

July 6, 2015	Petition for Special Hearing filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC under Section 500.7 of the Baltimore County Zoning Regulations to amend previous restrictions imposed in

	Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.
July 23, 2015	Entry of Appearance filed by People's Counsel for Baltimore County.
September 6, 2015	Certificate of Posting.
September 8, 2015	Certificate of Publication in newspaper
September 23, 2015	ZAC Comments.
September 28, 2015	Hearing held before the Office of Administrative Hearings.
October 13, 2015	Closing Memorandum filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner.
October 13, 2015	Protestants' Memorandum filed by Francis X. Borgerding, Jr., Esquire
October 14, 2015	E-mail to ALJ Beverungen from Lawrence E. Schmidt, Esquire objecting to the offering of new evidence as part of Mr. Borgerding's post-hearing memorandum.
October 22, 2015	Opinion and Order issued by the Administrative Law Judge wherein the Petition for Special Hearing was DENIED.
November 13, 2015	Notice of Appeal filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
November 16, 2015	Appeal received by the Board.
November 24, 2015	Notice of Assignment issued by the Board.
January 28, 2016	Letter and Trial Memorandum filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
February 12, 2016	E-mail to Board from People's Counsel submitting preliminary background of four County Board of Appeals decisions involving the *res judicata* doctrine.
February 12, 2016	E-mail to Board from People's Counsel attaching the Court of Special Appeals decision in Fifth Street V. Ciarpella (Dock of the Bay) case.

February 16, 2016 Protestant's Response to Petitioner's Trial Memorandum filed by Francis X. Borgerding, Jr., Esquire on behalf of Charles Wolinski, et al., Protestants.

February 17, 2016 Board convened for a Hearing, Day 1.

Exhibits submitted at Motion Hearing before the Board of Appeals:

Protestants' Exhibit No.

1 – Opinion and Order of OAH (Case No. 2016-0003-SPH) dated October 22, 2015

2 – Unreported Opinion of Court of Special Appeals No. 810, Sept. Term 2009, filed July 9, 2010

People's Counsel Exhibit No.

1 – Compilation of BCZR, Opinion of OAH (Case No. 2016-0003-SPH), Trial Memorandum from Appellant (Case No. 2016-0003-SPH), definition of anticipate, Unreported Court of Special Appeals of Maryland (No. 810 Sept. Term 2009, filed July 9, 2010), Majority Opinion of Baltimore County Board of Appeals (Case Nos. CBA-06-044 and CBA-07-134)

2 – Zoning Checklist/PAI

February 19, 2016 E-mails between Board and counsel regarding scheduling and witnesses.

March 8, 2016 Notice of Reassignment issued by the Board.

April 28, 2016 Board convened for a Hearing, Day 2.

Exhibits submitted at Hearings before the Board of Appeals:

Petitioner's Exhibit No.

1 – Site Plan

2A – Majority Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2B – Dissenting Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2C – Ruling on Motion for Reconsideration and Clarification (Case Nos. 07-144-SPH, CBA-06-044, and CBA-07-134)

3 – Circuit Court Opinion, Final Order, Case No. 03-C-08-009996

4 – Unreported Opinion, Court of Special Appeals, No. 810, Sept. Term, 2009, Filed July 9, 2010
5 – Memorandum Opinion (Exhibit) Contempt-Circuit Court for Baltimore County, Case No. 03-C-08-009996
6 – My Neighborhood Map/aerial photograph of "Dock of the Bay"
7 – My Neighborhood Map/aerial photograph of Millers Island, thumbtack showing Dock of the Bay
8A – Photo of entrance to Dock of the Bay/Boatyard
8B – Photo of Zoning Notice/Dock of the Bay
8C – Photo of Boatyard
8D – Photo of Dock of the Bay
8E – Photo of Dock of the Bay pier
8F – Photo of outdoor seating for Dock of the Bay
8G – Photo of seating at Dock of the Bay
8H – Photo of seating and chairs at Dock of the Bay
8I – Photo of pier at Dock of the Bay
8J – Photo of Row Boat Willie's
8K – Photo of Dock of the Bay
8L – Photo of Dock of the Bay play area for children
8M – Photo of seating inside of Dock of the Bay
8N – Photo of seating at Dock of the Bay
8O – Photo of Bar with patrons at Dock of the Bay
9 – Business license issued by MD to operate a restaurant
10 – Photo of sign viewed as you leave Dock of the Bay, neighbor respect sign
11A – Petition of residents of Millers Island in support
11B – Petition of non-residents of Millers Island in support
12A – Petition from resident customers of Dock of the Bay in support
12B – Petition from non-resident customers of Dock of the Bay in support
13 – Letter from Mark Alan to the Zoning Commission

Protestants' Exhibit No.

1 – Letter dated September 24, 2014 to Mike and Donna Kondylas from Francis X. Borgerding, Jr., Esquire
2 – Letter dated September 12, 2014 to Francis X. Borgerding, Jr., Esquire from Adam Rosenblatt, Assistant County Attorney (ID ONLY/NOT ADMITTED/NOT IN FILE)
3 – MDE – State Noise Pollution – noise that annoys
4 – (NOT IN FILE – NO NOTATION)
5 – My Neighborhood Map aerial photo of Dock of the Bay and surrounding residences

6 – Photo of Dock of the Bay from balcony
7 – Photo of Dock of the Bay
8 – Photo of seating at Dock of the Bay
9 – Thanner's ownership of Dock of the Bay re: sound and decibel levels letter dated May 13, 2008
10 – Letter dated June 9, 2008, letter measured decibel levels emanating from the Dock of the Bay
11 – Letter dated October 3, 2007 measuring the decibel levels from Dock of the Bay
12 – Photograph of Row Boat Willie's building
13 – Large map of aerial view of Dock of the Bay and area, 2016 Google Imaging
14 – My Neighborhood Map printed 4/27/2016, aerial view of Dock of the Bay and area
15 – 2015 Alcoholic Beverage License for Dock of the Bay
16 – Baltimore County Police Records, Sgt. Parrish
17 – Summary of Calls from Exhibit 16
18 – Facebook posts for Dock of the Bay 2/17/16 Boone Letter
19 – Facebook posts for Dock of the Bay 2/21/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
20 – Facebook post for Dock of the Bay 4/27/16 4:57 p.m. Boone Letter
21 – Facebook post for Dock of the Bay 4/27/16 5:24 p.m. Boone Letter
22 – Facebook post from Dock of the Bay 2/22/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
23 – Facebook posts from Dock of the Bay (ID ONLY/NOT ADMITTED/NOT IN FILE)

People's Counsel Exhibit No.

1 – Website photo showing hours of operation
2A – SDAT record showing 9025 Cuckold Point Road, Lot 504
2B – SDAT record showing Cuckold Point Road, Lot 500
2C – SDAT record showing Cuckold Point Road, Lot 502
2D – SDAT record showing Cuckold Point Road, Lot 501
3 – Deed to 9025 Cuckold Point Road dated September 30, 2014
4 – Deed to 9025 Cuckold Point Road dated March 10, 1999
5 – People's Counsel Sign-In Sheet, 2/17/16
6 – People's Counsel Sign-In Sheet, 4/28/16
7 – Map – Property ID and Zoning, 2014 image
8A – Map
8B – Map (color)
8C – Map

9 – Comprehensive Zoning Map
10 – Website page for Mark Alan date 4/26/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
11A – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
11B – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
12 – Letter dated April 27, 2016 from Denise Haas

May 18, 2016	Memorandum of People's Counsel for Baltimore County
May 19, 2016	Protestant's Memorandum filed by Francis X. Borgerding, Jr., Esquire on behalf of Charlie Wolinsky, Brad Metheny, Bonnie Metheny, Matt Charpella, Wayne Waldman and Mike Kondylas, Protestants.
May 19, 2016	Closing Memorandum in Lieu of Oral Argument filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/ Appellant.
June 14, 2016	Board convened for Public Deliberation.
September 15, 2016	Opinion and Order issued by the Board wherein the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music was DENIED.
October 14, 2016	Petition for Judicial Review filed in the Circuit Court for Baltimore County by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
October 19, 2016	Copy of Petition for Judicial Review received from the Circuit Court for Baltimore County by the Board of Appeals.
October 20, 2016	Certificate of Compliance sent to all parties and interested persons.
October 20, 2016	Response to Petition for Judicial Review filed by People's Counsel for Baltimore County.
November 3, 2016	Response to Petition for Judicial Review filed by Francis X. Borgerding, Jr., Esquire on behalf of Charles Wolinski, et al., Protestants.

December 14, 2016	Transcript of testimony filed.
December 14, 2016	Record of Proceedings filed in the Circuit Court for Baltimore County, Case No. 03-C-16-010551.
June 1, 2017	Argument before the Circuit Court for Baltimore County.
June 2, 2017	Order of the Circuit Court for Baltimore County wherein the case was REMANDED to the Board of Appeals.
June 6, 2017	Notice of Appeal to Court of Special Appeals filed by Francis X. Borgerding, Jr., Esquire on behalf of Charles Wolinski, et al.
June 14, 2017	Notice of Appeal to the Court of Special Appeals filed by People's Counsel for Baltimore County.
November 9, 2018	Unreported Opinion of the Court of Special Appeals wherein the appellants' appeal was dismissed as premature.
April 11, 2019	File retrieved from the Circuit Court for Baltimore County.
May 16, 2019	Notice of Deliberation on Remand from the Circuit Court for Baltimore County issued by the Board.
May 22, 2019	Letter to the Board from Francis X. Borgerding, Jr., Esquire requesting a postponement of the Public Deliberation.
May 29, 2019	Letter to the Board from Lawrence E. Schmidt, Esquire objecting to the postponement request of Mr. Borgerding.
May 31, 2019	Letter to Francis X. Borgerding, Jr., Esquire from the Board denying his request for a postponement of the Public Deliberation as participation is not allowed and attendance is not required.
May 31, 2019	Letter to People's Counsel for Baltimore County from the Board returning his letter of May 29, 2019 as the record is closed.
June 20, 2019	Board convened for Public Deliberation on Remand from the Circuit Court for Baltimore County.
August 22, 2019	Opinion and Order on Remand from the Circuit Court for Baltimore County issued by the Board wherein the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-

06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music was DENIED.

September 23, 2019 Petition for Judicial Review filed in the Circuit Court for Baltimore County by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner.

September 26, 2019 Line Requesting Removal of Respondent filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner.

October 28, 2019 Copy of Petition for Judicial Review received from the Circuit Court for Baltimore County by the Board of Appeals.

November 1, 2019 Certificate of Compliance and notification letters sent to all parties.

November 4, 2019 Response to Petition for Judicial Review filed by People's Counsel for Baltimore County.

November 8, 2019 Response to Petition for Judicial Review filed by Francis X. Borgerding, Jr., Esquire on behalf of Charles Wolinski, *et al.*, Protestants.

December 30, 2019 Transcript of testimony filed.

December 30, 2019 Record of Proceedings filed in the Circuit Court for Baltimore County.

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.

Tammy A. Zahner, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of December, 2019, a copy of the foregoing was mailed, first class mail, postage prepaid to the following:

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Kenneth Boone
Boone Kondylas, LLC
9025 Cuckold Point Road
Sparrows Point, MD 21219

Charles Wolinski
9019 Cuckold Point Road
Baltimore, MD 21219

Brad Metheny
2704 6th Street
Baltimore, MD 21219

Bonnie Metheny
2704 6th Street
Baltimore, MD 21219

Francis X. Borgerding, Jr., Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

Matt Ciarpella
2716 6th Street
Baltimore, MD 21219

Tammy Waldmann
9014 Cuckold Point Road
Baltimore, MD 21219

Tammy A. Zahner
Tammy A. Zahner

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY

*

PETITION OF:
BOONE KONDYLAS, LLC *

CIVIL ACTION
FOR JUDICIAL REVIEW OF THE * NO. C-03-cv-19–3515
OPINION OF THE BOARD OF APPEALS
OF BALTIMORE COUNTY *
Jefferson Building, Suite 203
105 W. Chesapeake Avenue *
Towson, Maryland 21204

*

IN THE MATTER OF:
BOONE KONDYLAS, LLC - Petitioner *

RE: Petition for Special Hearing to * RECEIVED
amend previous Restrictions imposed
in Cases 07-144-SPH, CBA-06-044 * NOV 12 2019
and CBA-07-134 so as to permit future
use of the property as a restaurant * BALTIMORE COUNTY
with limited accessory music BOARD OF APPEALS

*

County Board of Appeals
Case No.: 16-003-SPH *

* * * * * * * * * * * * *

RESPONSE TO PETITION FOR JUDICIAL REVIEW

Charles Wolinski, et al., in accordance with Maryland Rule 7-204, submits this response to the Petition for Judicial Review filed by Boone Kondylas, LLC and state that they oppose the Petition.

FRANCIS X. BORGERDING, JR.
CPF# 8812150059
409 Washington Avenue, Suite 600
Towson, Maryland 21204
410-296-6820 Fax: 410-296-6884
borgerdinglaw@aol.com

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 9th day of January, 2019, a copy of the foregoing was either mailed or served via MDEC to:

Lawrence Schmidt, Esquire
600 Washington Avenue, Suite 200
Towson, MD 21204

Peter Max Zimmerman, Esquire
Carole S. Demilio, Esquire
People's Counsel for Baltimore County
The Jefferson Building
105 West Chesapeake Avenue
Suite 204
Towson, MD 21204

Baltimore County Board of Appeals
105 West Chesapeake Avenue
Suite 203
Towson, MD 21204

FRANCIS X. BORGERDING, JR.
CPF# 8812150059

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY

PETITION OF:
BOONE KONDYLAS, LLC

FOR JUDICIAL REVIEW OF THE OPINION OF THE BOARD OF APPEALS OF BALTIMORE COUNTY
Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204

CIVIL ACTION
NO.: C-03-CV-19-003515

IN THE MATTER OF:
BOONE KONDYLAS, LLC – Petitioner

RE: Petition for Special Hearing to amend previous Restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music

County Board of Appeals Case No.: 16-003-SPH

RECEIVED
NOV 04 2019
BALTIMORE COUNTY
BOARD OF APPEALS

RESPONSE TO PETITION FOR JUDICIAL REVIEW

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, in accordance with Maryland Rule 7-204, submits this response to the Petition for Judicial Review filed by BOONE KONDYLAS, LLC and states that it intends to participate in this action for Judicial Review. The undersigned participated in the proceeding before the County Board of Appeals.

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County
The Jefferson Building
105 West Chesapeake Avenue, Suite 204
Towson, MD 21204
(410) 887-2188
pzimmerman@baltimorecountymd.gov
CPF# 7212010276

CAROLE S. DEMILIO
Deputy People's Counsel
The Jefferson Building
105 West Chesapeake Avenue, Suite 204
Towson, MD 21204
(410) 887-2188
cdemilio@baltimorecountymd.gov
CPF# 7412010076

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November 2019, a copy of the foregoing Response to Petition for Judicial Review was sent, via electronic filing to:

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Lawrence Schmidt, Esquire
600 Washington Avenue, Suite 200
Towson, Maryland 21204

And via first class mail, postage prepaid, to:

Baltimore County Board of Appeals
105 West Chesapeake Avenue, Suite 203
Towson, Maryland 21204

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY

*

PETITION OF:
BOONE KONDYLAS, LLC *

FOR JUDICIAL REVIEW OF THE OPINION OF * CIVIL ACTION
THE BOARD OF APPEALS NO.: C-03-CV-19-003515
OF BALTIMORE COUNTY *
Jefferson Building, Suite 203
105 W. Chesapeake Avenue *
Towson, Maryland 21204

*

IN THE MATTER OF:
BOONE KONDYLAS, LLC - Petitioner *

RE: Petition for Special Hearing to amend previous *
restrictions imposed in Cases 07-144-SPH, CBA-06-044
and CBA-07-134 so as to permit future use of the property *
as a restaurant with limited accessory music

*

County Board of Appeals Case No.: 16-003-SPH

* * * * * * * * * * * * *

CERTIFICATE OF COMPLIANCE

Madam Clerk:

Pursuant to the Provisions of Rule 7-202(d) of the *Maryland Rules*, the Board of Appeals of Baltimore County has given notice by mail of the filing of the Petition for Judicial Review to the representative of every party to the proceeding before it; namely:

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Kenneth Boone
Boone Kondylas, LLC
9025 Cuckold Point Road
Sparrows Point, MD 21219

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

Charles Wolinski
9019 Cuckold Point Road
Baltimore, MD 21219

Matt Ciarpella
2716 6th Street
Baltimore, MD 21219

Brad Metheny
2704 6th Street
Baltimore, MD 21219

Tammy Waldmann
9014 Cuckold Point Road
Baltimore, MD 21219

Bonnie Metheny
2704 6th Street
Baltimore, MD 21219

A copy of said Notice is attached hereto and prayed that it may be made a part hereof.

I HEREBY CERTIFY that on this 1st day of November, 2019 a copy of the foregoing Certificate of Compliance has been mailed to the individuals listed above.

Tammy A. Zahner

Tammy A. Zahner, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

November 1, 2019

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 220
Towson, Maryland 21204

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: Petition for Judicial Review
Circuit Court Civil Action No.: C-03-CV-19-003515
In the Matter of: Boone Kondylas, LLC
Board of Appeals Case No.: 16-003-SPH

Dear Counsel:

Notice is hereby given, in accordance with the Maryland Rules that a Petition for Judicial Review was filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, in the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter. The County Board of Appeals received written notification of acceptance from the Circuit Court for Baltimore County on October 28, 2019. Any party wishing to oppose the petition must file a response with the Circuit Court for Baltimore County within 30 days after the date of this letter, pursuant to the Maryland Rules.

In accordance with the Maryland Rules, the Board of Appeals is required to submit the record of proceedings of the Petition for Judicial Review within 60 days. Transcripts have previously been provided by Counsel. Additional copies can be purchased from the Board of Appeals in accordance with the County's copying policy.

A copy of the Certificate of Compliance has been enclosed for your convenience.

Very truly yours,

Tammy A. Zahner
Legal Secretary

Multiple Original Cover Letters
Enclosure

c: Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad Metheny
Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

E-FILED; Baltimore County Circuit Court
Docket: 9/23/20 3:56 PM; Submission: 10/2/2019 3:56 PM

PETITION OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	IN THE
	*	CIRCUIT COURT
	*	FOR
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY Jefferson Building, Suite 203 105 W. Chesapeake Avenue Towson, MD 21204	*	BALTIMORE COUNTY
	*	
	*	**Case No.:** **C-03-CV-19-003515**
IN THE MATTER OF: BOONE KONDYLAS, LLC - Petitioner	*	
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	
	*	
	*	
County Board of Appeals Case No. 16-003-SPH		

RECEIVED
OCT 28 2019
BALTIMORE COUNTY
BOARD OF APPEALS

* *

PETITION FOR JUDICIAL REVIEW

Petitioner, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, requests judicial review of the Opinion of the Board of Appeals for Baltimore County dated August 22, 2019, a copy of which is attached as Exhibit A, in the above referenced matter. Petitioner was a party below and fully participated, individually and through other counsel, in the proceedings.

This Petition is filed pursuant to Rules 7-202 and 7-203(b) of the Maryland Rules of Procedure.

/s/

LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
lschmidt@sgs-law.com
CPF # 7905010152

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **23rd** day of **September, 2019,** a copy of the foregoing Petition for Judicial Review was mailed, via first class mail to:

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Krysundra Cannington, Administrator
County Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carol S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

/s/
LAWRENCE E. SCHMIDT

RECEIVED
SEP 27 2019
BALTIMORE COUNTY
BOARD OF APPEALS

PETITION OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	IN THE CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY Jefferson Building, Suite 203 105 W. Chesapeake Avenue Towson, MD 21204	*	FOR BALTIMORE COUNTY
	*	**Case No.: C-03-CV-19-003515**
IN THE MATTER OF: BOONE KONDYLAS, LLC - Petitioner	*	
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	
County Board of Appeals Case No. 16-003-SPH	*	

* *

LINE REQUESTING REMOVAL OF RESPONDENT

Now comes the Petitioner, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, and hereby says the following:

1. A Petition for Judicial Review ("Petition") was e-filed on September 23, 2019 requesting judicial review of the Opinion of the Board of Appeals for Baltimore County pursuant to MD Rule 7-202.
2. In order to e-file the Petition, per MDEC, my paralegal had to include a Respondent on the initial filing.
3. Thereafter, I received a notice of deficient filing indicating "all parties included in File and Serve must also be included on the document and match exactly".
4. Upon contacting the Clerk's office, Petitioner's counsel was advised that the Office of People's Counsel was listed as a Respondent on the matter and, as such, would either

need to be identified as a party in the caption of the Petition or removed as a party to this matter by filing a Line.

5. As such, Petitioner requests the Court remove the Office of People's Counsel as a Respondent in this matter and issue a notice accepting the Petition as filed on September 23, 2019.

6. Any individual or entity that wishes to participate in this matter, including but not limited to the Office of People's Counsel, may file a Notice of Intent to Participate pursuant to MD Rule 7-204 and thereafter be entered into the case.

/s/
LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
lschmidt@sgs-law.com
CPF # 7905010152

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **26th** day of **September, 2019,** a copy of the foregoing Line Requesting Removal of Respondent was mailed, via first class mail to:

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Krysundra Cannington, Administrator
Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carol S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

/s/
LAWRENCE E. SCHMIDT

PETITION OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	IN THE
	*	CIRCUIT COURT
	*	FOR
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY Jefferson Building, Suite 203 105 W. Chesapeake Avenue Towson, MD 21204	*	BALTIMORE COUNTY
	*	
	*	**Case No.:** _____
IN THE MATTER OF: BOONE KONDYLAS, LLC - Petitioner	*	
	*	
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	
	*	
	*	
County Board of Appeals Case No. 16-003-SPH		

RECEIVED
SEP 25 2019
BALTIMORE COUNTY
BOARD OF APPEALS

* *

PETITION FOR JUDICIAL REVIEW

Petitioner, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, requests judicial review of the Opinion of the Board of Appeals for Baltimore County dated August 22, 2019, a copy of which is attached as Exhibit A, in the above referenced matter. Petitioner was a party below and fully participated, individually and through other counsel, in the proceedings.

This Petition is filed pursuant to Rules 7-202 and 7-203(b) of the Maryland Rules of Procedure.

LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
lschmidt@sgs-law.com
CPF # 7905010152

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **23rd** day of **September, 2019,** a copy of the foregoing Petition for Judicial Review was mailed, via first class mail to:

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Krysundra Cannington, Administrator
County Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carol S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

LAWRENCE E. SCHMIDT

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

August 22, 2019

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

Dear Counsel:

Enclosed please find a copy of the Opinion and Order on Remand from the Circuit Court for Baltimore County issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Sunny Cannington

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Multiple Original Cover Letters

c: Kenneth Boone/Boone Kondylas, LLC
Lawrence M. Stahl, Managing Administrative Law Judge
C. Pete Gutwald, Director/Department of Planning
Michael D. Mallinoff, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

EXHIBIT
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A

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE BOARD OF APPEALS
	*	OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION AND ORDER ON REMAND
FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY

This case comes to the Board on remand from the Circuit Court for Baltimore County from an appeal of an Order of this Board denying a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music (the "Remand Order").

The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire and Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation on the Remand Order was held on June 20, 2019.

Factual and Procedural Background

The subject property is located on the water front in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" ("DOB"). The Property is also improved with boat slips for patrons to dock their boats and access

DOB via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, DOB came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation (aka the "Thanner Era"), music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement complaints beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing before this Board to request a determination that DOB - with its associated live music - did not constitute a "nightclub." In our June 4, 2008 Opinion (the "2008 Opinion"), we held that Mr. Thanner's operation of DOB, along with music played, met the definition of "nightclub" in §101.1 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a "nightclub" was not permitted in a BL zone (even by special exception), this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (2008 Opinion, p. 14).

Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record before this Board supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. (CSA Opinion, 7/9/2010).

In or about 2014, the Petitioner purchased the Property and reopened DOB. Petitioner filed the instant Petition for Special Hearing to request that the restriction on live music be removed. A public hearing *de novo* was held before this Board on February 17, 2016 and April 28, 2016.

In our Opinion and Order dated September 15, 2016 (the "2016 Opinion"), from which this Remand Order originated, we concluded that the Petitioner's proposal here, would constitute a "nightclub" under BCZR §101, just as it did when Fifth Street, LLC owned and operated DOB. (See 2016 Opinion, p. 13). Succinctly, we stated that: "there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner…or before this Board after a *de novo* hearing." (*Id.*).

In weighing the evidence presented at that time and in issuing our 2016 Opinion, we incorporated - *in its entirety* - our 2008 Opinion. (2016 Opinion, p. 9). In doing so, our 2016 Opinion adopted our 2008 analysis of the facts under the definition of "nightclub" in BCZR, §101.1, as well as the eight (8) characteristics listed in the International Building Code ("IBC") for facilities within the "A-2 classification." According, in our 2016 Opinion, when we decided that the Petitioner's proposed use was the same as the 2008 operation by Thanner, we adopted all factual determinations we previously made.

Additionally, our 2016 Opinion referred to: "the facts and holdings as set forth in the Court of Special Appeals decision dated July 9, 2010" which affirmed our 2008 Opinion. (See 2016 Opinion, p. 9). This is the same appellate decision now referred to by the Circuit Court in the Remand Order as: "*Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009" from which the Circuit Court now requires further analysis.

Issues on Remand

The Remand Order instructs this Board to do the following:

> ….for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC's v. Ciarpella*, No. 810, September

> Term, 2009 which includes consideration of the criteria in the International Building Code (IBC).

Notwithstanding the language of our 2016 Opinion, and in order to comply with the Remand Order, we analyze the facts presented under the BCZR definition of "nightclub" and the criteria in the IBC. As stated by the Court of Special Appeals in *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, a "nightclub" is comprised of three elements under BCZR, §100.1: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor," and 3) "categorized as a nightclub by the Building Code of Baltimore County." (See CSA Opinion, 7/9/2010, p. 16).

The Court of Special Appeals in *Ciarpella*, noted that, in 2005, Baltimore County adopted the IBC as the Building Code of Baltimore County. (See CSA Opinion, 7/9/2010, p. 3). The Appellate Court further stated that IBC, §303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." (*Id.*).

Within Assembly Group A, Subgroup A-2 includes:

Assembly uses intended for food and/or drink consumption including, but not limited to:

> Banquet halls
> Night clubs
> Restaurants
> Taverns and bars

(IBC at 24).

Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g.,

restaurants.) The uniqueness of these occupancies is characterized by some or all of the following:

1) Low lighting levels;
2) Entertainment by a live band or recorded music generating above-normal sound levels;
3) No theatrical stage accessories;
4) Later-than-average operating hours;
5) Tables and seating arranged or positioned so as to create ill-defined aisles;
6) A specific area designated for dancing;
7) Service facilities for alcoholic beverages and food; and
8) High occupant load density.

(IBC at 3-17; 3-18).

The Court of Special Appeals in *Fifth Street* emphasized that the IBC Commentary explained that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. (See CSA Opinion, 7/9/2010, p. 4). The Court further noted that the 8 characteristics listed above "are advisory in determining whether Group A-2 is the appropriate classification." (*Id.*). The Court also stated that these eight (8) characteristics are "non-exclusive." (*Id.* at p. 11).

It is important to highlight that the Appellate Court in *Fifth Street* rejected Thanner's argument that DOB must either be a "standard restaurant" or a "nightclub". Mr. Thanner argued that if the DOB is primarily engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant, and not a "nightclub." (CSA Opinion, 7/9/2010, p. 19). The Appellate Court disagreed and held that the terms "standard restaurant" and "nightclub" are not mutually exclusive. The Court interpreted the phrase "standard restaurant" as being distinguishable from other types of restaurants such as "carry-outs", "fast-food," or "drive-through only." (*Id.*).

The Court added that permissible uses in a BL zone actually included dual uses (*i.e.* combinations of permissible uses). BCZR, §230.1.A.10. As a result, a property located in a BL zone could be operating as a dual use, such that one use is permissible and one use is not. (CSA Opinion, 7/9/2010, p. 20).

Here, in the Petitioner's case on the merits, Mr. Boone was the sole witness who testified about his proposed plan. His testimony only addressed some of the IBC characteristics. The other witnesses who testified on behalf of DOB were character witnesses for Mr. Boone. Each of those character witnesses either worked at Dock of Bay, or were related to someone who worked there. They were collectively of the opinion that live music should be permitted by this Board because Mr. Boone is a good person.

On this point, we repeat what we said in our 2016 Opinion that our decision now and then, does not reflect on Mr. Boone personally:

> We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that [he would] be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

(2016 Opinion, p. 13).

In regard to the eight (8) IBC characteristics, we find as follows:

1) **Low lighting levels**.

Petitioner failed to testify about, or provide any evidence regarding, his proposed plan for lighting levels.

2) **Entertainment by a live band or recorded music generating above-normal sound levels**.

DOB is open 7 days a week. (T. p. 55). Mr. Boone testified that he wants live music to be played every day. (T. pp. 104, 114). He wants live music played both inside and outside DOB at varying times. (T. p. 98). He wants to compete with eight (8) other bars/restaurants which are located on the peninsula and offer live music, even on weekdays. (T. p. 62-63). Mr. Boone testified that those competing businesses offer Sunday afternoon music from 1:00 pm to 5:00 or 6:00 pm. (T. 113-114). According to Mr. Boone, those establishments also have music on Wednesdays, Thursdays and Fridays. (T. p. 103). However, Mr. Boone also acknowledged that his competitors are located in a "business, major (BM) zone," which zone permits live music.

As for "live bands," the Court of Special Appeals reiterated that, during the Thanner era, live entertainment was offered on the following days and times, both inside and outside the restaurant:

> Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.
>
> On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

(CSA Opinion, p. 6).

In April of 2015, Mr. Boone hired Mark Allen as a soloist act to play on a Saturday night. (T. p. 57). While it is more expensive, Mr. Boone indicated that he has the option to hire Mr. Allen along with his band. (T. p. 58). In addition to Mr. Allen, Mr. Boone hired a Frank Sinatra singer and an Oomph band to play for Octoberfest. (T, p. 58). Mr. Boone hired a disc jockey on New Year's Eve. (T. p. 51).

As we stated in our 2016 Opinion, Mr. Boone would not agree to any limitation on the type of live music. (T. p. 104-105). Indeed, when asked in direct examination whether he would agree to a restriction on type of music, Mr. Boone would only agree to time restrictions:

> MR. SCHMIDT: Okay and if the Board proposed limitations on the type of music or the volume of music, you would, you would be amenable to those and follow those limitations?
>
> MR. BOONE: I'd be very happy to live within sound restrictions on outside music, time restrictions on both indoor and outdoor music and I do not want to cater to the young crowd and I'd be happy to live with time restrictions, both inside and outside.

(T. pp. 59-60).

Mr. Boone's concession that he would be amenable to a sound level restriction was not persuasive. Mr. Boone had the burden to prove to the Board what constitutes "above-normal sound levels" and how the proposed live music (whether soloist or band) would stay below those levels.

When asked on cross examination how Mr. Boone would implement his plan, he sarcastically responded that: "I'll have an army of people with sound meters." (T. p. 112). Although appearing to the Board as an after-thought during his direct testimony, Mr. Boone's proposal is to use a decibel monitoring device each time live music is played outside DOB. He testified that there should be an "agreeable" sound level for outside music and that bands would play within that sound level. (T. p. 107). Yet, Mr. Boone could not provide the Board with maximum sound level that he was proposing. (T. p. 111). When pressed for his maximum sound level, Mr. Boone responded that it would "be determined at a later time." (T. p. 113).

Mr. Boone testified on cross examination that he did not know what kind of noise levels would meet decibel levels of 55-65. (T. p. 80). He admitted that he would not personally be at the DOB full time to measure sound levels. (T. p. 97). Indeed, he conceded that he has never

personally operated a decibel monitoring device. (T. p. 120). Mr. Boone is not an expert in music or sound. (T. p. 111). DOB does not employ a sound engineer. (*Id.*).

In addition, Mr. Boone did not dispute that there would be amplification of music as he stated that: "Most of the sound will be controlled by the level of amplification." (T. p. 113). Russell McClelland was a witness who testified that during the Thanner Era, reggae music was played at amplified levels, after dark until 11:00 pm or 12:00 am, all days of the week. (T. p. 134). Mr. Boone candidly revealed that he has no previous experience operating a business where live music is played. (T. p. 116).

The Board finds that Mr. Boone's proposal was not credible. His testimony left unanswered critical aspects as to how he would implement his plan. It is beyond the expertise of this Board to determine what is "above-normal sound levels" or to determine how such sound should be measured. The Board is left to speculate as to what might happen if live music is permitted inside and/or outside DOB. Thus, the proposed plan is both impractical and unenforceable.

As for sound emanating from live music inside the DOB, Mr. Boone did not acknowledge the known problem which occurred during the Thanner era with sound escaping beyond the four (4) walls of the building. We consider this issue in light of Mr. Boone's testimony that, other than the footprint of the kitchen area (which he expanded by pouring a concrete pad), he has not made any changes to the DOB since the Thanner Era. As Mr. Boone said: "...the four walls are still the four walls." (T. pp. 40-41). Thus, there is no additional sound proofing of the building which may alleviate sound levels inside.

Mr. Boone interjected that currently (without live music), his typical customer is between 40-70 years old; average age is 50 years old. (T. 55). While he indicated that he does not intend

to cater to a younger crowd, if the type of live music draws a younger crowd, he would not be able to exclude those customers. (T. pp. 99-100). During boating season, DOB draws customers from all over Baltimore County. (T. p. 68).

Accordingly, while Mr. Boone initially suggested hiring a solo guitarist or a Frank Sinatra singer, Mr. Boone would not agree to a restriction on the type of music which DOB could offer. (T. pp. 104-105). In fact, he testified that he believed the restriction on music at DOB would be lifted when the liquor license was transferred from Thanner to the Petitioner. (T. p. 79).

As for "recorded music," Mr. Boone already offers recorded music by way of radios and televisions inside the DOB. (T. p. 52). The Court of Special Appeals noted that Thanner had: "ten television sets inside the restaurant, and another two at the outside bar. A house music system, connected to speakers inside and outside, played satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered." (CSA Opinion, 7/9/2010, p. 6). According, we find that the use and availability of recorded music has not changed.

Consequently, as to whether proposed live band or recorded music will generate above-normal sound levels, the Board finds that live band or live music will generate above-normal sounds levels and Mr. Boone's testimony did not persuade us otherwise.

3) **No theatrical stage accessories.**

Mr. Boone testified that he has no plans to build a stage from which a live band could perform. (T. p. 63). However, this Board is mindful, that a stage or at least a stage-like area (both inside and outside) would have to be created if live bands were to perform.

4) **Later-than-average operating hours.**

Mr. Boone verified that DOB is open seven (7) days a week. (T. p.55). He testified that during fall, spring, and winter seasons, DOB is opened Monday through Saturday from 11:00 am

until 10:00 pm; on Sundays, DOB closes around 9:00 pm. (T. p.55; p. 63). In the summer, on the weekends, he said DOB opens at 9:00 am for breakfast. (*Id.*). The outside space at DOB is open from April through October. (T. p. 48).

On cross examination, Mr. Boone's direct testimony as to current operating hours was contradicted with the introduction of a copy of the DOB website which confirms that DOB is actually open Monday through Thursday from 11:00 am to 11:00 pm; and Friday and Saturday 11:00 am until 1:00 am. (PC Ex. 1). (T. p. 96). Mr. Boone admitted that he arranged and approved the website, but had forgotten about the hours of operation listed there. (*Id.*).

He initially testified on direct that his plan was to have music on Friday and Saturday nights from 6:00 pm to 10:00 pm with last call for alcohol at midnight; he hopes DOB will then be cleared out by 12:30. (T. p. 60). He then stated that he would like music outside on Sundays: "probably 5:00 til 8:30 outside.....I don't expect to have music outside after dark." (T. p. 61).

Then, on cross examination, he denied that his proposal was to have all music stop on Friday and Saturday nights at 10:00 pm. (T. p. 103). Notwithstanding his direct testimony at the Board hearing, he added hours for both inside and outside music which would apply to all weekdays and weekends:

> What I said is that music inside would stop at 11:00 pm on Fridays and Saturdays, stop at 7:00 pm on Sundays, music outside would stop at dusk.

(T. p. 103). Mr. Boone agreed that, in summer months, "dusk" could be as late as 9:00 pm. (T. p. 104). Even Mr. Thanner's outside music ended at 8:00 pm. (CSA Opinion, 7/9/2010, p. 6).

We find that Mr. Boone's testimony on this factor was not credible. The DOB website, which Mr. Boone arranged and approved, reveals later than average operating hours for a restaurant. Accordingly, DOB hours are akin to those of a nightclub.

5) **Tables and seating arranged or positioned so as to create ill-defined aisles**.

Photographs of the tables and chairs both inside and outside the DOB reveal that neither are fixed or in any way anchored to the floor. (Pet. Ex. 8E, 8F, 8G, 8H, 8K, 8M and 8N). Additionally, Mr. Boone did not testify that the tables and chairs were attached to the floor. Accordingly, while both seating areas have aisles to permit serving food and beverages, nothing prevents such tables and chairs from being moved into ill-defined aisles, to allow for a band or for people to dance as in the Thanner Era. Indeed, this Board can reasonably expect that customers will rearrange tables and chairs so as to permit dancing when live music performs. This factor closely resembles a nightclub, rather than a restaurant.

6) **A specific area designated for dancing**.

Mr. Boone testified that the restaurant does not have a dance floor and that he has no plans to build a dance floor. (T. p. 63). In our 2008 Opinion, we likewise found that there was no specific dance area during the Thanner era. (BOA 2008 Opinion, p. 12; CSA Opinion, 7/9/2010, p. 6). Although the Appellate Court reaffirmed that there was no dance floor, it noted that: "....during live performances patrons often dance in between the tables." (CSA Opinion, 7/9/2010, p. 6).

Ironically, the existence of a dance floor under this IBC factor is a characteristic of a nightclub. Yet, the definition of "nightclub" in BCZR §101.1 is a facility "with or without a dance floor." Given that this is a proposed use, we must consider what is more likely to occur than not if live music is permitted. Based on Mr. Boone's testimony, the seating arrangement and layout of tables and chairs both inside and outside the restaurant is substantially similar to that of the Thanner Era, we find that there is nothing to prohibit patrons from dancing between the tables. It certainly would be reasonable to expect patrons to want to dance if live music is permitted.

Further, if there is no designated dance floor, nothing prevents patrons from moving tables and chairs to create a dance area.

7) **Service facilities for alcoholic beverages and food.**

There is no dispute that DOB serves both alcohol and food. Mr. Boone testified that, without live music, the food/alcohol ratio is consistently 80% food, 20% alcohol. (T. p. 56). During the Thanner Era, approximately 70% of sales was on food, 28% was on alcohol and 2% was on t-shirts and cookbooks. (CSA Opinion, p. 6). As a result, we find that the food/alcohol ratio is substantially similar to those during the Thanner Era. We can also reasonably expect that the sale of alcohol will increase if live music is permitted.

8) **High occupant load density.**

At full capacity, Mr. Boone testified that DOB has the capacity to *seat* over 223 people (98 people at inside seating, plus 25 more people at the inside bar; and an additional 100 people can sit outside). (T. p. 53). The Court of Special Appeals noted that, based on Mr. Thanner's testimony before this Board in 2008, the DOB had the capacity to serve 150-160 people and that, with those numbers, there was a high occupant load density. (CSA Opinion, p.5).

As set forth above, the description in Subgroup A-2 includes "occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants.)." Based on Mr. Boone's testimony of 223 people who can be seated at DOB, and giving consideration to even more people who would be standing and/or dancing, we find that DOB has a high occupant load density.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. The Board finds that DOB meets 7 of the 8 criteria set forth in Group A-2. This would be criteria 2, 3, 4, 5, 6, 7, and 8 (with no evidence presented as to criteria #1). Simply put, as we stated in our 2016 Opinion and based on the IBC characteristics above, we find that music, under the Petitioner's proposal, whether played inside or outside, is a factor in finding that the DOB is classified as a "nightclub" under the definition set forth in BCZR, §101.1.

DOB proposed operations are substantially the same as in 2008. Both Mr. Thanner and Mr. Boone expressed the desire for live music to boost revenue and compete with the neighboring restaurants located in BM zones. Moreover, there has been no change to the physical layout of the building, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of inside live music on the neighboring properties.

The County Council has determined that "nightclubs" can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in that zone. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101.1. The facts presented by the Petitioner here have not changed that determination.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 22nd day of August, 2019, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Deborah C. Dopkin

Jason S. Garber

Board of Appeals of Baltimore County

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August 22, 2019

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RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

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DOB via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

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Mr. Thanner filed a Petition for Special Hearing before this Board to request a determination that DOB - with its associated live music - did not constitute a "nightclub." In our June 4, 2008 Opinion (the "2008 Opinion"), we held that Mr. Thanner's operation of DOB, along with music played, met the definition of "nightclub" in §101.1 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a "nightclub" was not permitted in a BL zone (even by special exception), this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (2008 Opinion, p. 14).

Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record before this Board supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. (CSA Opinion, 7/9/2010).

In or about 2014, the Petitioner purchased the Property and reopened DOB. Petitioner filed the instant Petition for Special Hearing to request that the restriction on live music be removed. A public hearing *de novo* was held before this Board on February 17, 2016 and April 28, 2016.

In our Opinion and Order dated September 15, 2016 (the "2016 Opinion"), from which this Remand Order originated, we concluded that the Petitioner's proposal here, would constitute a "nightclub" under BCZR §101, just as it did when Fifth Street, LLC owned and operated DOB. (See 2016 Opinion, p. 13). Succinctly, we stated that: "there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner...or before this Board after a *de novo* hearing." (*Id.*).

In weighing the evidence presented at that time and in issuing our 2016 Opinion, we incorporated - *in its entirety* - our 2008 Opinion. (2016 Opinion, p. 9). In doing so, our 2016 Opinion adopted our 2008 analysis of the facts under the definition of "nightclub" in BCZR, §101.1, as well as the eight (8) characteristics listed in the International Building Code ("IBC") for facilities within the "A-2 classification." According, in our 2016 Opinion, when we decided that the Petitioner's proposed use was the same as the 2008 operation by Thanner, we adopted all factual determinations we previously made.

Additionally, our 2016 Opinion referred to: "the facts and holdings as set forth in the Court of Special Appeals decision dated July 9, 2010" which affirmed our 2008 Opinion. (See 2016 Opinion, p. 9). This is the same appellate decision now referred to by the Circuit Court in the Remand Order as: "*Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009" from which the Circuit Court now requires further analysis.

Issues on Remand

The Remand Order instructs this Board to do the following:

> ....for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC's v. Ciarpella*, No. 810, September

> Term, 2009 which includes consideration of the criteria in the International Building Code (IBC).

Notwithstanding the language of our 2016 Opinion, and in order to comply with the Remand Order, we analyze the facts presented under the BCZR definition of "nightclub" and the criteria in the IBC. As stated by the Court of Special Appeals in *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, a "nightclub" is comprised of three elements under BCZR, §100.1: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor," and 3) "categorized as a nightclub by the Building Code of Baltimore County." (See CSA Opinion, 7/9/2010, p. 16).

The Court of Special Appeals in *Ciarpella*, noted that, in 2005, Baltimore County adopted the IBC as the Building Code of Baltimore County. (See CSA Opinion, 7/9/2010, p. 3). The Appellate Court further stated that IBC, §303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." (*Id.*).

Within Assembly Group A, Subgroup A-2 includes:

Assembly uses intended for food and/or drink consumption including, but not limited to:

> Banquet halls
> Night clubs
> Restaurants
> Taverns and bars

(IBC at 24).

Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g.,

restaurants.) The uniqueness of these occupancies is characterized by some or all of the following:

1) Low lighting levels;
2) Entertainment by a live band or recorded music generating above-normal sound levels;
3) No theatrical stage accessories;
4) Later-than-average operating hours;
5) Tables and seating arranged or positioned so as to create ill-defined aisles;
6) A specific area designated for dancing;
7) Service facilities for alcoholic beverages and food; and
8) High occupant load density.

(IBC at 3-17; 3-18).

The Court of Special Appeals in *Fifth Street* emphasized that the IBC Commentary explained that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. (See CSA Opinion, 7/9/2010, p. 4). The Court further noted that the 8 characteristics listed above "are advisory in determining whether Group A-2 is the appropriate classification." (*Id.*). The Court also stated that these eight (8) characteristics are "non-exclusive." (*Id.* at p. 11).

It is important to highlight that the Appellate Court in *Fifth Street* rejected Thanner's argument that DOB must either be a "standard restaurant" or a "nightclub". Mr. Thanner argued that if the DOB is primarily engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant, and not a "nightclub." (CSA Opinion, 7/9/2010, p. 19). The Appellate Court disagreed and held that the terms "standard restaurant" and "nightclub" are not mutually exclusive. The Court interpreted the phrase "standard restaurant" as being distinguishable from other types of restaurants such as "carry-outs", "fast-food," or "drive-through only." (*Id.*).

The Court added that permissible uses in a BL zone actually included dual uses (*i.e.* combinations of permissible uses). BCZR, §230.1.A.10. As a result, a property located in a BL zone could be operating as a dual use, such that one use is permissible and one use is not. (CSA Opinion, 7/9/2010, p. 20).

Here, in the Petitioner's case on the merits, Mr. Boone was the sole witness who testified about his proposed plan. His testimony only addressed some of the IBC characteristics. The other witnesses who testified on behalf of DOB were character witnesses for Mr. Boone. Each of those character witnesses either worked at Dock of Bay, or were related to someone who worked there. They were collectively of the opinion that live music should be permitted by this Board because Mr. Boone is a good person.

On this point, we repeat what we said in our 2016 Opinion that our decision now and then, does not reflect on Mr. Boone personally:

> We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that [he would] be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

(2016 Opinion, p. 13).

In regard to the eight (8) IBC characteristics, we find as follows:

1) **Low lighting levels**.

Petitioner failed to testify about, or provide any evidence regarding, his proposed plan for lighting levels.

2) **Entertainment by a live band or recorded music generating above-normal sound levels**.

DOB is open 7 days a week. (T. p. 55). Mr. Boone testified that he wants live music to be played every day. (T. pp. 104, 114). He wants live music played both inside and outside DOB at varying times. (T. p. 98). He wants to compete with eight (8) other bars/restaurants which are located on the peninsula and offer live music, even on weekdays. (T. p. 62-63). Mr. Boone testified that those competing businesses offer Sunday afternoon music from 1:00 pm to 5:00 or 6:00 pm. (T. 113-114). According to Mr. Boone, those establishments also have music on Wednesdays, Thursdays and Fridays. (T. p. 103). However, Mr. Boone also acknowledged that his competitors are located in a "business, major (BM) zone," which zone permits live music.

As for "live bands," the Court of Special Appeals reiterated that, during the Thanner era, live entertainment was offered on the following days and times, both inside and outside the restaurant:

> Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.
>
> On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

(CSA Opinion, p. 6).

In April of 2015, Mr. Boone hired Mark Allen as a soloist act to play on a Saturday night. (T. p. 57). While it is more expensive, Mr. Boone indicated that he has the option to hire Mr. Allen along with his band. (T. p. 58). In addition to Mr. Allen, Mr. Boone hired a Frank Sinatra singer and an Oomph band to play for Octoberfest. (T, p. 58). Mr. Boone hired a disc jockey on New Year's Eve. (T. p. 51).

As we stated in our 2016 Opinion, Mr. Boone would not agree to any limitation on the type of live music. (T. p. 104-105). Indeed, when asked in direct examination whether he would agree to a restriction on type of music, Mr. Boone would only agree to time restrictions:

> MR. SCHMIDT: Okay and if the Board proposed limitations on the type of music or the volume of music, you would, you would be amenable to those and follow those limitations?
>
> MR. BOONE: I'd be very happy to live within sound restrictions on outside music, time restrictions on both indoor and outdoor music and I do not want to cater to the young crowd and I'd be happy to live with time restrictions, both inside and outside.

(T. pp. 59-60).

Mr. Boone's concession that he would be amenable to a sound level restriction was not persuasive. Mr. Boone had the burden to prove to the Board what constitutes "above-normal sound levels" and how the proposed live music (whether soloist or band) would stay below those levels.

When asked on cross examination how Mr. Boone would implement his plan, he sarcastically responded that: "I'll have an army of people with sound meters." (T. p. 112). Although appearing to the Board as an after-thought during his direct testimony, Mr. Boone's proposal is to use a decibel monitoring device each time live music is played outside DOB. He testified that there should be an "agreeable" sound level for outside music and that bands would play within that sound level. (T. p. 107). Yet, Mr. Boone could not provide the Board with maximum sound level that he was proposing. (T. p. 111). When pressed for his maximum sound level, Mr. Boone responded that it would "be determined at a later time." (T. p. 113).

Mr. Boone testified on cross examination that he did not know what kind of noise levels would meet decibel levels of 55-65. (T. p. 80). He admitted that he would not personally be at the DOB full time to measure sound levels. (T. p. 97). Indeed, he conceded that he has never

personally operated a decibel monitoring device. (T. p. 120). Mr. Boone is not an expert in music or sound. (T. p. 111). DOB does not employ a sound engineer. (*Id.*).

In addition, Mr. Boone did not dispute that there would be amplification of music as he stated that: "Most of the sound will be controlled by the level of amplification." (T. p. 113). Russell McClelland was a witness who testified that during the Thanner Era, reggae music was played at amplified levels, after dark until 11:00 pm or 12:00 am, all days of the week. (T. p. 134). Mr. Boone candidly revealed that he has no previous experience operating a business where live music is played. (T. p. 116).

The Board finds that Mr. Boone's proposal was not credible. His testimony left unanswered critical aspects as to how he would implement his plan. It is beyond the expertise of this Board to determine what is "above-normal sound levels" or to determine how such sound should be measured. The Board is left to speculate as to what might happen if live music is permitted inside and/or outside DOB. Thus, the proposed plan is both impractical and unenforceable.

As for sound emanating from live music inside the DOB, Mr. Boone did not acknowledge the known problem which occurred during the Thanner era with sound escaping beyond the four (4) walls of the building. We consider this issue in light of Mr. Boone's testimony that, other than the footprint of the kitchen area (which he expanded by pouring a concrete pad), he has not made any changes to the DOB since the Thanner Era. As Mr. Boone said: "...the four walls are still the four walls." (T. pp. 40-41). Thus, there is no additional sound proofing of the building which may alleviate sound levels inside.

Mr. Boone interjected that currently (without live music), his typical customer is between 40-70 years old; average age is 50 years old. (T. 55). While he indicated that he does not intend

to cater to a younger crowd, if the type of live music draws a younger crowd, he would not be able to exclude those customers. (T. pp. 99-100). During boating season, DOB draws customers from all over Baltimore County. (T. p. 68).

Accordingly, while Mr. Boone initially suggested hiring a solo guitarist or a Frank Sinatra singer, Mr. Boone would not agree to a restriction on the type of music which DOB could offer. (T. pp. 104-105). In fact, he testified that he believed the restriction on music at DOB would be lifted when the liquor license was transferred from Thanner to the Petitioner. (T. p. 79).

As for "recorded music," Mr. Boone already offers recorded music by way of radios and televisions inside the DOB. (T. p. 52). The Court of Special Appeals noted that Thanner had: "ten television sets inside the restaurant, and another two at the outside bar. A house music system, connected to speakers inside and outside, played satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered." (CSA Opinion, 7/9/2010, p. 6). According, we find that the use and availability of recorded music has not changed.

Consequently, as to whether proposed live band or recorded music will generate above-normal sound levels, the Board finds that live band or live music will generate above-normal sounds levels and Mr. Boone's testimony did not persuade us otherwise.

3) **No theatrical stage accessories.**

Mr. Boone testified that he has no plans to build a stage from which a live band could perform. (T. p. 63). However, this Board is mindful, that a stage or at least a stage-like area (both inside and outside) would have to be created if live bands were to perform.

4) **Later-than-average operating hours.**

Mr. Boone verified that DOB is open seven (7) days a week. (T. p.55). He testified that during fall, spring, and winter seasons, DOB is opened Monday through Saturday from 11:00 am

until 10:00 pm; on Sundays, DOB closes around 9:00 pm. (T. p.55; p. 63). In the summer, on the weekends, he said DOB opens at 9:00 am for breakfast. (*Id.*). The outside space at DOB is open from April through October. (T. p. 48).

On cross examination, Mr. Boone's direct testimony as to current operating hours was contradicted with the introduction of a copy of the DOB website which confirms that DOB is actually open Monday through Thursday from 11:00 am to 11:00 pm; and Friday and Saturday 11:00 am until 1:00 am. (PC Ex. 1). (T. p. 96). Mr. Boone admitted that he arranged and approved the website, but had forgotten about the hours of operation listed there. (*Id.*).

He initially testified on direct that his plan was to have music on Friday and Saturday nights from 6:00 pm to 10:00 pm with last call for alcohol at midnight; he hopes DOB will then be cleared out by 12:30. (T. p. 60). He then stated that he would like music outside on Sundays: "probably 5:00 til 8:30 outside.....I don't expect to have music outside after dark." (T. p. 61).

Then, on cross examination, he denied that his proposal was to have all music stop on Friday and Saturday nights at 10:00 pm. (T. p. 103). Notwithstanding his direct testimony at the Board hearing, he added hours for both inside and outside music which would apply to all weekdays and weekends:

> What I said is that music inside would stop at 11:00 pm on Fridays and Saturdays, stop at 7:00 pm on Sundays, music outside would stop at dusk.

(T. p. 103). Mr. Boone agreed that, in summer months, "dusk" could be as late as 9:00 pm. (T. p. 104). Even Mr. Thanner's outside music ended at 8:00 pm. (CSA Opinion, 7/9/2010, p. 6).

We find that Mr. Boone's testimony on this factor was not credible. The DOB website, which Mr. Boone arranged and approved, reveals later than average operating hours for a restaurant. Accordingly, DOB hours are akin to those of a nightclub.

5) **Tables and seating arranged or positioned so as to create ill-defined aisles**.

Photographs of the tables and chairs both inside and outside the DOB reveal that neither are fixed or in any way anchored to the floor. (Pet. Ex. 8E, 8F, 8G, 8H, 8K, 8M and 8N). Additionally, Mr. Boone did not testify that the tables and chairs were attached to the floor. Accordingly, while both seating areas have aisles to permit serving food and beverages, nothing prevents such tables and chairs from being moved into ill-defined aisles, to allow for a band or for people to dance as in the Thanner Era. Indeed, this Board can reasonably expect that customers will rearrange tables and chairs so as to permit dancing when live music performs. This factor closely resembles a nightclub, rather than a restaurant.

6) **A specific area designated for dancing**.

Mr. Boone testified that the restaurant does not have a dance floor and that he has no plans to build a dance floor. (T. p. 63). In our 2008 Opinion, we likewise found that there was no specific dance area during the Thanner era. (BOA 2008 Opinion, p. 12; CSA Opinion, 7/9/2010, p. 6). Although the Appellate Court reaffirmed that there was no dance floor, it noted that: "....during live performances patrons often dance in between the tables." (CSA Opinion, 7/9/2010, p. 6).

Ironically, the existence of a dance floor under this IBC factor is a characteristic of a nightclub. Yet, the definition of "nightclub" in BCZR §101.1 is a facility "with or without a dance floor." Given that this is a proposed use, we must consider what is more likely to occur than not if live music is permitted. Based on Mr. Boone's testimony, the seating arrangement and layout of tables and chairs both inside and outside the restaurant is substantially similar to that of the Thanner Era, we find that there is nothing to prohibit patrons from dancing between the tables. It certainly would be reasonable to expect patrons to want to dance if live music is permitted.

Further, if there is no designated dance floor, nothing prevents patrons from moving tables and chairs to create a dance area.

7) **Service facilities for alcoholic beverages and food.**

There is no dispute that DOB serves both alcohol and food. Mr. Boone testified that, without live music, the food/alcohol ratio is consistently 80% food, 20% alcohol. (T. p. 56). During the Thanner Era, approximately 70% of sales was on food, 28% was on alcohol and 2% was on t-shirts and cookbooks. (CSA Opinion, p. 6). As a result, we find that the food/alcohol ratio is substantially similar to those during the Thanner Era. We can also reasonably expect that the sale of alcohol will increase if live music is permitted.

8) **High occupant load density**.

At full capacity, Mr. Boone testified that DOB has the capacity to *seat* over 223 people (98 people at inside seating, plus 25 more people at the inside bar; and an additional 100 people can sit outside). (T. p. 53). The Court of Special Appeals noted that, based on Mr. Thanner's testimony before this Board in 2008, the DOB had the capacity to serve 150-160 people and that, with those numbers, there was a high occupant load density. (CSA Opinion, p.5).

As set forth above, the description in Subgroup A-2 includes "occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants.)." Based on Mr. Boone's testimony of 223 people who can be seated at DOB, and giving consideration to even more people who would be standing and/or dancing, we find that DOB has a high occupant load density.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. The Board finds that DOB meets 7 of the 8 criteria set forth in Group A-2. This would be criteria 2, 3, 4, 5, 6, 7, and 8 (with no evidence presented as to criteria #1). Simply put, as we stated in our 2016 Opinion and based on the IBC characteristics above, we find that music, under the Petitioner's proposal, whether played inside or outside, is a factor in finding that the DOB is classified as a "nightclub" under the definition set forth in BCZR, §101.1.

DOB proposed operations are substantially the same as in 2008. Both Mr. Thanner and Mr. Boone expressed the desire for live music to boost revenue and compete with the neighboring restaurants located in BM zones. Moreover, there has been no change to the physical layout of the building, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of inside live music on the neighboring properties.

The County Council has determined that "nightclubs" can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in that zone. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101.1. The facts presented by the Petitioner here have not changed that determination.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 22nd day of August, 2019, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Deborah C. Dopkin

Jason S. Garber

BOARD OF APPEALS OF BALTIMORE COUNTY
MINUTES OF DELIBERATION

IN THE MATTER OF: Boone Kondylas, LLC 16-003-SPH

DATE: June 20, 2019

BOARD/PANEL: Maureen E. Murphy, Panel Chair
Deborah C. Dopkin
Jason S. Garber

RECORDED BY: Tammy Zahner, Legal Secretary

PURPOSE: To deliberate the following:

1. Order of the Circuit Court for Baltimore County remanding this matter to the Board for a determination of whether the proposed use of the subject property (the Dock of the Bay) would constitute a "nightclub" as defined by the BCZR under the analysis approved by the Court of Special Appeals in the matter of *Fifth Street, LLC v. Ciarpella,* No. 810, September Term 2009, which includes consideration of the criteria in the International Building Code (IBC).

PANEL MEMBERS DISCUSSED THE FOLLOWING:

- The Board discussed the history of this matter, which was the subject of Board of Appeals Opinions in 2016 and 2008. The Petitioner's request in the 2016 case was to amend previous restrictions in prior cases to permit future use of the property as a restaurant with limited accessory music.

- The 2008 Opinion of the Board found that the playing of music met 6 of the 8 criteria set forth in the International Building Code for a finding of a nightclub under the definition set forth in the BCZR. The Board Opinion was affirmed by the Circuit Court for Baltimore County and the Court of Special Appeals in an Unreported Opinion.

- The Board, in its 2016 Opinion, made findings of fact and also adopted and incorporated the Board of Appeals 2008 Opinion and the Court of Special Appeals Opinion in the *Fifth Street* case.

- One Member noted that on a practical point, a restaurant should be able to have background music and occasionally be able to dim the lights and have live music. However, the Board noted they are bound by the definition of "nightclub", and the facts of the case.

- The Board pointed out that during the hearing in the 2016 case, there was testimony concerning possible conditions and/or accommodations that could be made but the Petitioner did not want to be limited to a particular type of music, and there was inconsistency in the hours proposed for live music.

- The Board determined that the analysis has already taken place, additional testimony and evidence is not necessary, and that the only change between the cases was a change in ownership, and slight change to the floorplan.

CONCLUSION: After thorough review of the facts and law in this matter, the Board unanimously determined that the proposed use of the subject property constitutes a "nightclub" as defined by the BCZR under the analysis approved by the Court of Special Appeals in the matter of *Fifth Street, LLC v. Ciarpella,* No. 810, September Term 2009, which includes consideration of the criteria in the International Building Code (IBC).

NOTE: These minutes, which will become part of the case file, are intended to indicate for the record that a public deliberation took place on the above date regarding this matter. The Board's final decision and the facts and findings thereto will be set out in the written Opinion and Order to be issued by the Board.

Respectfully Submitted,

Tammy A. Zahner

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

May 31, 2019

Peter M. Zimmerman, Esquire
People's Counsel for Baltimore County
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: In the matter of: Boone Kondylas, LLC
Case No.: 16-003-SPH

Dear Mr. Zimmerman:

We received your enclosed letter on May 29, 2019 and it is herewith returned to you.

As you know, the Board concluded the hearing in this matter on April 28, 2016; the parties filed closing memoranda on May 19, 2016; and the record is now closed. Public deliberation on remand from the Circuit Court for Baltimore County will take place on June 20, 2019 at 9:00 a.m.

Accordingly, no further argument, evidence, or documentation may be submitted at this time, therefore I am returning to you the enclosed letter, which cannot be placed in the subject file nor become a part of the record in this matter.

Should the Board decide to reopen this matter after deliberation, you would be invited to resubmit your letter at that time.

Very truly yours,

Sunny Cannington

Krysundra Cannington
Administrator

Enclosure: Original letter and three copies dated May 29, 2019

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

May 31, 2019

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

RE: In the matter of: Boone Kondylas, LLC
Case No.: 16-003-SPH

Dear Mr. Borgerding:

I am writing in response to your letter of May 22, 2019, in which you request a postponement of the public deliberation in the above referenced matter scheduled for June 20, 2019. The Board is also in receipt of Mr. Schmidt's letter of opposition to your request, dated May 29, 2019.

Generally, the Board does not postpone public deliberations as participation is not allowed and attendance is not required. The minutes of the deliberation will be posted on our website upon completion. Therefore, your postponement request is denied. The Board will convene as scheduled on June 20, 2019 at 9:00 a.m.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Sunny Cannington

Krysundra Cannington
Administrator

c: Lawrence E. Schmidt, Esquire
Peter M. Zimmerman, Esquire/People's Counsel for Baltimore County

SMITH, GILDEA & SCHMIDT LLC

MICHAEL PAUL SMITH
DAVID K. GILDEA
LAWRENCE E. SCHMIDT
MICHAEL G. DEHAVEN
JASON T. VETTORI
MARIELA C. D'ALESSIO*
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LAUREN D. BENJAMIN
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ZACHARY J. WILKINS
of counsel:
EUGENE A. ARBAUGH, JR.
DAVID T. LAMPTON
MARY G. LOKER
STEPHEN J. NOLAN

May 29, 2019

Sent Via Hand Delivery
Ms. Krysundra L. Cannington, Administrator
Board of Appeals of Baltimore County
Jefferson Building
Second Floor, Suite 203
105 W. Chesapeake Avenue
Towson, MD 21204

RECEIVED
MAY 29 2019
BALTIMORE COUNTY
BOARD OF APPEALS

Re: In the Matter of: Boone Kondylas, LLC
Case No. 16-003-SPH

Dear Ms. Cannington,

I am writing to respond to Mr. Borgerding's request for postponement of the Deliberation scheduled for June 20, 2019 in the above referenced matter. Although I typically try to accommodate opposing counsel, I respectfully object to his request for postponement in this matter and ask that the Board deny it.

As we are all well versed in the process of a deliberation, the parties are not permitted to participate in the public deliberation and are not even required to attend. The Board produces minutes of the deliberation and a final order is thereafter issued. Under these circumstances, neither Mr. Borgerding's nor my attendance is required or necessary. We can both obtain the minutes thereafter.

I will likewise be out of the Country on the date of the Deliberation, however, I am not requesting a postponement as it will only serve to unnecessarily delay this matter.

I appreciate the Board's attention to this request and please do not hesitate to contact me should you have any questions. Thank you for your courtesy.

Very truly yours,

Lawrence E. Schmidt

LES/am
cc: Francis X. Borgerding, Jr., Esquire
Peter Max Zimmerman, Esquire

FRANCIS X. BORGERDING, JR.
ATTORNEY AT LAW

409 WASHINGTON AVENUE, SUITE 600
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RECEIVED
MAY 23 2019
BALTIMORE COUNTY
BOARD OF APPEALS

May 22, 2019

Board of Appeals of Baltimore County
Jefferson Building
Second Floor, Suite 203
105 W. Chesapeake Avenue
Towson, MD 21204

RE: In the Matter of: Boone Kondylas, LLC
16-003-SPH

Dear Sir/Madam:

I am writing to respectfully request a postponement of the Deliberation scheduled in the above-captioned matter for June 20, 2019 at 9:00 a.m. The reason for the postponement is that I will be out of the country on a pre-planned family vacation on that day.

Thank you for your anticipated cooperation.

Very truly yours,

FRANCIS X. BORGERDING, JR.

FXBJr:bjk
cc: Lawrence Schmidt, Esquire
Peter M. Zimmerman, Esquire

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

May 16, 2019

NOTICE OF DELIBERATION ON REMAND FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY

IN THE MATTER OF: Boone Kondylas, LLC
9025 Cuckold Point Road
16-003-SPH 15th Election District; 7th Councilmanic District

Re: Petition for Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044, and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music

Memorandum Opinion and Order issued by the Circuit Court for Baltimore County remanding this matter to the Board of Appeals. A public deliberation is scheduled for the following:

DATE AND TIME: **JUNE 20, 2019 at 9:00 a.m.**

LOCATION: Jefferson Building - Second Floor
Hearing Room #2 - Suite 206
105 W. Chesapeake Avenue

NOTE: PUBLIC DELIBERATIONS ARE OPEN WORK SESSIONS WHICH ALLOW THE PUBLIC TO WITNESS THE DECISION-MAKING PROCESS. A WRITTEN OPINION AND ORDER WILL BE ISSUED BY THE BOARD WITHIN A REASONABLE TIMEFRAME AFTER DELIBERATION AND A COPY SENT TO ALL PARTIES.

For further information, including our inclement weather policy, please visit our website www.baltimorecountymd.gov/Agencies/appeals/index.html

Krysundra "Sunny" Cannington
Administrator

---

c: Counsel for Petitioner/Appellant : Lawrence E. Schmidt, Esquire
Petitioner/Appellant : Boone Kondylas, LLC/Ken Boone

Counsel for Protestants : Francis X. Borgerding, Esquire
Protestants : Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella, and Tammy Waldmann

C. Pete Gutwald, Director/Department of Planning
Michael Field, County Attorney, Office of Law
Nancy West, Assistant County Attorney

Lawrence M. Stahl, Managing Administrative Law Judge
Michael Mallinoff, Director/PAI
Office of People's Counsel

16-003-SPH

Circuit Court for Baltimore City
Case No.: 03-C-16-010551

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 638

September Term, 2017

IN THE MATTER OF BOONE KONDYLAS, LLC

Meredith,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 9, 2018

RECEIVED
NOV 14 2018
BALTIMORE COUNTY
BOARD OF APPEALS

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Boone Kondylas, LLC ("Boone"), appellee, filed a zoning petition for special hearing in the Baltimore County Office of Administrative Hearings ("OAH"), seeking an amendment to, or rescission of, restrictions previously placed on Boone's waterfront property ("the property"), to permit the use of the property as a restaurant with limited accessory music and entertainment. Following the special hearing, an OAH administrative law judge ("ALJ") denied Boone's zoning petition on the ground that it was barred by *res judicata,* as a result of this Court's 2010 unreported opinion in *Fifth Street, LLC, et al. v. Matthew Ciarpella, et al.*, No. 810, September Term, 2009 (filed July 9, 2010) ("*DOB I*"), wherein we held that the operation by the previous owner comprised a use as both a restaurant and a nightclub, and that use as a nightclub was prohibited by the applicable zoning regulations.

Boone appealed the ALJ's decision to the Board of Appeals of Baltimore County ("Board"), which also denied Boone's petition as barred by *res judicata.* Boone petitioned for judicial review, and the Circuit Court for Baltimore County remanded the matter to the Board for a determination of whether the subject property, under Boone's ownership, currently meets the definition of a nightclub, in light of the factors cited in our opinion in *DOB I.*

Appellants, Charles Wolinski, *et al.* ("Wolinski")—residential neighbors of the property—and People's Counsel of Baltimore County ("People's Counsel"), appealed the decision of the circuit court.

The questions presented, as set forth in Wolinski's brief, are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition?

2. As a matter of law, should the Opinion of the County Board of Appeals in this matter dated September 15, 2016 have been affirmed by the Circuit Court for Baltimore County?

3. Does an administrative agency or on appeal a reviewing Court have the authority to amend the zoning restriction previously granted by the Court of Special Appeals?

The questions as presented by People's Counsel are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition, which alleges essentially a cosmetic change in management style or operation?

2. Is the County Board of Appeals' opinion correct and at least legally sufficient based on the deferential, contextual and interpretive scope of judicial review?

3. Does the Circuit Court remand misapply *res judicata*; exceed the prudential scope of judicial review, fail to exercise judicial self-restraint, and both disrespect and undermine the administrative function[?]

For the reasons that follow, we shall dismiss appellants' appeal as premature.

FACTS AND LEGAL PROCEEDINGS

The waterfront property at the center of the controversy in this matter is located on Cuckold Point Road on Miller's Island in Baltimore County. The 1.27 acre property is improved by a restaurant/bar called Dock of the Bay ("DOB").[1]

In October 2003, shortly after it suffered extensive damage from Hurricane Isabel, Fifth Street, LLC ("FSLLC"), purchased DOB.[2] After a lengthy rebuilding period, FSLLC

[1] A restaurant, under various names and owners, has operated on the property since the 1950s.

[2] For the background of DOB before Boone purchased it, we rely primarily on the factual recitation set forth in *DOB I*.

reopened DOB in March 2004. It was licensed as a restaurant with a capacity of approximately 150-160 patrons and held a Class D liquor license. On an outdoor patio, there was more seating and a bar, along with a children's play area. DOB had an in-house music system to play satellite radio inside and outside, and it offered live entertainment by disc jockeys, bands and karaoke performers.

In 2006, residential neighbors of DOB complained to the Baltimore County Department of Permits and Development Management that the live music was too loud and disruptive and that DOB was operating as a nightclub, which was not permitted in the applicable business zone.[3] DOB was cited three times for: operating a nightclub in a B.L.

[3] DOB is located in a B.L. (Business Local) business zone. Baltimore County Zoning Regulation ("BCZR") §230.1, permits the operation of a "standard restaurant" and a "tavern" in a B.L. zone but does not permit a "nightclub," even by special exception. BCZR §230.3.

BCZR §101.1 defines "standard restaurant" as:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

The same code section defines a "tavern" as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." Finally, "nightclub" is defined by the Code section as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County."

(continued . . .)

zone; erecting a tent without a permit and; failing to cease nightclub operations and to remove the tent.

In August 2006, FSLLC filed a petition for special hearing, seeking a determination of whether DOB was a nightclub in violation of BCZR.[4] The zoning commissioner determined that DOB was a nightclub under BCZR and the International Building Code and ordered DOB to discontinue the playing of music by way of speaker system. On appeal, a majority of the members of the Board affirmed that determination.[5] Upon judicial review, the Circuit Court for Baltimore County also affirmed the determination. In an unreported opinion by a panel of this Court in *DOB I*, we affirmed the circuit court's judgment, concluding that the transcript and record provided substantial evidence to support the Board's finding that DOB was operating as a nightclub. In reaching that

(. . . continued)

The International Building Code, which was adopted as the Building Code of Baltimore County, sets forth advisory characteristics in determining whether an establishment may be characterized as, *e.g.*, a nightclub, dance hall, banquet hall, or cabaret, to include some or all of the following: low lighting levels; entertainment by a live band or recorded music generating above-normal sound levels; no theatrical stage accessories; later than average operating hours; tables and seating arranged or positioned so as to create ill-defined aisles; a specific area designed for dancing; services facilities for alcoholic beverages and food; and high occupant load density.

[4] A "request for special hearing is, in legal effect, a request for a declaratory judgment." *Antwerpen v. Baltimore County*, 163 Md. App. 194, 209 (2005).

[5] One board member dissented, finding that DOB was a restaurant offering some musical entertainment on the side.

conclusion, we analyzed DOB's operation, using the criteria (for determining whether premises are being used as a nightclub) set forth in the International Building Code.

In 2010, Baltimore County filed a petition for contempt alleging that FSLLC continued to operate DOB in violation of the Board's order. At a hearing on the matter, FSLLC argued that DOB was no longer operating as a nightclub because it was not playing music outside the restaurant.

The circuit court, citing the Board's ruling that "the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR," found FSLLC in violation of the Board's order for "continuing to play live and/or recorded entertainment on the premises." The court found FSLLC to be in contempt of court and ordered that FSLLC permanently dismantle any outdoor speaker system at DOB and refrain from allowing "any live band, Disc Jockey, karaoke or any other form of live or recorded entertainment to perform at the Site" for a period of one year beginning November 10, 2010.

DOB closed in 2012. In 2014, Boone purchased the property from FSLLC and reopened DOB. In 2015, Boone filed a petition for special hearing to "amend previous restrictions imposed . . . so as to permit future use of the property as a restaurant with limited accessory music." Before the ALJ, Boone argued that, unlike FSLLC's use of DOB as a nightclub, its business was first and foremost a restaurant, with music to be offered only as a complement to the dining experience.

In his October 22, 2015 written opinion and order, the ALJ concluded that FSLLC's zoning violation and special hearing case had been appealed to the Board, the circuit court, and this Court, all of which had affirmed the agency's finding that DOB was a nightclub, subject to the conditions and restrictions contained in the agency's order. Therefore, the ALJ concluded, "*res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard." In the absence of any evidence of such significant changes by Boone, the ALJ continued, the ruling that DOB was both a restaurant and a nightclub must stand. Boone's petition was therefore denied.

Boone appealed the ALJ's decision to the Board on November 13, 2015. The Board heard argument on the matter on February 17 and April 28, 2016.

At the start of the hearing, People's Counsel argued that the doctrine of *res judicata* permitted the Board to dispose of the matter on a motion to dismiss. Counsel for DOB's residential neighbors agreed and added that amending the zoning restrictions would require a reversal of this Court's 2010 unreported decision, which the Board was not permitted to do. Boone claimed that there had been some significant changes since 2010 that should cause this Board to come to a different conclusion.

Boone's attorney, although acknowledging that FSLLC had operated a nightclub with loud rock music, which was not permitted in the pertinent B.L. zone, argued that Boone was not operating a nightclub, but a restaurant with the occasional "single acoustic guitar player" providing music. With regard to the *res judicata* argument, counsel averred

that *res judicata* did not apply because there had been a significant change in the facts of the case since *DOB I* was decided.

The Board reserved ruling on the *res judicata* issue and heard testimony.

Kenneth Boone ("Mr. Boone") the sole managing member of Boone Kondylas, LLC,[6] testified that DOB is licensed to operate as a restaurant and maintains a Class D liquor license, which Boone purchased from FSLLC. The restaurant averages 80% food / 20% alcohol sales.

Since Mr. Boone's purchase of DOB, his corporation has expanded the restaurant's kitchen to permit the outdoor steaming of crabs and removed the outdoor stage and tent that FSLLC had erected. Indoors, he said, DOB has seating for approximately 125 patrons at dining room tables and the bar, and there is outdoor seating for approximately 100 additional patrons. DOB has no dance floor or stage, and Mr. Boone has no plans to create either one.

DOB is presently open seven days a week, with posted hours of 11:00 a.m. to midnight, but the restaurant generally closes between 9:00 and 10:00 p.m. during winter months when business is slow. The average patron is between 40 and 70 years of age.

Other than a DJ on New Year's Eve 2014, Mr. Boone testified that he had hesitated to book live performers, as he was initially unfamiliar with what the applicable zoning code permitted. His hesitation appears to have been well founded because in 2015, when Mr.

[6] Mike and Donna Kondylas, the "Kondylas" of "Boone Kondylas, LLC" were no longer in partnership with Mr. Boone by the time of the hearing.

Boone scheduled an acoustic guitarist to play on a Saturday night, the neighbors complained about the potential for noise and disruption, and a zoning official threatened to pull DOB's liquor license if the musician played. Mr. Boone cancelled the guitarist, as well as scheduled performances by a Frank Sinatra cover singer and an "oompah" band for Oktoberfest, and he had not scheduled any live music since then.

Boone's petition centered on his desire to "cater to the demographic" and book soloists to play at DOB. Mr. Boone said he was willing to "live within sound restrictions on outside music [and] time restrictions of both indoor and outdoor music" in anticipation of offering live music outdoors on Friday and Saturday nights from 6:00 until 10:00 p.m. (with last call for alcohol at midnight) and on Sunday afternoons from 5:00 until 8:30 p.m.

Several neighborhood residents testified on Boone's behalf, stating that when FSLLC owned DOB, it hired "[v]ery loud, heavy metal" full-sized bands, which played until midnight or 1:00 a.m. on weekends. In contrast, DOB under Boone's ownership has a family atmosphere with an older demographic. The supporters advocated giving Boone a chance to have live music at DOB.

Charles Wolinski, whose house is approximately 200 feet from DOB, testified that he had fought with FSLLC for seven years over the loud music and the disorderly patrons in the parking lot. In his opinion, everything at DOB now that Boone owns it is "exactly the same" as when FSLLC owned it (other than the playing of live music), and the addition of live music would return the establishment to the level of disruption it had created during FSLLC's ownership.

In the opinion of Matthew Ciarpella, who was also a neighborhood protestant in the FSLLC litigation, the playing of any outdoor music at DOB would re-introduce the same noise problems that had been previously litigated. Other neighbors who had heard the loud music played when FSLLC owned DOB also protested the reinstatement of live music outside the restaurant.

The Board issued its written opinion on September 15, 2016. Therein, the Board noted that as the parties, or their privy, and the property had been involved in the previous litigation regarding the same zoning issue of whether live music should be permitted at the DOB, which led to the Board's 2008 opinion, the only manner in which the Board could act upon the new application for special permit previously denied would be if there had been a substantial change in the facts from those previously litigated. The Board found that the restaurant operations and layout and Boone's proposal for live music were substantially the same as when FSLLC owned the premises and litigated the matter. In the Board's view, a change in the restaurant's ownership or management style did not amount to a substantial change. Having previously determined that DOB comprised a nightclub not permitted in a B.L. zone, and having currently determined that no substantial change to the property existed that would support re-litigation of the issue, the Board denied Boone's petition to amend the previous restrictions imposed upon DOB.

Boone filed a petition for judicial review in the circuit court on October 17, 2016. The court heard argument on the petition on June 1, 2017.

Boone initially argued that the Board, in denying his petition on *res judicata* grounds, never decided the merits of the matter, that is, whether DOB can play live music and, if so, under what circumstances. Counsel for Boone said "whether the zoning is the same, the building is the same, the neighbors are the same, that doesn't matter. The Board of Appeals focused on the wrong inquiry" and "got this wrong" in failing to make a determination of the "ultimate issue." Counsel for Boone requested that the court reverse on the *res judicata* issue and remand to the Board for a determination of whether music should be allowed at DOB as an accessory use to the restaurant service and under what circumstances.[7] In the alternative, Boone argued that the court should find that the operative facts had changed since the time of FSLLC's ownership such that *res judicata* should not apply as a bar to the present litigation.

The circuit court observed that the Board had determined that the prior owner played music that was "loud and [performed by] rock bands and the neighbors didn't like it, therefore nobody can do anything different, because it might [move us] back into what the Dock of the Bay was under" the prior owner. The judge went on to say that the panel of this Court, in its *DOB I* decision was "very factually oriented" when it upheld the Board's determination that DOB was a nightclub while owned by FSLLC. In the circuit court's

[7] As the court pointed out, the applicable zoning regulations prohibit a nightclub from operating in a B.L. zone but does not prohibit music from being played. The Board appeared to use "live music" and "nightclub" interchangeably in its ruling.

view, for *res judicata* to apply, "the same analysis has to be done to see and determine whether the proposed use with the current owner would constitute a nightclub." In the court's words, "[i]f the facts were the same, then maybe *res judicata* would apply at this time . . ., but the analysis just was not done in this case."

Although the Board had found no substantial change in the facts as previously litigated, the circuit court observed that the Board did not perform an adequate analysis of the relevant criteria to determine whether DOB is currently a nightclub. Determining that that analysis should be done, the circuit court remanded the matter to the Board for a determination under the facts of this case as to "whether the proposed use would constitute a nightclub under the analysis used by the Court of Special Appeals in that prior case."

The circuit court issued its written order on June 2, 2017. The order remanded the matter to the Board "for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a 'nightclub' as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC)."[8]

[8] *See* footnote 3, *supra*, for the International Business Code criteria.

DISCUSSION

Although not raised by any party, before we may consider appellants' arguments, we must ensure that the appeal has been taken either from a final judgment or from an appealable interlocutory ruling. We shall hold that this appeal is premature.

Pursuant to Maryland Code (2013 Repl. Vol., 2017 Supp.) §12-301 of the Courts and Judicial Proceedings Article ("CJP"), a party may appeal from a final judgment in a civil case. The Court of Appeals has consistently stated that "a judgment or order of a court is final when it determines or concludes the rights of parties or when it denies the parties means of further prosecuting or defending their rights and interests in the subject matter of the proceeding." *Schultz v. Pritts*, 291 Md. 1, 5–6 (1981). We will dismiss an appeal if it is not taken from a final judgment entered in a civil case by a circuit court, or if a non-final judgment does not fit within the statutory exceptions or the collateral order doctrine. *Foy v. Baltimore City Det. Ctr.*, 235 Md. App. 37, 47 (2017), *cert. granted*, 457 Md. 660 (2018).

In general, where, as here, a circuit court orders a remand of the proceeding to an administrative agency, that is an appealable final order because when "a court remands a proceeding to an administrative agency, the matter reverts to the processes of the agency, and there is nothing further for the court to do. Such an order is an appealable final order because it terminates the judicial proceeding and denies the parties means of further prosecuting or defending their rights in the judicial proceeding." *Schultz*, 291 Md. at. 6 (citing *Fred W. Allnutt, Inc. v. Commissioner of Labor and Industry*, 289 Md. 35, 40

(1980)). Nevertheless, a circuit court's remand order in a judicial review action is not always an appealable final judgment. Although a remand after the circuit court has conducted a judicial review of the sole question raised in the administrative action, thereby precluding the parties from further contesting the validity of the agency's decision on the merits of the case, is an appealable final judgment, "a remand that precedes any judicial review is not a final judgment[.]" *Metro Maint. Sys. South, Inc. v. Milburn*, 442 Md. 289, 305, 310 (2015). As we suggested in *Foy*, *supra*, the "lack [of] any discernable conclusions of law or findings of fact" and the circuit court's apparent inability to assess the merits of the Board's decision may render the remand order a non-final judgment. 235 Md. App. at 52-53.

The sole issue before the circuit court in this matter was whether the Board was correct in denying Boone's petition on the ground of *res judicata*, based on the Board's determination that DOB was a nightclub when owned by FSLLC. The circuit court declared itself unable to make a finding on that sole claim because the Board had not determined whether DOB is currently a nightclub, pursuant to the International Business Code factors that were discussed in detail in *DOB I*.

The circuit court did not find any error of law on the part of the Board, nor did it affirm or reverse the Board's decision or decide or conclude the matter in dispute. In other words, the circuit court did not conduct judicial review. As in *Milburn*, the remand was to precede the circuit court's determination of whether there was substantial evidence in the record to support the Board's ruling and whether or not to affirm. 442 Md. at 308. In other

words, although the court did not specifically so state in its order, it deferred its ruling pending the remand, and the matter "contemplates that judicial review awaits the return of the case following the remand." *Id.* at 309. Specifically, once the Board has an opportunity to apply the International Business Code factors to the facts of this case, the circuit court will then determine whether *res judicata* would apply to support the denial of DOB's petition on that basis.

As noted in *Milburn*, 442 Md. at 309, although the parties "have, in a sense, been 'put out of court'. . . there is a strong potential, bordering on certainty, that the issue at hand—the viability of . . . an administrative decision—will be back for determination by the circuit court." The remand order in the subject case does not prevent the parties from continuing to defend or challenge the Board's decision following the remand; once the Board reconsiders its decision, the parties may continue to challenge or defend the Board's decision. All this was made clear in *Milburn*, where the Court said:

> It is true that, on remand, the Board of Appeals retains discretion to reconsider its decision. Finality, however, is not determined by considering what additional proceedings may occur before the agency, but what further proceedings, if any, will occur in the circuit court. *See Brewster* [*v. Woodhaven Bldg. & Dev., Inc.*, 360 Md. 602 (2000)] (proceedings before another forum are irrelevant to finality). Thus, the breadth of the additional proceedings at the agency level do not convert the remand order here into a final, appealable judgment.
>
> After the remand, the parties will have the opportunity to litigate their positions in the circuit court and pursue appellate review of those issues, including any contention that the remand was unlawful or an abuse of discretion. It may be, of course, that the lawfulness of the remand will no longer be at issue and that other issues concerning the validity of the Board's decisions will have become moot as a result of any modifications that the Board makes. In that respect, our holding that a remand that precedes any

judicial review is not a final judgment is consistent with the purpose of the final judgment rule—to promote judicial efficiency by limiting piecemeal appeals.

Id. at 310-11 (footnotes omitted).

APPEAL DISMISSED; COSTS TO BE PAID BY APPELLANTS.

PETITION OF BOONE KONDYLAS, LLC FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY	*	IN THE
	*	CIRCUIT COURT
IN THE CASE OF BOONE KONDYLAS, LLC LEGAL OWNERS/PETITION FOR SPECIAL HEARING ON PROPERTY LOCATED at 9025 Cuckold Point Road, Baltimore Maryland 21219	*	FOR
15TH Election and 7TH Councilmanic Districts	*	BALTIMORE COUNTY
Case No. 2016-003-SPH Before the County Board of Appeals	*	Case No. 03-C-16-010551

* * * * * * * * * * * * * *

NOTICE OF APPEAL TO THE COURT OF SPECIAL APPEALS

Dear Madam Clerk:

Please enter an appeal to the Court of Special Appeals of Maryland on behalf of the PEOPLE'S COUNSEL FOR BALTIMORE COUNTY from the final Circuit Court Order dated **June 2, 2017** (docketed **June 7, 2017**) in the above-captioned case. This follows the Notice of Appeal to Court of Special Appeals filed separately by Charles Wolinski, Brad & Bonnie Metheny, Matt Ciarpella, Wayne Waldman and Mike Kondylas by and through their attorney, Francis X. Borgerding, Esquire on June 6, 2017, Case No. 638, September Term 2017.

We respectfully request to be assigned the same Court of Special Appeals case number since both appeals relate to the final Order by Circuit Court Judge H. Patrick Stringer dated June 2, 2017.

RECEIVED AND FILED
2017 JUN 14 AM 11: 16

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

CAROLE S. DEMILIO
Deputy People's Counsel
The Jefferson Building
105 W. Chesapeake Avenue, Suite 204
Towson, MD 21204
(410) 887-2188
peoplescounsel@baltimorecountymd.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of June, 2017, a copy of the foregoing Notice of Appeal to the Court of Special Appeals was mailed to Lawrence Schmidt, Esquire, Smith, Gildea & Schmidt, 600 Washington Avenue, Suite 200, Towson, Maryland 21204 and Francis Borgerding, Jr, 409 Washington Avenue, Suite 600, Towson, Maryland 21204.

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

IN THE MATTER OF BOONE KONDYLAS, LLC Petitioner	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-16-010551

* *

ORDER

This matter came before the Court for a hearing on the *Petition for Judicial Review* of the opinion of the Board of Appeals for Baltimore County dated September 15, 206, filed by Petitioner, Boone Kondylas. Upon consideration of the Petitioner's *Memorandum in Support of Petition for Judicial Review*, the *Memorandum of People's Counsel for Baltimore County*, the *Memorandum in Opposition to Petition for Judicial Review* filed by the Protestants, and arguments of counsel, for the reasons stated on the record in open court, it is this 2nd day of June, 2017, by the Circuit Court for Baltimore County, hereby

ORDERED, that this matter is Remanded to the Board of Appeals for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC).

True Copy Test
JULIE L. ENSOR, Clerk
Per _____
Assistant Clerk

ENTERED JUN 07 2017
H. Patrick Stringer, Judge

FILED JUN 07 2017

IN THE MATTER OF:	*	IN THE
Boone Kondylas, LLC Petitioner	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No.: 03-C-16-010551

* * * * * * * * * * * * *

NOTICE OF APPEAL

Appellants, Charlie Wolinsky, Brad Metheny, Bonnie Metheny, Matt Charpella, Wayne Waldman and Mike Kondylas, by and through their attorney, Francis X. Borgerding, Jr., hereby note an appeal from the Order of the Circuit Court for Baltimore County, dated June 2, 2017, to the Court of Special Appeals of Maryland. A copy of said Order is attached hereto.

FRANCIS X. BORGERDING, JR.
409 Washington Avenue, Suite 600
Towson, Maryland 21204
410-296-6820
ATTORNEY FOR THE APPELLANTS

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 6 day of June, 2017, a copy of the foregoing was mailed, postage prepaid, to:

Larry Schmidt, Esquire
(via email)

Peter Max Zimmerman, Esquire
(via email)

RECEIVED AND FILED
2017 JUN -6 PM 3:13
CLERK OF THE CIRCUIT COURT

FRANCIS X. BORGERDING, JR.

IN THE MATTER OF BOONE KONDYLAS, LLC Petitioner	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-16-010551

* * * *

16-003-SPH

IN THE MATTER OF BOONE KONDYLAS, LLC Petitioner	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-16-010551

* *

ORDER

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ORDERED, that this matter is Remanded to the Board of Appeals for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC).

RECEIVED
JUN 08 2017
BALTIMORE COUNTY
BOARD OF APPEALS

H. Patrick Stringer, Judge

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

December 14, 2016

VIA HAND-DELIVERY
Civil Clerk
Circuit Court for Baltimore County
401 Bosley Avenue
Towson, Maryland 21204

RE: In the matter of: Boone Kondylas, LLC
Civil Action No.: 03-C-16-010551
Board of Appeals Case No.: 16-003-SPH

Dear Clerk:

Enclosed for filing please find the Proceedings before the Administrative Law Judge and the Board of Appeals for Baltimore County. Additionally, please allow this letter to reflect the filing of one accordion folder containing the entire Board of Appeals case file, exhibits, and transcript pursuant to Maryland Rule 7-206.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Enclosures

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY *

PETITION OF: *
BOONE KONDYLAS, LLC *

FOR JUDICIAL REVIEW OF THE OPINION OF * CIVIL ACTION
THE BOARD OF APPEALS NO. : 03-C-16-010551
OF BALTIMORE COUNTY *
JEFFERSON BUILDING – ROOM 203 *
105 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204 *

IN THE MATTER OF: *
BOONE KONDYLAS, LLC
FOR PROPERTY LOCATED AT *
9025 CUCKOLD POINT ROAD

15TH ELECTION DISTRICT *
7TH COUNCILMANIC DISTRICT

BOARD OF APPEALS CASE NO.: 16-003-SPH

* * * * * * * * * * * *

RECEIVED AND FILED
2016 DEC 14 A 11: 36
CLERK OF CIRCUIT COURT
BALTIMORE COUNTY

PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes the Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the original papers on file in the Department of Permits, Approvals and Inspections and the Board of Appeals of Baltimore County:

ENTRIES FROM THE DOCKET OF THE BOARD OF APPEALS AND DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS OF BALTIMORE COUNTY

July 6, 2015	Petition for Special Hearing filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC under Section 500.7 of the Baltimore County Zoning Regulations to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

July 23, 2015	Entry of Appearance filed by People's Counsel for Baltimore County.
September 6, 2015	Certificate of Posting.
September 8, 2015	Certificate of Publication in newspaper
September 23, 2015	ZAC Comments.
September 28, 2015	Hearing held before the Office of Administrative Hearings.
October 13, 2015	Closing Memorandum filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner.
October 13, 2015	Protestants' Memorandum filed by Francis X. Borgerding, Jr., Esquire
October 14, 2015	E-mail to ALJ Beverungen from Lawrence E. Schmidt, Esquire objecting to the offering of new evidence as part of Mr. Borgerding's post-hearing memorandum.
October 22, 2015	Opinion and Order issued by the Administrative Law Judge wherein the Petition for Special Hearing was DENIED.
November 13, 2015	Notice of Appeal filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
November 16, 2015	Appeal received by the Board.
November 24, 2015	Notice of Assignment issued by the Board.
January 28, 2016	Letter and Trial Memorandum filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
February 12, 2016	E-mail to Board from People's Counsel submitting preliminary background of four County Board of Appeals decisions involving the *res judicata* doctrine.
February 12, 2016	E-mail to Board from People's Counsel attaching the Court of Special Appeals decision in Fifth Street V. Ciarpella (Dock of the Bay) case.
February 16, 2016	Protestant's Response to Petitioner's Trial Memorandum filed by Francis X. Borgerding, Jr., Esquire on behalf of Charles Wolinski, et al., Protestants.

February 17, 2016 Board convened for a Hearing, Day 1.

Exhibits submitted at Motion Hearing before the Board of Appeals:

Protestants' Exhibit No.

1 – Opinion and Order of OAH (Case No. 2016-0003-SPH) dated October 22, 2015

2 – Unreported Opinion of Court of Special Appeals No. 810, Sept. Term 2009, filed July 9, 2010

People's Counsel Exhibit No.

1 – Compilation of BCZR, Opinion of OAH (Case No. 2016-0003-SPH), Trial Memorandum from Appellant (Case No. 2016-0003-SPH), definition of anticipate, Unreported Court of Special Appeals of Maryland (No. 810 Sept. Term 2009, filed July 9, 2010), Majority Opinion of Baltimore County Board of Appeals (Case Nos. CBA-06-044 and CBA-07-134)

2 – Zoning Checklist/PAI

February 19, 2016 E-mails between Board and counsel regarding scheduling and witnesses.

March 8, 2016 Notice of Reassignment issued by the Board.

April 28, 2016 Board convened for a Hearing, Day 2.

Exhibits submitted at Hearings before the Board of Appeals:

Petitioner's Exhibit No.

1 – Site Plan

2A – Majority Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2B – Dissenting Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2C – Ruling on Motion for Reconsideration and Clarification (Case Nos. 07-144-SPH, CBA-06-044, and CBA-07-134)

3 – Circuit Court Opinion, Final Order, Case No. 03-C-08-009996

4 – Unreported Opinion, Court of Special Appeals, No. 810, Sept. Term, 2009, Filed July 9, 2010

5 – Memorandum Opinion (Exhibit) Contempt-Circuit Court for Baltimore County, Case No. 03-C-08-009996

6 – My Neighborhood Map/aerial photograph of "Dock of the Bay"

7 – My Neighborhood Map/aerial photograph of Millers Island, thumbtack showing Dock of the Bay
8A – Photo of entrance to Dock of the Bay/Boatyard
8B – Photo of Zoning Notice/Dock of the Bay
8C – Photo of Boatyard
8D – Photo of Dock of the Bay
8E – Photo of Dock of the Bay pier
8F – Photo of outdoor seating for Dock of the Bay
8G – Photo of seating at Dock of the Bay
8H – Photo of seating and chairs at Dock of the Bay
8I – Photo of pier at Dock of the Bay
8J – Photo of Row Boat Willie's
8K – Photo of Dock of the Bay
8L – Photo of Dock of the Bay play area for children
8M – Photo of seating inside of Dock of the Bay
8N – Photo of seating at Dock of the Bay
8O – Photo of Bar with patrons at Dock of the Bay
9 – Business license issued by MD to operate a restaurant
10 – Photo of sign viewed as you leave Dock of the Bay, neighbor respect sign
11A – Petition of residents of Millers Island in support
11B – Petition of non-residents of Millers Island in support
12A – Petition from resident customers of Dock of the Bay in support
12B – Petition from non-resident customers of Dock of the Bay in support
13 – Letter from Mark Alan to the Zoning Commission

Protestants' Exhibit No.

1 – Letter dated September 24, 2014 to Mike and Donna Kondylas from Francis X. Borgerding, Jr., Esquire
2 – Letter dated September 12, 2014 to Francis X. Borgerding, Jr., Esquire from Adam Rosenblatt, Assistant County Attorney (ID ONLY/NOT ADMITTED/NOT IN FILE)
3 – MDE – State Noise Pollution – noise that annoys
4 – (NOT IN FILE – NO NOTATION)
5 – My Neighborhood Map aerial photo of Dock of the Bay and surrounding residences
6 – Photo of Dock of the Bay from balcony
7 – Photo of Dock of the Bay
8 – Photo of seating at Dock of the Bay
9 – Thanner's ownership of Dock of the Bay re: sound and decibel levels letter dated May 13, 2008

10 – Letter dated June 9, 2008, letter measured decibel levels emanating from the Dock of the Bay
11 – Letter dated October 3, 2007 measuring the decibel levels from Dock of the Bay
12 – Photograph of Row Boat Willie's building
13 – Large map of aerial view of Dock of the Bay and area, 2016 Google Imaging
14 – My Neighborhood Map printed 4/27/2016, aerial view of Dock of the Bay and area
15 – 2015 Alcoholic Beverage License for Dock of the Bay
16 – Baltimore County Police Records, Sgt. Parrish
17 – Summary of Calls from Exhibit 16
18 – Facebook posts for Dock of the Bay 2/17/16 Boone Letter
19 – Facebook posts for Dock of the Bay 2/21/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
20 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
21 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
22 – Facebook post from Dock of the Bay 2/22/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
23 – Facebook posts from Dock of the Bay (ID ONLY/NOT ADMITTED/NOT IN FILE)

People's Counsel Exhibit No.

1 – Website photo showing hours of operation
2A – SDAT record showing 9025 Cuckold Point Road, Lot 504
2B – SDAT record showing Cuckold Point Road, Lot 500
2C – SDAT record showing Cuckold Point Road, Lot 502
2D – SDAT record showing Cuckold Point Road, Lot 501
3 – Deed to 9025 Cuckold Point Road dated September 30, 2014
4 – Deed to 9025 Cuckold Point Road dated March 10, 1999
5 – People's Counsel Sign-In Sheet, 2/17/16
6 – People's Counsel Sign-In Sheet, 4/28/16
7 – Map – Property ID and Zoning, 2014 image
8A – Map
8B – Map (color)
8C – Map
9 – Comprehensive Zoning Map
10 – Website page for Mark Alan date 4/26/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
11A – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)

11B – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
12 – Letter dated April 27, 2016 from Denise Haas

May 18, 2016	Memorandum of People's Counsel for Baltimore County
May 19, 2016	Protestant's Memorandum filed by Francis X. Borgerding, Jr., Esquire on behalf of Charlie Wolinsky, Brad Metheny, Bonnie Metheny, Matt Charpella, Wayne Waldman and Mike Kondylas, Protestants.
May 19, 2016	Closing Memorandum in Lieu of Oral Argument filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
June 14, 2016	Board convened for Public Deliberation.
September 15, 2016	Opinion and Order issued by the Board wherein the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music was DENIED.
October 14, 2016	Petition for Judicial Review filed in the Circuit Court for Baltimore County by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, Petitioner/Appellant.
October 19, 2016	Copy of Petition for Judicial Review received from the Circuit Court for Baltimore County by the Board of Appeals.
October 20, 2016	Certificate of Compliance sent to all parties and interested persons.
October 20, 2016	Response to Petition for Judicial Review filed by People's Counsel for Baltimore County.
November 3, 2016	Response to Petition for Judicial Review filed by Francis X. Borgerding, Jr., Esquire on behalf of Charles Wolinski, et al., Protestants.
December 14, 2016	Transcript of testimony filed.
December 14, 2016	Record of Proceedings filed in the Circuit Court for Baltimore County.

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.

Tammy A. McDiarmid, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

PETITION OF BOONE KONDYLAS, LLC, JUDICIAL REVIEW OF THE DECISION OF THE BOARD OF APPEALS FOR BALTIMORE COUNTY	*	IN THE CIRCUIT COURT
IN THE MATTER OF BOONE KONDYLAS, LLC LEGAL OWNERS, PETITION FOR SPECIAL HEARING ON PROPERTY LOCATED at 9025 Cuckold Point Road, Sparrows Point, Maryland 21219	*	FOR BALTIMORE COUNTY Case No.: 03-C-16-010551
15th Election District, 7th Councilmanic District Case No.: 2016-003-SPH Before the County Board of Appeals	*	

* * * * * * * * * * * * *

RESPONSE TO PETITION FOR JUDICIAL REVIEW

Charles Wolinski, et al., in accordance with Maryland Rule 7-204, submits this response to the Petition for Judicial Review filed by Boone Kondylas, LLC and states that they oppose the Petition.

FRANCIS X. BORGERDING, JR.
409 Washington Avenue, Suite 600
Towson, Maryland 21204
410-296-6820

RECEIVED
NOV 07 2016
BALTIMORE COUNTY
BOARD OF APPEALS

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 7th day of November, 2016, a copy of the foregoing was mailed, postage prepaid, to:

Lawrence Schmidt, Esquire
600 Washington Avenue, Suite 200
Towson, MD 21204

Peter Max Zimmerman, Esquire
Carole S. Demilio, Esquire
People's Counsel for Baltimore County
The Jefferson Building
105 West Chesapeake Avenue
Suite 204
Towson, MD 21204

Baltimore County Board of Appeals
105 West Chesapeake Avenue
Suite 203
Towson, MD 21204

FRANCIS X. BORGERDING, JR.

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

October 27, 2016

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

Re: In the Matter of: *Boone Kondylas, LLC*
Case No. 16-003-SPH

Dear Mr. Schmidt:

I am in receipt of your request for transcript in the above referenced matter. Please be advised that we have sent the recording to the typist listed below.

The typist has been instructed to contact you by phone upon receipt of the recording. She will be able to provide you with the estimated cost, and required deposit. I have advised her that the original transcript is due to the Board no later than December 12, 2016.

Please direct all payments and questions regarding the transcript to the typist listed below.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Typist:	Christine Leary
Telephone #:	(443) 622-4898
Mailing Address:	9529 Fox Farm Road, Baltimore, MD 21236
E-mail Address:	crleary1@verizon.net

PETITION OF **BOONE KONDYLAS, LLC**, FOR JUDICIAL REVIEW OF THE DECISION OF THE BOARD OF APPEALS FOR BALTIMORE COUNTY	*	IN THE CIRCUIT COURT
IN THE MATTER OF BOONE KONDYLAS, LLC LEGAL OWNERS, PETITION FOR SPECIAL HEARING ON PROPERTY LOCATED at 9025 Cuckold Point Road, Sparrows Point, Maryland 21219	*	FOR BALTIMORE COUNTY
	*	Case No. 03-C-16-010551
15th Election District, 7th Councilmanic District	*	
Case No.: 2016-003-SPH Before the County Board of Appeals	*	

* * * * * * * * * * * * * *

RESPONSE TO PETITION FOR JUDICIAL REVIEW

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, in accordance with Maryland Rule 7-204, submits this response to the Petition for Judicial Review filed by BOONE KONDYLAS, LLC and states that it intends to participate in this action for Judicial Review. The undersigned participated in the proceeding before the County Board of Appeals.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Carole S Demilio

CAROLE S. DEMILIO
Deputy People's Counsel
The Jefferson Building
105 West Chesapeake Avenue, Suite 204
Towson, MD 21204
(410) 887-2188

RECEIVED
OCT 20 2016
BALTIMORE COUNTY
BOARD OF APPEALS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 2016, a copy of the foregoing Response to Petition for Judicial Review was mailed to:

Lawrence Schmidt, Esquire
600 Washington Avenue, Suite 200
Towson, Maryland 21204
Attorney for Boone Kondylas, LLC

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Baltimore County Board of Appeals
105 West Chesapeake Avenue, Suite 203
Towson, Maryland 21204

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY

*

PETITION OF:
BOONE KONDYLAS, LLC *

FOR JUDICIAL REVIEW OF THE OPINION OF * CIVIL ACTION
THE BOARD OF APPEALS NO. : 03-C-16-010551
OF BALTIMORE COUNTY *
JEFFERSON BUILDING – ROOM 203
105 W. CHESAPEAKE AVENUE *
TOWSON, MARYLAND 21204

*

IN THE MATTER OF:
BOONE KONDYLAS, LLC *
FOR PROPERTY LOCATED AT
9025 CUCKOLD POINT ROAD *

15TH ELECTION DISTRICT *
7TH COUNCILMANIC DISTRICT

*

BOARD OF APPEALS CASE NO.: 16-003-SPH

* * * * * * * * * *

RECEIVED AND FILED
2016 OCT 20 A 11:44
CLERK OF CIRCUIT COURT
BALTIMORE COUNTY

CERTIFICATE OF COMPLIANCE

Madam Clerk:

Pursuant to the Provisions of Rule 7-202(d) of the *Maryland Rules*, the Board of Appeals of Baltimore County has given notice by mail of the filing of the Petition for Judicial Review to the representative of every party to the proceeding before it; namely:

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Kenneth Boone
Boone Kondylas, LLC
9025 Cuckold Point Road
Sparrows Point, MD 21219

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

Charles Wolinski
9019 Cuckold Point Road
Baltimore, MD 21219

Brad and Bonnie Metheny
2704 6th Street
Baltimore, MD 21219

Matt Ciarpella
2716 6th Street
Baltimore, MD 21219

Tammy Waldmann
9014 Cuckold Point Road
Baltimore, MD 21219

Lawrence M. Stahl
Managing Administrative Law Judge
The Jefferson Building, Suite 103
105 W. Chesapeake Avenue
Towson, MD 21204

Andrea Van Arsdale, Director
Department of Planning
The Jefferson Building, Suite 100
105 W. Chesapeake Avenue
Towson, MD 21204

Arnold Jablon, Deputy Administrative Officer
Director of Permits, Approvals and Inspections
County Office Building
111 W. Chesapeake Avenue, Suite 105
Towson, MD 21204

Nancy C. West, Assistant County Attorney
Baltimore County Office of Law
The Historic Courthouse
400 Washington Avenue
Towson, MD 21204

Michael E. Field, County Attorney
Baltimore County Office of Law
The Historic Courthouse
400 Washington Avenue
Towson, MD 21204

A copy of said Notice is attached hereto and prayed that it may be made a part hereof.

I HEREBY CERTIFY that on this 20th day of October, 2016 a copy of the foregoing Certificate of Compliance has been mailed to the individuals listed above.

Tammy A. McDiarmid

Tammy A. McDiarmid, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

October 20, 2016

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 220
Towson, Maryland 21204

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: Petition for Judicial Review
Circuit Court Case No.: 03-C-16-010551
In the Matter of: Boone Kondylas, LLC
Board of Appeals Case No.: 16-003-SPH

Dear Counsel:

Notice is hereby given, in accordance with the Maryland Rules that a Petition for Judicial Review was filed on October 14, 2016 by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC, in the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter. Any party wishing to oppose the petition must file a response with the Circuit Court for Baltimore County within 30 days after the date of this letter, pursuant to the Maryland Rules.

In accordance with the Maryland Rules, the Board of Appeals is required to submit the record of proceedings of the Petition for Judicial Review within 60 days. Mr. Schmidt, having taken the appeal on behalf of his client, is responsible for the cost of the transcript of the record and the transcript must be paid for in time to transmit the same to the Circuit Court within the 60 day timeframe as stated in the Maryland Rules.

Courtsmart was the official record of the hearings before the Board. The disk(s) will be copied by this office and provided to you for transcription. The transcriptionist must meet the requirements set forth in Maryland Rule 16-406d(B) which states: *"a stenographer, court reporter, or transcription service designated by the court for the purpose of preparing an official transcript from the recording."* The Board of Appeals can assist in obtaining a qualified transcriptionist upon request.

Please be advised that the ORIGINAL transcript must be provided to the Board of Appeals no later than DECEMBER 12, 2016 so that it may be transmitted to the Circuit Court with the record of proceedings, pursuant to the Maryland Rules.

A copy of the Certificate of Compliance has been enclosed for your convenience.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Multiple Original Cover Letters
Enclosure

c: Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

October 20, 2016

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 220
Towson, Maryland 21204

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, Maryland 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, Maryland 21204

RE: Petition for Judicial Review
Circuit Court Case No.: 03-C-16-010551
In the Matter of: Boone Kondylas, LLC
Board of Appeals Case No.: 16-003-SPH

Dear Counsel:

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Courtsmart was the official record of the hearings before the Board. The disk(s) will be copied by this office and provided to you for transcription. The transcriptionist must meet the requirements set forth in Maryland Rule 16-406d(B) which states: "*a stenographer, court reporter, or transcription service designated by the court for the purpose of preparing an official transcript from the recording.*" The Board of Appeals can assist in obtaining a qualified transcriptionist upon request.

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A copy of the Certificate of Compliance has been enclosed for your convenience.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Multiple Original Cover Letters
Enclosure

c: Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY	*	
	*	
PETITION OF: BOONE KONDYLAS, LLC	*	
FOR JUDICIAL REVIEW OF THE OPINION OF THE BOARD OF APPEALS OF BALTIMORE COUNTY JEFFERSON BUILDING – ROOM 203 105 W. CHESAPEAKE AVENUE TOWSON, MARYLAND 21204	*	CIVIL ACTION NO. : 03-C-16-010551
	*	
IN THE MATTER OF: BOONE KONDYLAS, LLC FOR PROPERTY LOCATED AT 9025 CUCKOLD POINT ROAD	*	
	*	
15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	
	*	
BOARD OF APPEALS CASE NO.: 16-003-SPH		

* * * * * * * * * * * *

CERTIFICATE OF COMPLIANCE

Madam Clerk:

Pursuant to the Provisions of Rule 7-202(d) of the *Maryland Rules*, the Board of Appeals of Baltimore County has given notice by mail of the filing of the Petition for Judicial Review to the representative of every party to the proceeding before it; namely:

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Kenneth Boone
Boone Kondylas, LLC
9025 Cuckold Point Road
Sparrows Point, MD 21219

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

Charles Wolinski
9019 Cuckold Point Road
Baltimore, MD 21219

Brad and Bonnie Metheny
2704 6th Street
Baltimore, MD 21219

Matt Ciarpella
2716 6th Street
Baltimore, MD 21219

Tammy Waldmann
9014 Cuckold Point Road
Baltimore, MD 21219

Lawrence M. Stahl
Managing Administrative Law Judge
The Jefferson Building, Suite 103
105 W. Chesapeake Avenue
Towson, MD 21204

Andrea Van Arsdale, Director
Department of Planning
The Jefferson Building, Suite 100
105 W. Chesapeake Avenue
Towson, MD 21204

Arnold Jablon, Deputy Administrative Officer
Director of Permits, Approvals and Inspections
County Office Building
111 W. Chesapeake Avenue, Suite 105
Towson, MD 21204

Nancy C. West, Assistant County Attorney
Baltimore County Office of Law
The Historic Courthouse
400 Washington Avenue
Towson, MD 21204

Michael E. Field, County Attorney
Baltimore County Office of Law
The Historic Courthouse
400 Washington Avenue
Towson, MD 21204

A copy of said Notice is attached hereto and prayed that it may be made a part hereof.

I HEREBY CERTIFY that on this 20th day of October, 2016 a copy of the foregoing Certificate of Compliance has been mailed to the individuals listed above.

Tammy A. McDiarmid

Tammy A. McDiarmid, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

PETITION OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	IN THE
	*	CIRCUIT COURT
	*	FOR
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY Jefferson Building, Suite 203 105 W. Chesapeake Avenue Towson, MD 21204	*	BALTIMORE COUNTY
	*	
	*	**Case No.:** 03-C-16-10551
IN THE MATTER OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	
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	*	
15th Election District 7th Councilmanic District	*	
	*	
County Board of Appeals Case No. 16-003-SPH		

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CLERK OF CIRCUIT COURT
BALTIMORE COUNTY

* *

PETITION FOR JUDICIAL REVIEW

Petitioner, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, requests judicial review of the Opinion of the Board of Appeals for Baltimore County dated September 15, 2016, a copy of which is attached hereto, in the above referenced matter. Petitioner was a party below and fully participated, individually and through other counsel, in the proceedings.

This Petition is filed pursuant to Rules 7-202 and 7-203(b) of the Maryland Rules of Procedure.

RECEIVED
OCT 19 2016
BALTIMORE COUNTY
BOARD OF APPEALS

LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of **October, 2016,** a copy of the foregoing Petition for Judicial Review was delivered to:

Francis X. Borgerding, Esquire
409 Washington Avenue, Suite 600
Towson, MD 21204

Krysundra Cannington, Administrator
County Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carol S. Demilio, Esquire
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Towson, MD 21204

LAWRENCE E. SCHMIDT

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE BOARD OF APPEALS
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	OF BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge (the "ALJ") in which the ALJ denied a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music.

A public hearing was held *de novo* on February 17, 2016 and April 28, 2016. The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire of Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Woliński, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation was held on June 14, 2016.

Factual Background

The subject property is water front property located in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" (the "Restaurant"). The Restaurant is open seven (7) days a week and has a total seating capacity of approximately 225 persons (125 persons inside and 100 persons outside). The Property is also

improved with boat slips for patrons to dock their boats and access the Restaurant via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, the Restaurant came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation, music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement actions beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing to request a determination that the Restaurant with its associated live music did not constitute a 'nightclub.' In our June 4, 2008 Opinion, this Board held that Mr. Thanner's operation of the Restaurant along with music played met the definition of "nightclub" in §101 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a 'nightclub' was not permitted in a BL zone, this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (Board Opinion 6/4/08, p. 14). Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. Thereafter, the Restaurant closed.

In or about August of 2014, the Petitioner purchased the Property. In or about October of 2014, the Petitioner reopened the Restaurant under the previous name – Dock of the Bay. At the hearing, Kenneth Boone, owner of Boone Kondylas, LLC, the Petitioner, testified before this Board that his ownership and operation of the Restaurant is one of three businesses he owns. The Restaurant has both a business license and a liquor license. The food menu varies from seafood to sandwiches, hamburgers and pasta.

The Petitioner described the minimal improvements that have been made to the Restaurant since August of 2014. These have included pouring a concrete pad where the customers can eat steamed crabs, expanding the kitchen, and removing the outside stage installed by Mr. Thanner where the musicians formerly played.

In April of 2015, the Petitioner hired Mark Allen, a guitar player, to perform at the Restaurant. Mr. Allen was also a regular performer at the Restaurant during the period that Mr Thanner owned it. When signs advertising Mr. Allen's performance were put up at the Restaurant, a Baltimore County inspector instructed the Petitioner that the Restaurant would be closed down if music was permitted to play.

Mr. Boone mentioned that 'Row Boat Willie's', a restaurant located next to the Property is permitted to have live music. Row Boat Willie's is located in a BM (Business-major) zone which permits 'nightclubs' to operate. The Petitioner is competing with 8 other restaurants, including the 'The New White Swan' located at 8821 Millers Island Blvd. and 'The Islander' located at 9008 Cuckold Point Rd., on or near the waterfront and all of them have some type of live music. Mr. Boone was certain that the Restaurant would not be able to survive financially without live music.

While not excluding any specific age of customers, the plan is to hire musical performers who cater to a 50 year-old audience, who want to hear music while enjoying lunch or dinner. The Petitioner does not want to cater to a younger crowd as he anticipated the potential problems that might arise with a younger audience. In the summer months, boaters from all over Baltimore County patronize the Restaurant. The types of musical acts envisioned by the Petitioner would range from solo acoustic or electric guitar players to Frank Sinatra and Oompa bands.

The proposed hours for the musical groups would be Friday and Saturday nights from 6:00 p.m. to 10:00 p.m., with the last call at midnight, in hopes that the customers might leave by 12:30

a.m. On Sundays, in the summer, music would be played outdoors from 5:00 p.m. to 8:30 p.m. Also, there would not be a dance floor or stage area.

The Petitioner is amenable to a decibel level restriction for the sound stemming from the music. However, Mr. Boone has not personally operated any type of device to monitor decibel levels at the Restaurant.

On cross examination, the Petitioner conceded that the Restaurant hours of operation are in fact stated on the website. The hours of operation stated in the website are Monday to Thursday, 11:00 a.m. to 11:00 p.m.; Friday and Saturday 11:00 a.m. to 1:00 a.m.; and Sunday from 9:00 a.m. to 8:00 p.m. Mr. Boone then changed his testimony on the time period during which musical acts would perform and indicated that the music would end at Friday and Saturday nights at 11:00 p.m., on Sundays at 7:00 p.m.; and, at dusk for outdoor performances in the summer months which would end as late as 9:00 p.m.

The Petitioner acknowledged that it did not want to be restricted to certain types of music but would entertain other types of music such as jazz quartet bands or Reggae bands. The Petitioner was uncertain about normal sound levels or how the proposed music might be regulated.

In support of the Petitioner's proposed business, several Miller's Island residents testified. Cheryl Gowers of 2812 Bay Drive has lived at that address since 1993. At the previous hearing, Ms. Gowers testified against Mr. Thanner's operation. She was familiar with the problems that resulted from Mr. Thanner's operation of the business which, she said permitted very loud music including heavy metal music and played until midnight or 1:00 a.m. on most weekends. Presently, Ms. Gowers works as a waitress in the Restaurant for the Petitioner. Having worked at both The New White Swan and The Islander, she corroborated that live music is played at those establishments.

Russell McClelland, 9011 Miller's Island Blvd. testified that he lives 400 yds. from the Property. Mr. McClelland was familiar with the complaints from neighbors and the level of sound

coming from Mr. Thanner's restaurant. He described music at Mr. Thanner's restaurant as being played from speakers mounted to a stage outside the Restaurant. The music was amplified over the water and would occur all days of the week until midnight. He recalled that Reggae music was played.

Mr. McClelland is in support of the Petitioner's request here because he believes, like Ms. Gowers, that Mr. Boone will not permit the type of problems associated with Mr. Thanner's operation. Mr. McClelland works for the Petitioner by cutting the grass and policing both the parking lots and boat slips. If this request is granted, he is willing to monitor the sound level.

Charles Boland and Jerri Boland, his wife, 2414 Eugene Avenue, Edgemere, MD live 1 ½ miles from the Restaurant. Mr. Boland is a retired Baltimore County police officer whose son is employed by the Petitioner. Mr. Boland frequents the Restaurant 4-5 times per week and testified that the Petitioner's operation is family-oriented. The Bolands have no objection to live music at the Restaurant.

Dorothy Reilly, 2809 3rd Street, Miller's Island, is located 2 blocks from the Restaurant. Ms. Reilly has observed loud music coming from The White Swann and The Islander. She reiterated that the Petitioner's restaurant is family oriented. She does not like loud music but would like to hear softer music while there.

In the Protestants' case in chief, Charles Wolinski, 9019 Cockhold Point Rd. testified that his home is adjacent to the Restaurant. Mr. Wolinski is a high school biology teacher at Sparrow's Point High School. He can see the Restaurant from his house. He has 4 children, ranging in age from 13 yrs. to 3 yrs. Mr. Wolinski described his family's life through the Thanner years as living through a "nightmare." He specifically described the problems with the loud music both indoor and outdoor which occurred every weekend. Disorderly patrons were loud while the music was playing and, after the music ended, the clapping and screaming was just as bad as the music itself.

These patrons would then spillover into the parking lot and would continue with loud, disruptive behavior.

Because of the loud noises made by patrons and the loud music, he can never open the windows in his home in the summer or winter. All the noise from the music and the patrons could still be heard inside the home; even in the shower with the fan running. This situation disrupted his family's sleep and the enjoyment of their home. Due to the configuration of the Restaurant's door leading to the outside, even the music played indoors by a live band can be heard in his home and it is disruptive. He explained that each time the outside door would open, the music and noise from inside the Restaurant would project outdoors. He further stated that the parking would overflow into the neighborhood streets. He described one incident where a Restaurant patron, who was blocked in by another car on the parking lot, drove across Mr. Wolinski's lawn in order to exit the parking lot. That incident forced Mr. Wolinski to incur the cost of erecting a fence. Mr. Wolinski was clear that Mr. Thanner never controlled the crowds that came with playing music at the Restaurant.

Mr. Wolinski is also familiar with Mr. Boone's operation of the Restaurant and explained that the physical layout of the Restaurant has not changed. He is very concerned that the same problems will reoccur whether the music is played inside or outdoors. Mark Allen is the same performer hired by Mr. Thanner. Mr. Allen's guitar is connected to an amplifier which Mr. Wolinski described as so loud that Mr. Allen was no longer permitted to play at Rowboat Willie's. Mr. Wolinski recalled that Mr. Thanner also hired steel drum bands. In his experience and from personal observation, the music from Rowboat Willie's does not impact him or his family. He indicated that The Islander only has karaoke music inside.

Mr. Wolinski stated that the litigation against Mr. Thanner's operation lasted seven (7) years through the various appeals in the Court system and that he and the other Protestants paid

substantial attorney's fees. Toward that end, he was surprised that the new owner could make the identical request for music when that request was previously denied in the various appeals.

Also testifying for the Protestants was Matthew Ciarpella, 2116 6th Street, Miller's Island where he has resided for 11 years. Mr. Ciarpella experienced first-hand Mr. Thanner's operation of the Restaurant and also endured seven (7) years of litigation. He opposes outdoor music at the Restaurant due the proximity of the Restaurant to his house. As such, even if the proposed music ends at 7:00 p.m., rather than 9:00 p.m., it would still be intrusive. His house, similar to others in the neighborhood is built on elevated foundations such that the sound travels upward. When wind blows from the north over the water, the sound travels. He could hear the music and loud patrons while inside his house with the windows closed. Each time the outside door opened, bursts of sound would travel. This problem occurred even with a 6' privacy fence and a wall of Leland Cypress trees.

Mr. Ciarella is convinced that the type of music will not be limited to acoustic or Reggae. He insists that the Petitioner will not repeatedly hire the same musical acts because, economically, the Restaurant will profit from hiring a variety of bands. Moreover, the more popular the band, the more revenue will be generated. Karaoke would not be a better option because a microphone will still be used. He is familiar with Mark Allen's guitar which is connected to an electric amplifier and/or microphone whether he is playing classic rock, 'oldies music' or Reggae.

Mr. Ciarpella added that when the popular rendition of a song was played, he would hear cheering, clapping and hooting for the music to continue. In contrast, this additional noise from cheering and clapping does not occur when a song is being played on a radio. At The Islander, he said that there is a DJ inside and that he cannot hear that from his house.

Mr. Ciarpella was familiar with the layout of Row Boat Willie's as he was involved with constructing the sound proofing of the pavilion where the live music plays. The pavilion consists

of a 32x30 square shape and is opened on north side. The pavilion also has table seating and an elevated deck.

In his view, the proposal presented here is the same one that was previously rejected by this Board and by the courts. He testified that there will be no regulation of decibel levels. During the Thanner years, the neighbors regulated the music levels by filing complaints with Code Enforcement. What he learned through the Thanner litigation is that there is no regulation of noise levels by Baltimore County; rather any nuisance is complaint driven. This puts a burden on the Protestants to seek enforcement against the Restaurant.

He further testified that along with bands comes the followers which he described as a 'different type of crowd' than would normally be expected with music that accompanies dinner. He also stated that the amount of traffic not only increased with the live music but the followers of those bands did not drive civilly.

Mr. Ciarpella anticipates that, if the Petitioner's request is granted, he and his neighbors will endure more litigation monitoring the Petitioner and again when the Restaurant is subsequently sold. Any live music played at this restaurant will negatively affect his property values.

Brad Metheny, 2704 6th Street, Miller's Island, testified that he too lived through the Thanner era. He recalled that the bands would play on Friday and Saturday nights until 1:30 a.m. He also heard all the music and noise while inside his house with the doors and windows closed, with the air conditioning running and the TV playing. He approximated that his home is located 180' from the Restaurant.

Mr. Metheny described the instant hearing as being the same that he heard when Mr. Thanner and his employees previously testified. Granting this request would open the door to the same problems he endured for the last 7 years. Since outside the Restaurant can accommodate 150 people, if outdoor music is combined with alcohol consumption by patrons and boaters who

dock outside the Restaurant, the situation becomes problematic. He does not want to suffer through the same 'constant battle and disruption.' Indeed, Mr. Metheny's son and his family were living at 2712 6th Street which Mr. Metheny also owns. Due to the noise problems, his son was forced to move with his 4 year old granddaughter to Bel Air.

Mr. Metheny's mother-in-law previously owned The Fisherman's Inn in the 1940s and 1950s. Mr. Metheny recalled that when the Restaurant was The Fisherman's Inn there were outdoor dining tables without any problems.

Following Mr. Metheny's testimony was his wife, Bonnie Metheny as well as a neighbor Wayne Waldmann of 9014 Cuckhold Point Road. Both of those neighbors also opposed any type of music at the Restaurant.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. In short, the Petitioner asks this Board to believe that the same problems will not result if live music is now permitted.

In our decision of June 4, 2008, which decision was affirmed by both the Circuit Court and the Court of Special Appeals, we made many findings of fact. We incorporate that Opinion in its entirety herein. We also refer to the facts and holding as set forth in the Court of Special Appeals Opinion dated July 9, 2010.

Specifically, we previously found that the Restaurant could seat 150-160 patrons inside. Outside of the Restaurant was a patio, two television sets, along with an outside bar, and tables for patrons to use. There were also outside speakers connected to a radio which played music both inside and outside. The Restaurant had 14 boat slips for "transient" boat customers.

The Restaurant opened every day from 11:00 a.m. and closed at 2:00 a.m. In the winter, the Restaurant closed early as customers left. The kitchen closed at 11:00 p.m. but the bar stayed

open until 2:00 a.m. as permitted by the liquor license. The food menu was seafood, steaks and sandwiches. We also found that 70% of sales were from food and 30% were in beverages.

On Friday and Saturday nights, we found that live bands played from 9:00 p.m. to 1:00 a.m. We also found that on Saturday and Sunday afternoons, live music played from 4:00 p.m. to 8:00 p.m. (with the caveat that the music stopped after 8:00 because of the code violation complaints).

The type of music were "mostly duos" or "steel bands." There was no charge for live entertainment and the Restaurant stayed open until 2:00 a.m. when live music was played. We also heard testimony that the Restaurant would close without live music being available. In that case, we also heard the testimony against the live music from Matthew Ciarpella, Charles Wolinski, Brad and Bonnie Metheny and Patricia Waldmann.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not even hear the facts before determining whether the doctrine of *res judicata* applies. *Id* at 995 A.2d 1070. The Court also stated that *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett*, 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

This Board's Opinion of June 4, 2008 meets this test. (1) The Board was acting in a judicial capacity by conducting a hearing on the Petition for Special Hearing, where evidence was presented, and rulings were made on disputed factual and legal issues; (2) The issue of whether music should be permitted at this location was actually litigated; and (3) the Board's Opinion of June 4, 2008 was necessary for a resolution of the issue.

Under *Deleon v. Slear*, 328 Md. 569 (1992), the Court of Appeals made clear that in determining whether claims are the same for the purposes of *res judicata*, the Court has in the past applied "same evidence test." However, the *Deleon* Court acknowledged that the concept of "claim" is broad and that "claim" is defined as a "group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from the narrow concept of a 'cause of action.'" *Id.* at 589. The *Deleon* Court, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), emphasized that the most recent test for determining when two claims or causes of action are the same for purposes of *res judicata* is the "transaction" test as set forth in §24 of the Restatement (Second) of Judgments.

The Court of Appeals in *Bilbrough*, recited the transaction test as follows:

> The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 497-498; *Deleon* at 589.

Specifically, with respect to whether the claims are the same, the *Deleon* Court reviewed the facts to see whether they "are related in time, space, origin or motivation." *Id.* at 591. As applied to the instant case, the same parties, or their privy, are involved here as were involved in the Thanner litigation which led to our June 4, 2008 Opinion. We further find that, the same piece

of property has been involved as well as the same zoning issue with respect to whether a music should be permitted on the Property.

With regard to amending previous restrictions or conditions where an earlier application has been denied by a zoning board, the Court of Appeals in *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1936) appropriately explained that:

> The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions..... This rule seems to rest not strictly on the doctrine of res judicata, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.
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> * * * *
>
> The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County (3) decreased opposition of neighbors and some support by them; and (4) additional conditions attached to the granting of the permit.

Applying the reasoning of *Whittle* here, we find that there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner on the Petition for Special Hearing or before this Board after a *de novo* hearing. The same neighbors who incurred attorney fees and endured the Thanner era of ownership are still protesting both indoor and outdoor music.

The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that, in order to be successful on this request, the changes needed

under *Whittle* must be more than a change in the Restaurant's ownership or management style of the new owner.

We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that it be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

The County Council has determined that 'nightclubs' can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in the BM zone. In contrast, this restaurant is located in a BL zone which is not permitted to have live music. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101. The facts presented by the Petitioner here have not changed that determination.

We also cite our previous holding in *The Belvedere Baptist Church of Baltimore*, Case No. 15-004-SPH, wherein we declined to approve a request to amend a restriction in a previous ALJ Order. In that case, we applied the doctrine of *res judicata* and found that there was no substantial change in circumstances or facts between the first case and the second case to warrant the requested relief. Specifically, we found that: "there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decision." (Board Opinion, p.8).

In the Board's desire to be consistent in its holdings, we find that the facts of this case fit squarely within the relief requested in the *Belevedere Baptist* case. Here, there has been no change in the Property, the Restaurant, the neighborhood, the neighbors or the zoning that might lead to a different result.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Benfred B. Alston

Jane M. Hanley was on the panel and agreed with the majority opinion. She was not reappointed to the Board and her last day with the Board of Appeals was June 30, 2016.

PETITION OF: BOONE KONDYLAS, LLC 9025 Cuckold Point Road Sparrows Point, Maryland 21219	*	IN THE
	*	CIRCUIT COURT
	*	FOR
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY Jefferson Building, Suite 203 105 W. Chesapeake Avenue Towson, MD 21204	*	BALTIMORE COUNTY
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	*	**Case No.:** _____
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Factual Background

The subject property is water front property located in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" (the "Restaurant"). The Restaurant is open seven (7) days a week and has a total seating capacity of approximately 225 persons (125 persons inside and 100 persons outside). The Property is also

improved with boat slips for patrons to dock their boats and access the Restaurant via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, the Restaurant came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation, music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement actions beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing to request a determination that the Restaurant with its associated live music did not constitute a 'nightclub.' In our June 4, 2008 Opinion, this Board held that Mr. Thanner's operation of the Restaurant along with music played met the definition of "nightclub" in §101 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a 'nightclub' was not permitted in a BL zone, this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (Board Opinion 6/4/08, p. 14). Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. Thereafter, the Restaurant closed.

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The Petitioner described the minimal improvements that have been made to the Restaurant since August of 2014. These have included pouring a concrete pad where the customers can eat steamed crabs, expanding the kitchen, and removing the outside stage installed by Mr. Thanner where the musicians formerly played.

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While not excluding any specific age of customers, the plan is to hire musical performers who cater to a 50 year-old audience, who want to hear music while enjoying lunch or dinner. The Petitioner does not want to cater to a younger crowd as he anticipated the potential problems that might arise with a younger audience. In the summer months, boaters from all over Baltimore County patronize the Restaurant. The types of musical acts envisioned by the Petitioner would range from solo acoustic or electric guitar players to Frank Sinatra and Oompa bands.

The proposed hours for the musical groups would be Friday and Saturday nights from 6:00 p.m. to 10:00 p.m., with the last call at midnight, in hopes that the customers might leave by 12:30

a.m. On Sundays, in the summer, music would be played outdoors from 5:00 p.m. to 8:30 p.m. Also, there would not be a dance floor or stage area.

The Petitioner is amenable to a decibel level restriction for the sound stemming from the music. However, Mr. Boone has not personally operated any type of device to monitor decibel levels at the Restaurant.

On cross examination, the Petitioner conceded that the Restaurant hours of operation are in fact stated on the website. The hours of operation stated in the website are Monday to Thursday, 11:00 a.m. to 11:00 p.m.; Friday and Saturday 11:00 a.m. to 1:00 a.m.; and Sunday from 9:00 a.m. to 8:00 p.m. Mr. Boone then changed his testimony on the time period during which musical acts would perform and indicated that the music would end at Friday and Saturday nights at 11:00 p.m., on Sundays at 7:00 p.m.; and, at dusk for outdoor performances in the summer months which would end as late as 9:00 p.m.

The Petitioner acknowledged that it did not want to be restricted to certain types of music but would entertain other types of music such as jazz quartet bands or Reggae bands. The Petitioner was uncertain about normal sound levels or how the proposed music might be regulated.

In support of the Petitioner's proposed business, several Miller's Island residents testified. Cheryl Gowers of 2812 Bay Drive has lived at that address since 1993. At the previous hearing, Ms. Gowers testified against Mr. Thanner's operation. She was familiar with the problems that resulted from Mr. Thanner's operation of the business which, she said permitted very loud music including heavy metal music and played until midnight or 1:00 a.m. on most weekends. Presently, Ms. Gowers works as a waitress in the Restaurant for the Petitioner. Having worked at both The New White Swan and The Islander, she corroborated that live music is played at those establishments.

Russell McClelland, 9011 Miller's Island Blvd. testified that he lives 400 yds. from the Property. Mr. McClelland was familiar with the complaints from neighbors and the level of sound

coming from Mr. Thanner's restaurant. He described music at Mr. Thanner's restaurant as being played from speakers mounted to a stage outside the Restaurant. The music was amplified over the water and would occur all days of the week until midnight. He recalled that Reggae music was played.

Mr. McClelland is in support of the Petitioner's request here because he believes, like Ms. Gowers, that Mr. Boone will not permit the type of problems associated with Mr. Thanner's operation. Mr. McClelland works for the Petitioner by cutting the grass and policing both the parking lots and boat slips. If this request is granted, he is willing to monitor the sound level.

Charles Boland and Jerri Boland, his wife, 2414 Eugene Avenue, Edgemere, MD live 1 ½ miles from the Restaurant. Mr. Boland is a retired Baltimore County police officer whose son is employed by the Petitioner. Mr. Boland frequents the Restaurant 4-5 times per week and testified that the Petitioner's operation is family-oriented. The Bolands have no objection to live music at the Restaurant.

Dorothy Reilly, 2809 3rd Street, Miller's Island, is located 2 blocks from the Restaurant. Ms. Reilly has observed loud music coming from The White Swann and The Islander. She reiterated that the Petitioner's restaurant is family oriented. She does not like loud music but would like to hear softer music while there.

In the Protestants' case in chief, Charles Wolinski, 9019 Cockhold Point Rd. testified that his home is adjacent to the Restaurant. Mr. Wolinski is a high school biology teacher at Sparrow's Point High School. He can see the Restaurant from his house. He has 4 children, ranging in age from 13 yrs. to 3 yrs. Mr. Wolinski described his family's life through the Thanner years as living through a "nightmare." He specifically described the problems with the loud music both indoor and outdoor which occurred every weekend. Disorderly patrons were loud while the music was playing and, after the music ended, the clapping and screaming was just as bad as the music itself.

These patrons would then spillover into the parking lot and would continue with loud, disruptive behavior.

Because of the loud noises made by patrons and the loud music, he can never open the windows in his home in the summer or winter. All the noise from the music and the patrons could still be heard inside the home; even in the shower with the fan running. This situation disrupted his family's sleep and the enjoyment of their home. Due to the configuration of the Restaurant's door leading to the outside, even the music played indoors by a live band can be heard in his home and it is disruptive. He explained that each time the outside door would open, the music and noise from inside the Restaurant would project outdoors. He further stated that the parking would overflow into the neighborhood streets. He described one incident where a Restaurant patron, who was blocked in by another car on the parking lot, drove across Mr. Wolinski's lawn in order to exit the parking lot. That incident forced Mr. Wolinski to incur the cost of erecting a fence. Mr. Wolinski was clear that Mr. Thanner never controlled the crowds that came with playing music at the Restaurant.

Mr. Wolinski is also familiar with Mr. Boone's operation of the Restaurant and explained that the physical layout of the Restaurant has not changed. He is very concerned that the same problems will reoccur whether the music is played inside or outdoors. Mark Allen is the same performer hired by Mr. Thanner. Mr. Allen's guitar is connected to an amplifier which Mr. Wolinski described as so loud that Mr. Allen was no longer permitted to play at Rowboat Willie's. Mr. Wolinski recalled that Mr. Thanner also hired steel drum bands. In his experience and from personal observation, the music from Rowboat Willie's does not impact him or his family. He indicated that The Islander only has karaoke music inside.

Mr. Wolinski stated that the litigation against Mr. Thanner's operation lasted seven (7) years through the various appeals in the Court system and that he and the other Protestants paid

substantial attorney's fees. Toward that end, he was surprised that the new owner could make the identical request for music when that request was previously denied in the various appeals.

Also testifying for the Protestants was Matthew Ciarpella, 2116 6th Street, Miller's Island where he has resided for 11 years. Mr. Ciarpella experienced first-hand Mr. Thanner's operation of the Restaurant and also endured seven (7) years of litigation. He opposes outdoor music at the Restaurant due the proximity of the Restaurant to his house. As such, even if the proposed music ends at 7:00 p.m., rather than 9:00 p.m., it would still be intrusive. His house, similar to others in the neighborhood is built on elevated foundations such that the sound travels upward. When wind blows from the north over the water, the sound travels. He could hear the music and loud patrons while inside his house with the windows closed. Each time the outside door opened, bursts of sound would travel. This problem occurred even with a 6' privacy fence and a wall of Leland Cypress trees.

Mr. Ciarella is convinced that the type of music will not be limited to acoustic or Reggae. He insists that the Petitioner will not repeatedly hire the same musical acts because, economically, the Restaurant will profit from hiring a variety of bands. Moreover, the more popular the band, the more revenue will be generated. Karaoke would not be a better option because a microphone will still be used. He is familiar with Mark Allen's guitar which is connected to an electric amplifier and/or microphone whether he is playing classic rock, 'oldies music' or Reggae.

Mr. Ciarpella added that when the popular rendition of a song was played, he would hear cheering, clapping and hooting for the music to continue. In contrast, this additional noise from cheering and clapping does not occur when a song is being played on a radio. At The Islander, he said that there is a DJ inside and that he cannot hear that from his house.

Mr. Ciarpella was familiar with the layout of Row Boat Willie's as he was involved with constructing the sound proofing of the pavilion where the live music plays. The pavilion consists

of a 32x30 square shape and is opened on north side. The pavilion also has table seating and an elevated deck.

In his view, the proposal presented here is the same one that was previously rejected by this Board and by the courts. He testified that there will be no regulation of decibel levels. During the Thanner years, the neighbors regulated the music levels by filing complaints with Code Enforcement. What he learned through the Thanner litigation is that there is no regulation of noise levels by Baltimore County; rather any nuisance is complaint driven. This puts a burden on the Protestants to seek enforcement against the Restaurant.

He further testified that along with bands comes the followers which he described as a 'different type of crowd' than would normally be expected with music that accompanies dinner. He also stated that the amount of traffic not only increased with the live music but the followers of those bands did not drive civilly.

Mr. Ciarpella anticipates that, if the Petitioner's request is granted, he and his neighbors will endure more litigation monitoring the Petitioner and again when the Restaurant is subsequently sold. Any live music played at this restaurant will negatively affect his property values.

Brad Metheny, 2704 6th Street, Miller's Island, testified that he too lived through the Thanner era. He recalled that the bands would play on Friday and Saturday nights until 1:30 a.m. He also heard all the music and noise while inside his house with the doors and windows closed, with the air conditioning running and the TV playing. He approximated that his home is located 180' from the Restaurant.

Mr. Metheny described the instant hearing as being the same that he heard when Mr. Thanner and his employees previously testified. Granting this request would open the door to the same problems he endured for the last 7 years. Since outside the Restaurant can accommodate 150 people, if outdoor music is combined with alcohol consumption by patrons and boaters who

dock outside the Restaurant, the situation becomes problematic. He does not want to suffer through the same 'constant battle and disruption.' Indeed, Mr. Metheny's son and his family were living at 2712 6th Street which Mr. Metheny also owns. Due to the noise problems, his son was forced to move with his 4 year old granddaughter to Bel Air.

Mr. Metheny's mother-in-law previously owned The Fisherman's Inn in the 1940s and 1950s. Mr. Metheny recalled that when the Restaurant was The Fisherman's Inn there were outdoor dining tables without any problems.

Following Mr. Metheny's testimony was his wife, Bonnie Metheny as well as a neighbor Wayne Waldmann of 9014 Cuckhold Point Road. Both of those neighbors also opposed any type of music at the Restaurant.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. In short, the Petitioner asks this Board to believe that the same problems will not result if live music is now permitted.

In our decision of June 4, 2008, which decision was affirmed by both the Circuit Court and the Court of Special Appeals, we made many findings of fact. We incorporate that Opinion in its entirety herein. We also refer to the facts and holding as set forth in the Court of Special Appeals Opinion dated July 9, 2010.

Specifically, we previously found that the Restaurant could seat 150-160 patrons inside. Outside of the Restaurant was a patio, two television sets, along with an outside bar, and tables for patrons to use. There were also outside speakers connected to a radio which played music both inside and outside. The Restaurant had 14 boat slips for "transient" boat customers.

The Restaurant opened every day from 11:00 a.m. and closed at 2:00 a.m. In the winter, the Restaurant closed early as customers left. The kitchen closed at 11:00 p.m. but the bar stayed

open until 2:00 a.m. as permitted by the liquor license. The food menu was seafood, steaks and sandwiches. We also found that 70% of sales were from food and 30% were in beverages.

On Friday and Saturday nights, we found that live bands played from 9:00 p.m. to 1:00 a.m. We also found that on Saturday and Sunday afternoons, live music played from 4:00 p.m. to 8:00 p.m. (with the caveat that the music stopped after 8:00 because of the code violation complaints).

The type of music were "mostly duos" or "steel bands." There was no charge for live entertainment and the Restaurant stayed open until 2:00 a.m. when live music was played. We also heard testimony that the Restaurant would close without live music being available. In that case, we also heard the testimony against the live music from Matthew Ciarpella, Charles Wolinski, Brad and Bonnie Metheny and Patricia Waldmann.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n,* 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not even hear the facts before determining whether the doctrine of *res judicata* applies. *Id* at 995 A.2d 1070. The Court also stated that *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett,* 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

This Board's Opinion of June 4, 2008 meets this test. (1) The Board was acting in a judicial capacity by conducting a hearing on the Petition for Special Hearing, where evidence was presented, and rulings were made on disputed factual and legal issues; (2) The issue of whether music should be permitted at this location was actually litigated; and (3) the Board's Opinion of June 4, 2008 was necessary for a resolution of the issue.

Under *Deleon v. Slear*, 328 Md. 569 (1992), the Court of Appeals made clear that in determining whether claims are the same for the purposes of *res judicata*, the Court has in the past applied "same evidence test." However, the *Deleon* Court acknowledged that the concept of "claim" is broad and that "claim" is defined as a "group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from the narrow concept of a 'cause of action.'" *Id.* at 589. The *Deleon* Court, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), emphasized that the most recent test for determining when two claims or causes of action are the same for purposes of *res judicata* is the "transaction" test as set forth in §24 of the Restatement (Second) of Judgments.

The Court of Appeals in *Bilbrough*, recited the transaction test as follows:

> The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 497-498; *Deleon* at 589.

Specifically, with respect to whether the claims are the same, the *Deleon* Court reviewed the facts to see whether they "are related in time, space, origin or motivation." *Id.* at 591. As applied to the instant case, the same parties, or their privy, are involved here as were involved in the Thanner litigation which led to our June 4, 2008 Opinion. We further find that, the same piece

of property has been involved as well as the same zoning issue with respect to whether a music should be permitted on the Property.

With regard to amending previous restrictions or conditions where an earlier application has been denied by a zoning board, the Court of Appeals in *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1936) appropriately explained that:

> The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions..... This rule seems to rest not strictly on the doctrine of res judicata, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.
>
> * * * *
>
> The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County (3) decreased opposition of neighbors and some support by them; and (4) additional conditions attached to the granting of the permit.

Applying the reasoning of *Whittle* here, we find that there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner on the Petition for Special Hearing or before this Board after a *de novo* hearing. The same neighbors who incurred attorney fees and endured the Thanner era of ownership are still protesting both indoor and outdoor music.

The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that, in order to be successful on this request, the changes needed

under *Whittle* must be more than a change in the Restaurant's ownership or management style of the new owner.

We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that it be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

The County Council has determined that 'nightclubs' can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in the BM zone. In contrast, this restaurant is located in a BL zone which is not permitted to have live music. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101. The facts presented by the Petitioner here have not changed that determination.

We also cite our previous holding in *The Belvedere Baptist Church of Baltimore*, Case No. 15-004-SPH, wherein we declined to approve a request to amend a restriction in a previous ALJ Order. In that case, we applied the doctrine of *res judicata* and found that there was no substantial change in circumstances or facts between the first case and the second case to warrant the requested relief. Specifically, we found that: "there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decision." (Board Opinion, p.8).

In the Board's desire to be consistent in its holdings, we find that the facts of this case fit squarely within the relief requested in the *Belevedere Baptist* case. Here, there has been no change in the Property, the Restaurant, the neighborhood, the neighbors or the zoning that might lead to a different result.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Benfred B. Alston

Jane M. Hanley was on the panel and agreed with the majority opinion. She was not reappointed to the Board and her last day with the Board of Appeals was June 30, 2016.

Board of Appeals of Baltimore County

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September 15, 2016

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RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Multiple Original Cover Letters

c: Kenneth Boone/Boone Kondylas, LLC
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE BOARD OF APPEALS OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge (the "ALJ") in which the ALJ denied a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music.

A public hearing was held *de novo* on February 17, 2016 and April 28, 2016. The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire of Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation was held on June 14, 2016.

Factual Background

The subject property is water front property located in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" (the "Restaurant"). The Restaurant is open seven (7) days a week and has a total seating capacity of approximately 225 persons (125 persons inside and 100 persons outside). The Property is also

improved with boat slips for patrons to dock their boats and access the Restaurant via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, the Restaurant came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation, music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement actions beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing to request a determination that the Restaurant with its associated live music did not constitute a 'nightclub.' In our June 4, 2008 Opinion, this Board held that Mr. Thanner's operation of the Restaurant along with music played met the definition of "nightclub" in §101 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a 'nightclub' was not permitted in a BL zone, this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (Board Opinion 6/4/08, p. 14). Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. Thereafter, the Restaurant closed.

In or about August of 2014, the Petitioner purchased the Property. In or about October of 2014, the Petitioner reopened the Restaurant under the previous name – Dock of the Bay. At the hearing, Kenneth Boone, owner of Boone Kondylas, LLC, the Petitioner, testified before this Board that his ownership and operation of the Restaurant is one of three businesses he owns. The Restaurant has both a business license and a liquor license. The food menu varies from seafood to sandwiches, hamburgers and pasta.

The Petitioner described the minimal improvements that have been made to the Restaurant since August of 2014. These have included pouring a concrete pad where the customers can eat steamed crabs, expanding the kitchen, and removing the outside stage installed by Mr. Thanner where the musicians formerly played.

In April of 2015, the Petitioner hired Mark Allen, a guitar player, to perform at the Restaurant. Mr. Allen was also a regular performer at the Restaurant during the period that Mr. Thanner owned it. When signs advertising Mr. Allen's performance were put up at the Restaurant, a Baltimore County inspector instructed the Petitioner that the Restaurant would be closed down if music was permitted to play.

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While not excluding any specific age of customers, the plan is to hire musical performers who cater to a 50 year-old audience, who want to hear music while enjoying lunch or dinner. The Petitioner does not want to cater to a younger crowd as he anticipated the potential problems that might arise with a younger audience. In the summer months, boaters from all over Baltimore County patronize the Restaurant. The types of musical acts envisioned by the Petitioner would range from solo acoustic or electric guitar players to Frank Sinatra and Oompa bands.

The proposed hours for the musical groups would be Friday and Saturday nights from 6:00 p.m. to 10:00 p.m., with the last call at midnight, in hopes that the customers might leave by 12:30

a.m. On Sundays, in the summer, music would be played outdoors from 5:00 p.m. to 8:30 p.m. Also, there would not be a dance floor or stage area.

The Petitioner is amenable to a decibel level restriction for the sound stemming from the music. However, Mr. Boone has not personally operated any type of device to monitor decibel levels at the Restaurant.

On cross examination, the Petitioner conceded that the Restaurant hours of operation are in fact stated on the website. The hours of operation stated in the website are Monday to Thursday, 11:00 a.m. to 11:00 p.m.; Friday and Saturday 11:00 a.m. to 1:00 a.m.; and Sunday from 9:00 a.m. to 8:00 p.m. Mr. Boone then changed his testimony on the time period during which musical acts would perform and indicated that the music would end at Friday and Saturday nights at 11:00 p.m., on Sundays at 7:00 p.m.; and, at dusk for outdoor performances in the summer months which would end as late as 9:00 p.m.

The Petitioner acknowledged that it did not want to be restricted to certain types of music but would entertain other types of music such as jazz quartet bands or Reggae bands. The Petitioner was uncertain about normal sound levels or how the proposed music might be regulated.

In support of the Petitioner's proposed business, several Miller's Island residents testified. Cheryl Gowers of 2812 Bay Drive has lived at that address since 1993. At the previous hearing, Ms. Gowers testified against Mr. Thanner's operation. She was familiar with the problems that resulted from Mr. Thanner's operation of the business which, she said permitted very loud music including heavy metal music and played until midnight or 1:00 a.m. on most weekends. Presently, Ms. Gowers works as a waitress in the Restaurant for the Petitioner. Having worked at both The New White Swan and The Islander, she corroborated that live music is played at those establishments.

Russell McClelland, 9011 Miller's Island Blvd. testified that he lives 400 yds. from the Property. Mr. McClelland was familiar with the complaints from neighbors and the level of sound

coming from Mr. Thanner's restaurant. He described music at Mr. Thanner's restaurant as being played from speakers mounted to a stage outside the Restaurant. The music was amplified over the water and would occur all days of the week until midnight. He recalled that Reggae music was played.

Mr. McClelland is in support of the Petitioner's request here because he believes, like Ms. Gowers, that Mr. Boone will not permit the type of problems associated with Mr. Thanner's operation. Mr. McClelland works for the Petitioner by cutting the grass and policing both the parking lots and boat slips. If this request is granted, he is willing to monitor the sound level.

Charles Boland and Jerri Boland, his wife, 2414 Eugene Avenue, Edgemere, MD live 1 ½ miles from the Restaurant. Mr. Boland is a retired Baltimore County police officer whose son is employed by the Petitioner. Mr. Boland frequents the Restaurant 4-5 times per week and testified that the Petitioner's operation is family-oriented. The Bolands have no objection to live music at the Restaurant.

Dorothy Reilly, 2809 3rd Street, Miller's Island, is located 2 blocks from the Restaurant. Ms. Reilly has observed loud music coming from The White Swann and The Islander. She reiterated that the Petitioner's restaurant is family oriented. She does not like loud music but would like to hear softer music while there.

In the Protestants' case in chief, Charles Wolinski, 9019 Cockhold Point Rd. testified that his home is adjacent to the Restaurant. Mr. Wolinski is a high school biology teacher at Sparrow's Point High School. He can see the Restaurant from his house. He has 4 children, ranging in age from 13 yrs. to 3 yrs. Mr. Wolinski described his family's life through the Thanner years as living through a "nightmare." He specifically described the problems with the loud music both indoor and outdoor which occurred every weekend. Disorderly patrons were loud while the music was playing and, after the music ended, the clapping and screaming was just as bad as the music itself.

These patrons would then spillover into the parking lot and would continue with loud, disruptive behavior.

Because of the loud noises made by patrons and the loud music, he can never open the windows in his home in the summer or winter. All the noise from the music and the patrons could still be heard inside the home; even in the shower with the fan running. This situation disrupted his family's sleep and the enjoyment of their home. Due to the configuration of the Restaurant's door leading to the outside, even the music played indoors by a live band can be heard in his home and it is disruptive. He explained that each time the outside door would open, the music and noise from inside the Restaurant would project outdoors. He further stated that the parking would overflow into the neighborhood streets. He described one incident where a Restaurant patron, who was blocked in by another car on the parking lot, drove across Mr. Wolinski's lawn in order to exit the parking lot. That incident forced Mr. Wolinski to incur the cost of erecting a fence. Mr. Wolinski was clear that Mr. Thanner never controlled the crowds that came with playing music at the Restaurant.

Mr. Wolinski is also familiar with Mr. Boone's operation of the Restaurant and explained that the physical layout of the Restaurant has not changed. He is very concerned that the same problems will reoccur whether the music is played inside or outdoors. Mark Allen is the same performer hired by Mr. Thanner. Mr. Allen's guitar is connected to an amplifier which Mr. Wolinski described as so loud that Mr. Allen was no longer permitted to play at Rowboat Willie's. Mr. Wolinski recalled that Mr. Thanner also hired steel drum bands. In his experience and from personal observation, the music from Rowboat Willie's does not impact him or his family. He indicated that The Islander only has karaoke music inside.

Mr. Wolinski stated that the litigation against Mr. Thanner's operation lasted seven (7) years through the various appeals in the Court system and that he and the other Protestants paid

substantial attorney's fees. Toward that end, he was surprised that the new owner could make the identical request for music when that request was previously denied in the various appeals.

Also testifying for the Protestants was Matthew Ciarpella, 2116 6th Street, Miller's Island where he has resided for 11 years. Mr. Ciarpella experienced first-hand Mr. Thanner's operation of the Restaurant and also endured seven (7) years of litigation. He opposes outdoor music at the Restaurant due the proximity of the Restaurant to his house. As such, even if the proposed music ends at 7:00 p.m., rather than 9:00 p.m., it would still be intrusive. His house, similar to others in the neighborhood is built on elevated foundations such that the sound travels upward. When wind blows from the north over the water, the sound travels. He could hear the music and loud patrons while inside his house with the windows closed. Each time the outside door opened, bursts of sound would travel. This problem occurred even with a 6' privacy fence and a wall of Leland Cypress trees.

Mr. Ciarella is convinced that the type of music will not be limited to acoustic or Reggae. He insists that the Petitioner will not repeatedly hire the same musical acts because, economically, the Restaurant will profit from hiring a variety of bands. Moreover, the more popular the band, the more revenue will be generated. Karaoke would not be a better option because a microphone will still be used. He is familiar with Mark Allen's guitar which is connected to an electric amplifier and/or microphone whether he is playing classic rock, 'oldies music' or Reggae.

Mr. Ciarpella added that when the popular rendition of a song was played, he would hear cheering, clapping and hooting for the music to continue. In contrast, this additional noise from cheering and clapping does not occur when a song is being played on a radio. At The Islander, he said that there is a DJ inside and that he cannot hear that from his house.

Mr. Ciarpella was familiar with the layout of Row Boat Willie's as he was involved with constructing the sound proofing of the pavilion where the live music plays. The pavilion consists

of a 32x30 square shape and is opened on north side. The pavilion also has table seating and an elevated deck.

In his view, the proposal presented here is the same one that was previously rejected by this Board and by the courts. He testified that there will be no regulation of decibel levels. During the Thanner years, the neighbors regulated the music levels by filing complaints with Code Enforcement. What he learned through the Thanner litigation is that there is no regulation of noise levels by Baltimore County; rather any nuisance is complaint driven. This puts a burden on the Protestants to seek enforcement against the Restaurant.

He further testified that along with bands comes the followers which he described as a 'different type of crowd' than would normally be expected with music that accompanies dinner. He also stated that the amount of traffic not only increased with the live music but the followers of those bands did not drive civilly.

Mr. Ciarpella anticipates that, if the Petitioner's request is granted, he and his neighbors will endure more litigation monitoring the Petitioner and again when the Restaurant is subsequently sold. Any live music played at this restaurant will negatively affect his property values.

Brad Metheny, 2704 6th Street, Miller's Island, testified that he too lived through the Thanner era. He recalled that the bands would play on Friday and Saturday nights until 1:30 a.m. He also heard all the music and noise while inside his house with the doors and windows closed, with the air conditioning running and the TV playing. He approximated that his home is located 180' from the Restaurant.

Mr. Metheny described the instant hearing as being the same that he heard when Mr. Thanner and his employees previously testified. Granting this request would open the door to the same problems he endured for the last 7 years. Since outside the Restaurant can accommodate 150 people, if outdoor music is combined with alcohol consumption by patrons and boaters who

dock outside the Restaurant, the situation becomes problematic. He does not want to suffer through the same 'constant battle and disruption.' Indeed, Mr. Metheny's son and his family were living at 2712 6th Street which Mr. Metheny also owns. Due to the noise problems, his son was forced to move with his 4 year old granddaughter to Bel Air.

Mr. Metheny's mother-in-law previously owned The Fisherman's Inn in the 1940s and 1950s. Mr. Metheny recalled that when the Restaurant was The Fisherman's Inn there were outdoor dining tables without any problems.

Following Mr. Metheny's testimony was his wife, Bonnie Metheny as well as a neighbor Wayne Waldmann of 9014 Cuckhold Point Road. Both of those neighbors also opposed any type of music at the Restaurant.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. In short, the Petitioner asks this Board to believe that the same problems will not result if live music is now permitted.

In our decision of June 4, 2008, which decision was affirmed by both the Circuit Court and the Court of Special Appeals, we made many findings of fact. We incorporate that Opinion in its entirety herein. We also refer to the facts and holding as set forth in the Court of Special Appeals Opinion dated July 9, 2010.

Specifically, we previously found that the Restaurant could seat 150-160 patrons inside. Outside of the Restaurant was a patio, two television sets, along with an outside bar, and tables for patrons to use. There were also outside speakers connected to a radio which played music both inside and outside. The Restaurant had 14 boat slips for "transient" boat customers.

The Restaurant opened every day from 11:00 a.m. and closed at 2:00 a.m. In the winter, the Restaurant closed early as customers left. The kitchen closed at 11:00 p.m. but the bar stayed

open until 2:00 a.m. as permitted by the liquor license. The food menu was seafood, steaks and sandwiches. We also found that 70% of sales were from food and 30% were in beverages.

On Friday and Saturday nights, we found that live bands played from 9:00 p.m. to 1:00 a.m. We also found that on Saturday and Sunday afternoons, live music played from 4:00 p.m. to 8:00 p.m. (with the caveat that the music stopped after 8:00 because of the code violation complaints).

The type of music were "mostly duos" or "steel bands." There was no charge for live entertainment and the Restaurant stayed open until 2:00 a.m. when live music was played. We also heard testimony that the Restaurant would close without live music being available. In that case, we also heard the testimony against the live music from Matthew Ciarpella, Charles Wolinski, Brad and Bonnie Metheny and Patricia Waldmann.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not even hear the facts before determining whether the doctrine of *res judicata* applies. *Id* at 995 A.2d 1070. The Court also stated that *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett*, 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

This Board's Opinion of June 4, 2008 meets this test. (1) The Board was acting in a judicial capacity by conducting a hearing on the Petition for Special Hearing, where evidence was presented, and rulings were made on disputed factual and legal issues; (2) The issue of whether music should be permitted at this location was actually litigated; and (3) the Board's Opinion of June 4, 2008 was necessary for a resolution of the issue.

Under *Deleon v. Slear*, 328 Md. 569 (1992), the Court of Appeals made clear that in determining whether claims are the same for the purposes of *res judicata*, the Court has in the past applied "same evidence test." However, the *Deleon* Court acknowledged that the concept of "claim" is broad and that "claim" is defined as a "group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from the narrow concept of a 'cause of action.'" *Id.* at 589. The *Deleon* Court, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), emphasized that the most recent test for determining when two claims or causes of action are the same for purposes of *res judicata* is the "transaction" test as set forth in §24 of the Restatement (Second) of Judgments.

The Court of Appeals in *Bilbrough*, recited the transaction test as follows:

> The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 497-498; *Deleon* at 589.

Specifically, with respect to whether the claims are the same, the *Deleon* Court reviewed the facts to see whether they "are related in time, space, origin or motivation." *Id.* at 591. As applied to the instant case, the same parties, or their privy, are involved here as were involved in the Thanner litigation which led to our June 4, 2008 Opinion. We further find that, the same piece

of property has been involved as well as the same zoning issue with respect to whether a music should be permitted on the Property.

With regard to amending previous restrictions or conditions where an earlier application has been denied by a zoning board, the Court of Appeals in *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1936) appropriately explained that:

> The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions..... This rule seems to rest not strictly on the doctrine of res judicata, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.
>
> * * * *
>
> The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County (3) decreased opposition of neighbors and some support by them; and (4) additional conditions attached to the granting of the permit.

Applying the reasoning of *Whittle* here, we find that there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner on the Petition for Special Hearing or before this Board after a *de novo* hearing. The same neighbors who incurred attorney fees and endured the Thanner era of ownership are still protesting both indoor and outdoor music.

The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that, in order to be successful on this request, the changes needed

under *Whittle* must be more than a change in the Restaurant's ownership or management style of the new owner.

We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that it be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

The County Council has determined that 'nightclubs' can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in the BM zone. In contrast, this restaurant is located in a BL zone which is not permitted to have live music. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101. The facts presented by the Petitioner here have not changed that determination.

We also cite our previous holding in *The Belvedere Baptist Church of Baltimore*, Case No. 15-004-SPH, wherein we declined to approve a request to amend a restriction in a previous ALJ Order. In that case, we applied the doctrine of *res judicata* and found that there was no substantial change in circumstances or facts between the first case and the second case to warrant the requested relief. Specifically, we found that: "there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decision." (Board Opinion, p.8).

In the Board's desire to be consistent in its holdings, we find that the facts of this case fit squarely within the relief requested in the *Belevedere Baptist* case. Here, there has been no change in the Property, the Restaurant, the neighborhood, the neighbors or the zoning that might lead to a different result.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Benfred B. Alston

Jane M. Hanley was on the panel and agreed with the majority opinion. She was not reappointed to the Board and her last day with the Board of Appeals was June 30, 2016.

BOARD OF APPEALS OF BALTIMORE COUNTY
MINUTES OF DELIBERATION

IN THE MATTER OF: Boone Kondylas, LLC (aka Dock of the Bay) 16-003-SPH

DATE: June 14, 2016

BOARD/PANEL: Maureen E. Murphy, Chairman
Jane M. Hanley
Benfred B. Alston

RECORDED BY: Sunny Cannington/Administrator

PURPOSE: To deliberate the following:

1. Petition for Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044, and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music

PANEL MEMBERS DISCUSSED THE FOLLOWING:

STANDING

- The Board reviewed that this property has a history. The previous owner was cited for operating a nightclub. This matter requests to amend the restrictions to allow the current owner to play music. The previous cases were appealed to the Circuit Court and Court of Special Appeals.
- The Board stated that a Motion to Dismiss was made verbally by People's Counsel at the hearing. In other cases such as Galasso and Zinn, the new cases were clearly identical to previously requested relief. The Board decided at the hearing that they needed to hear the facts of this matter to determine if *res judicata* applied.
- The Board reviewed that in order for *res judicata* to not apply the Petitioners must show a substantial change in circumstances.
- In the previous case, the property owner operated a restaurant/night club which provided live and recorded music. It was determined that he was not allowed to do that on the property due to the zoning classification.
- The current owner purchased the property and is operating a restaurant. He wishes to provide live and recorded music. The Board was unable to find a substantial change. The property has not changed; the neighborhood has not changed; the only change they were able to find was in the ownership of the property.
- The Board understands that the competition is allowed to provide live and recorded music but the properties are zoned differently. The Board determined that the law requires that a substantial change must have already occurred.
- The Board finds that there have not been any substantial changes to the property or circumstances in this matter and therefore the request to allow limited accessory music on the subject property is barred by *res judicata.*

FINAL DECISION: After thorough review of the facts, testimony, and law in the matter, the Board unanimously agreed to DENY the requested Petition for Special Hearing relief and GRANTED the Motion to Dismiss.

NOTE: These minutes, which will become part of the case file, are intended to indicate for the record that a public deliberation took place on the above date regarding this matter. The Board's final decision and the facts and findings thereto will be set out in the written Opinion and Order to be issued by the Board.

Respectfully Submitted,

Sunny Cannington

Sunny Cannington

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

April 29, 2016

NOTICE OF PUBLIC DELIBERATION

IN THE MATTER OF: Boone Kondylas, LLC
9025 Cuckold Point Road
16-003-SPH 15th Election District; 7th Councilmanic District

Re: Petition for Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044, and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music

11/7/13 Opinion and Order issued by the Administrative Law Judge wherein the requested relief was DENIED.

This matter having been heard on February 17, 2016 and concluded on April 28, 2016, a public deliberation has been scheduled for the following:

DATE AND TIME: **TUESDAY, JUNE 14, 2016 at 9:30 a.m.**

LOCATION: Jefferson Building - Second Floor
Hearing Room #2 - Suite 206
105 W. Chesapeake Avenue

NOTE: Closing briefs are due on **Thursday, May 19, 2016 by 3:00 p.m.**
(Original and three [3] copies)

NOTE: PUBLIC DELIBERATIONS ARE OPEN WORK SESSIONS WHICH ALLOW THE PUBLIC TO WITNESS THE DECISION-MAKING PROCESS. ATTENDANCE IS NOT REQUIRED AND PARTICIPATION IS NOT ALLOWED. A WRITTEN OPINION AND/OR ORDER WILL BE ISSUED BY THE BOARD AND A COPY SENT TO ALL PARTIES.

For further information, including our inclement weather policy, please visit our website www.baltimorecountymd.gov/Agencies/appeals/index.html

Krysundra "Sunny" Cannington
Administrator

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c: Counsel for Petitioner/Appellant : Lawrence E. Schmidt, Esquire
Petitioner/Appellant : Boone Kondylas, LLC/Ken Boone

Counsel for Protestants : Francis X. Borgerding, Esquire
Protestants : Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella, and Tammy Waldmann

Office of People's Counsel
Arnold Jablon, Director/PAI
Nancy West, Assistant County Attorney

Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Michael Field, County Attorney, Office of Law

RECEIVED
MAY 19 2016
BALTIMORE COUNTY
BOARD OF APPEALS

IN THE MATTER OF: Boone Kondylas, LLC 9025 Cuckold Point Road	*	BEFORE THE BOARD OF APPEALS
	*	FOR
15th Election District 7th Councilmanic Districts	*	BALTIMORE COUNTY
	*	Case No. 2016-003-SPH

* * * * * * * * * * * * *

CLOSING MEMORANDUM IN LIEU OF ORAL ARGUMENT

Boone Kondylas LLC, Petitioner/Appellant, through Lawrence E. Schmidt and Smith, Gildea and Schmidt, LLC, its attorneys, submits this Closing Memorandum in Lieu of Oral Argument and respectfully states the following.

STATEMENT OF THE CASE

This matter comes before the Board of Appeals ("Board") as an appeal by Boone Kondylas, LLC (Property Owner) of the denial of a Petition for Special Hearing by the County Administrative Law Judge ("ALJ"). The Property Owner seeks an amendment of previous restrictions imposed in Cases 07-144-SPH, CBA-06-044, and CBA-07-134 so as to permit the use of the subject property as a restaurant with accessory music/entertainment. By written decision dated October 22, 2015, ALJ John E. Beverungen denied the Petitioner's Petition for Special Hearing, holding that consideration of the same was barred by the doctrine of res judicata. After considering testimony and evidence offered over two hearing days, the Board requested written memorandum in lieu of oral closing argument and this Memorandum follows.

STATEMENT OF FACTS

The subject property is a water front property adjacent to the Chesapeake Bay in the Millers' Island community of eastern Baltimore County. The property is zoned BL. The property is 55,594 square feet (1.276 acres) in area. The property is improved with a commercial building and associated parking area. The business located thereon is known as "The Dock of the Bay". The Dock of the Bay is a restaurant and serves meals seven days a week. There are seating areas both inside and outside of the building, as well as a pier for patrons who arrive by boat and an outdoor children's play area. The seating capacity of the restaurant is approximately 225 persons, including seating for 125 persons inside (including at the bar and tables) and 100 outside.

A restaurant has operated at this location since the 1950's. For years, the restaurant operated (without dispute or incident) as the Fisherman's Inn. Ironically, the Fisherman's Inn was owned and operated by the family of Bonnie Metheny, who appeared in opposition to the current and proposed use. As an accessory component to the restaurant operation, the Fisherman's Inn/Dock of the Bay has historically provided entertainment (in the form of music) to its dining patrons. The restaurant closed following extensive damage that was sustained as the result of Hurricane Isabel in 2003. The property/business was thereafter acquired and re-opened under the ownership and management of Fifth Street, LLC. Lawrence Thanner was the managing member of Fifth Street, LLC. He significantly changed the character of the business, in that he introduced live music, dancing and a party type atmosphere at the facility.

Due to the nature of Mr. Thanner's operation and the noise generated thereby, there was a disruption to the neighborhood which resulted in complaints to the Code Enforcement Division of Baltimore County's Department of Permits, Approvals and Inspections. Ultimately, multiple citations were issued to Fifth Street, LLC. There then followed a "legal nightmare" (as characterized by the Protestants and their counsel) during which lengthy legal proceedings were engaged between Mr. Thanner and many of his neighbors. The civil code violation cases were heard by the County Code Citation Hearing Officer and Fifth Street, LLC was found to be operating in violation of the Baltimore County Zoning Regulations ("BCZR"). Fines were imposed. The separate citation cases were appealed to the Board as case numbers CBA-06-044 and CBA-07-134. Concurrently, Fifth Street, LLC filed a Petition for Special Hearing with the Zoning Commissioner seeking approval for live entertainment on the Property. (Case No. 07-144-SPH). This Petition was denied by the Commissioner and also appealed to the Board. The Code Citation cases and the special hearing case were consolidated for hearing before the Board of Appeals.

Notwithstanding the representations of People's Counsel made in open hearing in the instant case, the issue of whether the Dock of the Bay's restaurant use could have accessory music was not addressed in the first case.[1] In a written decision issued by a 2-1 vote, the Board determined that Fifth Street's business was a "nightclub" and thus

[1] As a preliminary matter, People's Counsel moved to dismiss the instant case as barred by res judicata. During oral argument to the Board in support of the Motion; People's Counsel said that the Court of Special Appeals addressed the argument that music could be permitted as an accessory use to a restaurant. This statement is incorrect. A review of the Court's decision; as will be discussed hereinafter in further detail, discloses no such analysis by the Court. Thus, the issue presented in the instant matter was not considered in the previous case.

prohibited in the BL zone. The Board applied the definition within BCZR § 101 of "nightclub" to the operation as conducted and determined that the Dock of the Bay was a nightclub. Specifically, the Board analyzed certain factors which are incorporated in the definition of nightclub via the International Building Code. It was determined that Fifth Street, LLC's operation was a nightclub based upon the existence of these factors and the characteristics/operation of the business. Further, the Board noted that a nightclub was not a permitted use in the BL zone, which at all relevant times was/is the zoning of the property. In its order, the Board specifically stated that "as to whether the facility which provides music at this location is a 'nightclub' as defined in the BCZR Section 101, 102.1 and 230 is hereby answered in the affirmative and the playing of music by way of speaker system, live or recorded entertainment must be discontinued."[2]

The Board's determination was appealed to the Circuit Court (Petitioner's Exhibit 3), and then to the Court of Special Appeals (Petitioner's Exhibit 4). The decision was affirmed at all levels. Following the issuance of the decision by the Court of Special Appeals, Baltimore County instituted contempt proceedings in the Circuit Court for Baltimore County (Case No. 03-C-08-0099 96, Petitioner's Exhibit No. 5), alleging that Fifth Street, LLC and Mr. Thanner were operating the business as a night club and in violation of the prior decisions. The Circuit Court determined that Mr. Thanner had no personal responsibility and he was found not to be in contempt. However, Fifth Street,

[2] In his opening statement, counsel for the Protestants wrongly characterized the Board's prior order as prohibiting "live music". As specifically stated in its order, the Board prohibited both live and recorded "entertainment."

LLC was found to be in contempt. The Court enjoined the playing of music at the Property and proposed a fine if its order were violated. The Court stated that the Board made no distinction between outdoor and indoor music and thus any music was not allowed. In its Contempt Order, the Court stated that "any live or recorded entertainment" was prohibited for a period of one year. Being unable to operate in the manner which Mr. Thanner desired, the Dock of the Bay closed.

In August 2014, Boone Kondylas, LLC acquired the property and business. After a period of interior building renovation, Mr. Ken Boone (managing member of the LLC and manager of the restaurant) re-opened the business as a restaurant in October 2014. The business operates seven days a week serving lunch and dinner. It generally opens at 11:00 a.m. and closes when the last patron leaves, usually between 9:00 and 11:00 p.m. The closing time is not uniform and depends on volume of patrons, the season and night of the week. There is a brunch on Sundays. The clientele is mature and family oriented. The Dock of the Bay has a liquor license and sells alcohol but the main focus of the business is serving meals. In fact, Mr. Boone indicated more than 80% of his sales are food and the remaining are alcohol. The Dock of the Bay has operated since Mr. Boone reopened it without and complaints to Baltimore County.

In April 2015, the Dock of the Bay arranged for a solo guitar solo player, Mark Alan, to provide music one weekend night to enhance the patrons dining experience.[3]

[3] Mr. Boone also testified that he had contacted an Oompah Band to appear for an Octoberfest event and a Sinatra Impersonator to appear. However, these were both cancelled. Mr. Allen had also been contacted by Mr. Boone's former partner (Donna Kondylas) to appear on New Year's Eve in 2014. (See Petitioner's Exhibit 13). But this event was also cancelled.

Shortly thereafter, an inspector from the Department of Permits, Approvals and Inspections (Code Citation Division) appeared at the restaurant and advised the manager that the playing of any music was not allowed and that the County would "close the restaurant down" if any music was played. Like other restaurants/taverns on Miller's Island, and indeed many throughout Baltimore County, Mr. Boone would like to provide music/entertainment to enhance his patrons' "dining experience". He testified that any outside entertainment would conclude at dusk and inside music (on the weekends) would end by 11:00 p.m. The entertainment would be tailored to the typical tastes of his family oriented and mature clientele.

ARGUMENT

I. The instant Petition is not barred by res judicata.

The doctrine of *res judicata* bars the litigation of a cause of action after it has already been litigated to a final judgment. *Gertz v. Anne Arundel County,* 339 Md. 261, 269 (1995); *DeLeon v. Slear,* 328 Md. 569, 580 (1992). Furthermore, *res judicata* may be applicable in administrative (quasi judicial) proceedings. *Batson v. Shiflett,* 325 Md. 684 (1992). *Res judicata* also bars re-litigation of claims that were, or could have been litigated in an earlier proceeding between the parties. *Batson* 325 Md. 684 (1992). In order to successfully establish a claim for *res judicata,* the following elements must be satisfied: (1) The parties in the present litigation should be the same or in privity with the parties to the earlier case; (2) the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction. *DeLeon,* 328 Md. at 580.

Res judicata does not apply if the cause of action or claim is different from the first case to the second. The nature of the claim is determined by the relevant facts as presented in each case.

A leading case on the application of res judicata to administrative (zoning) decisions is *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n 192 Md. App. 719 (2010)*. This was a Baltimore County case, in which the Board of Appeals considered two separate cases involving a commercial property located in Lutherville. The operative facts were as follows:

The "Galleria" commercial property is a 211,635 square foot commercial center primarily leased for offices, with retail on the first floor located adjacent to the intersection of York Road and Seminary Avenue in Lutherville. In 2003, the Galleria petitioned for variance and special hearing relief, seeking the approval of an amendment to its zoning/subdivision plan which had been approved in 1983. The requested zoning relief related to the parking provided at the site, including 14 spaces that had been added by the Galleria shortly before the filing of the petitions and without County approval. The petitions requested approval of the property's parking layout, including the newly added spaces. Ultimately, after proceedings before the Zoning Commissioner; and then the Board and Circuit Court on appeal, the relief requested was denied. The final decision on this case (a/k/a as "Seminary Galleria I") was issued on September 19, 2005.

On February 23, 2006, the owner of the center instituted "Seminary Galleria II" by the filing of zoning petitions (variance and special hearing). Again, the petitions

related to parking. The owner contended that Seminary Galleria II was not barred by the doctrine of res judicata because the Galleria (in the second case) was identified as a "shopping center" under the BCZR and that the regulations governing parking which were applicable to shopping centers were different than those applicable to a non-shopping center (which it was the prior designated use of the property).

Seminary Galleria II wound its way through hearing before the Zoning Commissioner, the Board of Appeals, the Circuit Court and the Court of Special Appeals. In a reported decision, the Court of Special Appeals affirmed the decision of the Circuit Court and found Seminary Galleria II barred by res judicata. In its comprehensive written opinion, the Court concluded that neither the facts nor law had changed in the time between Seminary Galleria I and Seminary Galleria II and that the second case was thus barred. Citing a prior decision of the Court of Appeals (*Whittle v. Board of Zoning Appeals 211 Md. 36 (1956)*, the Court of Special Appeals opined that "where the facts are subject to changes which might reasonably lead to an opposite result from that arrived at in an earlier case, and if there have been substantial changes in fact and circumstances between the first case and the second, the doctrine of res judicata would not prevent" a subsequent zoning application. See *Seminary, 192 Md. App. at 737* (citing *Whittle v. Board of Zoning Appeals, 211 Md. 36, 45 (1956)*).

The Seminary galleria opinion also concluded that the changes to the operative facts must be substantial. Citing *Woodlawn Ass'n v. Board 241 Md. 187* the Court of Appeals has stated that "substantial changes in fact and circumstances must be, indeed, substantial." Pg. 197. Similarly, in *The Chatham Corp v. Beltram 243 Md. 138 (1966)* the

Court rejected a second suit because "the facts underlying the previous denial remained unchanged" (Cited in *Seminary at 738*). Thus, it is clear that a substantial change in the material facts from one case to a second will preclude the operation of res judicata in an administrative proceeding.

In considering the applicability of res judicata, the relevant facts in this case are not, as the Protestants suggest, that the building footprint is the same, that the Property has not been improved since the first case, that the zoning is the same, etc. What is relevant is if the facts upon which the previous determination was made that the Dock of the Bay was a nightclub still exist. As clearly demonstrated through the evidence presented, the facts were substantially different in the first case (Fifth Street, LLC) than they are in the second case (Boone Kondylas, LLC). Further, the facts which have changed are operative and material to the controversy. In the first case, the Board of Appeals determined that the Dock of the Bay was a nightclub based upon the facts presented at that time regarding the operation as then conducted by its then owner.

Specifically, the Board considered the factors identified in the International Building Code which distinguish a nightclub and made the following findings:

- Lower interior lighting levels were in place when bands were playing (BOA Opinion, Pg. 5)
- Bands were playing "quite loudly" creating noise louder than would normally be associated with a restaurant use (BOA Opinion Pg. 5)
- A stage outside the restaurant was installed for use by entertainers (bands) when they play outside during warmer months (BOA Opinion, pg. 5)

- The business was open until 2:00 a.m. (BOA Opinion pg. 5)
- There were ill defined aisles between tables, particularly when music was played (BOA Opinion pg. 5)
- Dancing took place while bands were playing on a makeshift dance floor (BOA Opinion pg. 5)
- The serving of alcoholic beverages and food (BOA Opinion pg. 5)
- A high occupant load density (i.e. a crowded facility) (BOA Opinion pg. 5)

In the instant case and in contrast to the prior findings, the evidence established the following:

- Lighting levels will not change when entertainment will be provided.
- The nature of the entertainment is markedly different. The owner anticipates "solo acts" of adult contemporary music geared towards a mature crowd and not multi-piece bands.
- There will be no stage or stage accessories.
- The restaurant typically stays open no later than midnight and closes earlier on weekdays. The restaurant operates year round.
- The tables and seating are laid out to create defined aisles.
- There is no dance floor or dancing.
- The primary focus of the business is to serve meals, not provide entertainment.
- The restaurant is typically not over crowded or even at capacity.

Based upon the nature of the prior operation (and specifically its findings as to the nature of the operation) the Board determined the prior operation to be a nightclub. But the different nature of the operation compels a different finding here. The operation of the Dock of the Bay by Fifth Street, LLC was a nightclub with accessory food and drink. The operation of the Dock of the Bay by Boone Kondylas, LLC is a restaurant with proposed accessory entertainment to enhance the dining experience. The material facts support this significant difference between these distinct uses of this property.

The pragmatic and appropriate application of the principles of res judicata to the facts here leads to the clear conclusion that the current case cannot be barred. It is further noted that, in addition to restaurants, other permitted uses in the BL (i.e. hotels, country clubs and theatres) frequently provide entertainment (e.g. wedding receptions) as an accessory component to those primary uses. Such an accessory component is appropriate and may be allowed. The Board, based upon the material facts which now apply (which are different than before), may determine that accessory entertainment at the Dock of the Bay is appropriate and warranted. It may further define and limit that entertainment. But, it is contended, the Board must consider this issue and cannot wrongly apply the doctrine of res judicata to prohibit the current owner from having his "day in court" in order to fairly and objectively consider the issue presented. The strict application of res judicata sought by the Protestants and People's Counsel would forever bar even the consideration of entertainment to any activity at 9025 Cuckold Point Road, no matter the circumstances. This is not what res judicata was intended to limit.

In sum, this is not a res judicata case. Res judicata is intended to prevent a litigant from getting a second bite of the apple. The circumstances here are different. Although there is privity between Fifth Street LLC and Boone Kondylas, the operation of the business existing at Cuckold Point Road is different. The question presented in the prior case turned on the narrow question of the nature of the operation as then conducted. The Board (and Court of Special Appeals) did not rule that entertainment/music was not allowed in restaurants/taverns. To the contrary, the Court noted that such entertainment in restaurants was common. The question there was whether the then operation became a night club when the music started. The factual differences and inquiry here preclude the application of res judicata.

A final comment is in order about People's Counsel's and Protestants' repeated claims that Mr. Boone "knew or should have known" about the prohibition on entertainment by the prior case. As he clearly testified, he was the investor when Boone Kondylas LLC was founded and anticipated that his partners (Kondylas) would run the operation. When that relationship ended, he became the restaurant manager. As he indicated, he thought that the prohibition was "a hurdle that could be navigated" and that it was a restriction related to the liquor license which would be undone when the license was transferred.

More importantly, there is no "self imposed hardship" consideration in a special hearing case. The instant matter is not a variance. What the Petitioner knew or should have known is of no consequence. What is significant is that, like the hundreds of restaurants in Baltimore County, Mr. Boone is entitled to his day in Court to consider

the extent of a necessary part of the business (entertainment) common to many restaurants.

II. Live and recorded music/entertainment should be permitted at the Dock of the Bay as accessory to the restaurant use.

In the prior case, the Court of Special Appeals determined that Mr. Thanner's Dock of the Bay business was a "dual use." (CSA Opinion pgs. 19-22) Within a footnote on page one of its opinion, the Court clearly states that the Dock of the Bay functions as a "restaurant". (CSA Opinion, Footnote 1, Page 1). Notwithstanding this finding, the Court then goes on to opine that the business morphs into a nightclub use when the primary focus of the activity is to provide entertainment. The Court explicitly rejected Thanner's contention that the use must be one (restaurant) *or* the other (nightclub), holding that dual uses are permitted under the BCZR. (CSA Opinion, Page 20).

However, in reaching this conclusion, it is clear that not every restaurant that provides entertainment/music automatically becomes a nightclub. Obviously, it depends upon the nature of the activity; to wit, is the providing of entertainment the main focus of the business; or is it merely (as Mr. Boone characterized his intentions) an "enhancement of the dining experience." That a restaurant may provide entertainment without becoming a nightclub is manifest. But, when this entertainment becomes the primary focus of the operation, the use is no longer a restaurant or tavern (as permitted in the BL zone) but a nightclub, which is not allowed in that zone.

A "restaurant, standard" is defined in BCZR Section 101 as a "facility or part of a facility used *primarily for serving meals and beverages to persons seated at tables on the*

premises of the establishment." (emphasis added) The BCZR then goes on to define "fast food", "carry out" and "fast food, drive through" as other types of restaurants . That the Dock of the Bay is a standard restaurant cannot be disputed. The primary purpose of the business is to serve meals and beverages to patrons who are seated at tables on the premises.

A "nightclub" is defined in BCZR Section 101 as a "tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County." This definition no where mentions the providing of meals and beverages as part of a nightclub's business. It is thus apparent that the primary focus of a restaurant is to provide meals/beverages; whereas the primary focus of a nightclub is to provide entertainment.

Moreover, the nightclub definition incorporates the provisions of Baltimore County's Building Code. Baltimore County has adopted the model International Building Code as its Building Code. Chapter 3 of the International Building Code establishes "use and occupancy classifications" (attached hereto as Exhibit A). Set forth in Chapter 3 are a variety of use classifications, including business uses, educational uses, factory uses, mercantile uses, etc. Within Section 303 of Chapter 3 are listed "Assembly Group A" uses. Assembly Group A uses include, among others, uses of a building "for the gathering of persons for purposes such as civic, social or religious functions; recreation, food or drink consumption or awaiting transportation." Assembly group A uses are further categorized into addition subgroups. Assembly Group A-2, list

uses "for both food and/or drink consumption." The Uses in Assembly Group A-2 include banquet halls, casinos, nightclubs, restaurants, taverns and bars. These uses are grouped together within the same category because they share many of the same characteristics. The primary purpose of the Building Code is to ensure that buildings are constructed (and uses conducted therein) in a manner that promotes the public safety. The uses in Assembly Group A-2 include activities where alcohol is consumed, where patrons may be distracted and where there is a higher likelihood of injury or death in the event of fire or other calamity. The characteristics referenced above (e.g. lighting levels, the presence of a stage, etc.) are listed in the Building Code as characteristics of all of the uses in Assembly Group A-2. That is, both restaurants and nightclubs fall within the same category and sub-category; and share many of the same characteristics.

However, consistent with the BCZR (which by definition, stresses that restaurants primarily serve food and drink and nightclubs primarily entertain) the Building Code provides a distinction between nightclubs and restaurants. Specifically, within the commentary, the Building Code notes that "Group A-2 includes occupancies in which people congregate in high densities for social entertainment, including drinking and dancing (e.g. nightclubs, banquet halls, cabarets) ***and*** food and drink consumption (e.g. restaurants). Thus, notwithstanding their many similarities, both the BCZR and the Building Code recognize the difference between nightclubs (entertainment) and restaurants (food and drink).

In that Dock of the Bay is a restaurant, the question is then presented, "when it provides entertainment; does it become a nightclub?" The answer is dependent on the nature and degree of the entertainment provided. Is the entertainment an enhancement of the dining experience; or does it become focus of why customers patronize the business? Under the Dock of the Bay's current operation, it is averred that the entertainment proposed will be exclusively accessory to the restaurant operation and not the focus of the business.

The BCZR defines an "accessory use or structure" as a "use or structure which: (a) is customarily incident and subordinate to and serves a principle use or structure; (b) is subordinate in area, extent or purpose to the principal use or structure; (c) is located on the same lot as the principal use or structured served; and (d)contributes to the comfort, convenience or necessity of occupants, business or industry in the principal use or structure served . . ." That entertainment in a restaurant can be an accessory use is obvious. It squarely meets each of the four components of the definition. As was acknowledged at the hearing, many of the restaurants in the neighborhood have music or entertainment. The Board members can utilize their own life experience. Undoubtedly all have dined in a restaurant where there is music. This does not make these businesses nightclubs when music is playing.

The question in this case is one of degree. This operation is not Mr. Thanner's, nor does Mr. Boone want or intend it to be. The question presented here is to what extent the playing of music/entertainment should be allowed. An evaluation of the property and neighborhood to consider the impact of entertainment at Dock of the Bay

is warranted. First, although appreciative of their prior nightmare with Mr. Thanner, the neighbors themselves have unclean hands. The closest neighbors (and those who object the loudest) live on BL zoned property. That classification promotes business use. Moreover, the neighbors all moved into the neighborhood long after the Dock of the Bay was existing and operating. The neighbors concerns remind one of individuals who move into a community zoned RC 2 and then complain about the sounds, sights and smells associated with neighboring agricultural uses. When one builds a house in and/or establishes residency in a business zone and/or next to an existing business, one can reasonably expect impacts from that business. Finally, there are commercial and similar uses in the immediate area which already impact the residences in the area. The Islander Inn, Bill's Boats and Rowboat Willie's are all in the immediate area. The neighbors' testimony that the outside music at the neighboring Rowboat Willie's tiki-bar is acceptable while objecting to music at Dock of the Bay is without credibility.

Moreover, a closer examination of exactly what the neighbors are objecting to is warranted. There was a different level of opposition presented at the hearing. Mr. Wolinski wants nothing (entertainment wise) at the Dock of the Bay. Matt Chiapella objects to "outdoor music" (apparently indoor music is acceptable to him). Some of the Protestants seem to object to the commercial activity of Dock of the Bay. They testified in opposition to hearing patrons in the parking lot, indoor patrons who talk loudly, etc. But these occurrences will take place whether there is music or not. As noted above, Mr. Boone wants nothing more than what his competitors and typical restaurants have. As previously stated, he proposes music outdoor no later than dusk and on weekends

indoor (Friday and Saturday) no later than 11:00 p.m. He appreciates his neighbors concerns and wants to be a good neighbor.

The Board may condition any approval that it grants to Dock of the Bay which allows entertainment. It is within the clear authority of the Board (as with any quasi-judicial body) to limit, modify or condition the orders that it issues (See also BCZR § 501.7.) The question presented here is what condition should be attached to any approval. Mr. Boone has already offered the parameters of possible conditions/restrictions on the playing of music when he offered to limit entertainment based upon: A.) whether it was inside or outside; and B.) when it was being provided. As noted above, he is agreeable to requiring outdoor entertainment/music to conclude at dusk and indoor music to end by 11:00 p.m. It is to be noted that Mr. Boone's proposed limitation is consistent with that offered by the Department of Planning in their Zoning Advisory Committee comment (attached hereto as Exhibit B). Obviously, the objective evaluation from that agency recognizes the character of the neighborhood and the nature of the restaurant business.

It should further be noted that the testimony was consistent that activity inside the restaurant could not be heard but for when patrons were entering/exiting and doors were open. Thus, entertainment inside of the building will certainly not be disruptive to the neighbors.

The Protestants also endeavored to introduce evidence about the amount of noise permitted under law. However, the evidence that they attempted to introduce to establishment noise levels permitted under law was inaccurate. Baltimore County's

regulations as to noise are in Article 17, Title 3 of the County Code. The County's regulation sets out no specific measurable requirement (i.e. decibel level) but merely states that a person may not create noise that "unreasonably disturbs the peace, quiet and comfort of the neighboring inhabitants." (See BCC § 17-3-103, attached hereto as Exhibit C.1.) Obviously, the degree of reasonableness is highly subjective.

State law regarding noise is found in the Annotated Code of Maryland. Therein, (Environmental Article § 3-401, attached hereto as Exhibit C.2.) requires that the Department of the Environment shall adopt noise standards. These standards shall be based upon (among other considerations) the zoning of the area and the residential, commercial or industrial nature of the area at issue. (See § 3-401 (c) (1)). The State's noise standards are codified in the Code of Maryland Regulation (COMAR) at 26.01.03.02, attached hereto as Exhibit C.3. Within that section, maximum decibel levels are established for "*receiving land use categories*" (emphasis added). For industrial categories, the maximum decibel levels are 75 during both the day and evening. For commercial categories, such as the BL zone assigned to the Dock of the Bay and many of the neighboring properties, the maximum decibels allowed are 67 during the day and 62 at night, and for the residential categories, the maximum decibel level is 55 at night and 65 during the day. It is to be noted that these restrictions are based upon the "receiving land"; thus, sound measurements are to be taken at the property line. The Protestants' claims that mere conversation exceeds permitted noise levels is disingenuous. The noise is not to be measured where individuals are conversing, but at the property line. Moreover, the standard relates to "land use *categories.*" Thus, it is

apparent that it is not the use of the adjacent land which drives the decibel threshold, but the land use category of the adjacent property. As noted above, the adjacent residentially used properties are largely zoned BL. Moreover, the limits established in COMAR can be waived through a variety of exemptions, including for sound created at public gatherings under permit or permission of the local jurisdiction. Thus, the Board of Appeals, as an entity of the local jurisdiction, may provide for an exemption to these requirements.

As Mr. Boone testified, he would be willing to monitor, if the Board directs, the level of decibels generated by the Dock of the Bay. As he indicated, a manager of the restaurant is on duty at all times and monitoring of noise could be among his/her assignments. As required in COMAR, the measurements are to be taken at the property or zoning line and the Board could establish those parameters within its order. Whether this is an appropriate (or unwieldy) restriction is a decision left to the proper discretion of the Board. Nonetheless, in addition to monitoring where and when the entertainment is provided, this is a further option for the Board.

III. The Board has the jurisdiction to make findings and offer conclusions in this case

Obviously, upon a finding that res judicata does not bar the instant petition, the Board may enter any findings and orders that are based upon the evidence taken and in accordance with the law. Protestants raised, as an objection to this matter going forward, a claim that the Board cannot consider this matter. Relying on language in the decision by ALJ Beverungen (Page 2) the Protestants assert that the Board cannot render

any decision which would overrule the decision of the appellate court. This argument misses the mark. Petitioner does not seek to revisit the prior case. Petitioner acknowledges that Fifth Street LLC operated a nightclub on the property when it provided entertainment. Petitioner does not endeavor to re-litigate Fifth Street's operation and the Board's findings (and Court's conclusions) regarding the same. But the instant case is not about Fifth Street LLC. Instead, it is about the Dock of the Bay operation as currently conducted by Boone Kondylas LLC. As noted above, this is a different operation. To adopt Protestants myopic approach to the issue presented would forever preclude the Board from ever considering a case about a property that had previously been the subject of a prior zoning hearing. Zoning cases where prior site plans/orders are amended are common. Such a result is clearly not consistent with the law.

CONCLUSION

Wherefore Boone Kondylas LLC respectfully requests:

1. That the Board of Appeals find that Dock of the Bay is a restaurant and may have accessory entertainment to enhance the dining experience of its patrons;
2. That the Board of Appeals set the limits and conditions in the providing of entertainment by the Dock of the Bay to ensure that the use is appropriate for the locale; and

3. For such other and further relief as the nature of its cause may require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2016 a copy of the foregoing document was mailed via first class mail, postage prepaid to:

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  - SECTION 302 CLASSIFICATION
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303.1 Assembly Group A.
303.2 Assembly Group A-1.
303.3 Assembly Group A-2.
303.4 Assembly Group A-3.
303.5 Assembly Group A-4.
303.6 Assembly Group A-5.

303.1 Assembly Group A.
303.2 Assembly Group A-1.
303.3 Assembly Group A-2.
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SECTION 303 ASSEMBLY GROUP A

303.1 Assembly Group A.

Assembly Group A occupancy includes, among others, the use of a building or structure, or a portion thereof, for the gathering of persons for purposes such as civic,social or religious functions; recreation, food or drink consumption or awaiting transportation.

303.1.1 Small buildings and tenant spaces.

A building or tenant space used for assembly purposes with an *occupant load* of less than 50 persons shall be classified as a Group B occupancy.

303.1.2 Small assembly spaces.

EXHIBIT
tabbies
A

The following rooms and spaces shall not be classified as Assembly occupancies:

1. A room or space used for assembly purposes with an *occupant load* of less than 50 persons and accessory to another occupancy shall be classified as a Group B occupancy or as part of that occupancy.

2. A room or space used for assembly purposes that is less than 750 square feet (70 m^2) in area and accessory to another occupancy shall be classified as a Group B occupancy or as part of that occupancy.

303.1.3 Associated with Group E occupancies.
A room or space used for assembly purposes that is associated with a Group E occupancy is not considered a separate occupancy.

303.1.4 Accessory to places of religious worship.
Accessory religious educational rooms and religious auditoriums with *occupant loads* of less than 100 are not considered separate occupancies.

303.2 Assembly Group A-1.
Assembly uses, usually with fixed seating, intended for the production and viewing of the performing arts or motion pictures including, but not limited to:

Motion picture theaters
Symphony and concert halls
Television and radio studios admitting an audience
Theaters

303.3 Assembly Group A-2.
Assembly uses intended for food and/or drink consumption including, but not limited to:

Banquet halls
Casinos (gaming areas)
Nightclubs
Restaurants, cafeterias and similar dining facilities (including associated commercial kitchens)
Taverns and bars

303.4 Assembly Group A-3.
Assembly uses intended for worship, recreation or amusement and other assembly uses not classified elsewhere in Group A including, but not limited to:

Amusement arcades
Art galleries
Bowling alleys
Community halls
Courtrooms
Dance halls (not including food or drink consumption)
Exhibition halls
Funeral parlors

Gymnasiums (without spectator seating)
Indoor *swimming pools* (without spectator seating)
Indoor tennis courts (without spectator seating)
Lecture halls
Libraries
Museums
Places of religious worship
Pool and billiard parlors
Waiting areas in transportation terminals

303.5 Assembly Group A-4.
Assembly uses intended for viewing of indoor sporting events and activities with spectator seating including, but not limited to:

Arenas
Skating rinks
Swimming pools
Tennis courts

303.6 Assembly Group A-5.
Assembly uses intended for participation in or viewing outdoor activities including, but not limited to:

Amusement park structures
Bleachers
Grandstands
Stadiums
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to the public but used mostly by police officers. After reviewing the code, the official cannot find a specific reference to a shooting gallery in Sections 303 through 312 or in the associated tables. The building official asks the designer for additional information about the activities to be conducted in the building and is told that there will be a small sign-in booth, patron waiting/viewing area and the actual shooting area. Based on this information, the building official can determine that the most logical classification of the building is Group A-3, assembly. This classification is based on the fact that the building is used for the congregation of people for recreation. A shooting gallery is similar in many respects to a bowling center, which is classified as Group A-3 (see Figure 302.1).

SECTION 303
ASSEMBLY GROUP A

303.1 Assembly Group A. Assembly Group A occupancy includes, among others, the use of a building or structure, or a portion thereof, for the gathering of persons for purposes such as civic, social or religious functions; recreation, food or drink consumption or awaiting transportation.

❖ Because of the arrangement and density of the occupant load associated with occupancies classified in the Group A assembly category, the potential for multiple fatalities and injuries from fire is comparatively high. For example, no other use listed in Section 302.1 contemplates occupant loads as dense as 5 square feet (0.46 m^2) per person (see Table 1004.1.1). Darkened spaces in theaters, nightclubs and the like serve to increase hazards. In sudden emergencies, the congestion caused by large numbers of people rushing to exits can cause panic conditions. For these and many other reasons, there is a relatively high degree of hazard to life safety in assembly facilities. The relative hazards of assembly occupancies are reflected in the height and area limitations of Table 503 that are, in comparison, generally more restrictive than for buildings in other group classifications.

There are five specific assembly group classifications, Groups A-1 through A-5, described in this section. Where used in the code, the general term "Group A" is intended to include all five classifications.

The fundamental characteristics of all assembly occupancies are identified in this section. Structures that are designed or occupied for assembly purposes must be placed in one of the assembly group classifications. There are buildings and spaces which are used for assembly purposes, but are not classified as Assembly occupancies. The "exceptions" to this rule include small assembly buildings, tenant spaces and assembly spaces in mixed-use buildings. These exceptions to the Group A classification are addressed in Sections 303.1.1 through 303.1.4.

303.1.1 Small buildings and tenant spaces. A building or tenant space used for assembly purposes with an *occupant load* of less than 50 persons shall be classified as a Group B occupancy.

❖ There are often small establishments that typically serve food and have a few seats that technically meet the definition of an assembly Group A occupancy but due to the low occupant load pose a lower risk than a typical assembly occupancy. These types of buildings and tenant spaces are to be considered as Group B occupancies when the occupant load is determined to be less than 50 persons. Examples of this include small "fast food" establishments and small "mom-and-pop" cafes or coffee shops.

303.1.2 Small assembly spaces. The following rooms and spaces shall not be classified as Assembly occupancies:

1. A room or space used for assembly purposes with an *occupant load* of less than 50 persons and accessory to another occupancy shall be classified as a Group B occupancy or as part of that occupancy.
2. A room or space used for assembly purposes that is less than 750 square feet (70 m^2) in area and accessory to

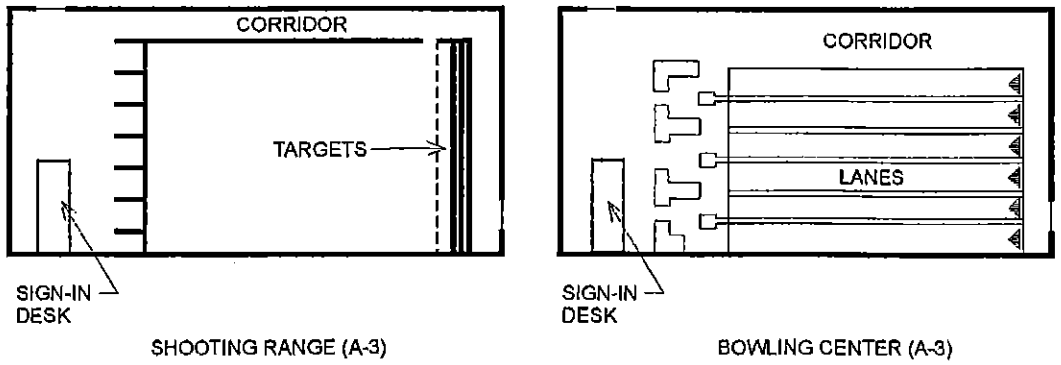


Figure 302.1
GROUP CLASSIFICATION

another occupancy shall be classified as a Group B occupancy or as part of that occupancy.

❖ Assembly rooms or spaces within larger buildings that house other uses may be classified as other than Group A depending on occupant load or the size of the space. Where the occupant load of the assembly space is less than 50, or where the floor area of the space used for assembly purposes is less than 750 square feet (65 m^2), a classification of other than Group A is permitted. In both cases, the purpose of the assembly space must be accessory to the principal occupancy of the structure (i.e., the activities in the assembly space are subordinate and secondary to the primary occupancy). If either the occupant load or floor area requirement is satisfied and the purpose of the assembly space is accessory to the principal occupancy, the space is permitted to either be classified as a Group B occupancy or as part of the principal occupancy. In either case, the assembly space is not required to be less than 10 percent of the area of the story on which it is located as is specified for accessory occupancies in Section 508.2 (IBC Interpretation No. 20-04).

The allowances given to assembly spaces in buildings containing multiple uses is a practical code consideration that permits a mixed-use condition to exist without requiring compliance with the provisions for mixed occupancies (see Section 508). Although the term "accessory" is used in describing the relationship of the uses, the intent of the term here is that the use of the space is related to, or part of, the main use of the space. These exceptions are not limited by the accessory use requirements found in Section 508.2.

Example 1: An office building, classified as a Group B occupancy, has a conference room used for staff meetings with an occupant load of 40 [see Figure 303.1.2(1)]. The occupancy classification of a conference room is generally considered a Group A-3. Since the occupant load of the conference room is less than 50 and its function is clearly accessory to the business area, the room is permitted to be classified the same as the main occupancy, Group B.

Example 2: A 749-square-foot (70 m^2) assembly area is located adjacent to a mercantile floor area of 5,000 square feet (465 m^2) [see Figure 303.1.2(2)]. Although the assembly use area occupies 15 percent of the 5,000-square foot (465 m^2) floor area, it does not exceed 750 square feet (70 m^2) and is not considered a Group A occupancy, but rather is classified as part of the Group M occupancy.

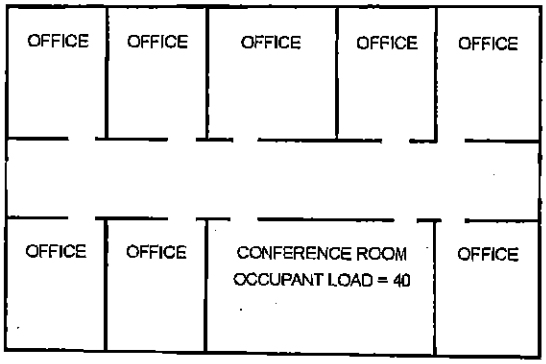
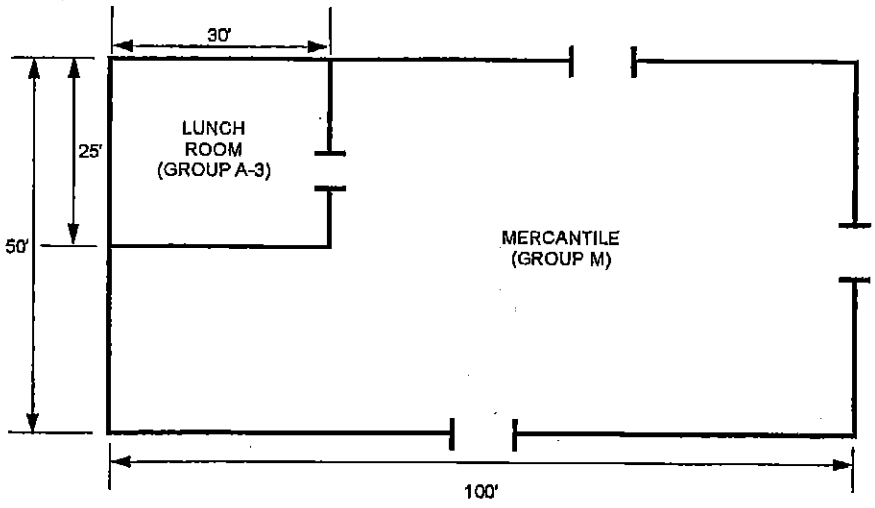


Figure 303.1.2(1)
ACCESSORY ASSEMBLY USE LIMITED BY OCCUPANT LOAD



For SI: 1 foot = 304.8 mm, 1 square foot = 0.0929 m^2.

Figure 303.1.2(2)
ACCESSORY ASSEMBLY USE GREATER THAN 10% OF FLOOR AREA BUT LESS THAN 750 SQ. FT.

303.1.3 Associated with Group E occupancies. A room or space used for assembly purposes that is associated with a Group E occupancy is not considered a separate occupancy.

❖ A typical educational facility for students in the 12th grade and below invariably contains many types of assembly spaces other than classrooms, including auditoriums, cafeterias, gymnasiums and libraries. These assembly spaces in a Group E building are not intended to be regulated as separate Group A occupancies, regardless of their floor area, but rather an extension of the Group E classification. It is worth mentioning, for these assembly functions to be considered part of the primary Group E occupancy, the assembly functions must be ancillary and supportive to the educational operation of the building. Otherwise, they would be classified into the appropriate Group A occupancy based upon their specific function. These assembly spaces, where classified as a portion of the Group E occupancy, are still considered as assembly in nature and must comply with assembly space requirements specified for accessibility and means of egress. However, often these school facilities are used for other functions such as a meeting of a community service organization or a community crafts fair. These types of uses fall outside of the intent of this section, and therefore such assembly spaces would need to be classified as a Group A.

303.1.4 Accessory to places of religious worship. Accessory religious educational rooms and religious auditoriums with *occupant loads* of less than 100 are not considered separate occupancies.

❖ Places of religious worship are listed as a Group A-3 occupancy. In addition to the worship hall, it is common for these facilities to contain smaller rooms used for educational activities. This provision allows such spaces to be considered as part of the Group A-3 classification rather than create a mixed-occupancy condition. For example, classrooms are normally classified as Group E if occupied by persons of ages through the 12th grade, or as Group B if the education is provided to adults. These types of classrooms could be considered as a part of the Group A-3 occupancy under the provisions of this section. It should be noted that this section does not modify the general provision requiring that assembly spaces are to be classified as Group A occupancies unless they have an occupant load of less than 50.

303.2 Assembly Group A-1. Assembly uses, usually with fixed seating, intended for the production and viewing of the performing arts or motion pictures including, but not limited to:

Motion picture theaters
Symphony and concert halls
Television and radio studios admitting an audience
Theaters

❖ Some of the characteristics of Group A-1 occupancies are large, concentrated occupant loads, low lighting levels, above-normal sound levels and a moderate fuel load.

Group A-1 is characterized by two basic types of activities. The first type is one in which the facility is occupied for the production and viewing of theatrical or operatic performances. Facilities of this type ordinarily have fixed seating; a permanent raised stage; a proscenium wall and curtain; fixed or portable scenery drops; lighting devices; dressing rooms; mechanical appliances or other theatrical accessories and equipment [see Figure 303.2(1)].

The second type is one in which the structure is primarily occupied for the viewing of motion pictures. Facilities of this type ordinarily have fixed seating, no stage, a viewing screen, motion picture projection booths and equipment [see Figure 303.2(2)].

Group A-1 presents a significant potential life safety hazard because of the large occupant loads and the concentration of people within confined spaces. The means of egress is an important factor in the design of such facilities. Theaters for the performing arts that require stages are considered particularly hazardous because of the amount of combustibles such as curtains, drops, scenery, construction materials and other accessories normally associated with stage operation. As such, special protection requirements applicable to stages and platforms are provided in Section 410 and Chapter 10.

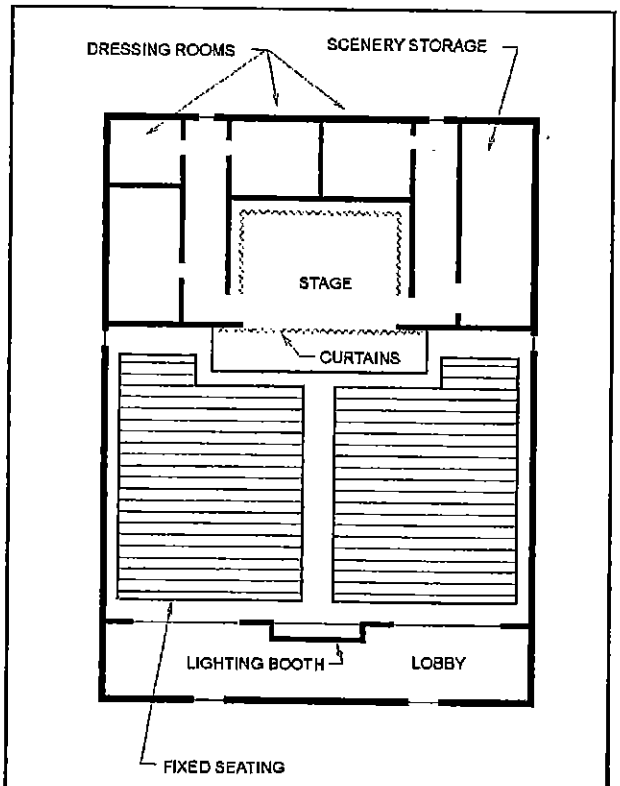


Figure 303.2(1)
GROUP A-1

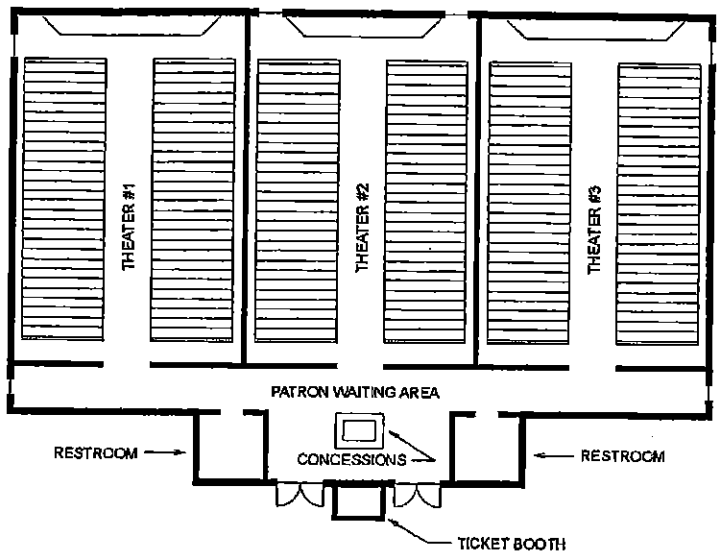


Figure 303.2(2)
GROUP A-1

303.3 Assembly Group A-2. Assembly uses intended for food and/or drink consumption including, but not limited to:

Banquet halls
Casinos (gaming areas)
Nightclubs
Restaurants, cafeterias and similar dining facilities (including associated commercial kitchens)
Taverns and bars

❖ Group A-2 includes occupancies in which people congregate in high densities for social entertainment, including drinking and dancing (e.g., nightclubs, banquet halls, cabarets) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:

- Low lighting levels;
- Entertainment by a live band or recorded music generating above-normal sound levels;
- No theatrical stage accessories;
- Later-than-average operating hours;
- Tables and seating arranged or positioned so as to create ill-defined aisles;
- A specific area designated for dancing;
- Service facilities for alcoholic beverages and food; and
- High occupant load density.

The fire records are very clear in identifying that the characteristics listed above often cause a delayed awareness of a fire situation and confuse occupants regarding the appropriate response, resulting in an increased egress time and sometimes panic. Together, these factors may result in extensive life and property losses. These characteristics are only advisory in determining whether Group A-2 is the appropriate classification. Often there are additional characteristics that are unique to a project, which also must be taken into consideration when a classification is made.

Not all restaurants have all of these characteristics. Most fast food restaurants will only have two or three of these, yet they are appropriately classified as Group A-2.

Example: The Downtown Club, a popular local nightclub/dance hall, features a different band every weekend [see Figure 303.3]. It is equipped with a bar

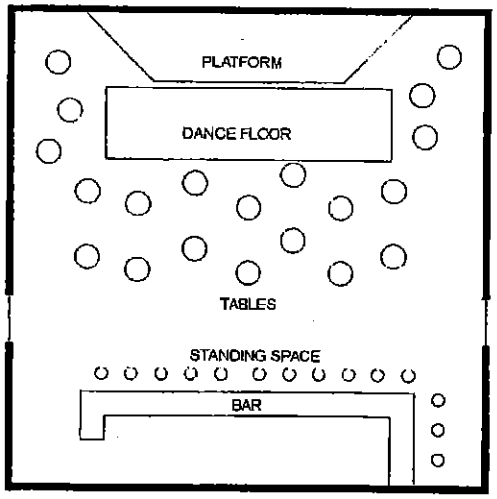


Figure 303.3
GROUP A-2

and basic kitchen facilities so that beverages and appetizers can be served. There is a platform for a band to perform, a dance floor in front of the platform and numerous cocktail tables and chairs. The tables and chairs are not fixed, resulting in a hazardous arrangement because there are no distinct aisles. When the band performs, the house lights are dimmed and spotlights are keyed in on the performers. The club is equipped with a sound system that is used at loud levels. The club is open until 3:00 a.m.—the latest time the local jurisdiction will allow.

From this description of the Downtown Club, one can readily see that the appropriate classification is Group A-2. Sometimes, however, it is not this easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the functions of the building and each area within the building.

Two of the specific uses listed as Group A-2 occupancies are typically not considered as facilities primarily used for food and/or drink consumption, however their classification as such has been deemed appropriate for varying reasons. The placement of casino gaming areas in the Group A-2 classification is because they share many hazard characteristics with nightclubs and, to some extent, the other uses in the category. The presence of distracting lights, sounds and decorations, along with the potential for alcohol consumption, create an assembly environment that is best addressed under the Group A-2 provisions. The classification is specific to the gaming areas of casino, therefore other related uses such as administrative, storage and lodging areas are to be individually classified based upon their specific use.

Commercial kitchens, when associated with a Group A-2 dining and drinking establishment, are also classified as Group A-2. Although commercial kitchens do not pose the same conditions and concerns as the other uses classified as Group A-2, their classification as such recognizes the relationship that exists between the dining and cooking areas. Providing a physical fire-resistive separation between the kitchen and the dining area that it serves is often found to be impractical. Assigning a single occupancy classification for both the commercial kitchen and its associated dining area eliminates any potential for an unnecessary mixed-occupancy condition. This single classification approach can also be applied where the occupant load of the dining area is below 50, allowing for a Group B classification. Under such circumstances, the kitchen would be considered an extension of the Group B dining facility. See also commercial kitchens in Group F-1.

303.4 Assembly Group A-3. Assembly uses intended for worship, recreation or amusement and other assembly uses not classified elsewhere in Group A including, but not limited to:

Amusement arcades
Art galleries
Bowling alleys
Community halls
Courtrooms
Dance halls (not including food or drink consumption)
Exhibition halls
Funeral parlors
Gymnasiums (without spectator seating)
Indoor *swimming pools* (without spectator seating)
Indoor tennis courts (without spectator seating)
Lecture halls
Libraries
Museums
Places of religious worship
Pool and billiard parlors
Waiting areas in transportation terminals

❖ Structures in which people assemble for the purpose of social activities (such as entertainment, recreation and amusement) that are neither classified in Group A-1 or A-2 nor appropriately classified in Group A-4 or A-5 are to be classified in Group A-3. Exhibition halls, libraries, dance halls (not including food and drink), places of religious worship, museums, gymnasiums, recreation centers, health clubs, fellowship halls, indoor shooting galleries, bowling centers and billiard halls are among the facilities often classified in Group A-3. Also, since they most nearly resemble this occupancy classification, public and private spaces used for assembly are often classified in Group A-3. These include large courtrooms, meeting rooms and conference centers. Similarly, lecture rooms located in colleges, universities or in schools for students above the 12th grade that have an occupant load of 50 or more are also classified in Group A-3, as well as structures in which people gather exclusively for worship and other religious purposes. Although such worship and religious purposes are without restriction to any particular sect or creed, the intent of the code is to limit Group A-3 classification to occupancies that are specifically related to worship services, devotions and religious rituals.

The fire hazard in terms of combustible contents (fuel load) in structures classified in Group A-3 is most often expected to be moderate to low. Since structures classified in Group A-3 vary widely as to the purpose for which they are used, the range of fuel load varies widely. For example, the fuel load in a library or an exhibition hall usually is considerably greater than that normally found in a gymnasium. While the code specifically addresses kitchens associated with Group A-2 restaurants and similar dining facilites, it is silent regarding accessory kitchens one might find associated with community centers or a fellowship hall of a place of religious worship. These kitchens should be considered carefully by the building official. Each facility and its use will be somehwat unique. The intensity and frequency of the use of the space for serving of food as well as the type of cooking equipment installed are important factors. The occasional use of the fellowship hall for a fundraising dinner where food is brought in and warmed is one end of the spectrum and may warrant keeping a Group A-3 classification. But when the same hall

becomes a daily charity "soup" kitchen, then Group A-2 classification is more appropriate.

303.5 Assembly Group A-4. Assembly uses intended for viewing of indoor sporting events and activities with spectator seating including, but not limited to:

Arenas
Skating rinks
Swimming pools
Tennis courts

❖ Structures provided with spectator seating in which people assemble to watch an indoor sporting event are to be classified as Group A-4. Arenas, skating rinks, swimming pools and tennis courts are among the facilities often classified as Group A-4. The distinguishing factor between Group A-4 and A-5 structures is whether the event is indoors or outdoors. Group A-4 facilities are limited to indoor structures only. The distinguishing factor between Group A-4 and Group A-3 facilities is the presence of a defined seating area. While Group A-3 facilities are indoors (i.e., tennis courts, swimming pools), they typically do not have a defined seating area in which to view the event. Only facilities that are both indoors and have a defined seating area are to be classified as Group A-4.

303.6 Assembly Group A-5. Assembly uses intended for participation in or viewing outdoor activities including, but not limited to:

Amusement park structures
Bleachers
Grandstands
Stadiums

❖ Structures classified in Group A-5 are outdoor facilities where people assemble to view or participate in social and recreational activities (e.g., stadiums, grandstands, bleachers, coliseums). In order to qualify as an outdoor facility, the structure must be one where the products of combustion are freely and rapidly vented to the atmosphere (i.e., a structure without enclosures that would prevent the free movement of smoke from the occupied area to the outside). Any recreation facility that has exterior walls that enclose the facility and a roof that fully covers the area would not be classified in Group A-5, but rather in Group A-3 or A-4 depending on whether a seating area has been provided. In the case of a structure with a retractable roof, the more stringent occupancy classification (i.e., Group A-4) would be required.

Since occupancies classified in Group A-5 are primarily viewing and sports participation areas, the fuel load associated with them is very low (i.e., the structure itself and seats). Since the fuel load present is relatively low and the expectation is that smoke will be quickly evacuated from the structure, the relative fire hazard of occupancies classified in Group A-5 is expected to be low. The life safety hazard from panic that might occur in an emergency, however, is a serious concern; hence, the capability of large crowds to exit the structure quickly and orderly during emergencies is an important design consideration (see Section 1028).

Both Group A-4 and A-5 occupancies will include a variety of uses that support the viewing of sports and similar activities. There will likely be luxury seating suites, locker rooms, toilet facilities and press boxes, which are clearly part of the overall uses of the facility. There will also be offices, food concession stands and merchandise stands which by their use are different occupancies, but are probably within the accessory occupancy limits established in Section 508.2. Because of the multitiered design of most Group A-4 and A-5 occupancies, the limit for accessory occupancies to account for less than 10 percent of the story will need to be creatively applied. There may be full-fledged restaurants that are in the same building, but may be open to guests not limited to those attending an event. A Group A-2 occupancy designation is likely the most appropriate classification and the mixed-occupancy conditions would most typically be addressed under the accessory occupancy provisions of Section 508.2.

SECTION 304
BUSINESS GROUP B

304.1 Business Group B. Business Group B occupancy includes, among others, the use of a building or structure, or a portion thereof, for office, professional or service-type transactions, including storage of records and accounts. Business occupancies shall include, but not be limited to, the following:

Airport traffic control towers
Ambulatory care facilities
Animal hospitals, kennels and pounds
Banks
Barber and beauty shops
Car wash
Civic administration
Clinic, outpatient
Dry cleaning and laundries: pick-up and delivery stations and self-service
Educational occupancies for students above the 12th grade
Electronic data processing
Laboratories: testing and research
Motor vehicle showrooms
Post offices
Print shops
Professional services (architects, attorneys, dentists, physicians, engineers, etc.)
Radio and television stations
Telephone exchanges
Training and skill development not within a school or academic program

❖ The risks to life safety in the business occupancy classification are relatively low. Exposure to the potential effects of fire is limited because business-type facilities most often have low fuel loads, are nor-

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon
Deputy Administrative Officer and
Director of Permits, Approvals and Inspections

DATE: August 4, 2015

FROM: Andrea Van Arsdale
Director, Department of Planning

SUBJECT: 9025 Cuckold Point Road

INFORMATION:

Item Number: 16-003

Petitioner: Ken Boone

Zoning: BL

Requested Action: Special Hearing

SUMMARY OF RECOMMENDATIONS:

The Department of Planning has reviewed the Petition for a Special Hearing to determine whether the Administrative Law Judge should approve amendments to previous restrictions imposed in Zoning Cases 07-144-SPH, CBA-06-044, CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music and other and further relief as may be required.

Testimony in the aforementioned cases established the fact of the prior use of the property as a "nightclub" which is not listed as an allowed use in the zone. Upon a site visit and discussions with the petitioner's counsel, the Department understands the future use of the property will be as a permitted restaurant that will have music, both live and reproduced, as an accessory component.

The Department has no objection to the granting of the petitioned zoning relief conditioned upon the following:

There shall be no dance floor, nor shall the restaurant become a "nightclub" as defined in the BCZR Section 101.1 and the Building Code of Baltimore County.

All accessory music shall be limited to reasonable sound levels so as not to disturb adjacent properties.

All accessory music shall be limited to the following hours or as may be otherwise established by the Administrative Law Judge:

a. No outdoor music after 10:00 p.m. Monday thru Saturday.
b. No indoor music after 12:00 a.m. (midnight) Monday thru Saturday.
c. No music after 8:00 p.m. on Sundays.

For further information concerning the matters stated herein, please contact Bill Skibinski at 410-887-3480.

Division Chief: Kathy Schlabach

AVA/KS

C: Bill Skibinski

EXHIBIT
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B

Print

Baltimore County Code

TITLE 3. NOISE

Section

17-3-101. Definitions

17-3-102. Legislative intent

17-3-103. Prohibited

17-3-104. Enforcement

17-3-105. Penalty

17-3-106. Responsibility of owner or landlord

§ 17-3-101. DEFINITIONS.

(a) *In general.* In this title the following words have the meanings indicated.

(b) *Domestic noise.*

(1) "Domestic noise" means noise related to human activity that is not created by machinery, tools, mechanical devices, or equipment used in connection with a business purpose.

(2) "Domestic noise" includes noises produced:

(i) Vocally;

(ii) With a radio receiving set, musical instrument, phonograph or any other device intended for the production or reproduction of sound; or

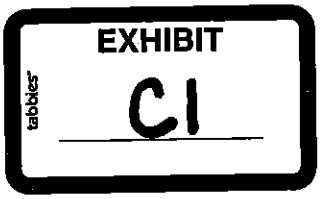
(iii) By a household tool or other equipment.

(c) *Landlord.* "Landlord" means the person who manages, leases, holds, or otherwise controls the property of an owner.

(d) *Owner.* "Owner" means the person listed on the tax records of the county as the property owner.

(1988 Code, § 20-45) (Bill No. 123-93, 1993, § 2; Bill No. 114-99, § 3, 7-1-2004; Bill No. 73-03, § 20, 7-1-2004)

§ 17-3-102. LEGISLATIVE INTENT.



The County Council intends to prohibit excessive domestic noise for the purpose of securing and promoting public health, comfort, convenience, safety, welfare, peace, and quiet in the county.

(1988 Code, § 20-46) (Bill No. 123-93, 1993, § 2; Bill No. 114-99, § 3, 7-1-2004)

§ 17-3-103. PROHIBITED.

A person may not create domestic noise or allow domestic noise to be created that unreasonably disturbs the peace, quiet, and comfort of the neighboring inhabitants.

(1988 Code, § 20-47) (Bill No. 123-93, 1993, § 2; Bill No. 114-99, § 3, 7-1-2004)

§ 17-3-104. ENFORCEMENT.

A police officer shall:

(1) Investigate complaints of alleged domestic noise violations occurring in the county; and

(2) File a written report if the investigation concludes that a violation of § 17-3-103 of this title has occurred.

(1988 Code, § 20-48) (Bill No. 123-93, 1993, § 2; Bill No. 114-99, § 3, 7-1-2004)

§ 17-3-105. PENALTY.

(a) *Criminal.* A person who violates § 17-3-103 of this title is guilty of a misdemeanor and on conviction is subject to:

(1) A fine not exceeding $500 or imprisonment not exceeding 90 days or both for a first offense; and

(2) A fine of not less than $500 or imprisonment not exceeding 90 days or both for any subsequent offense.

(b) *Civil.*

(1) (i) As an alternative to a criminal action, the police may issue a civil citation to a person who violates § 17-3-103 of this title.

(ii) The amount of the civil penalty may not exceed $500.

(2) The police may request that the county seek an injunction to prohibit the person from creating or allowing the creation of domestic noise.

(1988 Code, § 20-49) (Bill No. 123-93, 1993, § 2; Bill No. 114-99, § 3, 7-1-2004)

§ 17-3-106. RESPONSIBILITY OF OWNER OR LANDLORD.

(a) *Civil citation to owner or landlord.*

(1) A police officer may issue a civil citation to the owner or landlord of the building or premises from which domestic noise in violation of § 17-3-103 of this title emanates if more than three written reports have been filed under § 17-3-104 of this title, at one address, within a 60-day period.

(2) The police may issue additional civil citations for each subsequent report filed within 6 months after the initial report.

(b) *Notice.* Before issuing a citation, the Chief of Police or a designee shall send by certified mail or deliver written notice to the owner or landlord that three written reports have been filed under § 17-3-104 of this title within a 60 day period.

(c) *Penalty.* The amount of the civil penalty may not exceed:

(1) $500 for the first citation; and

(2) $750 for each additional citation issued within 6 months after the initial written report filed under § 17-3-104 of this title.

(1988 Code, § 20-50) (Bill No. 123-93, 1993, § 2; Bill No. 114-99, § 3, 7-1-2004)

WESTLAW

NOTES OF DECISIONS (7)

Validity
Private nuisance
Equitable relief
Target shooting
Review

West's Annotated Code of Maryland
Environment
Title 3. **Noise** Control
Subtitle 4. Rulemaking and Enforcement (Refs & Annos)

§ 3-401. Noise standards
West's Annotated Code of Maryland Environment Effective: March 14, 2016 (Approx. 4 pages)

Effective: March 14, 2016

MD Code, **Environment**, § 3-401

§ 3-401. **Noise** standards

Currentness

(a) Except as otherwise provided by law, the Department shall adopt **environmental noise** standards, sound level limits, and **noise** control rules and **regulations** as necessary to protect the public health, the general welfare, and property.

(b) In adopting **environmental noise** standards, the Department or a political subdivision that chooses to adopt **environmental noise** standards shall consider:

(1) Information published by the Administrator of the United States **Environmental** Protection Agency on the levels of **environmental noise** that must be attained and maintained in defined areas under various conditions to protect public health and welfare with an adequate margin of safety; and

(2) Scientific information about the volume, frequency, duration, and other characteristics of **noise** that may harm public health, safety, or general welfare, including:

(i) Temporary or permanent hearing loss;

(ii) Interference with sleep, speech communication, work, or other human activities;

(iii) Adverse physiological responses;

(iv) Psychological distress;

(v) Harm to animal life;

(vi) Devaluation of or damage to property; and

(vii) Unreasonable interference with the enjoyment of life or property.

(c)(1) In adopting sound level limits and **noise** control rules and **regulations**, the Department or the political subdivision shall consider, among other things:

(i) The residential, commercial, or industrial nature of the area affected;

(ii) Zoning;

(iii) The nature and source of various kinds of **noise**;

(iv) The degree of **noise** reduction that may be attained and maintained using the best available technology;

(v) Accepted scientific and professional methods for measurement of sound levels; and

(vi) The cost of compliance with the sound level limits.

(2) The sound level limits adopted under this subsection shall be consistent with the **environmental noise** standards adopted by the Department.

EXHIBIT
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(3) The sound level limits and **noise** control rules and **regulations** adopted under this subsection may not prohibit trapshooting or other target shooting on any range or other property in Frederick County that the Frederick County Department of Planning and Zoning has approved as a place for those sporting events.

(4) The sound level limits and **noise** control rules and **regulations** adopted under this subsection shall be as follows for residential heat pumps and air conditioning units:

(i) Residential heat pumps 75 dba; and

(ii) Residential air conditioning units 70 dba.

(5)(i) The sound level limits and **noise** control rules and **regulations** adopted under this subsection may not prohibit trapshooting, skeetshooting, or other target shooting between the hours of 9 a.m. and 10 p.m. on any range or other property of a shooting sports club that is chartered and in operation as of January 1, 2001.

(ii) This paragraph does not apply in Allegany County, Anne Arundel County, Baltimore City, Calvert County, Charles County, Garrett County, Howard County, Montgomery County, St. Mary's County, and Washington County.

(6)(i) Except as provided in subparagraph (ii) of this paragraph, the Department may not adopt sound level limits and **noise** control rules and **regulations** under this subsection that prohibit trapshooting, skeetshooting, or other target shooting between the hours of 9 a.m. and 10 p.m. in Allegany County, Anne Arundel County, Garrett County, or Washington County on any range or other property of a shooting sports club that is chartered and in operation as of January 1, 2005.

(ii) 1. Subject to the provisions of subsubparagraph 2 of this subparagraph, the Department may adopt sound level limits and **noise** control rules and **regulations** under this subsection that prohibit trapshooting, skeetshooting, or other target shooting between the hours of 9 a.m. and 10 p. m. in Allegany County, Anne Arundel County, Garrett County, or Washington County on any range or other property of a shooting club that the Department determines is not in compliance as of January 1, 2005 with **environmental noise** standards, sound level limits, or **noise** control rules and **regulations** adopted under this title.

2. A sound level limit or **noise** control rule or **regulation** adopted under this subsection shall allow trapshooting, skeetshooting, and other target shooting between the hours of 9 a.m. and 10 p.m. by a shooting sports club that the Department determines has become compliant with sound level limits and **noise** control rules and **regulations** adopted under this title.

(7)(i) Except as provided in subparagraph (ii) of this paragraph, in Howard County, the sound level limits and **noise** control rules and **regulations** adopted under this subsection may not prohibit the electronic amplification of sound at an outdoor concert venue with a capacity of over 15,000 individuals that:

1. Within the area that is included in a 0.25 mile radius of the venue, produces sound that is:

A. 95 dba or lower between 9:00 a.m. and 11:00 p.m.; and

B. 55 dba or lower between 11:00 p.m. and 11:30 p.m.; and

2. Within the area that is outside a 0.25 mile radius of the venue, produces sound that is:

A. 72.5 dba or lower between 9:00 a.m. and 11:00 p.m.; and

B. 55 dba or lower between 11:00 p.m. and 11:30 p.m.

(ii) 1. Except as provided in subsubparagraph 2 of this subparagraph, an outdoor concert venue with a capacity of over 15,000 individuals may not produce any electronic amplification of sound between 11:30 p.m. and 9:00 a.m.

2. The limitations concerning the electronic amplification of sound at an outdoor concert venue under subsubparagraph 1 of this subparagraph do not apply to an activity sponsored or authorized by the Howard County Public School System between 8:00 a.m. and 9:00 a.m.

(iii) Notwithstanding § 3-105(a)(1) and (2) of this title, the **noise** control ordinances, rules, or **regulations** adopted by Howard County and in effect on October 1, 2013, do not apply to the electronic amplification of sound at an outdoor concert venue in the county with a capacity of over 15,000 individuals.

(d)(1) This section does not authorize the Department to adopt **environmental noise** standards, sound level limits, or **noise** control rules and **regulations** that apply to **noise** from:

(i) Construction or repair work on public property;

(ii) Fire or rescue station alerting devices; or

(iii) In Frederick County or Frederick City:

1. A fair listed in the Maryland Agricultural Fairs and Shows Schedule that is maintained by the Maryland Agricultural Fair Board; or

2. Any other event held on the same grounds as a fair under item 1 of this item.

(2) **Noise** control rules and **regulations** that apply to Department of Transportation facilities shall be adopted by the Department of Transportation.

Credits

Acts 1982, c. 240, § 2; Acts 1982, c. 527; Acts 1983, c. 338; Acts 1987, c. 306, § 16; Acts 1988, c. 6, § 11; Acts 1997, c. 14, § 1, eff. April 8, 1997; Acts 2000, c. 425, § 1, eff. Oct. 1, 2000; Acts 2001, c. 628, § 1, eff. Oct. 1, 2001. Amended by Acts 2003, c. 239, § 1, eff. June 1, 2003; Acts 2005, c. 394, § 1, eff. July 1, 2005; Acts 2012, c. 360, § 1, eff. Oct. 1, 2012; Acts 2013, c. 421, § 1, eff. Oct. 1, 2013, Acts 2014, c. 45, § 1, eff. April 8, 2014; Acts 2016, c. 8, § 1, eff. March 14, 2016.

Formerly Art. 43, §§ 823, 824, 828, 830.

Editors' Notes

ADMINISTRATIVE CODE REFERENCES

Department of the **Environment**

- Occupational, industrial, and residential hazards, control of **noise** pollution, see COMAR 26.02.03.01 et seq.

LIBRARY REFERENCES

Health and **Environment** ⚭25.8.

C.J.S. Health and **Environment** §§ 61, 129, 137.

RESEARCH REFERENCES

Encyclopedias

Maryland Law Encyclopedia **Environmental Regulation**; Pollution Control § 11, Rights of Political Subdivisions.
Maryland Law Encyclopedia **Environmental Regulation**; Pollution Control § 62, **Noise** Standards.

Relevant Notes of Decisions (6) View all 7

Notes of Decisions listed below contain your search terms.

Validity

Statute that allowed Department of the **Environment** to continue imposing in some counties, but not in others, **noise** control **regulations** on shooting sports clubs, such as trapshooting club, that were not compliant with Department's existing **noise regulations** did not violate equal protection clause; the statute was rationally related to General Assembly's legitimate interest in promoting local preferences. Lonaconing Trap Club, Inc. v. Maryland Dept. of **Environment**, 2009, 978 A.2d 702, 410 Md. 326. Constitutional Law ⚭ 3723; **Environmental** Law ⚭ 316

Private nuisance

Evidence concerning gun fire **noise** generated by gun club was sufficient to establish that club was a private nuisance to its residential neighbors. Anne Arundel County Fish & Game Conservation Ass'n, Inc. v. Carlucci, 1990, 573 A.2d 847, 83 Md.App. 121, certiorari denied 580 A.2d 218, 320 Md. 800. Nuisance 33

Equitable relief

Even if gun club was exempt from Department of **Environment's noise regulations**, adjoining landowners were not precluded from seeking equitable relief from nuisance allegedly created by club's shooting activities. Code, **Environment**, § 3-101 et seq. Anne Arundel County Fish & Game Conservation Ass'n, Inc. v. Carlucci, 1990, 573 A.2d 847, 83 Md.App. 121, certiorari denied 580 A.2d 218, 320 Md. 800. Nuisance 21

Injunction issued by court to relieve adjoining landowners from nuisance created by **noise** emanating from gun club was not overbroad; court ordered that club design and implement **noise** abatement system for all of its facilities within six months. Anne Arundel County Fish & Game Conservation Ass'n, Inc. v. Carlucci, 1990, 573 A.2d 847, 83 Md.App. 121, certiorari denied 580 A.2d 218, 320 Md. 800. Nuisance 37

Target shooting

The 60 decibel sound limit required by Department of the **Environment regulation** prior to and on January 1, 2005, continued to apply to shooting sports clubs, such as trapshooting club, which were excluded from statutory exemption for existing clubs in applicable counties; amendment to statute giving Department authority to adopt **environmental noise** standards, which amendment stated that Department could adopt sound level limits prohibiting trapshooting, skeetshooting, and other target shooting between the hours of 9 a.m. and 10 p.m. in certain counties, did not abrogate Department's earlier **regulations** and did not require Department to reenact its **noise** control **regulations**. Lonaconing Trap Club, Inc. v. Maryland Dept. of **Environment**, 2009, 978 A.2d 702, 410 Md. 326. **Environmental Law** 327

Review

Trial court properly applied state **noise regulations** to gun club and adopted results of fast mode testing of **noise** levels from club's activities, in nuisance action arising from allegedly excessive **noise** emanating from club; expert related **noise** levels to existing statutory **regulation** to give trial court empirical standard by which to measure sound levels, and testified that fast mode method of testing would produce more accurate results. Anne Arundel County Fish & Game Conservation Ass'n, Inc. v. Carlucci, 1990, 573 A.2d 847, 83 Md.App. 121, certiorari denied 580 A.2d 218, 320 Md. 800. Nuisance 34

MD Code, **Environment**, § 3-401, MD ENVIR § 3-401
Current through Chapters 1 to 9, 16, 100, 103, 116 & 142 of the 2016 Regular Session of the General Assembly.

End of Document

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WESTLAW

Code of Maryland Regulations
Title 26. Department of the Environment
Subtitle 02. Occupational, Industrial, and Residential Hazards
Chapter 03. Control of Noise Pollution (Refs & Annos)
.02. Environmental Noise Standards
MD ADC 26.02.03.02 Code of Maryland Regulations (Approx. 7 pages)

COMAR 26.02.03.02

.02. Environmental Noise Standards.

Currentness

A. Precepts.

(1) It is known that noise above certain levels is harmful to the health of humans. Although precise levels at which all adverse health effects occur have not definitely been ascertained, it is known that one's well-being can be affected by noise through loss of sleep, speech interference, hearing impairment, and a variety of other psychological and physiological factors. The establishment of ambient noise standards, or goals, must provide margins of safety in reaching conclusions based on available data which relate noise exposure to health and welfare effects, with due consideration to technical and economic factors.

(2) The environmental noise standards set forth here represent goals expressed in terms of equivalent A-weighted sound levels which are protective of the public health and welfare. The ambient noise levels shall be achieved through application, under provisions of laws or regulations or otherwise, of means for reducing noise levels including, but not limited to, isolation of noise producing equipment, dampening of sound waves by insulation, equipment modification and redesign, and land use management.

B. Standards for Environmental Noise - General.

(1) A person may not cause or permit noise levels which exceed those specified in this table except as provided in §B(2) or (3), or §C, of this regulation.

Table 1 Maximum Allowable Noise Levels (dBA)for Receiving Land Use Categories

Day/Night	Industrial	Commercial	Residential
Day	75	67	65
Night	75	62	55

(2) A person may not cause or permit noise levels emanating from construction or demolition site activities which exceed:

(a) 90 dBA during daytime hours;

(b) The levels specified in Table 1 during nighttime hours.

(3) A person may not cause or permit the emission of prominent discrete tones and periodic noises which exceed a level which is 5 dBA lower than the applicable level listed in Table 1.

(4) A person may not cause or permit, beyond the property line of a source, vibration of sufficient intensity to cause another person to be aware of the vibration by such direct means as sensation of touch or visual observation of moving objects. The observer shall be located at or within the property line of the receiving property when vibration determinations are made.

EXHIBIT
tabbies
C3

(5) A person may not operate or permit to be operated an off-road internal combustion engine powered recreational vehicle, including, but not limited to, a dirt bike, an all terrain vehicle, a go cart, a snowmobile, or a similar vehicle, on private property closer than 300 feet to a neighboring residence or the associated curtilage, without the written permission of the affected resident, unless it can be demonstrated to the Department that the vehicle can be operated within the noise limits specified in Table 1 under §B(1) of this regulation.

C. Exemptions.

(1) The provisions of this regulation may not apply to devices used solely for the purpose of warning, protecting, or alerting the public, or some segment thereof, of the existence of an emergency or hazardous situation.

(2) The provisions of this regulation do not apply to the following:

(a) Household tools and portable appliances in normal usage during daytime hours;

(b) Lawn care and snow removal equipment (daytime only) when used and maintained in accordance with the manufacturer's specifications;

(c) Agricultural field machinery when used and maintained in accordance with manufacturer's specifications;

(d) Blasting operations for demolition, construction, and mining or quarrying (daytime only);

(e) Motor vehicles on public roads;

(f) Aircraft and related airport operations at airports licensed by the Maryland Aviation Administration;

(g) Boats on State waters or motor vehicles on State lands under the jurisdiction of the Department of Natural Resources;

(h) Emergency operations;

(i) Pile driving equipment during the daytime hours of 8 a.m. to 5 p.m.;

(j) Sound except those sounds that are electronically amplified, between 7 a.m. and midnight, created by:

(i) Sporting events (except trap shooting, skeet shooting, or other target shooting);

(ii) Entertainment events; and

(iii) Other public gatherings operating under permit or permission of the appropriate local jurisdiction;

(k) Rapid rail transit vehicles and railroads;

(l) Construction and repair work on public property;

(m) Air conditioning or heat pump equipment used to cool or heat housing on residential property; for this equipment, a person may not cause or permit noise levels which exceed 70 dBA for air conditioning equipment at receiving residential property and 75 dBA for heat pump equipment at receiving residential property;

(n) Household pets on residential property that are maintained in accordance with local zoning requirements;

(o) Except in Allegany, Anne Arundel, Baltimore City, Calvert, Charles, Garrett, Howard, Montgomery, St. Mary's, and Washington Counties, trap shooting, skeet shooting, or other target shooting between the hours of 9 a.m. and 10 p.m. on any range or other property of a shooting sports club that is chartered and in operation as of January 1, 2001;

(p) Trash collection operations between the hours of 7 a.m. and 10 p.m.

(q) Marina equipment used to move boats during the period from 7 am to 7 pm provided that the noise level does not exceed 80 dBA at 20 meters from the equipment.

(3) The events and gatherings under §B(2)(j) of this regulation include, but are not limited to, athletic contests, amusement parks, carnivals, fairs at fairgrounds, sanctioned auto racing facilities, parades, and public celebrations.

(4) In Frederick County or Frederick City, a fair listed in the Maryland agricultural fairs and shows schedule that is maintained by the Maryland Agricultural Fair Board, or any other event held on the same grounds and listed by the Agricultural Fair Board, is exempt from this chapter.

D. Measurement.

(1) The equipment and techniques employed in the measurement of noise levels may be those recommended by the Department, which may, but need not, refer to currently accepted standards or recognized organizations, including, but not limited to, the American National Standards Institute (ANSI), American Society for Testing and Materials (ASTM), Society of Automotive Engineers (SAE), International Electrotechnical Commission (IEC) and the United States Environmental Protection Agency (EPA).

(2) The measurement of noise levels shall be conducted at points on or within the property line of the receiving property or the boundary of a zoning district, and may be conducted at any point for the determination of identity in multiple source situations.

(3) Sound level meters used to determine compliance with Regulation .02 shall meet or exceed the specifications for Type II sound level meters.

Complete through Maryland Register Vol. 43, Issue 6, dated March 18, 2016.

COMAR 26.02.03.02, MD ADC 26.02.03.02

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BALTIMORE COUNTY
BOARD OF APPEALS

IN THE MATTER OF: Boone Kondylas, LLC
9025 Cuckold Point Road
15th Election District; 7th Councilmanic District

BEFORE THE BOARD OF APPEALS FOR BALTIMORE COUNTY

16-003-SPH

PROTESTANT'S MEMORANDUM

Protestants, Charlie Wolinsky, Brad Metheny, Bonnie Metheny, Matt Charpella, Wayne Waldman and Mike Kondylas, by and through their attorney, Francis X. Borgerding, Jr., files this Memorandum in Opposition to the Petitioner's proposed relief in the above-captioned case and states:

1. Res Judicata

The decision of the Law Judge for Baltimore County, John Beverungen, in his Opinion and Order (attached hereto for the Board's reference) with regard to the case found that the Petitioner's Petition for Special Hearing, pursuant to B.C.Z.R. 500.7 to amend previous restrictions imposed by case number 07-144-SPH-CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music be and is denied the requested relief under the Doctrine of Res Judicata. As Commissioner Beverungen stated, "I believe the Petition must also be denied based on res judicata. As discussed above, res judicata will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard." "But here I do not believe there have been significant changes, Petitioner is still proposing to operate a restaurant that would offer live or recorded music." Petitioner alleges that the use has changed. Pursuant to the factors stated in the International Building Code to determine that the property was indeed a nightclub. Petitioner alleges that under review of these characteristics, the use would be different than Fifth Street, LLC.

Per the Affidavit attached of Charles Wolinski, his contention is the use at this point is substantially the same although the Petitioner alleges that the music will be different it is still live or recorded music ... which the Court of Special Appeals found was prohibited from occurring on the site. Petitioner alleges that lighting levels do not change when entertainment will be provided. Pursuant to the Affidavit of Charles Wolinski, lighting levels are exactly the same Fifth Street, LLC operated.

2. Entertainment will be by live band or recorded music, there are no theatrical stage accessories, the hours of operation are limited, the tables and chairs are arranged exactly the same way, there are service facilities for alcoholic beverages and food. The Court of Special Appeals, on page one, dated July 9, 2010, in its decision the Court of Appeals stated at page three "A nightclub is defined as a tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is characterized as a nightclub by the Building Code of Baltimore County." The Building Code of Baltimore County relies on the factors listed above in the International Building Code to determine whether its use is a nightclub. Those factors apply to the Petitioner's proposed use as stated above. The Petitioner's proposed use seeks to provide live or recorded entertainment and thus qualifies as a nightclub under the Court of Special Appeals previous ruling. Petitioner's proposed use is, therefore, prohibited under the doctrine of res judicata.

Commissioner Beverungen also stated at page two of his October 22, 2015 Opinion and Order "As an initial matter, I do not believe the OAH has the authority to 'amend' restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the

Petition were appealed to the Board of Appeals, Circuit Court and then Court of Special Appeals. In an unreported opinion (No. 810, September Term 2009) the Appellant Court affirmed the Agency's findings, which necessarily included the conditions and restrictions found in those Orders. To amend those restrictions at this juncture would be akin to reversing the Appellate Court, which an administrative agency cannot do."

Under this logic, the Board is without authority to 'amend the restrictions found in the previous cases as Petitioner has requested.' The Petitioner is not actually asking for an amendment to the restrictions, the Petitioner is asking for reversal of the previous decision of the Court of Special Appeals. Accordingly, the Board is without authority to do so and the Petitioner's Petition should be denied.

Analyzing the elements of res judicata under the facts of the subject case, the Doctrine of Res Judicata applies. The Petitioner seeks to provide live or recorded music. That very music that was prohibited by the prior Court of Special Appeals ruling.

There was a final valid judgment on the merits by a court of competent jurisdiction in similar litigation. Therefore, the present case meets the definition of res judicata. *Deleon v. Slev*, 328 Md. 569 at 580. Commissioner Beverungen cited the *Seminary Galleria, LLC v. Dulaney Improvement Association*, 192 Md. App. 719 (2010).

This argument that the facts have changed does not have merit. See again Affidavit of Charles Wolinski and argument as indicated above.

TESTIMONY

Testifying on behalf of the Protestants were Charlie Wolinsky, Brad Metheny, Bonnie Metheny, Matt Charpella, Wayne Waldman and Mike Kondylas.

Charlie Wolinsky made the following points in his testimony.

My family and I have been going through this for seven years with Larry Thanner, now Ken Boone wants to do the same thing Larry was doing and call it something different.

It is the music that is the problem, not the restaurant. The last three years Larry ran the Dock of the Bay with no music there and there were no problems.

No way the Dock of the Bay can have music without disturbing the peace and tranquility of the neighbors.

The music negatively affects the quality of my family's life.

It is not just the sound from the music, it is everything that comes with it: large crowds, parking issues, and cheering after songs.

The Dock of the Bay is too close to homes to have live outdoor music.

The Liquor Board sets the decibel limit at 65 and the Dock of the Bay will be above that if they have live music.

The neighbors have a right to live in peace and quiet.

It does not matter how many people signed his Petition, you cannot allow the majority decide the rights of the minority.

Brad Metheny testified to the following points that this case has already been heard, appealed again and again and our position was supported throughout. He questioned whether the Dock of the Bay zoning was compatible for entertainment. Both Boone and Thanner owed a bar/restaurant with higher percentage of food sales yet neither can make it without live music.

Russ McClelland and Dorothea Reilly both testified on Boone's behalf. Both of their names are on the liquor license. McClelland even testified for Thanner in 2006 at the Liquor Board hearing.

Boone's name is NOT on the Dock of the Bay liquor license. Possibly not even a resident of Maryland. Not required to spend any hours at his business. He could operate as an absentee owner. Who is the responsible party. If he gets violations on his liquor license does he simply switch the people named on it?

Thanner started same way Boone wants to. Quiet and low key. Records would show that the complaints started slowly after and the process of dealing with it and getting the zoning enforced took approximately seven years. Something that no one wants to or should have to repeat.

Thanner moved his entertainment outside. The houses that were built were built next to a bar/restaurant. The Dock of the Bay only had outside dining. Thanner added the music. Starting on weekends. Then turned into longer hours, more frequent, louder, more people, then also on the inside from 9:30 until 1:30 a.m. Plus the large amount of loud people on the deck area, the pier and the parking lot.

Thanner moved a bar outside in the Spring of 2007. Now you also have people outside drinking because of the no smoking ban. And this all within from 75 feet to a couple hundred feet of people's homes.

All we as residents would have to look forward to from Spring until Fall are two bars side by side with live entertainment taking away all our rights to privacy and peace and quiet.

Bonnie Metheny made the following points in her testimony:

This issue has already been decided by the court. Asked the Board to uphold the order that is in place that if the Dock of Bay has live music in a B.L. zone, it becomes a nightclub not allowed in a B.L. zone.

This music issue has pitted neighbor against neighbor.

Boone allowed his Dock of the Bay Facebook followers to insult us and allowed our addresses to be published on the Dock of the Bay Facebook page making me feel very uncomfortable. By allowing this he is directly encouraging animosity with his patrons.

Boone, as a successful businessman and the president of two printing companies, did not do due diligence by checking the history/background before he bought the Dock of the Bay.

The police report from the Dock of the Bay during the time when Thanner had live music was given as an exhibit showcasing the number of 911 calls with noise being the loudest complaint.

I am against live inside/outside entertainment.

Mike Kondylas testified that Ken Boone was made aware prior to the time that he purchased the subject property that there were prior court rulings prohibiting music on the property.

3. **ARGUMENT**

Pursuant to the testimony of the Protestants above, the Protestants relayed to the Board what they went through during the seven years of operation of the Dock of the Bay by Larry Tanner. The Protestants indicate they are very apprehensive to have the issue arise again. The Protestants made clear that they feel that any outdoor live music will be disturbing to them. In addition, they indicated that indoor live music becomes a problem when the doors of the restaurant are open and the music level spikes at that point. The neighbors related the extensive disturbance the operation of music from the Dock of the Bay caused them. Wayne Waldman even alleged that he sustained a heart attack as a

result of the stress from the music emanating from the Dock of the Bay. In short, the Protestants do not want to revisit the disturbance which emanated from the Dock of the Bay in the past. The Protestants are fearful that even though the present Petitioner claims that music levels will not be disturbing to the neighbors that once you introduce music all of the problems that they had before will surface again.

As indicated above, the Protestants feel that the issue of live music from the property was thoroughly litigated seven years ago ending with a decision of the Court of Special Appeals which they feel should now be honored. Permitting live music from the subject property will only start the cycle of disturbance that they testified about all over again.

WHEREFORE, the Protestants pray that this Honorable Board:

A. Deny the Petitioners Petition to have live recorded music at the Dock of the Bay under the principal of Res Judicata;

B. That this Honorable Board deny Petitioner's requested relief; and

C. For such other and further relief as the nature of the cause may require.

FRANCIS X. BORGERDING, JR.
409 Washington Avenue, Suite 600
Towson, Maryland 21204
410-296-6820
ATTORNEY FOR PROTESTANTS

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 19th day of May, 2016, a copy of the foregoing was mailed, postage prepaid, to:

Larry Schmidt, Esquire
(via email)

Peter Max Zimmerman, Esquire
(via email)

FRANCIS X. BORGERDING, JR.

RE:	PETITION FOR SPECIAL HEARING 9025 Cuckold Point Road; SE/S Cuckold Point Road, 15' SW of c/line of 5th Avenue 15th Election & 7th Councilmanic Districts Legal Owner(s): Boone Kondylas, LLC By Ken Boone Petitioner(s)	*	BEFORE THE BOARD OF APPEALS FOR BALTIMORE COUNTY 2016-003-SPH

* * * * * * * * * * * * *

MEMORANDUM OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY

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RE:	PETITION FOR SPECIAL HEARING 9025 Cuckold Point Road; SE/S Cuckold Point Road, 15' SW of c/line of 5th Avenue 15th Election & 7th Councilmanic Districts Legal Owner(s): Boone Kondylas, LLC By Ken Boone Petitioner(s)	*	BEFORE THE BOARD OF APPEALS FOR BALTIMORE COUNTY 2016-003-SPH

* * * * * * * * * * * * *

MEMORANDUM OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY

Statement of the Case

On September 30, 2014, Boone-Kondylas, LLC ("B-K") acquired 9025 Cuckold Point Road from Fifth Street, LLC ("FSLLC"). On July 6, 2015, B-K filed this zoning petition for special hearing to try to legitimize music entertainment at the Dock of the Bay. The B.L. zone (Business-Local) does not permit nightclub use, as confirmed by the 2008 County Board of Appeals ("CBA") and 2010 final judicial orders. There has been no legislative change to the nightclub definition, area zoning, or area land use or characteristics. The County Council has thus accepted the nightclub prohibition.

B-K was about to restart this use, but a liquor inspector advised it is disallowed. Undeterred, B-K filed the present petition. We call this case "**DOB II**," and the previous 2006 litigation "**DOB I**." At administrative law judge (ALJ) John Beverungen's **DOB II** hearing, the same citizens protested as in **DOB I**. B-K labeled its music as an "accessory use;" just a request to "amend the restrictions." They wanted to avoid the **DOB I** CBA, Circuit Court, and Court of Special Appeals (CSA) decisions. These had concluded that musical entertainment is a prohibited nightclub use.

On October 22, 2015, ALJ Beverungen denied the petition. He found B-K could not avoid the preclusive *res judicata* doctrine. He wrote,

> "But here, I do not believe there have been significant changes. Petitioner is still proposing to operate a restaurant that would offer live music."

ALJ Beverungen also rejected B-K's claim that its music would be less disruptive,

> "The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played

during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010)."

B-K appealed. Based on testimony and exhibits presented to the CBA, the full record confirms our definitive conclusion that *res judicata* applies as a matter of law.

DOB I: The First Miller Island Conflict

"The past is never dead; it's not even past."
William Faulkner, Requiem for a Nun

In 2005, Matthew Ciarpella began to complain about the noisy music. CSA decision, page 7, fn 5. At that time, FSLLC (Lawrence Thanner, Thanner Enterprises, principals) owned and operated Dock of the Bay. Ciarpella's April 21, 2006 complaint led to enforcement citations in May, June, and August, 2006 and an August 23 hearing. FSLLC was found to be in violation.

Concurrently, on August 23, 2006, FSLLC filed a zoning petition for special hearing (as in the present case) to try to legitimize the use as a restaurant with accessory music, and thus not a nightclub. The Zoning Commissioner denied this petition.

FSLLC appealed both decisions to the CBA, where they were consolidated. In 2008, the CBA majority (Wescott, Grier) decided the entertainment use -- including indoor and outdoor music – constituted a nightclub under BCZR Sec. 101.1. This use is not permitted in the B.L. Zone. BCZR Sec. 230.1.A.1. Therefore, it is prohibited. BCZR Sec. 102.1; Kowalski v. Lamar 25 Md. App. 493 (1975). The CBA prohibited the music use and affirmed the enforcement order, still allowing the restaurant use.

The CBA unanimously (Stahl joining the majority) denied FSLLC's motion for reconsideration, which asked the CBA to explain the definitional criteria, to advise what sort of music they could play. The CBA declined to provide such advice, recognizing the intractability and difficulty of implementation or enforcement.

The Circuit Court (2009) and CSA (2010) both affirmed. See Fifth Street, LLC v. Ciarpella. CSA Judge Deborah Eyler delivered a brilliant opinion. She explained the nightclub use is a prohibited "dual use" and found ample evidence to support the CBA

decision. Judge Eyler also rejected FSLLC's belated argument that the county enforced the law unfairly and unconstitutionally here while other restaurants offered music. The CSA mandate ended the **DOB I** judicial review.

Unfortunately, FSLLC did not comply. This caused Baltimore County to file a complaint against Thanner Enterprises. This led the Circuit Court to issue the ensuing 2010 contempt order.

All the **DOB I** CBA, Circuit Court, and Court of Special Appeals decisions are in the current record as exhibits. Petitioner's Exh. 2A, 2b, 2C, 3, 4, 5.

The Boone-Kondylas Regime

"Double, double, toil and trouble.
Fire burn, and cauldron bubble."
W. Shakespeare, Macbeth

Boone-Kondylas, LLC ("B-K") was launched in 2014 to acquire Dock of the Bay. B-K has no track record. The principals were Kenneth Boone and Michael Kondylas. Boone lives near downtown Baltimore City. He had experience in business, but none with restaurants, taverns, music, or nightclubs. Kondylas resides on Millers Island, nearby on Millers Island Boulevard. He testified he knew Thanner and the DOB I litigation history. It seems likely he brought Thanner and Boone together.

On November 3, the Baltimore County Liquor Board approved the transfer of the Dock of the Bay's Class D (On-Sale) Beer, Wine, and Liquor License from Lawrence Thanner of Thanner Enterprises to Donna Lee Kondylas (Michael's wife) and Michelle Kondylas (Michael's daughter). There was thereafter dissension between Boone and Michael Kondylas. On March 2, 2015, the Liquor Board approved a change of corporate officers, from Donna and Michelle Kondylas to Russell McClelland and Dorothea Reilly. The liquor license allows operations until 2 A.M.

B-K's current corporate structure is unclear. Kenneth Boone presented as the controlling owner and officer. He made no mention of McClelland and Reilly's involvement. Nor was that revealed until Brad Metheny described the liquor license.

Boone testified he thought the prior history involved a "hurdle" which could be overcome, and that neither Thanner nor Kondylas told him the full story. But Kondylas

testified he told Boone the history. He also gave Boone the September 24, 2014 letter from Francis Borgerding, attorney for protestants, which described "long running court battles," and "that all previous zoning decisions still apply to the property." Separately, Denise Haas, President of the Millers Island Community Association, reports in her April 25, 2016 letter that, contrary to Boone's claim of previous ignorance, Boone called her in February, 2015 and was aware of the prior restrictions.

Whatever the state or degree of prior knowledge, B-K forged ahead with another zoning petition, initiating another round of litigation. B-K has since dedicated itself to circumventing the **DOB I** CBA and court orders. B-K has sought to distance itself from Thanner, who it portrays as the "bad owner."

B-K campaigned for support from customers, employees, and others. This is reflected in the petition drive. But this also stirred negative feelings toward affected neighbors, reflected in Bonita Metheny's testimony and Denise Haas' April, 2016 letter. The Dock of the Bay facebook page became a forum to identify and criticize the opposition. Ms. Haas did not wish to see a repeat of the community divisiveness and tension among neighbors and friends. Her letter reports facebook postings of the names, addresses, and phone numbers of those who oppose the B-K petition; and that she herself received a harassing message from a DOB employee.

The Dock of the Bay

"Looks like nothing's gonna change
Everything still remains the same
* * *
Sittin' on the dock of the bay.
Otis Redding, (Sittin' On) The Dock of the Bay

The place is the same as in the Thanner days. There is still the 2400 square feet interior, including restaurant, bar, and television sets. The capacity remains at 150-60. See CSA decision page 5. There are still the outdoor patio or "courtyard" and bar. There remain the transient boat slips for customer use. Ibid.

The hours are about the same. Like B-K, Thanner previously proposed to stop the music relatively early in the evening. The B-K website anyway has a closing time of 1 A.M. on weekends. The transferred liquor license allows operation until 2 A.M.

Oppression

"Get up, stand up, stand up for your rights,
Get up, stand up, don't give up the fight."
Bob Marley, Get Up, Stand Up

The adjacent citizens suffered through the **DOB I** years. Mr. Ciarpella, Charles Wolinski, Brad and Bonnie Metheny, and Patricia Waldmann all testified at the 2008 CBA hearing as "neighbors living approximately 100 to 250 feet from the Dock of the Bay." Page 6. These distances apparently relate to the location where music is played, not from the parking areas, which are immediately adjacent to most of their properties.

They came back to testify. Wayne Waldmann also testified. Suffice it to say they provided strong reasons not only to expose **DOB II** as more of the same, but also to convey the devastating impact on their lives and health. This begins with the inevitably loud music, "above normal sound levels." There is then the cheering and noise of patrons who drink alcoholic beverages. The crowd noise spills over to the parking lot at odd hours. The music comes from the courtyard and also from inside when the door is opened. The sound carries and magnifies depending on wind direction. The sound appears to reverberate into the houses and their yards. There are no significant obstructions to interrupt or mitigate the sound. It is credible that one of the citizens suffered a heart attack due in substantial part to stress from the persistent loud music.

There is also the serious adverse impact on property values. To illustrate, the Methenys own two lots at 2712, 2714 6th Street and their dwelling at 2704 6th Street, Brad testified that family members occupying 2712 had to move out because of the noise problems. The place is now rented. If B-K were allowed to restart musical entertainment, it would be very difficult for any residents to sell their dwellings.

This is a localized area with short distances from DOB to adjacent residences. Amplified music can even fill up a concert hall, sports arena, or stadium. It is not realistic or credible that B-K can provide music, especially live music, without recurrence of

major disturbances. Thanner had also tried to portray a soft, friendly operation in his **DOB I** testimony. He also begged the CBA to frame some sort of approval. The CBA did not buy it in 2008. There is less reason to buy into it now.

Res Judicata Overview: the Peace Process

"Cause out on the edge of darkness
There rides a peace train"
Cat Stevens, Peace Train

B-K's thrust is that its new ownership involves a substantial change in conditions compared to **DOB I**. But *res judicata* for zoning is based on the essential nature of the property, not on personality, style, or programmatic details. For a multitude of reasons, we shall show BK's assertion is delusive and without merit as a matter of law.

Res judicata applies to parties and privies in quasi-judicial administrative proceedings. Batson v. Shifflett 325 Md. 684, 701-04 (1992); Powell v. Breslin 430 Md. 52, 63-65 (2013); Fertitta v. Brown 252 Md. 594, 599-600 (1969); Seminary Galleria v. Dulaney Valley Imp. Ass'n 192 Md. App. 719, 736 (2010). A successor owner is in privity with a previous owner. 13 M.L.E. Judgments Sec. 123 (2016); Walzl v. King 113 Md. 550 (1910); cf. Kim v. Collington Center III 180 Md. App. 606, 615-20 (2008). This point is especially apt in zoning cases, where issues revolve around property use rather than the owner's identity or personality. City of Baltimore v. Poe 224 Md. 428 (1961).

The public policy underlying the doctrine is that it is unfair to put parties through repeat cases. It is also inimical and subversive to the efficient and proper administration of justice. In Batson, Judge Karwacki wrote, 325 Md. at 701-02

> In *United States v. Utah Constr. Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), the Court spoke particularly to the preclusive effect of administrative law rulings, stating that:
>
> > "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." [citations omitted].
>
> *Id.* at 422, 86 S.Ct. at 1560, 16 L.Ed.2d at 661. Thus, agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court."

The Supreme Court cited Utah Constr. Co. in Astoria Federal Savings & Loan Assoc. v. Solimino 501 U.S. 104, 107 (1991). Justice David Souter added,

> "Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. ... The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal ...."

The *res judicata* doctrine is accepted worldwide: *l'autorite de la chose juge* in French, *cosa juzgada* in Spanish. Indeed, it translates into virtually every legal language.

Here, we shall review the similarities between **DOB I** and **DOB II**. We cite the legislative support of the zoning legislation and map in place. We deconstruct B-K's zoning by plebiscite tactic. We dispel B-K's "accessory use" assertion. We then discuss the aggravating factor that nightclub use is a nuisance.

There will then follow a review of key Court of Appeals opinions. We dispose of B-K's fictitious claims of substantial change and other arguments. We conclude with recent Baltimore County *res judicata* cases.

Nightmare on 6th Street: The Second Miller Island Conflict
A Clinical Comparison of the Two Cases

"These are the years between
These are the years that were hard fought and won
Contracts torn at the edges, old signatures stained with tears
Seasons of war and peace, these should not be forgotten years
* * *
The hardest years, the darkest years, the roarin' years, the fallen years
These should not be forgotten years
* * *
We will remember, these should not be forgotten years"
Midnight Oil, Forgotten Years

The Miller Island citizens along 6th Street and adjacent to Dock of the Bay suffered through The First Miller Island Conflict. It was hard fought and won (2005-10), but not without adverse impact on health and welfare.

After a few years of relative peace and respite, B-K began the Second Miller Island Conflict. The conflict is reactivating the strife thought to be over and done, which should be over and done.

In our preliminary motion to dismiss, we reviewed the BCZR Sec. 101.1 nightclub definition's incorporated Baltimore County BOCA International Building Code criteria. We referred to the 2008 CBA majority's discussion, pages 7-13, the ensuing ruling on motion for reconsideration, and the CSA decision. We found no substantial change in circumstances. The full record just reinforces our conclusion. We elaborate,

(1) Low light levels. It is the custom and practice for any tavern to have low light levels. The evidence is that Dock of the Bay is operating as it did in Thanner's time, with low light levels in the late hours. Light levels only get lower when there is music entertainment. There are no glaring bright lights or spotlights. There is no basis to conclude any substantial change.

(2) Entertainment by a live band or recorded entertainment generating above-normal sound levels. Despite Thanner's assertion in **DOB I** that the music had been moderated to duos, steel bands, or island music, the CBA recognized the sound traveled to the adjacent dwellings and concluded its discussion on page 8,

> "There is no question that the bands do play at sound levels which extend beyond the four walls of the restaurant."

Stripped of its veneer, B-K's soft scenario of acoustic guitar music is no more convincing than Thanner's island music. Thanner could also have promoted acoustic guitar, and the result would have been the same. The **DOB I** CBA found that musical entertainment, especially live music, would generate above-normal sound levels. This is logical.

Indeed, we learned that acoustic guitar music is typically amplified; that B-K's first signing, Mark Alan, has a sound system; and that he could be heard from Rowboat Willie's as far away as Bay Drive. The technology for acoustic guitar and other music amplification just gets more powerful, as with technology in other areas of life.

B-K failed to mention there would be other eastside music groups. There inevitably would be other performers, from solo to bands, and other types of music.

Given B-K's relentless petition drive to mobilize popular support, there is no doubt that patrons would demand the excitement of loud music typical of late night entertainment. In this context, the "mature audience" scenario is fictitious.

Another factor is B-K's portrayal of the opposition as obstructionists. If music were allowed, and Pandora' Box opened, any complaints will be met with disdain.

Adjacent residents Wolinski, Metheny, and Ciarpella live right next to the Dock of the Bay parking lot and within 40-50 yards of the outdoor patio area. Even the Waldmanns could hear the music 100 yards away, the length of a football field. We reiterate that amplified music can fill up a hall, arena or stadium. There is also the cheering and crowd noise, and the spillover into the parking lot.

It would be delusive to find any substantial change in conditions to suggest moderate or normal sound levels. It would only be worse.

(3) No theatrical stage accessories. As in **DOB I**, there do not appear to be any significant stage accessories. The physical facility is the same.

(4) Later than average operating hours. In **DOB I**, the CBA found the typical tavern operating hours to be later than average. Thanner had said he was stopping the music early in the evening, but this did not matter. The CBA found Dock of the Bay is a tavern which maintains the Class D liquor license, allowing service until 2 A.M.

B-K, like Thanner, has suggested it would stop service some time before midnight. But it is delusive to believe that, if allowed, the music entertainment would end at an early hour. The B-K website lists a closing time of 1 A.M. on weekends.

The average restaurant which serves dinner, even with incidental liquor, closes by 9 P.M or 10 P.M. if not earlier. Facilities with significant bar business stay open later. Dock of the Bay is a tavern with such business. If accompanied by music, the late hours would only increase as crowds energize. Again, it would be delusive to find any substantial change in circumstances which would moderate the operating hours.

(5) Tables and seating arranged or positioned so as to create ill-defined aisles. The CBA found in **DOB I** that the tables and seating appeared mainly to be arranged in

normal defined aisles, so there was no issue there. It is unclear what will happen to the aisles if B-K is allowed to have music and attracts the large crowds which it anticipates.

(6) Specific area designated for dancing. The CBA found no designated area for dancing in **DOB I**. It is unclear whether B-K would clear an area for its crowds.

(7) Service facilities for alcoholic beverages and food. The CBA found this to be present in **DOB I**, and the same situation plainly exists for the current case.

(8) High occupancy load density. The CBA noted the **DOB I** seating capacity at 150-60, a high occupancy load density. There is still the same facility with the same capacity. With outdoor entertainment, it is likely that the capacity could be exceeded.

The motion for reconsideration. In **DOB I**, Fifth Street asked the CBA to provide guidance on the above criteria. The CBA declined to give an advisory opinion. To the extent B-K wants the CBA to give some conditional approval, it is similar to **DOB I**'s reconsideration request. It should similarly be denied.

The CBA found in **DOB I** that six of eight nightclub criteria were satisfied: 1, 2, 3, 4, 7, and 8, and that this was sufficient to define the nightclub use. Judge Eyler agreed.

The CBA thus definitively disallowed musical entertainment, including live music. The decision did not depend on personality, style, type of music, type of audience, programming, performance times, or other details. Like B-K, Thanner tried chameleon-like to put across a moderate image. But a leopard cannot change its spots. When you have a tavern with serious music entertainment, you have a nightclub.

There is simply no substantial change in circumstances. Indeed, B-K's relentless drive for approval suggests the nightclub use will be more intense. Once approved in any way, shape, or form, the conditional inch would become a mile. There is no practical way to exercise control. There is no effective way to enforce a conditional approval. It was difficult enough to deal with **DOB I**.

The Legislative Sound of Silence Post-DOB I

"The sound of silence ..." Simon and Garfunkel, The Sound of Silence

FSLLC's argued also that the nightclub definition is overbroad. But the CBA majority disagreed, observing that any such complaint could be taken up with the County Council.

The CBA wrote at page 13,

> "The Board is not unmindful that the definition of a nightclub, under BCZR, can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.L. zones, might be considered "nightclubs" under the present criteria of the BCZR. It is not for the Board to change the definition but for the County Council to consider."

At the CSA, Judge Eyler made the same point, at page 21,

> "Finally, FSLLC echoes the concerns expressed by both the majority and dissenting members of the Board that the definition of a nightclub under the Zoning Code is extremely broad. We agree with the Board majority that this is a matter for the Baltimore County Council to address if it is deemed necessary. "The 'wisdom or expediency' of the [zoning ordinance] in its current form is not a matter for judicial intervention." *Lonoconing Trap Club, Inc. v. Md. Dep't of the Env't*, 410 Md. 326, 349 (2009)(quoting *Salisbury Beauty Schools v. State Bd. Of Cosmetologists*, 268 Md. 32, 48 (1973))."

On appeal, FSLLC also argued it was unfair to enforce the law against Dock of the Bay, while other restaurants supposedly could play music without interference. They recast the issue as a violation of due process and unconstitutional discriminatory enforcement. Judge Eyler found the issue not preserved. CSA decision pages 22-23. She added that Fifth Street '... cites to no Maryland authority for its propositions." Page 23.

The Court of Appeals subsequently confirmed that Baltimore County enforcement authorities may exercise discretion in choosing which violations to pursue, Falls Road Comm. Ass'n v. Baltimore County 437 Md. 115, 141-45 (2014).

To repeat, the County Council has not changed the nightclub definition or the zoning map classifications for Dock of the Bay and the neighborhood. In Washington Suburban Sanitary Comm'n v. C.I. Mitchell and Best 303 Md. 544, 559 (1985), the Court upheld an administrative interpretation undisturbed by subsequent legislative activity.

> "This legislative acquiescence in the administrative construction gives rise to a presumption that the administrative interpretation is correct."

See, e.g. Sinai Hospital v. Dep't of Employment 309 Md. 28, 46 (1987). Where an administrative interpretation or ruling results from a contested adversary proceeding, is publicly established, and thus is well known to the legislature, it is entitled to great weight across the board. Magan v. Medical Mutual 331 Md. 535, 546 (1993).

The County Council could have changed the law or map to allow music at Dock of the Bay and/or other B.L. Zone locations. The Council did no such thing. The CBA decision applies across the board. It is conclusive as to Dock of the Bay.

Zoning by Plebiscite Redux

"One great object of the Constitution was to restrain majorities from oppressing minorities or encroaching upon their just rights."
James K. Polk, President

Thanner cited and drew on support of patrons and others. B-K produced its petitions. But zoning decisions are not subject to a plebiscite. A majority, no matter how large, may not disregard the rule of law or suppress minority rights.

We wrote in in Geddes/Riffin, Circuit Court Case No. 03-C-14-013332, defending the CBA decision which denied another "accessory use" petition,

> "The Riffins have sought solace in the support of Appellant Will Geddes and some others who did not attend the hearing but signed affidavits. Apart from the debatable status of absentee affidavits, this would not justify the petition.
>
> The Court of Appeals held long ago that zoning decisions are not subject to a plebiscite by neighbors. Benner v. Tribbitt 190 Md. 6, 20 (1948), citing, *inter alia,* Eubank v. City of Richmond 226 U.S. 137 (1912). While Benner addressed a situation where various neighbors opposed a building permit for a gas station, the principle applies equally to any neighborhood opinion, whether favorable or unfavorable. So, in Cabin John Limited Partnership v. Montgomery County Council 259 Md. 661, 674 (1970), the Court sustained the trial judge's exclusion of a market survey, on the ground that it was equivalent to a plebiscite. Judge Smith there cited and quoted Benner as the main case, with subsequent iterations in Smith v. Board of County Comm'rs 252 Md. 280, 285 (1969); Mayor & Council of Rockville v. Cotler 230 Md. 335, 340 (1963); and Montgomery County v. Scrimegour 211 Md. 306, 313 (1956)."

In Riffin, unlike here, there was actually no evidence that the activities were disturbing the neighbors. Even so, neighborhood support could not overtake the rule of law.

Circuit Judge Susan Souder agreed. She wrote, while affirming the CBA's denial,

> "This Court acknowledges that the Riffins obtained and introduced into evidence at the hearing before the ALJ letters from many neighbors who do not take issue with the Riffins' equipment or use of their property. It seems that Mr. Riffin is a good neighbor to some, plowing driveways and moving felled trees for certain neighbors. However, Mr. Riffin's neighborliness is not the issue before this Court. Also, it was apparently one or more complaints that triggered the Riffins' citations, which led to the Settlement Agreement between the Riffins and the County and the Riffins' Petition for Special Hearing. Transcript at 87:18-22; 115:23-24."

In contrast, there is a disturbance here, with a tense atmosphere. The Dock of the Bay facebook page functions as a forum to identify and criticize the opposition. If not for the rule of law, the 6th Street citizens would have no protection.

Accessory Use Redux

B-K has tried to rationalize its music as "accessory" to a permitted restaurant. Thanner tried this in **DOB I.** Judge Eyler disposed of this contention. CSA pages 19-21. She confirmed the impermissible nightclub use constituted a dual principal use. It could not be covered up as a mere "accessory use." ALJ Beverungen concurred here.

The Court of Appeals has rejected similar efforts to rebrand uses. St. Clair v. Colonial Pipeline 235 Md. 578, 582-83 (1964), prohibited storage of petroleum products may not be renamed as conditionally permitted public utility use in agricultural district; Smith v. Miller 249 Md. 390 (1968), prohibited sawmill may not be rebranded as conditional processing of farm products permitted in agricultural district; Arundel Supply Corp. v. Cason 265 Md. 371, 377-78 (1972), prohibited washing, screening and batching of materials trucked in from other places may not be rebranded as accessory to permitted excavation of gravel, especially where the use is listed as a principal special exception.

We dealt with another fictitious "accessory use" suggestion in Geddes/Riffin. 2014-094-SPH. We discussed the BCZR Sec. 101.1 definitional element: "(a) is customarily incident and subordinate to and serves a principal use..." We cited Dampman v. City of Baltimore 231 Md. 280 (1963) to clarify the meaning of "incidental" is "appertaining, subordinate, or casual thereto." 231 Md. at 286. As reflected by the intensity of the current litigation's intensity, there is nothing "incidental," or "appertaining, subordinate, or casual," about the music in controversy.

The CBA rejected the Geddes/Riffin accessory use claim in its November 7, 2014 opinion, pages 7-10. The Circuit Court affirmed on December 22, 2015, addressing accessory use on pages 8-9. The case is currently on appeal at the CSA.

An Aggravating Factor: the Nuisance Dimension

"The right thing in the wrong place." Euclid v. Ambler Realty Co.

The law of nuisance focuses on substantial interference with the enjoyment of property rights. It is one cornerstone of zoning law. The Supreme Court wrote in Village of Euclid v. Ambler Realty Co. 272 U.S. 365, 387-88 (1926),

> "The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim 'sic utere tuo ut alienum non laedas,' which lies at the foundation of so much of the common low of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. Sturgis v. Bridgeman, L. R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Radice v. New York*, 264 U.S. 292, 294, 44 S. Ct. 325, 68 L. Ed. 690."

Zoning law allocates and controls uses in different zones. Zoning can provide a margin of safety to prevent uses which tend to affect adjacent property owners adversely.

There are other purposes of zoning law. Based on planning, public works, fiscal and other public interest considerations, zoning may limit uses which are not necessarily nuisances. So, even if this Dock of the Bay nightclub use were not a nuisance in this locality, it would still be prohibited. Because it has been and is by its nature so disturbing, this is an aggravating factor. Of all the zoning cases involving *res judicata*, this use strikes the cruelest and unkindest cut of all.

Maryland Court of Appeals Decisions on Substantial Changes in Conditions

"Please don't bother trying to find her
She's not there."
The Zombies, She's Not There

In 1936, the Court of Appeals applied *res judicata* to zoning case for a proposed substation post office in a residential zone. Mayor & City Council v. Linthicum 170 Md. 245 (1936). The Court observed "... there had been no change in the proposal, either in the use planned, or in the neighborhood conditions; and there was none in the relevant ordinances." Citing Linthicum, the Court in Bensel v. Mayor and City Council 203 Md. 506 (1954), similarly implemented the doctrine to sustain dismissal of a complaint to allow a nonconforming business use. Four years previously, there had been a final court judgment sustaining the Zoning Commissioner's permit denial.

Whittle v. Board of Zoning Appeals of Baltimore County 211 Md. 36 (1956), attached, addressed the matter in depth. This involved a special permit for a funeral home on York Road, Towson. In 1949, there had been a prior application, based on need, population increase, and lack of proportionate increase in funeral homes. Area residents had opposed the project based on its effect on enjoyment of their homes and on traffic. Upon judicial review of the CBA approval, the Circuit Court had reversed.

Despite this final denial, the contract purchasers acquired the property. In 1954, they filed a second petition. They adduced testimony that the neighboring church supported the petition; experts said there would be no adverse impact on traffic and parking, and no decrease in area property values or adverse psychological impact; there was more neighborhood commercial activity; and there was greater increase in population than previously. 211 Md. at 40-41. The neighbors still opposed the application, finding no need, that the use would be commercial, and it would still affect property values. The BZA granted the second petition; and the Circuit Court affirmed.

The Court of Appeals reversed. Chief Judge Brune wrote, 211 Md. at 45,

> "The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions. See Bassett

on Zoning (2nd Ed., 1940), pp. 119-120; Yokely on Zoning Law and Practice (1953 Ed.), § 128; 168 A.L.R. 124; St. Patrick's Church Corporation v. Daniels, 113 Conn. 132, 154 A. 343; Burr v. Rago, 120 Conn. 287, 180 A. 444; Rommell v. Walsh, 127 Conn. 272, 16 A.2d 483; Rutland Parkway, Inc. v. Murdock, 241 App.Div. 762, 270 N.Y.S. 971. This rule seems to rest not strictly on the doctrine of *res judicata*, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.

In the instant case we have, of course, a prior court determination and the question of *res judicata* is directly involved.

Many zoning questions do not rest upon immutable facts, St. Patrick's Church Corp. v. Daniels, supra, and the application of the rules of *res judicata* is not always so easy and so clear cut as in the Linthicum and Bensel cases. It is our view that where the facts are subject to changes which might reasonably lead to an opposite result from that arrived at in an earlier case, and if there have been substantial changes in facts and circumstances between the first case and the second, the doctrine of *res judicata* would not prevent the granting of the special permit sought by the appellees. They contend that such changes have occurred, and we shall now proceed to examine the alleged differences.

The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County; (3) decreased opposition of neighbors and some support by them; (4) additional conditions attached to the granting of the permit."

The Court then explained in detail why petitioners' assertions of changed conditions were not sufficiently substantial to escape the previous denial. It is noteworthy that the alleged changed conditions in Whittle were factual, not speculative, and looked more serious than any purported changes B-K manufactures here. But they were still rejected.

Woodlawn Area Citizens Ass'n v. Board of County Comm'rs 241 Md. 187 (1966) involved a zoning reclassification from zoning for detached houses to a zone allowing garden apartments. In 1955, a previous request had been dismissed. A 1961 application had ended in dismissal by the District Council, judicially sustained in 1962. In 1963, the applicants renewed their effort with a third application. This time, they succeeded at the District Council. The Circuit Court affirmed, on the basis of changed conditions.

The Court of Appeals again reversed. Judge Hammond wrote, 241 Md. at 197,

"We think Whittle is dispositive of the case before us."

The alleged changes in conditions involved a proposed East-West highway, still speculative; the terrain and relative suitability for garden apartments, still the same; the

need for apartments and the increase in population, not considered a substantial change; eight zoning reclassification of other properties to garden apartment zones, but irrelevant because on the far side of busy highways; rezoning of a shopping center and two other commercial areas, found not to affect the residential neighborhood character; and that the definition of the requested zone had been altered, making it more like a floating zone, but the only change was a modest decrease in density, still allowing many apartments. 241 Md. at 197-201. Once again, the changes found insubstantial in Woodlawn Citizens were far greater in type and magnitude than those in the present case.

In the same year, the Court decided Alvey v. Hedin 243 Md. 334 (1966). Mrs. Alvey tried to avoid denial of her previous request to rezone property from agricultural to heavy commercial to operate a marina. She alleged her second application asked for a light commercial instead of heavy commercial zone; an adjacent property had been rezoned from agricultural to cottage residential; and there was need for more boating and mooring facilities. The Court rejected these changes as insubstantial. 243 Md. at 340-42. Again, the alleged changes in Alvey were greater than the imagined B-K changes. In the same year to the same effect is Chatham Corp. v. Beltram 243 Md. 138 (1966).

These cases show that a substantial change in conditions must be relevant, essential, and involve the property and neighborhood. They do not pertain to the applicant's personality. They do not pertain to stylistic, programmatic, marketing, or other details. B-K's alleged changes are even more cosmetic and delusive than the alleged changes deemed insubstantial in the foregoing Court of Appeals decisions.

Miller Island Mythology

> ***"A great deal of intelligence can be invested in ignorance when the need for illusion is deep."*** Saul Bellow, To Jerusalem and Back (1976)
>
> ***"Red Herring" "something intended to divert attention from the real problem or matter at hand; a misleading clue"... "anything that diverts attention from a topic or line of inquiry"*** **... earlier simply** ***"a false lead"*** Dictionary.com

It is challenging in a zoning case to keep one's eye on the ball. This calls here for identification and dissection of B-K's misleading and tangential arguments.

(1) The "acoustic guitar" myth: B-K testified there would be acoustic guitar music, suggesting it would be relatively quiet. Thanner had made a similar pitch in 2008 --- toning down to "mostly duos or steel bands" (CBA majority page 4), otherwise described as "island music" (CSA decision page 6).

B-K gave Mark Alan as the prospective first performer of soft acoustic music. But when Charles Wolinski testified, we learned Mark Alan uses an amplifier. Based on Alan's proffered website, he uses a Bose sound system, Shure microphone, and Crafter guitar. There were reports also that his performance at Rowboat Willie's disturbed residents as far as five blocks away on Bay Drive.

In the music world, there are many sorts of equipment available to amplify acoustic guitars. The CBA could take notice of this with a brief Google search. The so-called quiet "acoustic guitar" scenario is misleading.

Moreover, if B-K is allowed to have live music, it is inevitable there will be all sorts of musicians and bands besides Mark Alan. The citizens indicate a variety of acts play on the east side. There is no proof that any other acoustic guitar players perform in the area, so the situation is open-ended. To suggest that a tavern open potentially until 2 A.M. with a Class D liquor license will have soft music is misleading.

(2) The "mature audience" myth: B-K testified, and Mark Alan signed a statement, that DOB would attract "mature audiences." These would be in the 40 to 60 year old range. Putting aside the obvious initial observation that there will be patrons of various ages, with some musicians attracting a young crowd, the portrayal of the 40 to 60 year old generation as a "quiet music" generation is absurd.

As should be apparent, and as was confirmed in citizen testimony, the current 40 to 60 year old generation was born (1955-75) toward the latter part of the baby boom generation and beginning of Generation X. These are the generations which grew up with rock and roll, R & B, disco, MTV, VH1, and even punk rock and heavy metal. Their interest in the music they grew up with doesn't disappear when they reach the age of 40. The "mature music" pitch is delusive.

(3) The "moderate hours" myth: B-K suggested it might or would close early, despite its posted 1 AM website closing time. By "early," it might be 11 P.M. But this is the same kind of pitch made by Thanner. Indeed, he testified that he had discontinued all outside evening music, that is to say, even music until 9 P.M. CSA decision, page 6.

As a practical matter, if any live music is allowed in any way, shape, or form, then any supposed time limit will evaporate. It would be the musical opening of Pandora's Box. Any effort at enforcement would be ineffective and intractable. The music would continue as B-K would spin its way into a defensive posture.

(4) The "special order" (camel's nose) myth: B-K's strategy is to secure CBA approval to fit their promotion of a moderate operation based on type of music, target audience, and hours. This resembles the scaled back operation Thanner pitched, described in the 2008 CBA and 2010 CSA decisions. It resembles also Thanner's motion for reconsideration, which sought the advisory opinion.

The CBA in 2008 deemed it inappropriate and impractical to frame or implement some cosmetic conditional approval. There is a classic metaphor of the camel who gets his nose under the tent. The problem is that once the camel get his nose in the tent, it is not long before the camel is all in, displacing the tent dwellers. Given an inch, B-K could take the mile, and life along 6th Street would be miserable.

(5) The "other bars with music" myth. B-K brought up music at Rowboat Willie's and the Sail Inn. While the situations there are quite different, the main point is that this issue is another rerun from **DOB I.** We addressed this issue in our discussion of FSLLC's arguments that the nightclub definition is overbroad and enforced unfair.

Moreover, the claims of unfairness do not add up. The other situations are not comparable. Rowboat Willie's is in the B.M. (Business-Major) Zone, where nightclubs are permitted. BCZR Sec. 233.1.B. It does not border the residences on Sixth Street. Rowboat Willie's tavern area is a small part of the "Bill's Boats" boatyard. The outdoor music area is much smaller than the DOB patio/courtyard. While some of their music apparently generated complaints as far away as Bay Drive, these do not seem to have been persistent or as problematic as the DOB music.

Meanwhile, Sail Inn, albeit zoned B.L., is a much smaller facility. It does not have an outdoor music area. The music there is only indoors and has not posed a problem.

(6) The "Fisherman's Inn" myth. B-K cross-examined about the Fisherman's Inn, which operated in the twentieth century, before Hurricane Isabel. Fisherman's Inn is irrelevant. The history was available for review in **DOB I.** Moreover, such vague evidence as was elicited here suggested just occasional modest inside music. Fisherman's Inn never had the type, magnitude, duration, or problematic character of the music later associated with Dock of the Bay.

B-K seemed to imply that some residents who constructed dwellings around 2003 should not object to above-normal sounds of music because they knew or should have known of prior commercial use at the inn. This apples and oranges implication is absurd, demeaning, and disrespectful. Even Thanner did not make that pitch.

(7) The "protestants on 6th Street reside on B.L. Zone properties" myth: This is another delusive pitch. There has been no change in the area zoning since **DOB I**. A dwelling is a permitted use in any B.L. Zone which adjoins a residential zone, such as here. BCZR Sec. 230.1.A. The 6th Street residents do not forfeit their rights to quiet enjoyment or to complain about adjacent illegal activities by virtue of the B.L. Zone.

Seminary Galleria and other recent Baltimore County cases

"It's déjà vu all over again." Yogi Berra

The County Board of Appeals often remembers its own history. Here is an update.

(1) **Seminary Galleria, LLC v. Dulaney Valley Imp. Ass'n** 192 Md. App. 719 (2010). This involved business parking in the residential zone split at the Galleria shopping/office complex in Lutherville at York Road and Seminary Avenue. **SG** tried to overcome the initial final denial by arguing that facts and circumstances had changed: that it was required to have 1,000 parking spaces instead of the 728 originally thought based on a newly found tenant mix and "... characterization of the entire complex as a 'shopping center;'" that it had a new 'zoning verification letter;' and that there were specific aspects of the 14 parking spaces. 192 Md. App. at 731, 739-41. The CBA approved the second petition in 2008 (Stahl, Crizer). But their decision was reversed, on

judicial review as a matter of law. Judge Meredith reviewed the Court of Appeals cases in detail and essentially found no substantial change in conditions.

(2) **Back River, LLC v. Baltimore County:** CBA No. 2008-531-SPH (2013), Belt, Zerwitz, Wescott; CSA No. 2495, Sept. Term, 2013 (2014), Arthur, J. This involved side and rear yard setbacks for a cell phone tower at 810 Back River Neck Road, adjacent to residentially zoned property. **BRLLC** tried to overcome its previous variance denial by another claim of substantial change in circumstances: that the law had changed so as to allow the tower next to the adjacent vacant residentially zoned property; that a dwelling was no longer on an adjacent property; and that they filed a special hearing instead of a variance. The CBA rejected these arguments, and the CSA affirmed.

Judge Arthur dissected each of the arguments. He explained,

> The two petitions involve a single transaction: Sprint's attempt to secure permission from the local zoning bodies to retain a wireless telecommunications tower on the property." Pages 18-25.

He exposed **BRLLC's** suggestion of a change in the law as fallacious, "an unconvincing exercise in sophistry," Pages 25-33. Even if **BRLLC's** legal theory were correct, it could have argued the point in the first case and also adjusted the tower location to avoid the need for variances, Pages 33-36. Furthermore, **BRLLC'S** argument that it was precluded from asserting its new theory in the first case was specious, Pages 36-40.

(3) **In the Matter of Steven and Joanne Galasso,** CBA No. 13-029 (2013), Murphy, Thurston, Gioioso. This involved a request for map correction to secure a business zone in Lutherville on Falls Road. The CBA applied the "transaction" test to find the petition raised issues equivalent to those of previous cases. Pages 9-13. The Galassos appealed, but then voluntarily dismissed their appeal. Civil Action No. 03-C-14-000485 (2014).

(4) **In the Matter of Harlan Zinn**, CBA No. 13-295-SPH (2014), Murphy, Thurston, Gioioso. This involved a request to approve a dwelling on an undersized waterfront lot on Cold Spring Road in the Bowleys Quarters area. The petitioners in the first case (2003), Janice Oberst and Robert Long, had requested variances; in the second case (2004) Oberst and Zinn requested approval to build a dwelling on an undersized lot. These two cases resulted in denials.

In 2007, Zinn filed another request for variances, which the Zoning Commissioner and the CBA both dismissed based on *res judicata*. But Zinn filed yet another petition, which the CBA heard in 2013. Zinn's new argument for change was that the small lot table provisions do not apply. He also asserted the property was larger than originally thought. Citing Seminary Galleria and Powell v. Breslin, the CBA dismissed this petition. The CBA found it "incredulous' that Zinn would claim the small lot table does not apply after his repeated requests for relief from such restrictions. Page 10.

(5) In the Matter of Belvedere Baptist Church (Davenport Preschool) CBA No. 15-004-SPH (2015), Thurston, Alston, Rosen. Here, the preschool on Cheverly Road requested relief from a condition imposed in the final 2013 grant of their special exception. They wanted a maximum of 150 children, instead of the 120 maximum set in the earlier case, which had been contested by area residents. In setting the limit, the ALJ had recognized the residents' traffic congestion concerns.

The preschool argued that conditions had changed. They argued that the actual operation of the school showed how safe it was, that there had been no accidents, and that parents were required to sign a statement regarding safe driving. They also cited the growth of the student population and the need to accommodate them. The CBA rejected these arguments, indicating that the traffic issues and the needs of the school were there in the first case and had been resolved there. If the preschool was unhappy with the condition in the earlier case, they should have filed an appeal.

(6) In the Matter of Andrew and Stephanie Mattes, CBA No. 11-051-SPH (2012), Wescott, Belt, Crizer. This involved a petition by area citizens to obtain a determination that fishing and crabbing operation on Island View Road had exceeded the scope of its 1978 use permit approval. Zoning Commissioner Wiseman had previously denied their petition to determine that the permit itself was illegal; but in his opinion, he advised that they could file another petition to seek review of their additional concern that the expansion or intensification was excessive and illegal.

The owners/operators of the commercial fishing operation asserted *res judicata*. Our office argued that the expansion issue was sufficiently different from the validity of

the original permit to be separate. We stressed that ZC Wiseman had explicitly advised concerned residents to file a new petition. It would therefore be extraordinarily unfair to apply *res judicata* in this unique circumstance. Nevertheless, the CBA held that *res judicata* was applicable, and dismissed the petition.

Mattes reflects just how strongly the CBA upholds the law. It sends another strong message that repeat litigation is not acceptable. There are not even equitable excuses.

Conclusion: Whoah

> ***"He just says***
> ***Whoah -- oh***
> ***Don't wanna see you back here again."***
> Midnight Oil, Whoah

> ***"And worse I may be yet. The worst is not***
> ***So long as we can say 'This is the worst.'"***
> W. Shakespeare, King Lear

Res judicata fits this case and precludes the latest petition. A change in ownership does not translate to a substantial change in conditions. **DOB I** concluded definitively that musical entertainment is prohibited. There is even more to say.

Compared with the key Court of Appeals cases, the land use involved in this litigation poses the most aggravating, direct, immediate, and intense adverse effect on the health and welfare of the affected citizens. The same can be said compared with the cases to come before the CBA in the last decade. There is no more fitting case to put to rest, for the reasons given by Justice David Souter, previously quoted,

> "Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. ...

As a matter of law, the County Board of Appeals should and must deny this petition.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May, 2016, a copy of the foregoing Memorandum of People's Counsel for Baltimore County was mailed to Francis Borgerding, Jr, 409 Washington Avenue, Suite 600, Towson, Maryland 21204, attorney for Protestants and Lawrence Schmidt, Esquire, 600 Washington Avenue, Suite 200, Towson, Maryland 21204, Attorney for Petitioner(s).

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

211 Md. 36
Court of Appeals of Maryland.

James L. WHITTLE et al.
v.
BOARD OF ZONING APPEALS OF BALTIMORE COUNTY, and J. Liston Wiedefeld et al.

No. 210.
|
Aug. 20, 1956.

Certiorari proceeding to review decision of Board of Zoning Appeals granting special permit to use building in residential area for funeral home. The Circuit Court, Baltimore County, Lester L. Barrett, J., entered its order affirming board's order and protestants appealed. The Court of Appeals, Brune, C. J., held that where essentially same facts appeared in 1949 hearing on petition for special permit to use building for funeral home as appeared or could have been shown in hearing on present petition and where Circuit Court had entered judgment denying 1949 petition, petitioners were barred by res judicata.

Reversed and remanded with directions.

West Headnotes (9)

[1] **Judgment**
Courts or Other Tribunals Rendering Judgment

Fact that decision on 1949 petition to obtain special permit to use building in residential area for funeral home was that of a Circuit Court did not prevent operation of rule of res judicata.

1 Cases that cite this headnote

[2] **Zoning and Planning**
Successive applications

Provisions of zoning ordinance prohibiting board of zoning appeals until after lapse of 18 months from considering and acting upon new application for special permit previously denied does not dispense with rule of res judicata.

3 Cases that cite this headnote

[3] **Zoning and Planning**
Successive applications

General rule is that after lapse of such time as may be specified by ordinance, a zoning appeals board may consider and act upon new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions because it would be arbitrary for board to arrive at opposite conclusions on substantially same state of facts and same law.

8 Cases that cite this headnote

[4] **Judgment**
Effect of change in law or facts

Where facts are subject to change which might reasonably lead to opposite result from that arrived at in earlier case and if there have been substantial changes in facts and circumstances between first and second case, the doctrine of res judicata does not prevent granting of special permit to use building as funeral home in residential area.

13 Cases that cite this headnote

[5] **Judgment**
Effect of change in law or facts

Where court's determination in 1949 denied petition for special permit to use building on property in residential area for funeral home, construction of new stone church to replace wooden church adjacent to property and addition of one new filling station in neighborhood and in area containing two such stations was not sufficient change or increase in commercialization to make doctrine of res judicata inapplicable to 1954 petition to obtain permit for same use.

3 Cases that cite this headnote

[6] **Judgment**
Effect of change in law or facts

On hearing on 1954 petition for special permit, previously denied by court's determination in 1949, to use building in residential area for funeral home, testimony of increased population in area and need for funeral home did not show materially different situation from that prevailing in 1949 and evidence of less opposition in neighborhood did not show such change in circumstances as to make doctrine of res judicata inapplicable.

5 Cases that cite this headnote

[7] **Judgment**
Effect of change in law or facts

Where court's determination in 1949 denied petition for special permit to use building on property in residential area for funeral home, additional conditions which were attached to granting petition for same permit in 1954 and which restricted area covered, required more extensive planting of shrubbery, and changed proposed lighting and sign amounted to only slight distinction and did not render doctrine of res judicata inapplicable.

3 Cases that cite this headnote

[8] **Judgment**
Scope of Adjudication

Application of rule of res judicata does not depend upon whether or not the case was as comprehensively or persuasively presented at first trial as at second.

3 Cases that cite this headnote

[9] **Judgment**
Identity of Subject-Matter

Where essentially same facts appeared in 1949 hearing on petition for special permit to use building in residential area for funeral home as appeared or could have been shown in hearing on 1954 petition and where Circuit Court had entered judgment denying 1949 petition, petitioners on 1954 petition were barred by res judicata.

Cases that cite this headnote

Attorneys and Law Firms

*38 **42 Kenneth C. Proctor, Towson, for appellants.

George W. McManus, Jr., Baltimore and W. Albert Menchine, Towson (O'Conor & McManus, Baltimore, on the brief), for appellee.

Before BRUNE, C. J., and DELAPLAINE, COLLINS, HENDERSON and HAMMOND, JJ.

Opinion

BRUNE, Chief Judge.

This is an appeal from an order of the Circuit Court for Baltimore County affirming an order of the Board of Zoning Appeals of Baltimore County which had granted a special permit to the individual appellees (hereinafter usually referred to as 'the appellees') to use the building located at 7400 York Road as a funeral home. The Board of Zoning Appeals had reversed the Zoning Commissioner who had denied the request for a special permit.

The first and principal controversy is whether or not a prior adverse ruling by the Circuit Court for Baltimore County on an application for a special permit for a funeral home on the same premises is *res judicata* as to the present case.

The earlier petition was filed on November 23, 1949, by Lucretia G. Leonard, as owner, and the appellees, as contract purchasers, to obtain a special permit to use the same property as a funeral home. This petition was denied by the Zoning Commissioner, but was granted by the Board of Zoning Appeals *39 which reversed the Zoning Commissioner on appeal by the petitioners. The only witnesses produced by the petitioners at the hearing before the Board were J. Liston Wiedefeld, one of the petitioners, and Charles D. DeLosier, who was the secretary of the Maryland State Funeral Association. Mr. Wiedefeld testified that the property in question had been used as a Medical Research Laboratory from 1934 to 1943 and that it had not been used as a residence during that time. He testified further that there was a great need for a funeral home in the neighborhood because of the great increase in the population of Baltimore County and the lack of increase in a proportionate number of funeral establishments. He also testified that at that time he owned a

funeral home in Baltimore and did not intend to move it to the proposed new location but intended to operate two separate funeral establishments. Mr. DeLosier testified that there was a definite need for a funeral home in the neighborhood because of the large population. Eight witnesses testified in opposition to the petition to the effect that they had lived in a highly residential area with fine homes and that their homes either abutted on or were in close proximity to the property in dispute and that the issuance of the special permit would adversely **43 affect the value and enjoyment of their homes and would increase the traffic along York Road. The Board of Zoning Appeals stated in its opinion reversing the Zoning Commissioner that it felt that the granting of the special permit for a funeral home 'will not create congestion and increase the traffic hazard, will not affect the health, safety or the general welfare of the people of the community, neither does the Board feel that the granting of this special permit will depreciate the value of adjacent property.' The Board attached as a condition to the granting of the permit 'the planting of additional shrubbery on the north side of the property.'

The neighboring property owners then filed a petition for a writ of certiorari in the Circuit Court for Baltimore County to review the decision and order of the Board of Zoning Appeals. Judge John B. Gontrum, in reversing the Board of Zoning Appeals, found that the petitioners had offered no testimony that would justify the granting of the permit and *40 that the granting of the permit would have an adverse effect on the value of the real estate in the vicinity.

Thereafter, following a motion for reargument, Judge Gontrum adhered to his original decision and filed an opinion in which he reviewed the testimony before the Board of Zoning Appeals, and relied principally upon Heath v. Mayor and City Council of Baltimore, 187 Md. 296, at page 304, 49 A.2d 799, and Jack Lewis, Inc. v. Mayor & City Council of Baltimore, 164 Md. 146, 164 A. 220. He added to what Judge Offutt wrote in the Jack Lewis, Inc., case about the depressing effect of a funeral home in a residential area, some quotations on the subject of death from Bacon and Shakespeare and some comments of his own on the different manner in which death is regarded by different peoples of the in different places. In speaking of the attitude of many persons in this section of the country, he observed that 'The solace of religion and the consolations of philosophy are not sufficient to change the fundamentally pessimistic attitude of most persons toward death and the grave.' He also pointed out that the term, 'funeral home,' is a euphemism and that such an enterprise is commercial, not residential.

At the time of the decision of the first case by the Circuit Court for Baltimore County, there was no provision for a further appeal in a Baltimore County zoning case to the Court of Appeals, so that the decision of the Circuit Court was final.

The Wiedefeld's contract to purchase the property at 7400 York Road was conditioned upon the special permit for a funeral home being granted. In spite of the fact that the permit was denied, they proceeded to purchase the property. Thereafter, on April 27, 1954, the appellees, now the owners of the property, filed and second petition which gives rise to the present case for a special permit to use the same property for a funeral home. Upon denial of this petition by the Zoning Commissioner, they appealed to the Board of Zoning Appeals, which reversed the Commissioner and granted the special permit.

At the hearing before the Board, the appellees called twelve witnesses. Among them were the pastor of a church which adjoins the subject property on the south and which has over *41 200 members, and also several neighbors, all of whom said that they had no objection to a funeral home being on the property, and some of whom testified that they thought the establishment of a funeral home on the property would be beneficial to the neighborhood. There was also testimony that a funeral home would have no adverse effect on York Road traffic and parking because there would be sufficient off-street parking furnished on the ample grounds of the home itself. There was further testimony by real estate experts that a funeral home at this location would not decrease the value of residential property in the neighborhood. There was also testimony that it would **44 cause no psychological ill-effects on the neighbors; and there was some testimony relating to commercial activity in the neighborhood which was claimed to have changed its basic characteristics. Finally there was testimony that the population of Baltimore County had increased tremendously since 1949, the date of the first application, and that there was now even a greater need for more funeral homes in the county.

Six witnesses testified on behalf of the appellants objecting to the issuance of the special permit. Their testimony was to the general effect (1) that there was no need for a funeral home in the area, (2) that the granting of the permit would make the place commercial and (3) that it would adversely affect the value of neighboring properties.

After the decision of the Board of Zoning Appeals, the protestants filed a petition for a writ of certiorari in the Circuit Court for Baltimore County to review its decision and Order.

The appellees were granted leave to intervene as parties defendant. Judge Lester L. Barrett upheld the decision of the Board of Zoning Appeals, holding that the Board had acted in the exercise of its discretion in granting the special permit. In rejecting the contention that the previous decision by Judge Gontrum made the matter *res judicata*, he stated that 'there is reason to believe, from the record, that since the ruling of Judge Gontrum, at least one additional commercial usage, that of a filling station has been granted in the immediate location, and, in addition, Judge Gontrum based his ruling *42 on an entirely different record than the one that is now before this Court.'

The appellants raise two questions:

1. Is the decision of the Circuit Court for Baltimore County in the first case *res judicata* in the second case?

2. Are the sections of the Zoning Regulations for Baltimore County which provide for the issuance of a special permit or exceptions for a funeral establishment in a residential zone invalid because they authorize unlawful 'spot zoning?'

We find it necessary to consider only the first of these questions.

The appellants contend that under the doctrine of *res judicata* and the decision of the Circuit Court in the 1949 case, the petition in the present case should have been denied. They rely particularly upon Mayor and City Council of Baltimore v. Linthicum, 170 Md. 245, 183 A. 531, and Bensel v. Mayor and City Council of Baltimore, 203 Md. 506, 101 A.2d 826, in support of this contention.

In Mayor and City Council of Baltimore v. Linthicum, the petitioner in January, 1933 and again in October, 1933, filed petitions to use a piece of property in a residential area as a post office sub-station. Both of these petitions were rejected because the proposed use would be a business use. The petitioner appealed to the Baltimore City Court from the denial of his second petition, and that Court affirmed the Board. No appeal from the City Court to this Court in such a case was then allowed. The owner then instituted mandamus proceedings, but such proceedings were held inappropriate and no appeal was taken. After the passage of Chapter 448 of the Acts of 1935, which allowed an appeal to this Court from orders of the Baltimore City Court in zoning cases, the owner filed a third petition for a special permit to use the same property as a post office sub-station. This was denied by the Board of Zoning Appeals, the case was appealed to the Baltimore City Court and on this occasion the City Court reversed the Board and held that the permit should have been granted. On appeal to this Court, the judgment of the Baltimore City Court was reversed, and the Court of Appeals held that the petitioners *43 were bound by the first decision. The proposed use was still a business use and the first decision was *res judicata* of that question.

**45 In Bensel v. Mayor and City Council of Baltimore, 203 Md. 506, 101 A.2d 826, the appellant had filed an application, based upon an alleged non-conforming use, to continue using his place of residence as a place of business. It was held by the Baltimore City Court on appeal from the Board that there was not enough evidence to show a non-conforming use, and no appeal was taken from that judgment. Four years later the appellant filed an amended bill of complaint in the Circuit Court of Baltimore City alleging essentially the same facts as in the first case and asking for a declaratory decree declaring that he had a non-conforming use in the property. The Circuit Court held that the first case had adjudicated the question whether there was or was not a non-conforming use and was therefore conclusive of the rights of the parties, and this Court affirmed this holding. The fact that there was not a non-conforming use on a certain date was a fixed and stable fact and could not be changed by anything that happened thereafter.

The Linthicum and Bensel cases differ from the present case in that the facts which had been adjudicated in the first litigation were not, and could not be, affected by any change in facts or circumstances or conditions which might have occurred in the interim between the two suits. In the Linthicum case, a business use continued to be a business use; in the Bensel case, the existence or non-existence of a non-conforming use on a past date could not be affected by any subsequent event. (There had been no amendment of the law in either of those cases, nor is any amendment of the law involved in the instant case.)

The Linthicum and Bensel cases do not hold that the denial of a special permit which has once been sustained (or ordered) by a court of competent jurisdiction can never be reopened or reconsidered, and we do not understand the appellants' contention as going so far as to assert such a doctrine. They seem to concede that a change in circumstances might warrant reconsideration and a different result in an application for a special permit in such a case as the present, but they *44 deny that a showing of any substantial change in facts or circumstances has been made. The correctness of this contention is the key to the case.

[1] [2] Before going further, we may take note of several points. First, the fact that the decision on the 1949 petition was that of a Circuit Court does not prevent the operation of the rule of *res judicata*. Mayor and City Council of Baltimore v. Linthicum, Bensel v. Mayor and City Council of Baltimore, both cited above. Second, the doctrine of *res judicata* has been held not to be applicable where the earlier decision was made not by a court of record, but by a board of zoning appeals, an administrative agency. Knox v. Mayor and City Council of Baltimore, 180 Md. 88, 23 A.2d 15. Third, provisions of a zoning ordinance such as the Baltimore County ordinance, under which, until after the lapse of a period of six months [now eighteen months in Baltimore County] a board of zoning appeals may not consider and act upon a new application for a special permit previously denied does not dispense with the rule of *res judicata*. Mayor and City Council of Baltimore v. Linthicum, supra. As was said in that case in speaking of a similar provision in the Baltimore City ordinance (170 Md. at page 249, 183 A. at page 533):

> 'For the decision of this case we need not determine exactly what was within the contemplation of the clause in its reference to subsequent submission of substantially the sme application to the board of zoning appeals. We do not interpret it to dispense with the rule, so as to provide that after an owner has submitted to the courts on appeal the questions of the character and classification of his use, and the correctness of its exclusion, and has obtained a decision that it is a business use, rightly excluded from the particular **46 neighborhood, he can continue asking every six months for judicial decisions on exactly the same questions. If that were the meaning, this court, under the act of 1935, as well as the trial court, would be required to examine and decide the case as often as the owner might wish to bring it up, allowing six months' intervals in his activities. The *45 words seem to us to require no such interpretation, and we think it would be unreasonable to attribute that purpose to the Legislature.'

[3] The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions. See Bassett on Zoning (2nd Ed., 1940), pp. 119-120; Yokely on Zoning Law and Practice (1953 Ed.), § 128; 168 A.L.R. 124; St. Patrick's Church Corporation v. Daniels, 113 Conn. 132, 154 A. 343; Burr v. Rago, 120 Conn. 287, 180 A. 444; Rommell v. Walsh, 127 Conn. 272, 16 A.2d 483; Rutland Parkway, Inc. v. Murdock, 241 App.Div. 762, 270 N.Y.S. 971. This rule seems to rest not strictly on the doctrine of *res judicata*, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.

In the instant case we have, of course, a prior court determination and the question of *res judicata* is directly involved.

[4] Many zoning questions do not rest upon immutable facts, St. Patrick's Church Corp. v. Daniels, supra, and the application of the rules of *res judicata* is not always so easy and so clear cut as in the Linthicum and Bensel cases. It is our view that where the facts are subject to changes which might reasonably lead to an opposite result from that arrived at in an earlier case, and if there have been substantial changes in facts and circumstances between the first case and the second, the doctrine of *res judicata* would not prevent the granting of the special permit sought by the appellees. They contend that such changes have occurred, and we shall now proceed to examine the alleged differences.

The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County; (3) decreased opposition of neighbors and some support by them; (4) additional conditions attached to the granting of the permit.

[5] *46 Only two changes in the immediate neighborhood are shown. One is the construction of a new stone church building to replace a wooden one on the property just south of the appellees' land. That involves no commercialization. The other is the addition of one filling station in an area already commercial and already containing two such stations. Its distance from the Wiedefeld property is not clearly shown, but it would seem to be about 400 feet to the south on the York Road.

There have been considerable commercial developments on the York Road both north and south of the appellees' property. The road itself is a heavily traveled north-south highway to the north of the City of Baltimore. La Paix Avenue runs west from the York Road a little to the north of the Wiedefeld land and a number of lots fronting on the south side of La Paix Avenue back on the Wiedefeld tract. Both to the west of No. 7400 York Road and along La Paix Avenue the area is residential. Apart from the new filling station, none of the new commercial developments along the York Road, so far as we are informed, have had any effect upon the residential character of the neighborhood where the protestants live. That one new filling station, some 400 feet to the south on a busy highway, at or near an intersection already having two filling stations does not, in our judgment, show any substantial **47 change or increase in commercialization between 1949 and 1954.

[6] Increased population of the county and an asserted need for a new funeral home in the Towson area to meet the needs of an increased population added no new element to the case. They were among the items relied upon by the appellees in their first effort to secure a special permit. In the second case, they offered testimony to show a further increase in population and hence a greater need for a new funeral home. Testimony on this phase of the case was more detailed in the second case than in the first, but the issue was the same and the testimony in the present case does not, in our estimation, show a materially different situation from that prevailing in 1949.

*47 With regard to the attitude of the neighbors, there was undoubtedly less opposition to the appellees' second application for a permit than to their first, and some neighbors supported the second application. The Board attached a good deal of weight to these facts. This Court had on several occasions expressed disapproval of zoning and kindred actions being based upon a 'plebiscite of neighbors.' Benner v. Tribbitt, 190 Md. 6, 57 A.2d 346, 353; Northwest Merchants Terminal, Inc., v. O'Rourke, 191 Md. 171, 60 A.2d 743; Kahl v. Consolidated Gas, Electric Light & Power Co., 191 Md. 249, 60 A.2d 754. The latter case and Board of County Com'rs of Anne Arundel Co. v. Snyder, 186 Md. 342, 46 A.2d 689, indicate that the wishes of residents of a neighborhood may be considered by the legislative body in enacting a restrictive regulation; but, as was said in the Kahl case [191 Md. 249, 60 A.2d 757], 'A restrictive act may not be passed or a permit refused merely because the community wants it.' These cases dealt with the imposition of restrictions, not their waiver, but the guiding principle would seem to be the same as to either the benefit of the community at large. The opinion in the Kahl case shows this to be the basis for the rule, for in the sentence following the above quotation, the majority opinion states: 'But even if the community wants it, that does not invalidate the action of the authorities, if such action is beneficial to the community at large, and prevents the erection of structures inimical to the public health, welfare or safety.' 191 Md. at page 256, 60 A.2d at page 757. There does not seem to have been any difference between the majority and minority opinions on this point. Judge Henderson's dissenting opinion, in which Judge Delaplaine joined, states, at page 264 of 191 Md., at page 761 of 60 A.2d: 'It is quite true that zoning looks to the future, and has as one of its principal objects the preservation of property values in residential districts by prohibiting or restricting the establishment of new commercial or industrial enterprises in particular areas.'

The opinion of the neighbors is doubtless of some weight in appraising the probable effect upon land values in a community of a proposed change in the use of some of the land in the neighborhood; and it is true that Judge Gontrum attached *48 some importance to the widespread neighborhood opposition to the appellees' first petition. However, the extent of the actual change shown in the attitude of neighbors does not seem impressive. Those most directly affected remain opposed to the appellees' petition. It is not shown how many of the members of the nearby church lived in the immediate vicinity-other than the minister-and it appears that a considerable part of the congregation lived at some little distance from the church and the proposed funeral home. One newcomer to the neighborhood who lived on the other side of the York Road favored the petition, another witness who resided 500 feet away, also on the other side of the York Road and in the neighborhood of the filling stations, favored it. Still another, a personal friend of Mr. Wiedefeld, who lived a block or so away, and who was doubtful whether he could see the Wiedefeld property from his home, but thought he might possibly be able to see it from the second floor, was **48 favorable to the granting of the permit. He admitted that his feelings might be different if the funeral home was to be alongside of his home.

None of these witnesses, so far as we are informed, testified to any facts upon which his opinion was based which had not been presented, or available for presentation, in the first case.

In our view, such change in neighborhood sentiment as may be shown by the record, including any inference which may be drawn from the absence of organized neighborhood association opposition in the second case, does not show such a change in circumstances as to make the doctrine of *res judicata* inapplicable.

[7] The additional conditions attached to the granting of the permit in the second case seem to amount to only slight distinctions.

Restricting the area covered by the permit to a depth of 400 feet west of the York Road made no substantial practical difference at least with regard to the immediate use of the property. That 400 foot depth included, as the Board stated, all of the area which the petitioners proposed *49 to use for the funeral home according to a plat submitted to the Board. This plat also showed some plans with regard to shrubbery, parking areas and driveways, and was incorporated by reference in the Board's opinion and order. Its provisions with regard to the planting of shrubbery were somewhat more extensive than what was required by the Board's order in the first case. There were also some changes in proposed lighting and in the sign to be placed at the entrance, but they were of little moment.

In general, we think that the petitioners presented a more thorough and persuasive case on their second application than on their first. This was notably true of the evidence with regard to the probable effect of the establishment of a funeral home upon land values in the neighborhood, even though the trial Judge declined to accept the appraisers' views based upon comparable properties in another suburban area at their full face value, because they did not take sufficiently into account the general rise in land values.

[8] But the application of the rule of *res judicata* does not depend upon whether or not the case was as comprehensively or persuasively presented at the first trial as at the second. As was stated in Sterling v. Local 438, etc., 207 Md. 132, 113 A.2d 389, 393, certiorari denied 350 U.S. 875, 76 S.Ct. 119, 100 LEd. 773, rehearing denied 350 U.S. 898, 76 S.Ct. 151, 100 L.Ed. 789, motions for leave to file petitions for rehearing denied 350 U.S. 943, 76 S.Ct. 298, 100 L.Ed. 823, 'If the second suit is between the same parties and is upon the same cause of action, a judgment in the earlier case on the merits is an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which could have been litigated.' The first rezoning case was litigated and all the information which could have been produced should have been produced and the second case cannot be decided on testimony whih might have been introduced in the first case.

[9] Because essentially the same facts appeared in the second case as appeared or as could have been shown in the first case, the appellees are barred by *res judicata*, the their petition *50 should have been denied. The order of the Circuit Court will accordingly be reversed and the case remanded.

Order reversed, with costs, and the case remanded to the Circuit Court for Baltimore County for the passage of an order in accordance with the opinion of this Court.

All Citations

211 Md. 36, 125 A.2d 41, 71 A.L.R.2d 1353

End of Document

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Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

March 8, 2016

NOTICE OF REASSIGNMENT

IN THE MATTER OF: Boone Kondylas, LLC
9025 Cuckold Point Road
16-003-SPH 15th Election District; 7th Councilmanic District

Re: Petition for Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044, and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music

11/7/13 Opinion and Order issued by the Administrative Law Judge wherein the requested relief was DENIED.

REASSIGNED FOR: **THURSDAY, APRIL 28, 2016, AT 10:00 A.M. – Day 2**

LOCATION: Hearing Room #2, Second Floor, Suite 206
Jefferson Building, 105 W. Chesapeake Avenue, Towson

NOTICE: This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.

Please refer to the Board's Rules of Practice & Procedure, Appendix B, Baltimore County Code.

IMPORTANT: No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

If you have a disability requiring special accommodations, please contact this office at least one week prior to hearing date.

For further information, including our inclement weather policy, please visit our website www.baltimorecountymd.gov/Agencies/appeals/index.html

Krysundra "Sunny" Cannington
Administrator

---

c: Counsel for Petitioner/Appellant : Lawrence E. Schmidt, Esquire
Petitioner/Appellant : Boone Kondylas, LLC/Ken Boone

Counsel for Protestants : Francis X. Borgerding, Esquire
Protestants : Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella, and Tammy Waldmann

Office of People's Counsel
Arnold Jablon, Director/PAI
Nancy West, Assistant County Attorney

Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Michael Field, County Attorney, Office of Law

Krysundra Cannington

From: Krysundra Cannington
Sent: Tuesday, March 01, 2016 10:12 AM
To: 'Francis X. Borgerding, Jr.'
Subject: RE: Boone Kondylas 16-003-SPH aka Dock of the Bay

Mr. Borgerding,

Did you hear back from your clients regarding their availability?

Sunny

-----Original Message-----
From: Francis X. Borgerding, Jr. [mailto:borgerdinglaw@aol.com]
Sent: Wednesday, February 24, 2016 4:26 PM
To: Krysundra Cannington <kcannington@baltimorecountymd.gov>; 'Lawrence Schmidt, Esquire' <lschmidt@sgs-law.com>; Peoples Counsel <peoplescounsel@baltimorecountymd.gov>
Cc: 'Alyssa Fiore' <afiore@sgs-law.com>
Subject: RE: Boone Kondylas 16-003-SPH aka Dock of the Bay

Krysundra,
I forgot to check with my clients as to their availability. I will do so and get back to you. Thanks Frank

-----Original Message-----
From: Krysundra Cannington [mailto:kcannington@baltimorecountymd.gov]
Sent: Wednesday, February 24, 2016 3:04 PM
To: Lawrence Schmidt, Esquire; Francis X. Borgerding, Jr. (borgerdinglaw@aol.com); Peoples Counsel
Cc: Alyssa Fiore
Subject: Boone Kondylas 16-003-SPH aka Dock of the Bay

Good afternoon Counsel,

In order to schedule a hearing before the Board of Appeals, without conflict, I am providing the following dates which are open for assignment on the Board's docket:

Wednesday, April 6, 2016
Monday, April 11, 2016
Thursday, April 14, 2016
Monday, April 25, 2016
Wednesday, April 27, 2016
Thursday, April 28, 2016

Unless otherwise agreed by the parties, our hearings begin at 10:00 a.m.

Please contact me to confirm availability. The Notice of Assignment will be issued to all parties at the time an agreeable date is established.

Thank you,

Sunny

Krysundra "Sunny" Cannington
Administrator
Board of Appeals of Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, MD 21204
Phone: 410-887-3180
Fax: 410-887-3182

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Krysundra Cannington

From: Alyssa Fiore <afiore@sgs-law.com>
Sent: Thursday, February 25, 2016 8:57 AM
To: Krysundra Cannington; Lawrence Schmidt; Francis X. Borgerding, Jr. (borgerdinglaw@aol.com); Peoples Counsel
Subject: RE: Boone Kondylas 16-003-SPH aka Dock of the Bay

Sunny,

Larry and our client are available for all of the dates provided, **except for** April 27th.

Thanks.

Alyssa M. Fiore
Paralegal
SMITH, GILDEA & SCHMIDT, LLC
600 Washington Avenue
Suite 200
Towson, MD 21204
(410) 821-0070
(410) 821-0071 - fax
afiore@sgs-law.com

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From: Krysundra Cannington [mailto:kcannington@baltimorecountymd.gov]
Sent: Wednesday, February 24, 2016 3:04 PM
To: Lawrence Schmidt; Francis X. Borgerding, Jr. (borgerdinglaw@aol.com); Peoples Counsel
Cc: Alyssa Fiore
Subject: Boone Kondylas 16-003-SPH aka Dock of the Bay

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Thank you,

Sunny

Krysundra "Sunny" Cannington
Administrator
Board of Appeals of Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
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Phone: 410-887-3180
Fax: 410-887-3182

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Krysundra Cannington

From: Francis X. Borgerding, Jr. <borgerdinglaw@aol.com>
Sent: Wednesday, February 24, 2016 4:26 PM
To: Krysundra Cannington; 'Lawrence Schmidt, Esquire'; Peoples Counsel
Cc: 'Alyssa Fiore'
Subject: RE: Boone Kondylas 16-003-SPH aka Dock of the Bay

Krysundra,
I forgot to check with my clients as to their availability. I will do so and get back to you. Thanks Frank

-----Original Message-----
From: Krysundra Cannington [mailto:kcannington@baltimorecountymd.gov]
Sent: Wednesday, February 24, 2016 3:04 PM
To: Lawrence Schmidt, Esquire; Francis X. Borgerding, Jr.
(borgerdinglaw@aol.com); Peoples Counsel
Cc: Alyssa Fiore
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Krysundra Cannington

From: Francis X. Borgerding, Jr. <borgerdinglaw@aol.com>
Sent: Wednesday, February 24, 2016 4:10 PM
To: Krysundra Cannington; 'Lawrence Schmidt, Esquire'; Peoples Counsel
Cc: 'Alyssa Fiore'
Subject: RE: Boone Kondylas 16-003-SPH aka Dock of the Bay

Krysundra,
I can do all dates except April 14th. Thanks Frank

-----Original Message-----
From: Krysundra Cannington [mailto:kcannington@baltimorecountymd.gov]
Sent: Wednesday, February 24, 2016 3:04 PM
To: Lawrence Schmidt, Esquire; Francis X. Borgerding, Jr.
(borgerdinglaw@aol.com); Peoples Counsel
Cc: Alyssa Fiore
Subject: Boone Kondylas 16-003-SPH aka Dock of the Bay

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Thank you,

Sunny

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Towson, MD 21204
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Krysundra Cannington

From: Krysundra Cannington
Sent: Wednesday, February 24, 2016 3:04 PM
To: Lawrence Schmidt, Esquire; Francis X. Borgerding, Jr. (borgerdinglaw@aol.com); Peoples Counsel
Cc: Alyssa Fiore
Subject: Boone Kondylas 16-003-SPH aka Dock of the Bay

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Krysundra Cannington

From: Lawrence Schmidt <lschmidt@sgs-law.com>
Sent: Friday, February 19, 2016 3:23 PM
To: Peoples Counsel; Krysundra Cannington
Cc: borgerdinglaw@aol.com; Alyssa Fiore; Ken Boone (kboone@tidewaterdirect.com)
Subject: RE: Dock of the Bay

I have no objection to Mr. Borgerding and/or Mr. Zimmerman calling as many witnesses who live in the neighborhood and have an interest in this matter as they want. Whether that is one, two or ten does not matter, I certainly agree that they have the right to be heard. But if Mr. Zimmerman and Mr. Borgerding want to use the first day of hearings as "discovery", to then figure out who they might want to call to testify, then I object. If anyone other than residents (which were the people in the room who couldn't be reached) is to testify (particularly some expert witness) then I only think it fair that they be disclosed in advance so that if I require rebuttal, I can have the individual present and ready to testify on that day. I don't want to be placed in the unfair position where I need a continuance to produce a rebuttal witness. And therefore drag this matter out unnecessarily.

I only ask that the People's Counsel and Mr. Borgerding provide me the courtesy of notifying me reasonably in advance as to who they may produce; assuming that it is not a resident. Again, there was no one other than residents who were present when we concluded the hearing. I assume that both sides were ready to try their respective cases on Wednesday. Had we not started late (and finished early) this case would be done. Respectfully, my client has a business to run and is entitled to have this matter resolved in a reasonably timely manner.

Larry Schmidt

Lawrence E. Schmidt
SMITH, GILDEA & SCHMIDT, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
(410) 821-0071 - fax
lschmidt@sgs-law.com

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-----Original Message-----
From: Peoples Counsel [mailto:peoplescounsel@baltimorecountymd.gov]
Sent: Friday, February 19, 2016 3:09 PM
To: Lawrence Schmidt; Krysundra Cannington
Cc: Peoples Counsel; borgerdinglaw@aol.com; Alyssa Fiore; Ken Boone (kboone@tidewaterdirect.com)
Subject: RE: Dock of the Bay

Dear Ms. Cannington,

As always, our office will cooperate as best we can on scheduling.
It is possible, based on what happened the first day, there might be additional witnesses, which would be different from my initial impression or thought, so there should be no assumption about limitation on witnesses.

Peter Zimmerman

-----Original Message-----
From: Lawrence Schmidt [mailto:lschmidt@sgs-law.com]
Sent: Friday, February 19, 2016 2:32 PM
To: Krysundra Cannington <kcannington@baltimorecountymd.gov>
Cc: Peoples Counsel <peoplescounsel@baltimorecountymd.gov>; borgerdinglaw@aol.com; Alyssa Fiore <afiore@sgs-law.com>; Ken Boone (kboone@tidewaterdirect.com) <kboone@tidewaterdirect.com>
Subject: RE: Dock of the Bay

Thanks Sunny. We will wait to hear from you.

Lawrence E. Schmidt
SMITH, GILDEA & SCHMIDT, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
(410) 821-0071 - fax
lschmidt@sgs-law.com

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-----Original Message-----
From: Krysundra Cannington [mailto:kcannington@baltimorecountymd.gov]
Sent: Friday, February 19, 2016 2:31 PM
To: Lawrence Schmidt
Cc: Peoples Counsel; borgerdinglaw@aol.com; Alyssa Fiore
Subject: RE: Dock of the Bay

Hi Larry,

Thank you for your email. I am working with the panel to find dates that work for day 2 and I will email everyone once I have some dates to offer.

Thank you again,

Sunny

Krysundra "Sunny" Cannington
Administrator
Board of Appeals of Baltimore County
The Jefferson Building, Suite 203

105 W. Chesapeake Avenue
Towson, MD 21204
Phone: 410-887-3180
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-----Original Message-----
From: Lawrence Schmidt [mailto:lschmidt@sgs-law.com]
Sent: Friday, February 19, 2016 2:16 PM
To: Krysundra Cannington <kcannington@baltimorecountymd.gov>
Cc: Peoples Counsel <peoplescounsel@baltimorecountymd.gov>; borgerdinglaw@aol.com; Alyssa Fiore <afiore@sgs-law.com>; Ken Boone (kboone@tidewaterdirect.com) <kboone@tidewaterdirect.com>
Subject: Dock of the Bay

Hi Sunny: As you are aware, we did not complete the Dock of the Bay hearing on Wednesday. The Petitioner's case (mine) was completed and Mr. Borgerding was able to call and complete the testimony of one of his clients/witnesses. He indicated that he had two more witnesses. Mr. Zimmerman indicated that he did not have any witnesses.

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Finally, my client would like to have the matter decided as soon as practical as it impacts his ongoing business operation. He ahs requested an expedited hearing date if possible.

Please contact Alyssa or I whenever you are rescheduling so that we can cooperate on a new date. We are happy to take the lead and coordinate with Messrs. Borgerding and Zimmerman.

Lawrence E. Schmidt
SMITH, GILDEA & SCHMIDT, LLC
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Towson, MD 21204
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(410) 821-0071 - fax
lschmidt@sgs-law.com

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Krysundra Cannington

From: Krysundra Cannington
Sent: Friday, February 19, 2016 2:31 PM
To: 'Lawrence Schmidt'
Cc: Peoples Counsel; borgerdinglaw@aol.com; Alyssa Fiore
Subject: RE: Dock of the Bay

Hi Larry,

Thank you for your email. I am working with the panel to find dates that work for day 2 and I will email everyone once I have some dates to offer.

Thank you again,

Sunny

Krysundra "Sunny" Cannington
Administrator
Board of Appeals of Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, MD 21204
Phone: 410-887-3180
Fax: 410-887-3182

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-----Original Message-----
From: Lawrence Schmidt [mailto:lschmidt@sgs-law.com]
Sent: Friday, February 19, 2016 2:16 PM
To: Krysundra Cannington <kcannington@baltimorecountymd.gov>
Cc: Peoples Counsel <peoplescounsel@baltimorecountymd.gov>; borgerdinglaw@aol.com; Alyssa Fiore <afiore@sgs-law.com>; Ken Boone (kboone@tidewaterdirect.com) <kboone@tidewaterdirect.com>
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IN RE:

PETITION FOR SPECIAL HEARING
SE CORNER CUCKOLD POINT ROAD
AND FIFTH STREET (9025 Cuckold Point Road)
15TH ELECTION DISTRICT
7TH COUNCILMANIC DISTRICT

BOONE KONDYLAS, LLC,
KEN BOONE

Petitioner

* * * * * * * * * * * * *

BEFORE THE
ADMINISTRATIVE LAW JUDGE
FOR BALTIMORE COUNTY

CASE NO.: 2016-003-SPH

RECEIVED
FEB 16 2016
BALTIMORE COUNTY
BOARD OF APPEALS

PROTESTANT'S RESPONSE TO PETITIONER'S TRIAL MEMORANDUM

Charles Wolinski, et al., by their attorney, Francis X. Borgerding, Jr. respond to the Petitioner's Trial Memorandum and respectfully states the following:

1. Res Judicata

The decision of the Law Judge for Baltimore County, John Beverungen, in his Opinion and Order (attached hereto for the Board's reference) with regard to the case found that the Petitioner's Petition for Special Hearing, pursuant to B.C.Z.R. 500.7 to amend previous restrictions imposed by case number 07-144-SPH-CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music be and is denied the requested relief under the Doctrine of Res Judicata. As Commissioner Beverungen stated, "I believe the Petition must also be denied based on res judicata. As discussed above, res judicata will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard." "But here I do not believe there have been significant changes, Petitioner is still proposing to operate a restaurant that would offer live or recorded music." Petitioner alleges that the use has changed. Pursuant to the factors stated in the International

Building Code to determine that the property was indeed a nightclub. Petitioner alleges that under review of these characteristics, the use would be different than Fifth Street, LLC. Per the Affidavit attached of Charles Wolinski, his contention is the use at this point is substantially the same although the Petitioner alleges that the music will be different it is still live or recorded music ... which the Court of Special Appeals found was prohibited from occurring on the site. Petitioner alleges that lighting levels do not change when entertainment will be provided. Pursuant to the Affidavit of Charles Wolinski, lighting levels are exactly the same Fifth Street, LLC operated.

2. Entertainment will be by live band or recorded music, there are no theatrical stage accessories, the hours of operation are limited, the tables and chairs are arranged exactly the same way, there are service facilities for alcoholic beverages and food. The Court of Special Appeals, on page one, dated July 9, 2010, in its decision the Court of Appeals stated at page three "A nightclub is defined as a tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is characterized as a nightclub by the Building Code of Baltimore County." The Building Code of Baltimore County relies on the factors listed above in the International Building Code to determine whether its use is a nightclub. Those factors apply to the Petitioner's proposed use as stated above. The Petitioner's proposed use seeks to provide live or recorded entertainment and thus qualifies as a nightclub under the Court of Special Appeals previous ruling. Petitioner's proposed use is, therefore, prohibited under the doctrine of res judicata.

Commissioner Beverungen also stated at page two of his October 22, 2015 Opinion and Order "As an initial matter, I do not believe the OAH has the authority to 'amend'

restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the Board of Appeals, Circuit Court and then Court of Special Appeals. In an unreported opinion (No. 810, September Term 2009) the Appellant Court affirmed the Agency's findings, which necessarily included the conditions and restrictions found in those Orders. To amend those restrictions at this juncture would be akin to reversing the Appellate Court, which an administrative agency cannot do."

Under this logic, the Board is without authority to 'amend the restrictions found in the previous cases as Petitioner has requested.' The Petitioner is not actually asking for an amendment to the restrictions, the Petitioner is asking for reversal of the previous decision of the Court of Special Appeals. Accordingly, the Board is without authority to do so and the Petitioner's Petition should be denied.

Analyzing the elements of res judicata under the facts of the subject case, the Doctrine of Res Judicata applies. The Petitioner seeks to provide live or recorded music. That very music that was prohibited by the prior Court of Special Appeals ruling.

There was a final valid judgment on the merits by a court of competent jurisdiction in similar litigation. Therefore, the present case meets the definition of res judicata. *Deleon v. Slev*, 328 Md. 569 at 580. Commissioner Beverungen cited the *Seminary Galleria, LLC v. Dulaney Improvement Association*, 192 Md. App. 719 (2010).

This argument that the facts have changed does not have merit. See again Affidavit of Charles Wolinski and argument as indicated above.

FRANCIS X. BORGERDING, JR.
409 Washington Avenue, Suite 600
Towson, Maryland 21204
410-296-6820

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 16th day of February, 2016, a copy of the foregoing was emailed (Schmidt) and hand-delivered to (Zimmerman)

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County
Jefferson Building
105 West Chesapeake Avenue, Room 204
Towson, Maryland 21204

FRANCIS X. BORGERDING, JR.

IN THE MATTER OF: THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER LEGAL OWNER and LAWRENCE THANNER, INDIVIDUALLY, SPECIAL HEARING ON PROPERTY LOCATED ON THE S/E CORNER OF CUCKOLD POINT ROAD AND FIFTH ST. (9025 CUCKOLD POINT ROAD)	*	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY JEFFERSON BUILDING 105 WEST CHESAPEAKE AVE., SUITE 203 TOWSON, MD 21204	*	Case No.: 03-C-08-009996
15th Election District 7th Councilmanic District CBA CASE NOS. 07-144-SPH; CBA-06-044 & CBA-07-134	*	

* * * * * * * * * * * * *

AFFIDAVIT

1. I, Charles Wolinski, am over eighteen years of age and competent to testify to the facts in the Response to the Trial Memorandum.

2. I was in the Dock of the Bay numerous times when it was operated by the previous owner, Fifth Street, LLC. Additionally, I have been in the Dock of the Bay on several occasions since the property has been operated by Boone Kondylas, LLC.

3. I hereby attest that the Petitioner, Boone Kondylas, LLC, use of the property at 9025 Cuckold Point Road in Baltimore County is substantially similar to the previous use of the property by Fifth Street, LLC in relation to the factors of low level lighting, the operation is proposing music which is live or recorded, there are no theatrical stage accessories, hours of operation are similar, the tables and seating are arranged similarly,

and service facilities for alcoholic beverages and food a

I solemnly affirm under the penalties of perjury that the aforegoing facts are true to the best of my knowledge, information and belief.

CHARLES WOLINSKI

16-003-SPH

RECEIVED
FEB 12 2016
BALTIMORE COUNTY
BOARD OF APPEALS

Peter Max Zimmerman

From: Peter Max Zimmerman
Sent: Friday, February 12, 2016 11:15 AM
To: Appeals Board
Cc: 'Lawrence Schmidt'; 'borgerdinglaw@aol.com'
Subject: Petition of Boone Kondylas, LLC, 9025 Cuckold Point Road, Case No. 2016-003-SPH
Attachments: Mattes 11-051-SPH 6-7-12 FINAL Opinion.pdf; Back River LLC 08-531-SPH CBA Opinion.pdf; Back River LLC II 08-531-SPH CSA Opinion.pdf; zinn Harlan 2013-295-SPH CBA Opinion.pdf; Belvedere Baptist Church 2015-004-SPH CBA Opinion.pdf; Fifth Street CBA Majority Opinion.pdf; Fifith Street CBA Dissenting Opinion.pdf; Fifth Street CBA Ruling on Motion Recon.pdf; Fifth Street CSA Decision.pdf

To the Appeals Board,

In lieu of a pre-hearing memorandum, our office submits for preliminary background four County Board of Appeals decisions involving the *res judicata* doctrine. These occurred subsequent to the reported opinion in Seminary Galleria v. Dulaney Valley Imp. Ass'n 192 Md. App. 719 (2010), a case in which our office participated and argued fruitfully at the Court of Special Appeals. The later cases are, in chronological CBA order:

1. In the Matter of Andrew Mattes, Island View Road, Case 11-051-SPH, June 7, 2012 (Wescott, Belt, Crizer).

2. In the Matter of Back River, LLC (Sprint PCS), 810 Back River Neck Road, Case 08-531-SPHX, April 19, 2013 (Belt, Zerwitz, Westcott), affirmed in Circuit and in attached Court of Special Appeals opinion, Back River, LLC v. Baltimore County, No. 2495, Sept. Term, 2013 (Arthur, J.), certiorari petition denied.

3. In the Matter of Harlan Zinn, 809 Cold Spring Road, Case 13-295—SPH, February 19, 2014, (Murphy, Thurston, Gioioso)

4. In the Matter of Belvedere Baptist Church of Baltimore (Davenport Preschool), 1301 Cheverly Road, Case 15-004-SPH, February 27, 2015 (Thurston, Alston, Rosen).

It is interesting that each of these cases involved special hearings in which the County Board of Appeals dismissed or denied the petitions based on *res judicata*, with the Back River, LLC affirmed all the way to the Court of Special Appeals, and certiorari petition denied.

It is also interesting that the *res judicata* doctrine is recognized in other parts of the world. In France, it L'Autorite de la Chose Juge. In the Spanish world, it is Cosa Juzgada.

We expect to focus on the issue at the hearing, and if necessary and appropriate, in a post-hearing memorandum. Preliminarily, it appears extremely improbable, as a matter of law, that a change in ownership could overcome this Board's attached majority decision in Cases No. CBA-06-044 and CBA 07-134, June 4, 2008 (Wescott, Grier in majority; Stahl dissenting), reconsideration unanimously denied September 12, 2008; affirmed, Fifth Street v. Ciarpella, CSA No. 810, Sept. Term, 2009,

While this is a *de novo* appeal, it is no surprise that ALJ John Beverungen denied the petition in his October 22, 2015 decision.

We are sending this e-mail to the attorney for petitioner, Lawrence Schmidt, and the attorney for neighboring protestants, Francis Borgerding.

We are also filing a hard copy with the County Board of Appeals, including each attachment.

Sincerely, Peter Max Zimmerman, People's Counsel for Baltimore County, 410 887-2188

Peter Max Zimmerman
2/18/16

IN THE MATTER OF ANDREW AND STEPHANIE MATTES – LEGAL OWNERS OF THE PROPERTY Located on the NW/S of Island View Road, 208' NW of c/line of Barrison Point Road (2534 Island View Road) 15th Election District, 6th Councilmanic District	*	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY
Theresa Guckert, David Donovan, and James Brown – Petitioners	*	Case No.: 11-051-SPH

* * * * * * * * * * * * *

OPINION

This matter is before the Board on a Motion to Dismiss filed by Lawrence E. Schmidt, Esquire and Smith, Gildea and Schmidt, LLC. Counsel for Andrew J. Mattes and Stephanie Mattes. It arises from a Petition for Special Hearing filed by Theresa Guckert, David Donovan, and James Brown (Petitioners) who were represented by Douglas N. Silber, Esquire. Deputy People's Counsel, Carole Demilio, also appeared before the Board. The hearing on the Motion to Dismiss was held on May 8, 2012. Briefs had been filed prior to the May 8th, 2012 hearing. A public deliberation was held on May 24, 2012.

Background

Petitioners filed a Petition for Special Hearing in case number 2010-0220-SPH requesting the Zoning Commissioner to "invalidate a fishing and shell fishing facility for nonconforming use or otherwise. Other reasons to be presented at the hearing." After a full hearing, Zoning Commissioner William J. Wiseman issued his Memorandum and Order dated April 19, 2010. In the order he denied the Petition and confirmed the validity of the existing use permit issued in 1978 for the property in question. Petitioners timely filed a Motion for Partial Reconsideration seeking a finding that the fishing, shell fishing, and crabbing operation at the subject site was operating at an intensity that was above that which was permitted in the 1978 use permit. That Motion was denied by Commissioner Wiseman in a ruling dated June 1, 2010. In that ruling,

Wiseman "instructed" Petitioners that he believed they could raise the issue of intensification by way of a new and separate Petition for Special Hearing. The Petitioners did not file an appeal to Commissioner Wiseman's Ruling of April 19, 2010 nor his denial of the subsequent Motion for Partial Reconsideration. Petitioners then filed the present case, asking Commissioner Wiseman to determine whether the scope and intensification of the fishing, shell fishing and crabbing business permitted by the use permit had been intensified. Respondents then filed a Motion to Dismiss the new Petition for Special Hearing arguing that the new Petition was barred by res judicata.

A hearing was held and by his order of December 20, 2010, Commissioner Wiseman denied the Motion and further found that his ruling constituted a "final order" thereby making it amenable to the filing of an immediate appeal to the Baltimore County Board of Appeals (the Board). The Board heard argument on the validity of the Motion to Dismiss and issued an Opinion and Remand Order dated August 2, 2011 finding that the appeal of the denial of the Motion to Dismiss was premature until the case was fully completed and all testimony heard. It returned the case to the Zoning Commissioner for further hearing and adjudication on the matter.[1] After conducting a full hearing, Administrative Law Judge, Lawrence M. Stahl, indicated he would hold his decision on the Motion to Dismiss sub curia until he heard the entire case.

Judge Stahl issued his decision on January 3, 2012. He denied the Motion to Dismiss on the basis of res judicata then ruled against the Petitioners on the merits of the case, with respect to the intensification issue.

---

1. In the meantime, the Office of Administrative Hearings of Baltimore County replaced and absorbed the hearing responsibilities of the Office of the Zoning Commissioner of Baltimore County by act of the County Council effective January 16, 2011.

Petitioners filed a timely appeal of ALJ Stahl's order to the Board of Appeals. Subsequently, Respondent filed a Motion to Dismiss the appeal again claiming that res judicata barred the filing of the second Petition before the Administrative Law Judge. This brought us to the present situation.

Decision

The Board finds that the Motion to Dismiss should be granted.

The doctrine of res judicata provides that a judgment on the merits in a previous suit between the same parties precludes a second suit predicated upon the same cause of action.

As set forth above, the present Petition for Special Hearing before the Board reads as follows " to invalidate a fishing and shell fishing facility for nonconforming use or otherwise. Other reasons to be presented at the hearing." This is the same language in the Petition for Special Hearing filed by Petitioners in 2010

In the initial decision dated April 19, 2010, Zoning Commissioner Wiseman cites two bills passed by the County Council. One bill, Bill No. 30-78 dated April 3, 1978 was "an ordinance to allow shoreline fishing and shell fishing facilities by Special Exception in DR zones in addition to permitting the continuation of existing shoreline fishing and shell fishing facilities in such zones..." The second is Bill No. 139-83 passed on October 17, 1983 by the Council, which states "for the purpose of ratifying and approving certain use permits issued under the authority of Bill No. 98-75 regarding fishing, crabbing and shell fishing operations; ratifying all actions taken by certain officials in the approval of such permits; and requiring compliance with all applicable zoning regulations with respect to any extension of such operations."

Bill No 30-78 section 3 which inserted a new paragraph, 7A, into the section 1B01.1c of the Baltimore County Zoning Regulations had four subparagraphs and stated:

> 7A. fishing and shell fishing facilities, shoreline class I or II except that a facility existing on July 1, 1977 may continue without a Special Exception if the use permit has been granted for it provided:
>
> * * * * * * * * *
>
> d) that no increase in the amount of floor or site area or in the number of boats devoted to the use nor another other change in the site plan is made.

Council Bill No. 139-83 contained section 3 which stated:

> And be it further enacted that nothing contained herein shall be construed to authorize the extension, expansion or intensification of any commercial fishing, crabbing and shell fishing operations, primary or secondary, or fishing and shell fishing facilities, shoreline, class I and class II, beyond that indicated in the plans accompanying the application for use permit unless and until the applicant shall have complied with all applicable Zoning Regulations, including but not limited to the Petitioning for the grant of a Special Exception for any extension or intensification of use, and that failure to comply with such Zoning Regulations shall subject the property to all applicable penalties, including a civil penalty.

It is clear that the issue of intensification was set forth in Bill 30-78 effective April 3, 1978 and Bill 139-83, effective October 17, 1983 and could have been argued by Petitioners in their Petition for Special Hearing filed in this matter in 2010.

The statement of Ms. Guckert submitted to the Board as Petitioner's Exhibit number 2, would indicate that she contends that the operation has been expanded by some of the statements set forth in that statement. She contends that on June 8, 2009, Mr. Mattes brought in two loads of tar and chip to make a road from Island View Road to the bulkhead on Brown's Creek (page 5 of Guckert's Statement). She also contends that Mr. Mattes was bringing in loads of dirt to fill in the water front property in back of his bulkhead (see page 6 of Guckert's Statement).

The Board is persuaded that the Motion to Dismiss should be granted on the basis of several cases cited by the Respondents in this matter. In Whittle v. Board of Zoning Appeals, 211 Md 36, 125 A.2d 41 (1956) the Court stated:

> If the second suit is between the same parties and is upon the same cause of action a judgment in the earlier case on the merits is an absolute bar not only to all matters which were litigated in the earlier case, but as to all matters which could have been litigated." Id 49, 125 A.2d 41.

A similar summary of this point appears in Alvey v. Alvey 225 Md 386, 390, 171 A.2d 92 (1961):

> The doctrine of res judicata is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action and is conclusive not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit, where the court had jurisdiction, proceedings were regular and his omission was due to his own negligence.

See also the decision of Board in case No 06-651-SPHA where the Board ruled on the issue of res judicata after a remand from the Circuit Court for Baltimore County in case no: 03-C-08-004351.

ORDER

THEREFORE, IT IS THIS 7th day of June, 2012 by the Board of Appeals of Baltimore County

ORDERED that the Motion to Dismiss the Petition for Special Hearing, on the basis of res judicata, is hereby GRANTED; and it is furthered

ORDERED that the Petition for Special Hearing to determined whether the scope and intensification of fishing and shell fishing allowed by the use permit has been exceeded, is

hereby **DENIED** on the basis that it has already been decided in case no 2010-0220-SPH by the Zoning Commissioner of Baltimore County, which decision was never appealed.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chair

Andrew M. Belt

Edward W. Crizer, Jr.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2495

September Term, 2013

BACK RIVER, LLC, ET AL.

v.

BALTIMORE COUNTY, MARYLAND, ET AL.

Zarnoch,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: December 30, 2014

This appeal is the second appeal before this Court concerning the retention of a wireless telecommunications tower in Baltimore County.

In 2002, landowner Back River LLC and its tenant Sprint PCS (hereinafter collectively referred to as "Sprint")[1] constructed a cell tower on a commercially-zoned property. In an administrative proceeding before the County Board of Appeals, Sprint requested variances to permit noncompliance with a local zoning ordinance that required the tower to be "set back at least 200 feet from any other owner's residential property line." Baltimore County Zoning Regulations § 426.6.A.1. The Board rejected that request, a circuit court affirmed the decision, and this Court ultimately affirmed the judgment in an unreported opinion: *Sprint PCS v. Baltimore County*, No. 47, Sept. Term 2004 (filed Aug. 3, 2005).

In 2012, Sprint filed a petition for special hearing, asserting a new legal theory under which the existing tower was actually in compliance with the setback regulations. An administrative law judge ruled otherwise and also held that the new petition was barred under the doctrine of res judicata. Sprint appealed to the Board of Appeals, which dismissed the appeal on res judicata grounds. The circuit court affirmed that decision. Because the Board's determination was legally correct, we also affirm.

---

[1] During the course of this series of zoning cases, Sprint merged with Nextel Communications in 2005 to form Sprint Nextel Corporation. *See, e.g., In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1256 (D. Kan. 2006).

FACTUAL AND PROCEDURAL BACKGROUND

A. The 1998 Zoning Regulations

In 1998, the County Council of Baltimore County enacted Bill 30-1998 ("An Act concerning Zoning – Wireless Telecommunications Towers and Antennas"). The act amended the Baltimore County Zoning Regulations ("BCZR") by establishing guidelines for the regulation of certain towers and antennas. Part of the express intent of the County Council was to ensure that any new wireless telecommunications towers would be located in commercial zones and would be "[l]ocated and designed to minimize [] visibility from residential and transitional zones." BCZR § 426.2.B.

To accomplish that purpose, the regulations imposed certain "setback" requirements[2] that restricted the placement of wireless telecommunications towers:

> **§ 426.6 Requirements for wireless communications towers.**
>
> A. Setbacks
>
> 1. If a tower is located in a residential zone, the tower shall be set back at least 200 feet from any other owner's residential property line.
>
> 2. If a tower is located in a transitional zone, the tower shall be set back at least 200 feet from any residential zone.
>
> 3. If a tower is located in a medium or high intensity commercial zone the tower shall be set back from an adjoining property line a distance equal to the setback required for other structures in the zone. However, if the property adjoins a residential zone, the tower shall be set back at least 200 feet from the residential zone line.
>
> 4. A structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line.

[2] As used in the BCZR, the term "setback" is defined as the "required minimum horizontal distance between the building line . . . and the related front, side or rear property line." BCZR § 101.1.

The Act also authorized the Zoning Commissioner or the County Board of Appeals to "grant a variance to a height or area requirement, including any setback, for a tower or structure housing equipment for a tower[,]" in accordance with the overall standards for the granting of variances. BCZR § 426.11. The Commissioner and the Board are empowered to grant variances "only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship." BCZR § 307.1.

B. Sprint's Petition for Variances

As of 2001, the property known as 810 Back River Neck Road in eastern Baltimore County was owned by Back River LLC. The surrounding area is heavily wooded. The property is located in close proximity to tributaries of the Chesapeake Bay. Most of the neighborhood falls within the Chesapeake Bay Critical Area and, accordingly is subject to significant restrictions from environmental regulations. *See generally* Md. Code (2000, 2012 Repl. Vol.), Natural Resources Art., §§ 8-1801 *et seq.*; Code of Maryland Regulations ("COMAR") 27.01; Baltimore County Code §§ 33-2-101 *et seq.*

In 2001, the parcel covered roughly 4.3 acres, in the shape of a rectangle about 223 feet in width and about 768 feet in length. A one-story commercial building stood at the east end of the property, with a retail storefront facing Back River Neck Road. The area behind that building was used for storage and other commercial purposes. The property was zoned as "Manufacturing, Light" or "M.L.," a medium-intensity, commercial classification that permits certain industrial, retail, transportation, storage, and other related uses. *See* BCZR § 253.1. Operating a wireless telecommunications tower on M.L. property is permitted by right, subject to the setback requirements. *See* BCZR §§ 253.1.B.23, 426.5.D.

Back River LLC leased part of the property to Sprint PCS, a telecommunications provider. Sprint PCS had selected the property as a potential location for a cell tower to fill a gap in its cellular coverage network. The two companies planned to construct a 115-foot tower near the west end of the property. The three adjoining properties to the north, west, and south, were each zoned under a residential zoning classification "R.C. 20," meaning "Resource Conservation – Critical Area." *See* BCZR § 1A05.[3]

In October 2001, Back River LLC and Sprint PCS (collectively "Sprint") filed a petition seeking a number of variances to accommodate construction of the proposed tower. Specifically, Sprint sought relief from BCZR § 426.6.A.3, to permit setbacks for the

[3] In general, permitted uses of R.C. 20 property include residential uses as well as natural resources, agricultural, recreational, institutional, and other public or quasi-public uses. *See* BCZR § 1A05.2. A special exception is required to use R.C. 20 property for a wireless telecommunications tower. *See* BCZR §§ 1A05.2.C.8, 426.5.D.

proposed tower of 148 feet from the northern property line, 75 feet from the western property line, and 75 feet from the southern property line, each in lieu of the required 200 feet "from the residential zone line." In addition, Sprint requested variances to permit setbacks for equipment cabinets supporting the proposed tower, of 40 feet each from the west and south property lines, in lieu of the 125 feet for those structures required by BCZR § 426.6.A.4.

After a hearing, the Zoning Commissioner for Baltimore County granted the requested variances. The Commissioner reasoned that compliance with the zoning regulations would not be possible on the site. In his January 4, 2002, order granting the variances, he wrote: "Although the property contains in excess of 4.0 acres in area, it is but 223 feet wide. Section 426.6 of the B.C.Z.R. requires a 200-foot setback from the nearest property line to the tower. In view of the width of the property, this setback cannot be maintained." Nonetheless, the Commissioner reasoned that the narrowness of the property made compliance uniquely difficult, and thus he concluded that variances from the setback requirements were appropriate.

The Office of People's Counsel filed a timely appeal from that decision.

C. **The 2002 Amendment to the Zoning Regulations**

In March 2002, while the appeal of the variance decision was pending, the County Council enacted Bill 17-2002 ("An Act concerning Wireless Telecommunications Towers – Setbacks"). The stated purpose of the act was to "revis[e] the setback requirements for wireless telecommunications towers" by repealing and reenacting § 426.6.A of the BCZR.

As amended, the regulation provided:

> **§ 426.6 Setback requirements for wireless telecommunications towers.**
>
> A. Setbacks
>
> 1. A tower shall be set back at least 200 feet from any other owner's residential property line.
>
> 2. A structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line.

The amendment took effect on May 5, 2002. In effect, the amendment simplified the setback requirements by combining subsections (1) through (3) into a single subsection. Those previous subsections had drawn distinctions between towers that were located in residential zones, towers that were located in transitional zones, and towers that were located in medium or high-intensity commercial zones. In each instance, however, the previous subsections permitted the tower if it were set back at least 200 feet from either a "residential property line" (in the case of a tower in a residential zone) or a "residential zone line" (in the case of a tower outside of a residential zone). Perhaps because the laborious distinctions were largely immaterial, the 2002 amendment replaced the three subsections with a single, new subsection that required towers, wherever they were located, to be set back at least 200 feet from a "residential property line."

On May 7, 2002, two days after the adoption of the amended setback requirements, the Baltimore County Department of Environmental Protection and Resource Management requested that Sprint change its site plan to minimize its environmental impact on nearby

bodies of water. Subsequently, Sprint revised its site plan, by relocating the proposed tower 60 feet to the east. Sprint submitted a revised variance request to the Board of Appeals, referring to the new setback regulations as they had been amended and renumbered by Bill 17-2002. With the administrative appeal still pending, Sprint then constructed the tower at its own risk.

D. Reversal of Order Granting Variances ("*Back River I*")

The Baltimore County Board of Appeals conducted a de novo hearing on Sprint's variance petition on September 25, 2002, and January 21, 2003. The Board issued an opinion on May 14, 2003, denying the requested variances. The Board rejected Sprint's arguments that "special circumstances or conditions exist[ed] that [were] peculiar to the land" (BCZR § 307.1) and that the property's shape made it "unique" under the meaning established by *Cromwell v. Ward*, 102 Md. App. 691 (1995). The Board specified that it was "not denying Sprint the right to erect a telecommunications tower in the . . . area," but "only saying that there may be a more appropriate piece of property where the tower could be erected and not require the variances that would be necessary on the instant property."

Subsequently, Sprint petitioned for judicial review of the Board's decision in the Circuit Court for Baltimore County. The circuit court affirmed the decision on February 5, 2004. Sprint appealed to the Court of Special Appeals, and this Court affirmed that judgment in an unreported opinion: *Sprint PCS v. Baltimore County*, No. 47, Sept. Term 2004 (filed Aug. 3, 2005).

Both the circuit court and this Court held that the Board's conclusion – namely, that the property possessed no "unique" characteristics that would justify variance relief – was supported by substantial evidence. Judge Adkins explained: "[I]f we were to hold that a variance must be granted, simply because a property cannot accommodate one otherwise permitted use without an area variance, we would be permitting 'the exception to swallow the rule.'" *Sprint PCS*, slip op. at 30-31.

D. Subsequent Developments

Despite the denial of Sprint's request for a variance, the tower remained on the property over the years that followed while the owners attempted to cure the setback deficiencies by acquiring land from the adjacent properties. In February 2008, Back River LLC purchased portions of the properties to the north and to west of the tower. With the additional acreage (approximately 0.6 additional acres), the tower is now located more than 200 feet from the northern property line and more than 200 feet from the western property line. However, Back River LLC was unable to purchase any of the land to the south of the tower. The tower continues to stand approximately 75 feet from the southern property line.

In May 2008, Sprint filed a petition for special hearing to permit a transfer of the portions of the property zoned R.C. 20 (*i.e.*, the property that had been purchased from the two adjacent parcels) into the property zoned M.L.; the transfer, if approved, would have had the effect of incorporating the newly-acquired property into the commercially-zoned property, thereby moving the "residential property line" farther away from the tower. Sprint

also filed a petition for special exception to increase the height of the existing tower from 115 feet to 125 feet. At the parties' request, consideration of those petitions was postponed, and a hearing was never rescheduled.

In November 2008, the Baltimore County Department of Permits and Development Management issued a citation to Back River LLC "for violations under [BCZR] § 426.6.A.1, failure to provide and maintain [a] 200 ft. set back from another's residential property line[.]" In January 2009, the County's Code Enforcement Hearing Officer issued a civil penalty of $9,200.00 for the zoning violation, which Sprint paid.[4]

E. Sprint's Amended Petition for Special Hearing ("*Back River II*")

In May 2012, Sprint filed an amended petition for special hearing, in which Sprint requested additional relief: "To confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations[.]"[5] Both the Office of People's Counsel and Baltimore County opposed the petition.

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[4] Findings of fact from the Code Enforcement Hearing Officer indicate that Back River LLC had reached an "agreement with family members [who owned the property to the south] to purchase [the] final piece of real estate needed to meet [the] set back requirement," but that the sale had not been finalized. The record here includes no indication that the sale and transfer were ever completed.

[5] Beginning with the 2012 amended petition and continuing through this appeal, Sprint has been represented by Lawrence E. Schmidt. Mr. Schmidt was the Zoning Commissioner whose ruling was reversed by the Board of Appeals in the 2002 decision that both the circuit court and this Court later upheld.

The hearing was conducted before the Office of Administrative Hearings for Baltimore County.[6] Sprint advanced the new theory that the location of the tower complied with BCZR § 426.6, as it had been amended in 2002 to require that a tower be "set back at least 200 feet from any other owner's residential property line." Sprint presented testimony that no residence was currently located on the residentially-zoned property 75 feet south of the tower. A witness for Sprint purported to opine that the zoning regulations require a 200-foot setback from an adjacent property line only if that property has actually been improved with a dwelling and is currently used as a residence.

In an opinion issued on August 2, 2012, the Administrative Law Judge denied Sprint's petition. The ALJ determined that the placement of the tower did not comply with the zoning regulations and also that the doctrine of res judicata barred Sprint from obtaining special hearing relief after the prior denial of its variance petition.

Sprint appealed the denial of its petition to the Board of Appeals. Baltimore County and the Office of People's Counsel jointly moved to dismiss the appeal on the grounds of res judicata. The Board of Appeals did not hear testimony, but instead accepted memoranda and considered oral arguments from the parties at a hearing on December 4, 2012. The Board

[6] In 2010, the County Council established the Office of Administrative Hearings, and authorized the administrative law judges of that Office to conduct zoning hearings and to exercise the powers formerly vested in the Zoning Commissioner. *See* Baltimore County Code §§ 3-12-101 *et seq.*

considered exhibits, including copies of the 2002 legislation and this Court's opinion in the prior variance case.

Sprint argued that it was not precluded from raising its claim, because (Sprint contended) it was advancing a legal theory (regarding the 2002 amendments) that had somehow not been available at the time of the administrative and judicial appeals from its variance petition from 2002 through 2005. Sprint's primary contention was that, in the prior proceedings, "neither the Board of Appeals, the Circuit Court, nor the Court of Special Appeals considered the impact of [the] change in law" that occurred while the prior administrative appeal was pending in 2002.

In an opinion and order dated April 19, 2013, the Board of Appeals concluded that res judicata barred Sprint's petition from bringing its petition for special hearing after the denial of the variance petition, because "the end result being [] sought as well as the underlying facts which are contained in both avenues of relief are the same[.]"[7] The Board further rejected Sprint's argument that a change of circumstances after the initial litigation justified an exception to the rule of res judicata.

After examining the 2002 amendment, the Board expressly rejected Sprint's argument that the current version of the law "bears little resemblance" to the law in effect at the time of the initial variance proceeding before the Zoning Commissioner. Although the 2002

[7] Although the Board's opinion noted that Back River LLC had received a code enforcement citation for violating the setback requirements of BCZR § 426.6.A.1, the Board's analysis focused only on the preclusive effect of the variance decisions.

amendment changed the setback requirement from 200 feet from the "residential zone line" in former § 426.6.A(3) to 200 feet from the "residential property line" in amended § 426.6.A(1), the Board reasoned that the change made no substantive difference:

> The terms 'property line' and 'zoning line' do refer to different things, but here the distinction is not relevant because the tower is not set back 200' from either the RC 20 "zone line" or the "property line" of the adjacent parcel. . . . [E]ven if the new version of the law were deemed slightly changed, its current terminology still bars [Sprint] from its present request for relief no matter what label that request for relief has taken on.

Accordingly, the Board granted the County's motion to dismiss Sprint's appeal.

Sprint petitioned for judicial review of the Board's decision in the Circuit Court for Baltimore County. After another hearing, the circuit court issued an order on January 10, 2014, denying the petition for judicial review and affirming the decision of the Board of Appeals. Finally, Sprint filed a timely appeal of that judgment to this Court.

SCOPE OF REVIEW

Sprint has submitted four questions for our review, which we now quote verbatim:

I. Did the Board properly apply the current setback requirements to the property at issue?

II. Did the Board err in dismissing Sprint's petition for special hearing as barred by res judicata, considering that the Board refused to hear evidence necessary to analyze whether Back River I and Back River II present different causes of action?

III. Does the Board's failure to conduct a de novo hearing and fully explain its reasons for its decision constitute reversible error?

IV. Is the circuit court's failure to issue a written decision reversible error pursuant to the Land Use Article of the Annotated Code Section 4-405?

The fourth question concerns an isolated procedural issue; the first three questions are closely interconnected.

The scope of our review of an agency's decision is defined by the record. "[I]n examining the record made below, we do not engage in an independent analysis of the evidence, . . . and we proceed from the premise that an agency's decision is prima facie correct and presumed valid[.]" *Montgomery Cnty. v. Butler*, 417 Md. 271, 284 (2010) (citations and quotation marks omitted). Ordinarily, "[o]ur role in reviewing the final decision of an administrative agency, such as the Board of Appeals, is 'limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Critical Area Comm'n for Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111, 122-23 (2011) (quoting *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005)). "When reviewing the decision of a local zoning body, such as the Board, we evaluate directly the agency decision, and, in doing so, we apply the same standards of review as the circuit court[.]" *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore Cnty.*, 407 Md. 53, 77 (2008).

Judicial review of an agency action typically concerns the narrow question of whether or not the agency order can be sustained on the agency's findings and for the reasons stated by the agency. *See Armstrong v. Mayor & City Council of Baltimore*, 410 Md. 426, 443,

461-62 (2009) (quoting *Trinity Assembly*, 407 Md. at 77-78). In general, it is improper for the reviewing court to search the record for alternative grounds to sustain the agency's decision other than those reasons relied upon by the agency. *See Anselmo v. Mayor & City Council of Rockville*, 196 Md. App. 115, 128 (2010).

The Board summarized its conclusion as follows: "As this Board is not swayed by the Petitioners' argument that this case involves an exception to the doctrine of res judicata, and somehow involves the application of new law that would change the outcome of prior decisions in this matter, the Motion to Dismiss filed by Baltimore County and joined by People's Counsel is GRANTED." By its own terms, the decision currently under review is not a denial of special hearing relief, but a dismissal of Sprint's appeal on the grounds of res judicata.[8] When the Board interpreted BCZR § 426.6, it did so within the narrow context of rejecting Sprint's argument that a significant "change in law" had occurred after the original litigation. Accordingly, it would be inappropriate for this Court to conduct an unbridled examination of the zoning regulations outside of the res judicata issue.

In *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719 (2010), this Court considered the question of "[w]hether an administrative agency's determination of the applicability of the doctrine of *res judicata* should be assessed pursuant

[8] Sprint's brief evidently concedes as much, by correctly stating: "Although the Board analyzed the amendment of BCZR § 426.6 in its written opinion, its[] decision granting Baltimore County's Motion to Dismiss was based upon the application of the doctrine of *res judicata*." Appellants' Br. at 17.

to the substantial evidence standard of review[.]" *Id.* at 722. The *Seminary* case concerned the preclusive effect of the denial of a petition for special hearing (and alternatively for variances) on a subsequent petition to legitimize the same use on the same property. The appellant contended that an administrative ruling on res judicata was "a mixed question of law and fact" that required review for reasonableness under the substantial evidence test. *Id.* at 734.

Our opinion recognized that the default standard of review of an administrative agency's decision is narrow and highly deferential. *Id.* at 733. Nevertheless, we held that the issue of whether res judicata barred the second special hearing petition was a question of law and that it was appropriate to conduct a plenary, de novo review of the Board's legal conclusion on that issue. *Id.* at 734. In doing so, we also "reject[ed] the appellant's implied assertion that the agency was required to resolve any disputed factual issue in th[e] case in order to determine whether the doctrine of *res judicata* was applicable." *Id.* at 722-23.

Accordingly, we will consider de novo the following questions, which we consolidate and restate in this form:

I. Did the Board err in dismissing Sprint's appeal from the denial of Sprint's petition for special hearing as barred by res judicata?

II. Is the circuit court's failure to issue a written decision reversible error pursuant to Md. Code (2012), § 4-405 of the Land Use Article?

As explained below, the answer to both questions is, no. Because we determine that the Board's legal conclusion was correct and also that the circuit court was not required to

issue a written opinion, it is unnecessary to remand to either body to receive additional evidence or to provide more detailed reasoning.

DISCUSSION

I.

A. The Doctrine of Res Judicata

"[I]t is crystal clear that a final judgment of a circuit court affirming a decision of an administrative agency . . . is entitled to full preclusive effect." *Esslinger v. Baltimore City*, 95 Md. App. 607, 621 (1993); *see also Stavely v. State Farm Mut. Auto. Ins. Co.*, 376 Md. 108, 116 (2003) (holding that, under principles of res judicata, earlier agency determination that is affirmed by Court of Special Appeals binds agency in later controversy between same parties).

A long and uninterrupted line of Maryland cases has established that a circuit court judgment affirming a decision by a local zoning body will bar a subsequent attempt to relitigate the matter, where there is only a slight distinction in the form of the second action. *See Fertitta v. Brown*, 252 Md. 594, 599 (1969) (prior determination that particular use of property violated zoning ordinance barred later action seeking declaratory relief to legitimize same use even if prior determination is unsound); *Alvey v. Hedin*, 243 Md. 334, 340 (1966) (appellants barred from second attempt to allege mistake in original zoning of land even though appellants were "attempting to get a different type of commercial classification than in the first case"); *Whittle v. Bd. of Zoning Appeals of Baltimore Cnty.*, 211 Md. 36, 48-49

(1956) (prior adverse ruling on permit application barred later permit application that attached additional conditions); *Bensel v. Mayor & City Council of Baltimore*, 203 Md. 506, 508-17 (1954) (denial of permit for nonconforming use barred subsequent action seeking to enjoin City from interfering with nonconforming use); *Mayor & City Council of Baltimore v. Linthicum*, 170 Md. 245, 249-50 (1936) (denial of prior application to allow proposed use of lot disposed of questions in subsequent application based on different theory); *see also Century I Condo. Ass'n, Inc. v. Plaza Condo. Joint Venture*, 64 Md. App. 107, 113-14 (1985) (earlier decision governing use exceptions acted as res judicata in later case involving building permit for same structure).

Generally, the doctrine of res judicata precludes a party from raising a claim in a second litigation "'if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation.'" *Cochran v. Griffith Energy Servs., Inc.*, 426 Md. 134, 140 (2012) (quoting *R & D 2001, LLC v. Rice*, 402 Md. 648, 663 (2008)). Res judicata, or claim preclusion, "ensures that courts do not waste time adjudicating matters which have been decided or *could have been* decided fully and fairly." *Anne Arundel Cnty. Bd. of Educ. v. Norville*, 390 Md. 93, 107 (2005) (emphasis in original). For this reason, the final judgment in a prior litigation will bind the parties even if a ruling in the original litigation is found later to be in error. *Powell v. Breslin*, 430 Md. 52, 64-65 (2013).

As the Court of Appeals has summarized, the doctrine of res judicata embodies three elements:

> (1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the current action is identical to that determined or that which could have been raised and determined in the prior litigation; and (3) there was a final judgment on the merits in the prior litigation.

Rice, 402 Md. at 663.

In this case, Sprint concedes that the first and third elements are present: the parties to its special hearing petition are substantially identical to the parties to the original action, which concluded in a final judgment on the merits. Sprint argues only that the claim presented in its current action could not have been raised and determined in the prior litigation.

B. Identity of Claims

To determine whether a case involves the same claims that were or could have been decided in earlier litigation, Maryland has adopted the "transaction test," set forth in § 24 of the Restatement (Second) of Judgments. *See Kent Cnty. Bd. of Educ. v. Bilbrough*, 309 Md. 487, 499-500 (1987). "Under the transaction test, what factual grouping constitutes a 'transaction' and what groupings constitute a series of connected 'transactions' are to be determined 'pragmatically, giving weight to such considerations as whether facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or

usage.'" *Boyd v. Bowen*, 145 Md. App. 635, 656 (2002) (quoting *Bilbrough*, 309 Md. at 498). Under this approach, "if the two claims or theories are based upon the same set of facts and one would expect them to be tried together ordinarily, then a party must bring them simultaneously." *Norville*, 390 Md. at 109. The modern view is that the dimensions of a claim are measured in factual terms, "'regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the [litigant]; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights.'" *Bilbrough*, 309 Md. at 497-98 (quoting Restatement (Second) of Judgments § 24, cmt. a).

Under that approach, we must conclude that the claim raised in Sprint's 2012 petition for special hearing ("[t]o confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations") is substantially identical to a claim that could have been raised and determined in the earlier litigation. When Sprint came before the Board in 2002, Sprint sought variances from the same setback regulations to permit retention of the same cell tower in the same location. The two petitions involve a single transaction: Sprint's attempt to secure permission from the local zoning bodies to retain a wireless telecommunications tower on the property.

Appellees in this case have pointed to no Maryland authority specifically holding that a property owner's petition seeking to confirm compliance with zoning regulations involves the "same claim," for res judicata purposes, as an earlier petition seeking variances from the

same zoning regulations. Nonetheless, that holding is compelled by the reasoning under comparable circumstances in three cases: *Jack v. Foster Branch Homeowners Ass'n No. 1, Inc.*, 53 Md. App. 325, 334 (1982), which reasoned that, under the transaction approach, a request for modification, reduction, or waiver of zoning regulations presents the same cause of action as an earlier petition for variance from the same zoning regulations; *Esslinger*, 95 Md. App. at 618, which adopted the transaction approach and held that claims for declaratory relief to allow a nonconforming use on a property presented the same claim as earlier zoning action seeking a permit for the same use; and *Seminary Galleria*, 192 Md. App. at 741-42, which held that even though a property owner's second special hearing petition involved a different zoning regulation from the regulation involved in the first, both petitions involved the same claim for approval of the same use.

In *Jack*, this Court considered the preclusive effect of a prior denial of a variance petition. The property owner in that case, Dr. Joseph Jack, operated a professional office at his residence, but did not furnish the off-street parking spaces required by a local zoning ordinance. *Jack*, 53 Md. App. at 327. Jack's application for variances was ultimately denied in a judgment of a circuit court. *Id.* at 330. A year later, Jack attempted to legitimize the use of his property through a different provision of the local zoning ordinance, by applying for a modification, reduction, or waiver of the parking requirements. *Id.*

On review of a circuit court's denial of the second application on grounds of res judicata, this Court reasoned:

> [I]f the transactional analysis espoused by the American Law Institute is applied, *Restatements (Second) of Judgments*, § 24 (1982), the appellees would prevail. Here, the "transactions" would be attempts to secure permission to operate with less than eight off-street parking spaces, and would be the same in each proceeding.

Jack, 53 Md. App. at 334. Nevertheless, we noted that the rule for determining the identity of claims was, at that time, the "same evidence" test. *Id.* (citing *MPC, Inc. v. Kenny*, 279 Md. 29 (1977)). Because this Court reasoned that the evidence necessary to sustain the variance action was not identical to the evidence necessary to support the second action, we held that res judicata did not bar Jack's claims. *Id.* at 334-36.

A few years later, however, the Court of Appeals endorsed the transactional approach when it decided *Bilbrough*. In adopting § 24 of the Restatement (Second) of Judgments, the Court expressed concern that "sole reliance on the same evidence or required evidence analysis to determine if the same claim is involved in two actions may improperly narrow the scope of a 'claim' in the preclusion context." *Id.* at 494.

Accordingly, the analysis evolved when this Court decided *Esslinger*. The property owner in that case, Donald Esslinger installed a free-standing satellite dish on his property. *Esslinger*, 95 Md. App. at 610. The City's Zoning Board denied three separate applications for a special exception to permit him to erect or retain the satellite dish. The denial of the first application was ultimately affirmed by a circuit court, and the denial of the last application was ultimately affirmed by this Court. *Id.* at 610-12. Later, Esslinger instituted an action pursuant to 42 U.S.C. § 1983, in which he alleged that the City's refusal to allow

him to erect and maintain a satellite receiving dish violated various constitutional rights. *Id.* at 613-14.

Much like the property owner in *Jack*, Esslinger argued that res judicata did not apply to the second action under the "same evidence" test. On review, however, we rejected that position, because the Court of Appeals had since approved of the transactional approach. *See Esslinger*, 95 Md. App. at 617 (citing *Bilbrough*, 309 Md. at 494, 498). We explained:

> Under the "transaction" approach, it is clear that the claim in the 1987 zoning case is identical to the present claim. Indeed, it is undisputed that both arise from precisely the same transaction, *i.e.*, Esslinger's attempt to place a free-standing satellite dish on his property. The facts of the two actions are thus related in "space, origin and motivation." Both involve Esslinger's request for and the Zoning Board's denial of a conditional use permit to allow the same satellite dish on the same property. The only difference between the 1987 zoning action and the 1992 civil rights action is that the latter protests a 1989 Zoning Board decision not to grant Esslinger a conditional use permit so that he could *erect* the dish and the former involved a 1986 Zoning Board decision not to grant Esslinger a conditional use permit so that he could *retain* the same dish. Maryland courts have long recognized that such small differences in the posture of the zoning request do not prevent application of *res judicata*.

Esslinger, 95 Md. App. at 618-19 (footnote omitted).

Accordingly, we held that res judicata barred Esslinger's claims for declaratory and injunctive relief, because he could have asserted those claims as the basis for overturning the original zoning decision. *Id.* at 620-24.

This Court further explained that "[b]oth § 24 of the Restatement and the Court of Appeals in approving the transactional test . . . make it clear that '[e]quating claim with

transaction' is 'justified only when the parties have ample procedural means for fully developing the entire transaction in the one action going to the merits to which the plaintiff is ordinarily confined.'" *Id.* at 619 (quoting *Bilbrough*, 309 Md. at 499). We reasoned that Esslinger could have obtained declaratory and injunctive relief from the circuit court in the earlier litigation, but that he could not have joined a claim for monetary damages to a petition for judicial review of the original zoning actions. *Esslinger*, 95 Md. App. at 623-24. "Accordingly, although Esslinger's claims for injunctive and declaratory relief [were] barred by *res judicata*, his claims for damages [were] not barred by *res judicata* since the latter could not have been asserted in the circuit court action reviewing the initial zoning case." *Id.* at 624.

In the instant case, the claim raised in Sprint's petition is not a claim for monetary relief, but one for relief of a declaratory nature. *See Antwerpen v. Baltimore Cnty.*, 163 Md. App. 194, 200 (2005) ("[a] request for special hearing is, in legal effect, a request for a declaratory judgment"). Under the reasoning of *Esslinger*, Sprint possessed sufficient procedural means to pursue a declaratory remedy when the circuit court reviewed the earlier zoning decision. Thus, res judicata bars the attempt to seek declaratory relief upon the same legal theory that a party could have asserted during a circuit court's review of a prior zoning case. *See Esslinger*, 95 Md. App. at 624.

This Court's more recent opinion in *Seminary Galleria* fortifies the conclusion that the claims raised in Sprint's two petitions are identical for the purposes of res judicata. In

that case, the property owner, Seminary, created 14 new parking spaces in a residentially-zoned portion of its property, without obtaining a permit. *Seminary Galleria*, 192 Md. App. at 723. Seminary then sought retroactive approval of the construction of the parking spaces, by filing a petition for special hearing and alternatively for a variance. *Id.* at 724. The Board of Appeals entered a final order denying the first request, and then Seminary filed a slightly different petition. *Id.* at 726-27. Seminary attempted to differentiate the new petition by introducing a new legal theory: that another section of the BCZR actually required Seminary to furnish the additional parking and that Seminary should be allowed to meet those minimum parking requirements to the extent possible. *Id.* at 727. The Board of Appeals held that Seminary was not precluded from bringing the second petition, and then it approved the parking plan. *Id.* at 729-30.

On review, this Court disagreed with that decision and held that Seminary was precluded from raising the claim in its second petition. We first concluded that the Board's final order in the first petition was entitled to preclusive effect, noting that "[t]he issue of whether the 14 parking spaces could remain was actually litigated" in the first litigation, and "[t]he ruling was necessary to – indeed, the essence of – the Board's decision" in the first case. *Id.* at 736. Despite the slight distinctions in Seminary's two requests, we reasoned that, "[i]n both cases, Seminary's request for relief was the retroactive approval of the same 14 spaces it had constructed in the [residential] zone." *Id.* at 741. The dispositive issue was that, "[w]ith reasonable diligence, Seminary could have discovered and asserted in support

of the original [] filing" the same evidence and legal theory that it raised in its later filing. *Id.* at 741-42. In other words, "Seminary's failure to accurately and contemporaneously survey the Galleria in connection with its first application to approve the additional spaces [was] not a reason to consider a second application seeking the same relief." *Id.* at 742.[9]

Sprint nonetheless contends that res judicata is inapplicable here. In support of that position, Sprint advances a number of overlapping arguments that fall into two general categories: (1) that, as a factual matter, the 2002 amendment to the applicable zoning regulations *was not* considered at the time of the earlier variance proceedings; and (2) that, as a legal matter, Sprint *could not* have asserted its current theory to obtain relief at the earlier proceedings. Sprint's first argument involves an erroneous characterization of the record; the second argument involves an erroneous interpretation of the law.

C. Prior Consideration of the Amended Regulation

During Sprint's original variance action, the Zoning Commissioner, the Baltimore County Board of Appeals, the Circuit Court for Baltimore County, and the Court of Special Appeals (in addition to each of the parties, including Sprint) all independently agreed that

[9] The *Seminary* Court did not expressly apply either the "same evidence" test or the transactional approach. *See Seminary Galleria*, 192 Md. App. at 741. Instead, the Court focused on the availability of the evidence and legal theory during the earlier litigation. The Court reasoned that the result was controlled by prior case law that precludes successive zoning applications as a general matter in the absence of any substantial change in circumstances. *See id.* at 740 (citing *Alvey v. Hedin*, 243 Md. 334 (1966); *Chatham Corp. v. Beltram*, 243 Md. 138 (1966); *Woodlawn Area Citizens Ass'n v. Bd. of Cnty. Comm'rs for Prince George's Cnty.*, 241 Md. 187 (1966)).

the placement of the tower violated the existing zoning regulations. Each of these prior decisions "hinged on the presumption" (Appellants' Br. at 5) that the BCZR required that the tower be set back 200 feet from each of the three property lines to the north, west, and south. Sprint now posits that, under its new interpretation of the 2002 amendment, this presumption must have been mistaken.

The foundation of Sprint's position is Sprint's contention that "it is apparent that the Board of Appeals, the Circuit Court, and the Court of Special Appeals each failed to consider the impact of th[e] change in the law" that allegedly resulted from the 2002 amendment. Appellants' Br. at 9-10. Sprint suggests that those prior administrative and judicial determinations were reviewed under the language of the earlier, 1998 regulation that predated the 2002 amendment: "Given the absence of any specific language stating, 'the law has been amended since this case was instituted' or 'Bill 17-02 has been enacted'; it is apparent that this amendment to the law (and most importantly, its impact on this case) was never considered by any of the administrative and judicial bodies that considered Sprint's variance petition in *Back River I*." Appellants' Br. at 10.

This theory of the record is fundamental to Sprint's appeal. It is also incorrect.

To illustrate how and why Sprint's theory is incorrect, some facts bear repeating. At the 2001 hearing before the Zoning Commissioner, Sprint originally requested variances under the zoning regulations that had been enacted by the 1998 bill. In particular, Sprint requested variances from § 426.6.A.3, which had required that, "if the [commercially-zoned]

property adjoins a residential zone, the tower shall be set back at least 200 feet from the residential zone line"; and a variance from § 426.6.A.4, which had required "a structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line."

While an appeal was pending before the Board of Appeals, Baltimore County amended § 426.6.A.4. The amendment, which took effect on May 5, 2002, re-codified former subsections A.1, A.2., and A.3 into a single standard in a new subsection A.1: "A tower shall be set back at least 200 feet from any other owner's residential property line." The amendment also renumbered former subsection A.4 (concerning setbacks from the equipment structures supporting a tower) as current subsection A.2.

After the effective date of the 2002 amendment, Sprint relocated the proposed tower site an additional 60 feet from the western property line. Subsequently, Sprint submitted a memorandum to the Board of Appeals that included its revised variance requests. The very first page of Sprint's 2002 memorandum explained: "the Baltimore County Council adopted Bill 17-2002 which revised BCZR § 426 such that the references within BCZR § 426.6.A for setbacks, which are the subject of Sprint's Petition for Variance, have been re-numbered." In the same memorandum, Sprint notified the Board of its requested variances from sub-sections A.1 and A.2, for reduced setbacks to the neighboring property lines, "in light of the revisions to BCZR § 426 pursuant to Bill 17-2002[.]" In other words, in Sprint's

memorandum to the Board of Appeals, Sprint presumed that the 2002 amendments governed the appeal.

On September 25, 2002, more than four months after the effective date of the 2002 amendment, the Board of Appeals conducted a hearing to consider Sprint's revised variance requests. During the administrative appeal, the Board was required to apply the updated regulations. *See Scrimgeour v. Fox Harbor, LLC*, 410 Md. 230, 240-41 (2009); *Layton v. Howard Cnty. Bd. of Appeals*, 399 Md. 36, 38 (2007) (re-affirming that, under the rule established by *Yorktown Corp. v. Powell*, 237 Md. 121 (1964), a "legislated change of pertinent law, which occurr[ed] during the ongoing litigation of a land use or zoning case, generally, shall be retrospectively applied").[10]

The text of the Board's 2003 opinion, in which the Board rejected Sprint's variance request, confirms that the Board considered the setback regulation as it had been amended and renumbered in 2002. The Board specifically noted that Sprint had originally requested variances under subsections A.3 and A.4, but that Sprint itself later revised its plan and requested variances under the renumbered subsections A.1 and A.2. The Board's opinion includes no references to the term "residential zone line," from the 1998 version of the regulation. Instead, employing the language of the 2002 amendment, the Board referred only

[10] The *Yorkdale* rule, which "provides for the retrospective application of changes to statutes that impact land use issues made during the course of litigation in land use and zoning cases" (*see Layton*, 399 Md. at 51), affects not only the Board of Appeals, but also the circuit court and the appellate courts. *See id.* at 69.

to the required 200-foot setbacks from each "property line" to the north, west, and south. In short, the Board did exactly what it was required to do in 2002: it evaluated Sprint's revised variance requests with reference to the setback requirements of the zoning regulation in effect at the time – the 2002 amendments.[11]

In Sprint's 2003 petition for judicial review, Sprint also informed the circuit court of the 2002 amendment, and Sprint quoted in full the updated sub-sections 426.6.A.1 and A.2, under the heading "Applicable Zoning Regulations." Similarly, in Sprint's 2004 appellate brief in its unsuccessful appeal to the Court of Special Appeals, Sprint again stated its requests for variances from subsections A.1 and A.2 "in light of the revisions of BCZR § 426 pursuant to Bill 17-2002[.]" The appendix to Sprint's brief even included the full text of the regulation, expressly as amended by "Bill No. 17-2002."

This Court's unreported opinion, authored by Judge Adkins, accurately cited the number of the subsection at issue. *Sprint PCS*, slip op. at 8 (citing "BCZR 426.6.A.1," and explaining that, in contrast to the factors considered for standard setbacks under the BCZR, "a wireless telecommunications tower on such a site must satisfy a greater setback – at least

[11] In an unconvincing exercise in sophistry, Sprint now contends that the Board's use of the phrase "property line" reveals that the Board actually must have been considering the location of the "residential zone line" under the pre-2002 legislation. Sprint theorizes that Zoning Commissioner had (imprecisely) referred to a "property line" in describing the setback required from the "residential zoning line" under the pre-2002 requirements. Sprint then theorizes that, in referring to the "property line," the Board of Appeals was not employing the language of the 2002 amendment (which refers to the "residential property line"), but was replicating the Zoning Commissioner's erroneous formulation of the pre-2002 legislation. We reject Sprint's convoluted argument.

200 feet from any residential boundary"). Later, the opinion even quoted the amended language: "The ML zone permits cellular towers by right, subject to a 200 foot setback requirement 'from any other owner's residential property line.' BCZR § 426.6(A)(1)." *Sprint PCS*, slip op. at 31.[12]

Contrary to Sprint's contentions, the reality is that, during the *Back River I* proceedings from 2002 through 2005, the Board and the reviewing courts considered *only* the setback requirements of the amended regulation. The term "residential zoning line" from the repealed version of BCZR § 426.6.A.3 was absolutely inconsequential in the variance review proceedings from 2002 to 2005. The obvious reason why the Board and the courts found it unnecessary to extensively discuss "the impact of this change in law" (Appellants' Br. at 9-10) was that the law did not change during the course of those proceedings. There was no mistake or oversight here (at least none by the reviewing bodies).

Sprint unsuccessfully attempts to draw an analogy between this case and *Gertz v. Anne Arundel County*, 339 Md. 261 (1995). In that case, the Court of Appeals held that an adverse

[12] In its memorandum to the Board of Appeals in *Back River II*, Sprint incorrectly asserted that this Court failed to cite the language of the 2002 regulation. In the same memorandum, Sprint argued that this Court "mistakenly described the setback requirements as they existed under the law then in effect." Sprint now admits that this Court's opinion quoted the correct regulation. Nonetheless, Sprint goes on to misquote this Court's earlier opinion, altering and re-ordering the Court's words in a thoroughly unpersuasive effort to establish that this Court was actually applying the pre-2002 requirements. Appellants' Br. at 10 n.6. Anyone with an elementary ability to read the English language could determine that this Court's earlier opinion proceeded on the supposition that the 2002 amendments, and not the earlier the legislation, governed the outcome of the case.

judgment against Anne Arundel County in an earlier contempt action involving the County and a property owner did not bar the County from proceeding in a later injunctive action against the property owner, where the second action was based on an emergency ordinance passed after the first case. *Id.* at 270. The Court explained that the rule of res judicata did not apply: "When the contempt action was litigated, the County had no right to proceed against Gertz under the Ordinance because it had not yet been enacted." *Id.* In the instant case, by contrast, Sprint had every right to raise claims based on the regulation that took effect several months before the de novo hearing. More precisely, from 2002 through 2005, Sprint did in fact bring a claim based on the amended regulation.

In sum, Sprint alleges that each of the administrative and judicial bodies that denied its variance petition in 2003, 2004, and 2005 erroneously "applied the old law when analyzing the variance issue." Appellants' Br. at 11. Sprint stakes out that position even though Sprint had revised its variance request to reflect the current law, even though Sprint informed each reviewing body of the 2002 amendment while contending that variances were needed, even though none of the written opinions applied the repealed subsection 426.6.A.3, even though none of those opinions used the term "residential zone line" or other language from that repealed sub-section, even though the Board and this Court both cited the amended subsection 426.6.A.1, and even though the Board and this Court employed the language of the 2002 amendment in referring to the required 200-foot setbacks from the three adjacent "property lines." Sprint's argument is, unarguably, incorrect.

In the midst of making its res judicata determination in this case, the Board of Appeals accepted at face value Sprint's suggestion that the applicable regulation had changed after the 2002 proceedings. Nonetheless, the Board expressly rejected Sprint's argument that the 2002 amendment significantly changed the setback requirements as applied to the property. The Board concluded that the distinction between the two versions of the regulation was "not relevant because the tower is not set back 200' from either the RC 20 'zone line' or the 'property line' of the adjacent parcel." The Board added: "even if the new version of the law were to be deemed slightly changed, its current terminology still bars [Sprint] from its present request for relief[.]"

Ordinarily, a degree of deference should be accorded to an administrative agency's interpretation and application of the statute that it is tasked with administering. *See Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 68-69 (1999). Specifically, the Court of Appeals has recognized that the Baltimore County Board of Appeals has considerable expertise in interpreting the BCZR. *Marzullo v. Kahl*, 366 Md. 158, 173 & n.11 (2001); *see id.* at 173-74 (holding that Court of Special Appeals erred by failing to give proper deference to Board's presumed expertise in construing the BCZR). For this reason, the Office of People's Counsel argues that this Court should uphold the Board's decision by deferring to the Board's interpretation of the BCZR amendment. On the other hand, Sprint asserts that the Board's interpretation of the regulations deserves no deference and, in any event, that a

remand is needed to allow the Board to re-analyze "the question of whether the phrase 'residential property line' amounts to a material change" in law. Appellants' Br. at 31.

The answer to both parties is that there was no change in the applicable law between the 2002 review proceedings and the current action. It was unnecessary for the Board to analyze the difference between the 1998 language and the 2002 language, because the 1998 language was never an issue in the prior administrative and judicial appeals. Accordingly, there is no reason to defer to the Board's answer to a legal question that should not have been considered, nor any reason to remand to allow the Board to provide a more detailed explanation on this inconsequential issue.

D. Availability of Sprint's New Legal Theory at Earlier Proceedings

The applicable law has not changed since the Board of Appeals reviewed Sprint's revised variance requests in 2002. Some time in the past decade, however, Sprint retained a new attorney and developed a new theory of that regulation. Sprint now contends that it could not have presented this argument to the Board in *Back River I*. Before analyzing whether Sprint could have asserted this claim in the earlier proceeding, it is necessary to describe, briefly, Sprint's current theory.

In 2002, the proposed site of the tower was within 200 feet of each of the property lines to the north, west, and south. These three property lines coincided with the zoning lines, which divided the commercially-zoned (M.L.) land from the adjoining residentially-zoned (R.C. 20) land. The 2002 amendment revised the language of the applicable setback

requirements from "the tower shall be set back at least 200 feet from the residential zone line" (former BCZR § 426.6.A.3), to "[a] tower shall be set back at least 200 feet from any other owner's residential property line." BCZR § 426.6.A.1.

Sprint contends that BCZR § 426.6.A.1, under its plain meaning, incorporates a "residential use requirement." Sprint argues: "The clear purpose of the amended regulation was to keep cell towers away from dwellings. A 200 foot setback is required only when property within 200 feet of a tower is owned by another *and has a dwelling thereon.*" Appellants' Br. at 14. Under this interpretation, the regulation does not require that a tower be set back any distance from an adjoining residentially-zoned property, as long as no one currently resides in a dwelling on that property.[13]

Sprint further asserts that, at the time of the review of its variance petition, the neighboring R.C. 20 properties to the north and west were vacant, but the property to the south was improved with a dwelling. In addition, Sprint proffered to the Board of Appeals in *Back River II* that, if it had been permitted to adduce evidence, its witnesses would have testified that the dwelling no longer stands on the property to the south. The Board took no testimony and made no factual findings on this disputed fact. Because the Board purported

[13] Sprint has drawn our attention to a pair of administrative decisions issued by the Deputy Zoning Commissioner for Baltimore County, which Sprint argues support its interpretation of BCZR § 426.6.A.1. One decision was expressly limited to the facts of the subject property, while the other decision involved split-zoned property. Even if these decisions were indistinguishable, we would see no reason why the Board of Appeals, let alone this Court, would be bound to follow them.

to dismiss an appeal after considering only legal issues, we shall assume, *arguendo*, that Sprint made accurate representations to the Board about the existence of the house on the southern property. *See Antwerpen*, 163 Md. App. at 203 (explaining that, where Board of Appeals ruled only on motion to dismiss and did not take evidence, this Court would assume that appellant's proffer to Board was correct).

Moreover, we shall take no position here on the correctness or incorrectness of Sprint's interpretation of BCZR § 426.6.A.1. The only relevant issue for our analysis is whether Sprint could have made the legal argument during the earlier proceeding. Under Sprint's theory, there was only one adjacent "residential property line" in 2002, the property line south of the tower. No setbacks would have been required from the property lines of the unimproved, residentially-zoned properties to the north and west of the tower. Thus, through only an ordinary degree of diligence (indeed, simply by examining the regulation and the site plan), Sprint could have realized that, under what Sprint now calls the "plain meaning" of the regulation, two of the requested variances would no longer be needed. Because the property itself was approximately 223 feet wide, Sprint could have revised its proposal by relocating the tower more than 200 feet north of the southern residential property line. Finally, Sprint could have argued before the Board that, as an alternative to variance relief, the Board should determine that no setbacks were required from the adjacent, vacant, residentially-zoned properties.

These two procedural means (revising the variance requests in light of the amended regulations and asking the Board to determine that variances were not legally necessary under the regulations) were not only available to Sprint. Sprint actually employed both mechanisms after the effective date of the amendment. When Sprint submitted its 2002 memorandum to the Board, Sprint revised its variance requests "in light of the revisions to BCZR § 426 pursuant to Bill 17-2002." At the same time, Sprint also argued that "setback variances for the equipment cabinets [were] not legally necessary since they [did] not qualify as 'structures' . . . as that term is defined by the BCZR." There is no merit to Sprint's contention that "treating the facts as separate trial units would not [sic] conform to the party's expectations because [Sprint's] rights under the new law could not have been litigated in the initial action." Appellants' Br. at 24.

Sprint argues here that it did not possess the procedural means to change its theory in the context of a de novo review of the variance petition. Sprint submits: "Although the Board's hearing was a *de novo* proceeding, the new theory (special hearing) could not have been considered because of the relief sought (variance) in the case then at issue." Appellants' Br. at 22. Sprint further argues that the transaction approach cannot be applied to this case, because (Sprint claims) it lacked the means to obtain relief during review of the variance petition. Appellants' Br. at 18-19.

In making these arguments, Sprint conflates the relief requested with a particular process to obtain that relief. The specific remedy requested in Sprint's 2012 petition was not

the hearing itself, but official confirmation that certain setbacks were not required from adjacent, unimproved properties. If Sprint believed that the language of the 2002 amendment somehow eliminated some of the setback requirements from adjacent properties, Sprint could have and should have presented those arguments in the earlier proceeding so that the Board could have resolved all issues in a single piece of litigation.[14]

Sprint attempts to place the issue under a technical lens rather than a pragmatic one, by contending: "Petitioners could not have been permitted to introduce a new petition for special hearing when only a petition for variance was under consideration during the appellate proceedings at the Board." Appellants' Br. at 22-23. Sprint attempts to distinguish *Cassidy v. Cnty. Bd. of Appeals of Baltimore Cnty.*, 218 Md. 418 (1958). In *Cassidy*, the Court of Appeals rejected an appellant's argument that the County Board of Appeals lacked jurisdiction to grant a special exception to a property owner because the public notice had mentioned only reclassification of the property. *Id.* at 421-25. The Court reasoned that, despite different standards of proof in the two petitions, the actual notice to the public substantially complied with the requirements, because the method of notice for both types

[14] There are many possible reasons why Sprint did not make such an argument. Perhaps the interpretation did not occur to Sprint's attorneys at the time, or perhaps the attorneys considered that interpretation to be untenable. Perhaps they saw no benefit in moving back the boundaries of the unoccupied residential properties on the north and the west, because Sprint had already constructed the tower, at its own risk, 75 feet from the (then-occupied) residential property to the south. Whatever Sprint's reasons for declining to present this theory at the time, those restrictions were self-created, and not imposed by the agencies or the courts.

of petition was identical, and because the notice clearly apprised the public of the character of the proposed action. *Id.* at 424-25.[15]

Sprint argues that *Cassidy* should be distinguished. Sprint contends that the only way to confirm whether or not the BCZR required setbacks from unimproved properties was through a petition for special hearing, but that additional public notice would have been required before granting that relief. But even assuming that additional notice would have been required for Sprint to introduce its theory, such an obstacle was purely temporary. Given the four months that elapsed between the effective date of the amendment in May 2002 and the Board's de novo hearing, Sprint had ample time to cure any defective notice. At most, the Board would have been required to post additional notice on the property and to publish notice in two newspapers of general circulation for 15 days before hearing the matter. *See* BCZR § 500.7.

Neither the Baltimore County Zoning Regulations nor the Rules of Practice and Procedure issued by the Baltimore County Board of Appeals outline a specific procedure for amending a petition at the Board level. If Sprint had argued that the 2002 zoning amendment drastically changed the nature of the setback requirements at issue in the case, then the Board

[15] Although Sprint mentioned the issue of public notice in a single page of its appellate brief, almost all of the substance of Sprint's argument on this issue was first presented in a 12-page section of a reply brief. This Court has no obligation to address the additional arguments that were not presented in the original brief. *See, e.g., Chang v. Brethren Mut. Ins. Co.*, 168 Md. App. 534, 550 n.7 (2006); *see also May v. Air & Liquid Systems Corp.*, 219 Md. App. 424, 440 & n.12 (2014).

could have selected an appropriate course of action: dismissing the case without prejudice to allow a new petition to be filed, remanding the case back to the Zoning Commissioner, staying the appeal to allow the Zoning Commissioner to conduct a special hearing before consolidating the appeal, or simply issuing notice and resolving the matter at the de novo hearing. We do not speculate as to which procedure would have been most appropriate. At most, a few additional steps would have been required before the exact remedy could be granted.[16]

In sum, the time to present Sprint's theory that the BCZR required no setbacks from the vacant, adjacent properties was during the 2002 litigation, not in the separate, multi-year litigation that Sprint commenced in 2012. It cannot be disputed that both of Sprint's claims seeking approval for the cell tower were so closely related in space, origin, and motivation that the claims formed a convenient trial unit. *See Esslinger*, 95 Md. App. at 618. Therefore, Sprint is precluded from bringing substantially the same claim that the Board and the reviewing courts could have resolved in the earlier litigation, if only Sprint had presented its argument at that time. *See Seminary Galleria*, 192 Md. App. at 741-42 (holding that res judicata barred special hearing petition, because "[w]ith reasonable diligence, [petitioner]

[16] As explained previously, in *Esslinger*, 95 Md. App. at 623-24, this Court held that res judicata bars a litigant from raising claims for declaratory relief based upon legal theories that he or she could have asserted in a prior judicial review of an administrative decision. *Esslinger* focused on the circuit court's power to grant that particular remedy, rather than the Board's power. Thus, even if the Board in 2002 could not have granted special hearing relief, the circuit court could have granted equivalent declaratory relief in 2003.

could have discovered and asserted in support of the original [] filing its current argument"); *see also Alvey*, 243 Md. at 340 (res judicata barred second rezoning application "because any of the testimony relied upon in the [second] case as to this question could and should have been presented in the first case"); *Whittle*, 211 Md. at 49 (res judicata barred second rezoning application because "all the information which could have been produced should have been produced [in the first case] and the second case cannot be decided on testimony whi[c]h might have been introduced in the first case"); *Linthicum*, 170 Md. at 249 (holding that prior judgment regarding proposed use of property "dispose[d] of all questions [] presented [in second case], for they were all involved in the general question of exclusion of use, whether they were actually raised or not").

II.

A. Issuance of Written Opinion by Circuit Court

Sprint's final contention is that the circuit court erred when it affirmed the decision of the Board of Appeals without issuing a written opinion. Sprint directs our attention to § 4-405(a) of the Land Use Article, which mandates that a circuit court must "file a written order and opinion embodying the reasons for its decision" after conducting judicial review of certain zoning decisions by a board of appeals. Sprint further argues that the circuit court's order failed to include its reasons, and thus that the case should be remanded with instructions that the circuit court issue a separate opinion.

These contentions are misguided. As the Office of People's Counsel correctly points out, the provision cited by Sprint is inapplicable to this case. Baltimore County is a charter county that has adopted home rule under Article XI-A of the Maryland Constitution. *See, e.g., Hope v. Baltimore Cnty.*, 288 Md. 656, 659-60 (1980); *see also Falls Rd. Cmty. Ass'n, Inc. v. Baltimore Cnty.*, 437 Md. 115, 136, 141 n.28 (2014). Section 4-405(a) of the Land Use Article is codified within a division that expressly does not apply to zoning matters in charter counties. *See* Md. Code (2012), § 1-401(a) of the Land Use Article.[17]

Judicial review over zoning cases in a charter county is governed by the Express Powers Act, currently codified in Title 10 of the Local Government Article. Under that Act, each charter county is authorized to establish a board of appeals with jurisdiction over zoning exception cases and other matters. *See* Md. Code (2013 Repl. Vol.), Local Government Art., § 10-305(a)-(b). In such cases, the county board of appeals is required to file an opinion that must include factual findings and the grounds for the decision. *Id.* § 10-305(c). There is no corresponding requirement that the circuit court issue its own separate opinion when reviewing a decision by a board of appeals. *See id.* § 10-305(d).

In addition, § 10-324(a) of the Local Government Article empowers a charter county to enact local laws providing for the right to seek review in the circuit court of any other

[17] Section 1-401 of the Land Use Article is titled "Charter counties; limited application of division." Subsection (a) reads: "General limited application. Except as provided in this section, this division does not apply to charter counties." Subsection (b) lists a number of exceptions (*i.e.* certain provisions that do apply to charter counties), but that list does not include § 4-405.

matter arising under local zoning laws. Section 604 of the Baltimore County Charter grants parties a right to obtain judicial review of decisions of the board of appeals by appealing to the circuit court. These provisions include no requirement that the circuit court file a separate opinion when reviewing zoning cases.

Sprint commenced the instant case by filing a petition for special exception and special hearing in 2008. The administrative law judge ultimately considered only the petition for special hearing, and then Sprint appealed to the county board of appeals and to the circuit court. Neither § 10-305 nor § 10-324 of the Local Government Article requires that the circuit court must embody its reasons in a written opinion. Thus, the circuit court's order affirming the decision of the board of appeals was not deficient. Sprint's request for a remand to the circuit court has no statutory basis.

CONCLUSION

For the reasons stated in this opinion, we affirm the judgment of the circuit court, which affirmed the decision of the Board of Appeals. Our ruling is based upon a de novo legal conclusion that, even if Sprint's factual proffers to the Board were accurate and even if Sprint's interpretation of the zoning regulations were correct, res judicata would still bar Sprint's present claim. Accordingly, there is no reason to remand for further proceedings to resolve any remaining factual or legal dispute. *See Seminary Galleria*, 192 Md. App. at 723, 742 (affirming circuit court's judgment reversing Board's zoning decision on grounds of res judicata, without remand); *Antwerpen*, 163 Md. App. at 203-04, 210 (affirming circuit court's judgment affirming Board's decision on purely legal grounds, without remand).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

IN THE MATTER OF HARLAN ZINN –Petitioner/Legal Owner 809 Cold Spring Road Middle River, MD 21220	*	BEFORE THE BOARD OF APPEALS OF
RE: Petition for Special Hearing to Approve Building Permit for Undersized Lot	*	BALTIMORE COUNTY
	*	Case No. CBA- 13-295-SPH

* * * * * * * * * * *

OPINION

This case comes to the Board on appeal of the denial by the Administrative Law Judge of a Petition for Special Hearing filed by Harlan Zinn, Petitioner, pursuant to Baltimore County Zoning Regulations §500.7 ("B.C.Z.R.") to approve a building permit for an undersized lot located at 809 Cold Spring Lane, Middle River, MD 21220 (the "Property).

A public hearing was held on November 13, 2013. The Petitioner was represented by Michael McCann, Esquire. Deputy People's Counsel for Baltimore County, Carole DeMilio, participated in the hearing. Edward C. Covahey, Jr., Esquire represented Danan Holding Corporation, Daniel and Nancy Hubers, Richard and Amelia Pitz, Edward Bardroff, Sr. and Mitium Lee O'Hare, Protestants.

MOTION TO DISMISS

At the beginning of the Board hearing, Deputy People's Counsel made a oral motion to dismiss the case on the basis of *res judicata*. Mr. Covahey joined in the Motion. Mr. McCann opposed the Motion contending that the instant case was different than the previous cases filed by the Petitioner or his predecessor in title.

PRIOR ZONING LITIGATION

In this appeal, Mr. Zinn seeks a building permit to construct a residence on the Property. The hurdle he faces is that BCZR §1B02 (a/k/a the "small lot table") requires that property zoned D.R. 3.5. be at least 10,000 sq. ft. with a front and rear yard setback of 30 feet each. Because this Property measures less than 10,000 sq. ft., it is 'undersized'. Mr. Zinn argues that the small lot table setbacks restrictions do not apply based on BCZR §1B02.3.A.5.

By way of background, the Property was platted in 1914 as Lot 304, Part of Plan C of Long Beach Estates on Galloway Creek. Other than a shed, the Property has remained unimproved, having been used as a place to dock and launch boats. In 1976, the Property was zoned D.R. 5.5 and the minimum lot size was 6,000 sq. ft. In 1992, the Property was rezoned D.R. 3.5 and the minimum lot size was increased to 10,000 sq. ft.

In considering the Motion to Dismiss, the Board reviewed the zoning history of the Property which is extensive and summarized from prior Orders as follows:

(1) 2003 – Petition for Variance; Zoning Commissioner, Case No.: 03-500-A. Janice Oberst, the predecessor in title, along with a contract purchaser, Robert Long, filed a Petition for relief from BCZR §303.1 and from the setback restrictions in small lot table in BCZR, §1B02.3.C.1. Specifically, she requested a front yard setback of 11 feet in lieu of the required 55 ft. and a rear yard setback of 2 ft. in lieu of the required 30 ft. In addition, she requested that the Property be approved as an undersized lot.

Ms. Oberst and her family had owned the Property since 1954. They lived in the house located at 810 Cold Spring Road. During the 50 years that Ms. Oberst's family had owned the Property, they kept a small sailboat there, and her father operated a charter business out of the

Property. A storage shed was also on the Property as well as a pier and bulkhead. In 2004, the Oberst family sold the home at 810 Cold Spring Road to Robert Kroll.

The Petition filed by Ms. Oberst was opposed by Richard Pitz, a neighboring property owner who is also opposed to the instant Petition. In 2005, the Zoning Commissioner denied the relief finding that the lot was too small to build a house, that to do so would be inconsistent with the neighborhood and further, that the requested relief failed to meet the uniqueness test set forth in *Cromwell v. Ward*, 102 Md. App. 691 (1995). Ms. Oberst did not appeal the Commissioner's decision.

(2) 2004 – Petition for Variance – Deputy Zoning Commissioner; Case No.: 04-522-A.

In 2004, Mr. Zinn, as the contract purchaser, along with Ms. Oberst, sought relief to allow construction of a dwelling on the Property. In requesting that relief, Mr. Zinn argued that the Property was an undersized lot, that the front yard setback be 23 ft. in lieu of the required 30 ft. and the rear yard setback be 2 ft. in lieu of the required 30 ft.

The Deputy Zoning Commissioner denied the relief sought and agreed with the prior decision of the Zoning Commissioner. That decision was appealed to this Board.

(3) 2005. Petition for Variance - Board of Appeals; Case No.: 04-522-A.

In the hearing on appeal, Mr. Zinn amended the Site Plan and argued that the size of the Property was larger at 7,504 sq. ft. because the property lines included a portion of the 40-foot right of way known as Cold Spring Road as well as a 900 sq. ft. road end parcel purchased by Ms. Oberst from Bowley's Quarters Improvement Association in 1992.

Protestant, Mr. Pitz, testified in opposition to that request, pointing out that his home and others in the area were built on double and triple lots. In addition, Robert Kroll, the purchaser of 810 Cold Spring Rd. also opposed Mr. Zinn's request.

In that case, this Board considered whether the case should be barred under *res judicata* and collateral estoppel. At that time, we allowed the case to go forward but ultimately denied the requested relief. We held that the Property could not be used as an undersized lot upon which a home could be built, without variances being granted for setbacks. In considering the variance requested, the Board found that the Property was not unique. We said that the fact that the Property was wider than it is long was not sufficient to make it unique for zoning purposes. We held that the Property was too small for a home to be built.

In making that decision, the Board found that the Property was not 7,504 sq. ft. as Mr. Zinn contended but rather the original 5,396 sq. ft. The Board did not find credible the argument that the property lines included the 40 foot right of way or the 900 sq. ft. purchased by Ms. Oberst. We held that the extent of the property lines must be determined by the Circuit Court.

Mr. Zinn did not appeal the decision of this Board.

(4) 2007 –Petition for Special Hearing under BCZR, §500.7, Zoning Commissioner, Case No.: 07-236-SPH.

In 2007, Mr. Zinn filed for special hearing relief under BCZR, §500.7 to request that a storage shed be constructed for kayaks, boating equipment and gardening equipment. The shed was intended to supplement the use of the pier. The Deputy Zoning Commissioner granted that relief subject to restrictions to ensure that the shed would not be converted to a dwelling. There was no opposition to the requested relief. There was no appeal filed.

(5) 2007 –Petition for Variance, Zoning Commissioner, Case No.: 07-545-A.

Five months after the Order granting the storage shed, Mr. Zinn filed a Petition for Variance from the setback restrictions contained in the small lot table. In that case, Mr. Zinn argued that the Property measured 7,342 sq. ft. and he wanted variances from the 10,000 sq. ft.

minimum lot size and from the 25 ft. front and rear setbacks in lieu of the required 30 foot setbacks.

The Zoning Commissioner dismissed the case on the basis of *res judicata* indicating that Mr. Zinn was bound by this Board's 2005 decision and could not relitigate the same matter. Mr. Zinn appealed that decision to this Board.

(6) 2008 – Board of Appeals, Petition for Variance, Case No.: 07-545-A.

This Board heard the appeal of the Zoning Commissioner's dismissal. In our decision, we summarized the previous cases and Opinions concerning the Property. Mr. Zinn alleged that the size of the Property at that time was 7,342 sq. ft. We held that res judicata barred that appeal and said that the matter was fully litigated. We noted that *res judicata* is intended to prevent endless re-litigation of issues that have already been legally determined. Mr. Zinn did not appeal our 2008 decision.

Baltimore County Zoning Regulations

§ 1B02.3. Special regulations for certain existing or proposed developments or subdivisions and for small lots or tracts in D.R. Zones.

> A. In D.R. Zones, contrary provisions of this article notwithstanding, the provisions of or pursuant to this subsection shall apply to the use, occupancy and development of; alteration or expansion of structures upon; and administrative procedures with respect to:
>
> * * * *
>
> 5. Any lot or tract of lots in single ownership which is in a duly recorded subdivision plat not approved by the Baltimore County Planning Board or Planning Commission.

C. Development standards for small lots or tracts.

1. Any dwelling hereafter constructed on a lot or tract described in Subsection A.3 or A.4 shall comply with the requirements of the following table:

Zoning Classification	Minimum Net Lot Area per Dwelling Unit (square feet)	Minimum Lot Width (feet)	Minimum Front Yard Depth (feet)	Minimum Width of Individual Side Yard (feet)	Minimum Sum of Side Yard Widths (feet)	Minimum Rear Yard Depth (feet)
D.R.1	40,000	150	50	20	50	50
D.R.2	20,000	100	40	15	40	40
D.R.3.5	10,000	70	30	10	25	30
D.R.5.5	6,000	55	25	10	—	30
D.R.10.5	3,000	20	10	10	—	50.
D.R.16	2,500	20	10	25	—	30

Decision

Over the past 10 years, 4 cases have been heard and decided by the Zoning Commissioner's office and 2 appeals have been heard and decided by this Board in regard to the Property. The issue before us is whether the instant appeal should be dismissed on the basis of *res judicata*. Having heard argument of counsel on the Motion to Dismiss at the hearing, having reviewed the prior decisions of the Zoning Commissioner's office and of this Board, and having deliberated the Motion at the hearing on the record (with consent of all Parties) we grant the Motion to Dismiss the case, on the basis of *res judicata*.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not hear the facts of a case before determining whether the doctrine of *res judicata* applies. *Id.* at 995 A.2d 1070.

The Court also stated that the doctrine of *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett*, 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

The doctrine of *res judicata* bars litigation of the same matter with respect not only to the legal claims or issues decided in the case but also as to all matters which could have been litigated in the first suit. In *Powell v. Breslin*, 430 Md. 52 (2013), the Court of Appeals reaffirmed its holding in *Alvey v. Alvey*, 225 Md. 386, 390 (1961):

> The doctrine of *res judicata* is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters which with propriety could have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit,....

The doctrine of *res judicata* applies in zoning cases where the issue revolves around property use rather than the owner's identity. *City of Baltimore v. Pre*, 224 Md. 428 (1961).

The Court of Appeals in *Deleon, et ux. v. Slear, et al.*, 328 Md. 569, 589 (1992) citing its holding in *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487 (1987), explained that the test for determining whether claims are the same for the purposes of *res judicata* is the 'transaction' test as set forth in §24 of the Restatement (Second) of Judgments. The Court said that regardless of the number of substantive legal theories or forms of relief that may be available to a petitioner,

and notwithstanding the number of rights that may have been invaded, or the variations in evidence needed to support the theories or rights, the transaction test analyzes the facts of each claim to determine whether they are coterminous.

The concept of 'claim' is distinguished from the narrow concept of 'cause of action' in that a claim is defined as "a group or aggregate of operative facts giving ground or occasion for judicial action..." *Deleon* at 589. Specifically, the holdings in *Bilbrough* and *Deleon* narrow our focus to whether the facts of each case "are related in time, space, origin or motivation." *Deleon* at 591.

Applying the holdings in *Deleon* and *Alvey* here, this case involves the same property, the same parties, and the same request for a building permit on a lot that has repeatedly been adjudicated as 'too small' for a residence. The facts of this case are related in time, space, origin and motivation. Mr. Zinn created this zoning history himself, without filing for all forms of available relief back in 2004, under whatever legal theories could have been brought, including the instant one. Rather, his approach over the years has been to file cases in piece-meal fashion, arguing that the size of this property has changed, or by changing the dimensions of his proposed residence. His failure to appeal and have our previous findings of fact overturned, binds him to the facts previously adjudicated.

The way we see it, without even considering the other 5 zoning decisions, the 2003 Zoning Commissioner's decision alone is enough to deny Mr. Zinn relief here. This is true under *Seminary Galleria* even if he was not a party in 2003 because as a successor owner, he is in privy. His predecessor in title, Ms. Oberst admitted that the small lot table applied by filing for relief from it and by requesting approval of the Property as an undersized lot. In this case, Mr. Zinn's latest theory is that the small lot table does not apply. He is bound by not only Ms.

Oberst' admission but by the Zoning Commission's decision to deny the relief and his finding of fact that the "lot is too small" for a house. When the decision was not appealed, it became final. Moreover, under holdings in *Powell, supra*, and *Alvey, supra*, the issue of whether the small lot table even applied should have been raised as alternative relief in the 2003 case. Since it was not, it is barred from being raised 10 years later.

Notwithstanding the 2003 decision, the very next year, Mr. Zinn, as a contract purchaser of the Property, files for virtually the same relief as Ms. Oberst - that he needed relief from the small lot table. The only appreciable difference is that he reduced the amount of the setback variance needed. After a hearing on the merits, the Deputy Zoning Commissioner in 2004 denied the relief for the same reason set forth in the 2003 decision. Any claim by Mr. Zinn that the Property was not subject to the small lot table restrictions should have been raised as an alternative form of relief in that case.

Thereafter, this Board permitted the appeal of the 2004 decision to be heard on the merits in a *de novo* hearing in which Mr. Zinn was represented by counsel. In that appeal, Mr. Zinn rearranged his argument and claimed that the lot size had increased by including the 40' right of way and the 900 sq. ft. of unbuildable land purchased by Ms. Oberst. After a hearing on the merits, we rejected this argument and specifically found that the Property was still the original 5,396 sq. ft. Mr. Zinn did not appeal our decision and is bound by our findings as to the Property size.

He waited another 3 years before filing for relief again with the Zoning Commissioner's office. At that time, in 2007, Mr. Zinn filed a Petition for Special Hearing. While his request for relief was for a storage shed to supplement his use of the pier where he docked a houseboat, the Deputy Zoning Commissioner granted the storage shed request but placed restrictions in the

Order to prohibit the use of the shed as a residence. The 2007 case and the instant one both involve a Petition for Special Hearing, Mr. Zinn could have raised his latest legal theory in 2007 but failed to do so. He did not appeal the Deputy Zoning Commissioner's decision.

After the 2007 decision, he only waited 5 months to file another request for variance relief from the restrictions in the small lot table so he could build a house. In June of 2007, Mr. Zinn attempted at that time to increase the square footage of the lot to 7, 342 sq. ft. He made this argument in 2007 despite this Board's previous decision and factual finding that the Property size was 5,396 sq. ft. In 2007, he also asked for a larger front and rear yard setbacks than he did back in 2004 notwithstanding our previous denial of the smaller setbacks. When we heard the Zoning Commissioner's 2007 decision, we agreed that the case should be dismissed on the basis of *res judicata*. Mr. Zinn did not appeal our decision and it became final.

Applying the standard set forth in *Seminary Galleria*, our previous decisions in Case No. CBA - 04-522-A and CBA 07-545-A meet this test: (1) this Board was acting in a judicial capacity by conducting hearings in both cases, where evidence was presented, and rulings were made on disputed legal issues; (2) the issue of whether the lot was large enough to construct a residence and the size of the Property was actually litigated; and (3) this Board's rulings and that of the Zoning Commissioner's office were necessary for a resolution of the requests for relief from the setback restrictions in the small lot table as well as variance relief.

The Board finds it to be incredulous that Mr. Zinn has repeatedly requested relief from the small lot table restrictions over the years and now wants to claim that such restrictions do not apply. Under the applicable case law, BCZR §1B02.3.A.5 provides no refuge for Mr. Zinn. As the foregoing sequence of decisions and factual history indicate, the instant case fits squarely within the doctrine of *res judicata* and should be dismissed.

ORDER

THEREFORE, IT IS THIS 19th day of February, 2014, by the Board of Appeals of Baltimore County

ORDERED that the Motion to Dismiss the Petition for Special Hearing relief is hereby GRANTED for the reasons set forth herein and the case shall be dismissed; and it is further,

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen Murphy/KC
Maureen E. Murphy, Panel Chairman

David L. Thurston

Wayne R. Giotoso, Jr.

RE: PETITION FOR SPECIAL HEARING
810 Back River Neck Road

15th Election & 6th Councilmanic Districts
Legal Owner: Back River LLC
Petitioner(s)

* BEFORE THE

* BOARD OF APPEALS

* FOR

* BALTIMORE COUNTY

* Case No.: 2008-0531-SPH

OPINION

This case comes before the Baltimore County Board of Appeals as a de novo hearing on an appeal of the decision of the Administrative Law Judge denying a Petition for Special Hearing filed by the Petitioners for the property located at 810 Back river Neck Road in Eastern Baltimore County. The Petitioner has requested the following relief: 1. To determine that an existing cell tower is compliant with the current setback regulations; 2. To approve a non-density transfer of land into the subject property from the north and west. The Baltimore County Office of Law and Office of People's Counsel has moved for dismissal of the Petitioner's appeal on the grounds *of res judicata*. Memorandum were submitted by all parties and oral arguments were heard by this Board on December 4, 2012. Lawrence E. Schmidt of Smith, Gildea & Schmidt LLC appeared on behalf of the Petitioners, Adam Rosenblatt, of the Baltimore County Office of Law appeared for Baltimore County, and Carole S. Demilio appeared on behalf of People's Counsel. The Motion to Dismiss was publicly deliberated on January 16, 2013.

BACKGROUND

The dispute at issue dates back to January 4, 2002, when former Zoning Commissioner Lawrence E. Schmidt issued a written Order granting the Petitioner a variance from BCZR § 426 to construct a cell tower in the location where it is still presently situated. (Baltimore County, Ex. 1) The case was appealed to the Board of Appeals, which reversed the decision and

denied the variances and the Circuit Court and Court of Special Appeals, both of which affirmed the Board of Appeals. (Baltimore County, Ex. 2, 4) In 2009, the Baltimore County Code Enforcement Hearing Officer issued an Order finding the Petitioner in violation of BCZR § 426.6.A.1 for failing to maintain a 200 foot setback "from another owner's residential property line" and issued a civil penalty which was not appealed. (Baltimore County Ex. 5) In the proceeding before this Board, the Petitioner contends that the cell tower, is in compliance with the BCZR and never actually required a setback variance. The County as well as People's Counsel contends that the Petitioner's current argument is barred by *res judicata*, thus resulting in their filing of the Motion to Dismiss presently before the Board.

FACTS

The facts involved in the matter are derived from related past legal decisions on the issue and a change in the wording of BCZR § 426.6A, which governs the setback requirements for Wireless Communications Towers in Baltimore County. Prior to May 5, 2002, of BCZR § 426.6A read as follows:

> 1. If a tower is located in a residential zone, the tower shall be set back at least 200 feet from any other owner's residential property line.
>
> 2. If a tower is located in a transitional zone, the tower shall be set back at least 200 feet from any residential zone.
>
> 3. If a tower is located in a medium or high intensity commercial zone, the tower shall be set back from an adjoining property line a distance equal to the setback required for other structures in the zone. However, if the property adjoins a residential zone, the tower shall be set back at least 200 feet from the residential zone.

In 2002, Bill 17-20 amended the law governing these setbacks to require that a "tower shall be setback at least 200 feet from any other owner's residential property line." BCZR § 426.6A(1) (emphasis added). (People's Counsel Ex. 1) This Bill became effective on May 5,

2002, and presently governs the setbacks for Wireless Communication Towers today. It is this change in of BCZR § 426.6A which the Petitioner basis its argument in the instant petition.

Bill 17-20 became effective four (4) months after Petitioner's original request for variance was granted, thus the pre-May 5, 2002 version of of BCZR § 426.6A was controlling at that time. The change occurred before the Board of Appeals conducted *de novo* hearings and denied the variances on May 14, 2003, and before the Court of Special Appeals affirmed the Board on August 3, 2005.

ARGUMENT

The doctrine of *res judicata* provides that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc,* 192 Md.App. 719, 734-737 (2010). Res judicata acts as "an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which *could have been* litigated." Id. (*citing Whittle v. Bd. of Zoning Appeals,* 211 Md. 36, 49 (1956) (emphasis in original)). In *Whittle,* the Court of Appeals stressed that successive litigation of zoning petitions is discouraged because it "would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law." 211 Md. at 45. The doctrine applies to the administrative decisions reached by the County Board of Appeals *Batson v. Shiflett,* 325 Md. 684, 705 (1992).

It is clear from the record of the prior proceeding involving this matter, it was not until the recent hearing before Baltimore County A.L.J. John E. Beverungen, that the Petitioners' raised the argument that in light of the 2002 statutory change to BCZR § 426.6A(1) a variance was not required to keep the cell tower at issue in its current location. The Petitioners, while

acknowledging the basic tenets of *res judicata,* opine that the request for relief now set before the Board, falls into an exception to the general prohibitions of *res judicata.*

Petitioners first contend that *res judicata* should not apply due to the fact that the manner of relief now being sought is A Request For Special Hearing and not a Request for Variance. As the end result being and sought as well as the underlying facts which are contained in both avenues of relief are the same, the Board is not convinced that changing the name of the proceeding circumvents the constraints of *res judicata.*

Additionally, Petitioners contend that *res judicata* should not apply to the instant petition due to the fact that the law "changed" after the original request for variance went before the Zoning Commissioner. Petitioners state that "the version of the regulation under consideration in the instant matter bears little resemblance to the law in effect when the earlier matter was filed and considered by the Commissioner." This Board does not agree with this assertion. Petitioners' primary argument is that the regulation at issue was amended in 2002 (Bill 17-02) to provide that a "cell tower" shall be set back at least 200' from any other owner's residential property line." (emphasis added). The former regulation provided that the set back was 200' from an adjoining "residential zone line." (emphasis added). Petitioners contend that "residential zone" is a defined term in BCZR § 101, while the newer phrasing – which became effective after the Zoning Commissioner's decision in the original variance case, 02-159-A, of a "residential property line" is different. Petitioners opine that a "residential property line" exists only when the property in question is improved with a dwelling.

For the Petitioners argument to prevail this Board must be convinced that the language used in Bill 17-02 possesses a different meaning than the language found in the law prior to 2002. Thus, the prior use of the terms "residential zone line" must differ from the meaning

intended in the terms "residential property line" found in the current law. As pointed out by ALJ Beverungen in his review of the matter, A "zone line" is a boundary that separates land into different zoning classifications. These lines are drawn by governmental authorities, who have the "power to alter zone lines from time to time" when in the public's interest. *Offutt v. Baltimore County*, 204 Md. 551, 557 (1954). Zone lines are not required to be divided along a "property line." In actuality "split-zoned" properties, are often encountered in zoning matters. A "property line" is a boundary establishing the limits of land owned by any particular person. Neither of these terms is defined in Webster's Dictionary (*See* BCZR § 101.1) or Black's Law Dictionary, for that matter. When a term is not defined in a statute, or dictionary, principles of statutory construction dictate that it be given its "ordinarily understood" meaning. *Comptroller v. JJPort, Inc.*, 184 Md. App. 608, 632 (2009).

The terms "property line" and "zoning line" do refer to different things, but here the distinction is not relevant because the tower is not set back 200' from either the RC 20 "zone line" or the "property line" of the adjacent parcel. Consequently, the Board finds that the present version of the law enacted by Bill 17-02 in 2002 is unambiguous on its face and requires no further interpretation beyond it plain meaning. Additionally, the Board finds that even if the new version of the law were to be deemed slightly changed, its current terminology still bars the Petitioner from its present request for relief no matter what label that request for relief has taken on.

CONCLUSION

As this Board is not swayed by the Petitioners' argument that this case involves an exception to the doctrine of res judicata, and somehow involves the application of new law that

would change the outcome of prior decisions in this matter, the Motion to Dismiss filed by Baltimore County and joined by People's Counsel is GRANTED.

ORDER

IT IS THEREFORE, this 19th day of April, 2013 by the Board of Appeals for Baltimore County,

ORDERED, that the Motion to Dismiss Appeal filed by Baltimore County's Department of Permits, Approvals and Inspections in Case No.: 08-531-SPHX be and is hereby GRANTED; and it is further

ORDERED, that the appeal in Case No.: 08-531-SPHX, be and is hereby DISMISSED WITH PREJUDICE.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Andrew M. Belt, Chairman

Wendy A. Zerwitz

Lawrence S. Wescott

RE:	PETITION FOR SPECIAL HEARING 1301 CHEVERLY ROAD 9th Election & 3rd Councilmanic Districts	*	BEFORE THE
		*	BOARD OF APPEALS
	Legal Owner: The Belvedere Baptist Church of Baltimore	*	FOR
	Lessee: Davenport Preschool LLC, Petitioners	*	BALTIMORE COUNTY
		*	Case No.: 15-004-SPH

OPINION

This case comes before the Baltimore County Board of Appeals on an appeal of Administrative Law Judge John Beverungen's decision denying a Petition for a Special Hearing to approve an amendment to Restriction No. 2 in Zoning Case No. 2013-0166-X for the property located at 1301 Cheverly Road in Eastern Baltimore County. People's Counsel for Baltimore County has moved for dismissal of Petitioners' appeal on the grounds of *res judicata*. Petitioner Davenport Preschool, LLC ("Davenport") [1] and People's Counsel submitted Memoranda, and the Board heard oral arguments on January 27, 2015. Matthew T. Vocci of Ober Kaler Grimes & Shriver appeared on behalf of Davenport, J. Carroll Holzer appeared on behalf of the Protestants, and Peter M. Zimmerman appeared on behalf of People's Counsel. The Board publicly deliberated the Motion to Dismiss on January 27, 2015.

BACKGROUND

The dispute at issue dates back to March 28, 2013, when Administrative Law Judge ("ALJ") Beverungen of the Office of Administrative Hearings issued a written order granting, with certain conditions, the Petition for a Special Exception filed by The Belvedere Baptist Church of

[1] Counsel for Davenport has indicated the proper name of the Lessee is 'Davenport Education, LLC.'

Baltimore, Legal Owner ("Belvedere") and Davenport, the Lessee. (Belvedere and Davenport are collectively referenced herein as "Petitioners"). Petitioners had sought the special exception pursuant to §424.5.A of the Baltimore County Zoning Regulations ("BCZR") to permit a Class B Group Child Care Center with more than 40 children in an existing church on the subject property. (Case No. 2013-166-X). After a contested hearing involving testimony and evidence from Davenport and several members of the community, the ALJ granted the Petition, subject to three conditions. The pertinent condition is No. 2, which states as follows:

> 2. The Petitioner shall have no more than 120 children in the facility at any one time, unless state regulations or fire and life safety regulations provide a lower number which would prevail.

(March 28, 2013 ALJ Opinion and Order at 7). Petitioners did not file an appeal of this Order. Certain community members ("Protestants") did file a timely appeal to the Board of Appeals from the ALJ's decision but subsequently withdrew their appeal. By Order dated June 27, 2013, the Board of Appeals dismissed Protestant's appeal with prejudice. (The 2013 hearing and appeal process shall be referred to as "Davenport I").

More than a year later, on July 8, 2014 and pursuant to § 500.7 of the BCZR, Petitioners filed for a Special Hearing, seeking amendment of Condition No. 2. Specifically, Petitioners wanted the ALJ to amend that condition to allow a maximum of 150 rather than 120 children in the child care facility. A public hearing was held and both sides again presented testimony and evidence. By Order dated September 12, 2014, ALJ Beverungen denied the Petition. Petitioners filed a timely appeal to this Board of Appeals. (The 2014 hearing and appeal process shall be referred to as "Davenport II"). People's Counsel has filed a Motion to Dismiss Petition for Special Hearing, based on the doctrine of *res judicata*. Petitioner Davenport opposes the Motion.

FACTS

In Davenport I, Petitioner Davenport sought a special exception in order to operate a childcare facility for more than forty children. Davenport intended to lease space in the existing Belvedere Baptist Church to house the facility. The Church is situated on a 12.711 acre property in a rural residential neighborhood consisting of approximately 160 homes and zoned DR 1. See Davenport I ALJ Opinion at 2,4. Under the DR 1 classification the Petitioners would be permitted to operate a class B Group Child Care Center with up to forty children as a matter of right. See BCZR §1B01.1.A.12. The Regulations require a Special Exception to operate a facility with more than forty children. See BCZR §424.5.A.

During the hearing in Davenport I, the Davenport representative indicated that applicable child care regulations would limit the number of child in the facility as planned to approximately 135. Davenport stated further that its goal was to enroll 150 children, resulting in approximately 120 children attending the center on any given day.[2] See Davenport I ALJ Opinion at 5-6. Neighborhood residents who spoke at the hearing identified potential traffic problems as their primary concern. Id. at 4. There was some divergent testimony as to the estimated number of vehicle trips through the neighborhood 150 enrolled children would generate. ALJ Beverungen stated that each such estimate represented "a lot of traffic" for the rural residential neighborhood and may well disturb the peace and quiet of the neighborhood. He stated further, however, that a large child care center with 100+ children would generate a large volume of traffic in any DR zone, not just this particular location. Id. at 4. According to ALJ Beverungen, the increase in traffic was "inherent" in the proposed use and "is exactly the type of inherent adverse effect that the legislature

[2] Given that some of the younger children would attend on a part-time basis, Davenport counted two such part-time children as one full-time enrollment.

was presumed to have anticipated when it allowed the use by a special exception." Id. He concluded he was compelled to grant the Petition because the Protestants failed to show that the proposed use at the particular location would have non-inherent adverse effects. Id. at 5.

Although he granted the Petition, ALJ Beverungen also conditioned the relief in an attempt "to mitigate the impacts on the community." Id. The "most significant condition" concerned the number of children at the facility. Considering both the expected traffic problems, and Davenport's testimony regarding the anticipated number of students and classrooms, the ALJ concluded 120 children was an appropriate figure. Id. He thus granted the special exception subject to the condition that Davenport would have "no more than 120 children in the facility at any one time. . . ." Id. at 7. Petitioners did not appeal this decision. Protestants did file but later withdrew an appeal. Therefore, on June 27, 2013, this Board dismissed the appeal with prejudice.

In July 2014 Petitioners reemerged and filed a Petition for a Special Zoning Hearing. The Petition sought amendment of Condition No. 2 in the March 2013 Order, such that Davenport would be permitted to increase the number of children in the facility to 150, rather than 120. Petitioners also wanted to build an additional classroom on the property to accommodate more children. ALJ Beverungen again heard testimony from witnesses for the Petitioner and Protestants and received exhibits regarding the proposed changes. In an Opinion dated September 12, 2014, ALJ Beverungen denied the Petition for Special Hearing. He emphasized that Petitioners had failed to indicate why the original restriction should not remain in place, that Davenport had not yet reached the maximum number of students permitted in condition No. 2,[3] and that Petitioners failed to demonstrate some change in circumstances that would justify a different restriction. See

[3] The Davenport representative indicated the then-current class had 109 children and that she wanted to build another classroom to house 16 more students. See Davenport II ALJ Opinion at 2.

Davenport II ALJ Opinion at 2-3. On October 10, 2014 Davenport filed a Notice of Appeal. People's Counsel filed a Motion to Dismiss the Petition for Special Hearing and Petitioner's appeal from the decision in Davenport II on the ground of *res judicata*. Davenport responded and on January 27, 2015 all parties presented arguments before the Board of Appeals.

DISCUSSION

I. Res Judicata

Under the doctrine of *res judicata,* a judgment on the merits in a previous suit between the same parties or their privies is entitled to full preclusive effect and bars a second suit predicated upon the same cause of action. Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc., 192 Md. App. 719, 734 (2010)(citations omitted). Res judicata acts as "an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which could have been litigated." Whittle v. Bd. of Zoning Appeals, 211 Md. 36, 49 (1956). See Garrett Park v. Montgomery County Council, 257 Md. 250, 257 (1970) (*res judicata* applies to every matter that was or might have been presented in the prior case).

Although some older cases held that *res judicata* did not apply to rulings of administrative agencies, it is now well-established that "when an administrative agency is performing a quasi-judicial function, the principles of *res judicata* are applicable." Seminary Galleria, 192 Md. App. at 735. This determination is guided by a three-part test: 1) whether the agency was acting in a judicial capacity; 2) whether the issue presented to the tribunal was actually litigated before the agency; and 3) whether the issue's resolution was necessary to the agency's decision. Id. at 736. See Batson v. Shiflett, 325 Md. 684, 705-08 (1992).

In acting upon the Petitions filed herein, the Office of Administrative Hearings acted in a judicial capacity, conducting a hearing and allowing the parties to present evidence. The parties

were precisely the same in both Davenport I and II. The issues regarding the maximum number of children presented in Davenport II were previously addressed, litigated and resolved in Davenport I. That resolution was key to the original decision. According to these criteria, the resulting conditioned decision rendered by ALJ Beverungen in Davenport I should preclude maintenance of a second action to amend that same condition.

Petitioners argue the decision is not entitled to a preclusive effect because it was based on an error of law. However, just as a final decision in a prior litigation, even if incorrect, will bind the parties to the litigation, a decision by an administrative agency acting in a judicial capacity is equally binding whether or not the decision was made in error. See Powell v. Breslin, 430 Md. 52, 64-65 (2013)(an incorrect ruling in a prior action does not deprive the ruling of *res judicata* effect). This should particularly apply when the party striving for that proverbial second bite at the apple failed to appeal the first determination. Even if this were not the case, the decision in Davenport I was not in error. Petitioners argue that Schultz v. Pritts, 291 Md. 1 (1981) and its progeny such as Montgomery County v. Butler, 417 Md. 271 (2010) should be considered in analyzing the matter. However, that is exactly the path ALJ Beverungen followed. Citing Schultz and Butler, the ALJ concluded that insofar as the community's traffic concerns are an inherent effect of a large child-care center in any DR zone, he was bound to, and therefore he did grant the Petition. See Davenport I ALJ Opinion at 3-4.

The fact that the ALJ also imposed certain conditions in an attempt to alleviate the traffic burden and protect the neighborhood does not in any way undermine the validity of his decision. To the contrary, the applicable zoning regulations specifically permit such conditional grants. According to BCZR §502.2, "[i]n granting any special exception, the Zoning Commissioner . . . shall impose such conditions, restrictions or regulations as may be deemed necessary or

advisable for the protection of surrounding and neighboring properties." See Halle Companies v. Crofton Civic Ass'n, 339 Md. 131, 140 (1995) (agency may impose reasonable conditions and restrictions in connection with a special exception order to mitigate the effect upon neighboring property and the community at large.); Baylis v. City Council of Baltimore, 219 Md. 164, 168 (1959). The ALJ permitted Petitioners to operate their business on a scale larger than that permitted as of right while concomitantly imposing certain restrictions intended to protect the neighborhood and its residents. This compromise was an appropriate use of his discretionary powers.

II. Substantial Change in Circumstances

Res judicata operates on the premise that faced with the same information, there is no reason to expend judicial resources and force opposing parties to rehash the same case in an ongoing effort to reach a different result. Thus, if a party *does* provide evidence of substantial changes in circumstances and fact between the first case and the second, res judicata may not necessarily prevent a second hearing on a previously decided matter. This issue arises fairly often in the zoning arena. According to the Court of Appeals, "[t]his rule seems to rest not strictly on the doctrine of *res judicata* but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law." Whittle, 211 Md. at 45. See Seminary, 192 Md. App. at 737("The Court of Appeals has emphasized that before a party can apply to a zoning agency for relief previously denied by the agency, 'substantial changes in fact and circumstances' must be, indeed, substantial.") (citations omitted); Jack v. Foster Branch Homeowner's Ass'n No. 1, Inc., 53 Md. App. 325, 333 (1982) (*res judicata* doctrine may not preclude a second case where there has been a material change in circumstances since the first decision); Chatham Corp. v. Beltram, 243 Md. 138, 151-52 (1966)

(barring a second attempt to re-raise a previously decided issue where the underlying facts remained unchanged).

Davenport contends that the actual operation of the school is a significant change in circumstances. They point to a document all school parents are required to sign regarding safe driving through the neighborhood and note that there have not been any traffic accidents. They further indicate that the growth of the student population and current space restrictions may require them in the future to refuse admittance to a few families. (Davenport's Response Memorandum at 7-8). These are not significant material changes that would warrant a rehearing or amendment of Condition No. 2. These same items were raised in Davenport I. The school's operation and the consequences thereof was a fact that was anticipated and discussed at the prior hearing. Condition No. 2 was imposed precisely to mitigate contemplated traffic problems resulting from the student population; the current absence of accidents argues more for the continuation of the condition rather than its amendment and a larger student body.[4] As to the school's parents now signing an agreement regarding safety and neighborhood issues, that is not a change warranting a rehearing; one would have assumed that school parents would obey traffic laws and exercise caution when driving through the neighborhood irrespective of the agreement. [5] In short, there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decisions.

[4] Moreover, while Davenport may desire more available student slots, the school has yet to reach the maximum number of students allowed under the existing condition.

[5] The "Community Respect Agreement" signed by the Davenport parents includes such statements as "I will come to a complete stop at every stop sign" and "I will not speed through the neighborhood . . . ."

CONCLUSION

In Davenport I, the ALJ struck a valid compromise between each party's concerns in light of the governing law. If Petitioners took issue with Condition No. 2 in the ALJ's decision they could have and should have filed a timely appeal with the Board. They failed to do so. The Protestants filed an appeal but withdrew that appeal in the apparent belief that Petitioners would be adhering to the conditions set forth in Davenport I. The community's good faith in withdrawing its appeal should not mean they are now required to fight the same battle every new school year. The parties in both Davenport I and II are identical, there are no material changes of fact or law, and the issues now presented either were addressed or could have been addressed in Davenport I. Petitioners have not presented any compelling reason permitting them, contrary to the doctrine of *res judicata*, to go back to the well and re-litigate the same issue in the hope of achieving a different result.

ORDER

IT IS THEREFORE, this 27th day of February, 2015 by the Board of Appeals for Baltimore County,

ORDERED, that the Motion to Dismiss Petition for Special Hearing filed by Baltimore County's People's Counsel be and is hereby GRANTED; and it is further

ORDERED, that the appeal in Case No. 2015-0004-SPH be and is hereby DISMISSED WITH PREJUDICE.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

David L. Thurston, Chairman

Benfred B. Alston

Meryl W. Rosen

16-003-SPH

Peter Max Zimmerman

To: Appeals Board
Cc: Lawrence Schmidt; borgerdinglaw@aol.com
Subject: Supplement, to include previous Court of Special Appeals decision on 9025 Cuckold Point Road (Dock of the Bay)
Attachments: Fifth Street CSA Decision.pdf

To the Appeals Board,

The Court of Special Appeals decision in Fifth Street v. Ciarpella (Dock of the Bay) is attached. It was inadvertently omitted from the e-mail sent earlier this morning. The opinion is dated July 9, 2010, the same year as Seminary Galleria v. Dulaney Improvement Association. Judge Deborah Eyler authored the excellent opinion.

Sincerely, Peter Max Zimmerman, People's Counsel, 410 887-2188

Peter Max Zimmerman
2/12/16

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 810

September Term, 2009

FIFTH STREET, LLC., ET AL.

v.

MATTHEW CIARPELLA, ET AL.

Eyler, Deborah S.,
Woodward,
Kehoe,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 9, 2010

Fifth Street, LLC, and its managing member, Lawrence J. Thanner, Jr. (collectively "FSLLC"), the appellants, own the Dock of the Bay, a restaurant and bar located at 9025 Cuckold Point Road in Baltimore County.[1] They appeal from the judgment of the Circuit Court for Baltimore County affirming a decision of the Baltimore County Board of Appeals ("Board"), finding them in violation of the Baltimore County Zoning Code ("Zoning Code") for operating a nightclub in a B.L. (Business Local) zone. The appellees are People's Counsel for Baltimore County ("the County") and Matthew Ciarpella, who resides near the restaurant. The FSLLC presents four questions for our review, which we have consolidated and rephrased as follows:

I. Did the Board err in concluding that the Dock of the Bay operates as a nightclub, as defined in the Zoning Code?

II. Is the definition of a "night club" in the Zoning Code so arbitrary and confusing as to deprive the appellants of their due process rights?

III. Did the Code Enforcement Division hearing officer err in concluding that the appellants violated the Zoning Code by erecting a tent without a permit?[2]

---

[1]We will refer to the Dock of the Bay as a restaurant, as all parties seem to agree that it performs this function, but we do not intend this description to be in any way determinative of the central issue in this case.

[2]As framed by FSLLC, the question presented are:

1. In Special Hearing Case No.: CBA-07-144-SPH, the County Board of Appeals erred as a matter of law in determining that the Dock of the Bay restaurant was a night club under the Baltimore County Zoning Regulations definition.

2. In Zoning Violation Case No.: 06-044, the finding of violation was in error as a matter of law.

(continued...)

For the reasons that follow, we shall affirm the judgment of the circuit court.

ZONING REGULATIONS

The Zoning Code establishes three types of business zones: B.L. (Business Local), B.R. (Business Roadside), and B.M. (Business Major). Zoning Code § 100.1.A.2. As noted above, the Dock of the Bay is located in the B.L. zone. The B.L. zone is the most restrictive of the three business zones.

Zoning Code section 230.1.A sets forth the permitted uses in the B.L. zone, which include the operation of a "standard restaurant" and a "tavern." Combinations of permitted uses also are allowed. Zoning Code § 230.1.A.10. A "nightclub" is not among the permitted uses in the B.L. zone, nor is it permitted by special exception. Zoning Code § 230.3.[3]

A "standard restaurant" is defined in the Zoning Code as follows:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

Id. at § 100.1. A "tavern" is defined as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." *Id.* Lastly, a "nightclub" is defined as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County." *Id.*

In 2005, the Baltimore County Council passed Bill No. 1-05, adopting the ICC International Building Code, 2003 Edition ("IBC"),[4] with some modifications, as the Building Code of Baltimore County. Chapter 3 of the IBC governs "Use and Occupancy Classification." IBC at 23. IBC section 303.1, entitled "Assembly Group A," includes "the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation." *Id.* at 24. Subgroup A-2 includes:

> Assembly uses intended for food and/or drink consumption including, but not limited to:
>
> Banquet halls
> Night clubs

[2](...continued)

3. If the Dock of the Bay is a restaurant, Civil Citation in Case No.: 07-134 and Case No.: 06-044 must be reversed.

4. County's arbitrary and confusing definition of night club violates Appellants' due process rights, violates standards for discretionary enforcement; leaves enforcement to the arbitrary discretion of County officials and constitutes undue favoritism by the County as established in the testimony before the Board of Appeals. Further, that the County's classification of night club must be reasonable and the evidence before the Board and the Board's conclusions established that the use of I.B.C. Group A-2 to define night club is unusable, arbitrary and capricious.

[3]A nightclub is a permitted use in the B.M. zone. Zoning Code § 233.1.

[4]International Code Council, *International Building Code* (2003).

Restaurants
Taverns and bars

Id.

The commentary to the IBC explains, "[b]ecause of the arrangement and density of the occupant load associated with occupancies classified in the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high." ICC, *IBC Commentary - Vol. 1*, at 3-16 (2003) ("IBC Commentary"). It then provides a description of each subgroup classification. Under Subgroup A-2, the following description appears:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - Low lighting levels;
> - Entertainment by a live band or recorded music generating above-normal sound levels;
> - No theatrical stage accessories;
> - Later-than-average operating hours;
> - Tables and seating arranged or positioned so as to create ill-defined aisles;
> - A specific area designated for dancing;
> - Service facilities for alcoholic beverages and food; and
> - High occupant load density.

Id. at 3-17 - 3-18. The IBC Commentary explains that the characteristics of Subgroup A-2 are particularly problematic with respect to fires and can result in loss of life. *Id.* at 3-18. Finally, it notes that the characteristics listed above "are only advisory in determining whether Group A-2 is the appropriate classification." *Id.*

FACTS AND PROCEEDINGS

The underlying facts are largely undisputed. The Dock of the Bay has been in operation since approximately 1955. It is situated on the Miller's Island peninsula between the Back River, to the west, and the Chesapeake Bay, to the east. To the south are residences that, like the Dock of the Bay, are zoned B.L. To the north and west of the property is a marina with attendant parking facilities. These properties are zoned B.M.

In September 2003, the Dock of the Bay was destroyed by Hurricane Isabel. One month later, FSLLC purchased the restaurant. Thanner then spent five months rebuilding the restaurant before reopening it in March 2004.

The interior of the restaurant is about 2,400 square feet. The first floor consists of a rectangular bar at one end and tables and chairs in most of the remaining open space. The second floor is used only for storage and office space. The business is licenced as a restaurant and is authorized to serve approximately 150-160 people. It also holds a Class-D liquor license.

Outside the restaurant is a patio area with more tables and chairs and an outside bar. Adjacent to the patio is a children's play area with a wooden pirate ship. The patio overlooks the Chesapeake Bay. FSLLC also owns a dock with 14 "transient" boatslips for customer use.

The restaurant is open daily from 11:00 a.m. until 2:00 a.m., although it frequently closes earlier on week nights, especially in the wintertime. It serves a full lunch and dinner

menu, with an emphasis on seafood. It also serves alcohol. Food service ends at 11:00 p.m. Approximately 70% of its sales are food, 28% beverages, including alcohol, and 2% T-shirts and cookbooks.

There are ten television sets inside the restaurant and another two at the outside bar. A house music system, connected to speakers inside and outside, plays satellite radio. The televisions and radio music are playing at all times except when live entertainment is offered.

Several forms of live entertainment are offered indoors, including disc jockeys, karaoke, and live bands. Live bands typically play on weekend nights from 9:00 p.m. until 1:00 a.m.

On Saturday and Sunday afternoons from May through September, live bands play outside during the daylight hours between 4:00 p.m. and 8:00 p.m. Live music used to play outside until 9:00 p.m., but Thanner ended that practice in response to complaints from neighbors conveyed to him by the Liquor Board. Although the types of bands that play vary, generally the bands are not "full-scale rock" bands. Rather, they are smaller groups that play "island music."

Although there is no dance floor, during live performances patrons often dance in between the tables.

On April 21, 2006, a little over two years after the Dock of the Bay reopened under FSLLC's management, the Code Enforcement Division ("CED") of the Baltimore County Department of Permits and Development Management ("DPDM") received a letter of

complaint from Matthew Ciarpella, through counsel, regarding live music at the restaurant.[5] The letter alleged that the Dock of the Bay was operating as a nightclub, which is not a permitted use in the B.L. Zone.

In May, June, and August of 2006, the Dock of the Bay was cited for operating a nightclub in a B.L. zone, erecting a tent without a permit, and failing to cease nightclub operations and to remove the tent.[6]

On August 18, 2006, FSLLC filed a "Petition for Special Hearing," presenting two questions:

> 1. Whether the use of the property at 9025 Cuckold Point Rd., Millers Island 21219 is in violation of the [Zoning Code ?]
> 2. Is the use by Fifth Street, LLC, a restaurant, at 9025 Cuckold Point Rd., which provides music during the day, . . . a "night club" as defined in the [Zoning Code]?

On August 23, 2006, before the petition for special hearing was ruled upon, the case came before a CED Hearing Officer at the DPDM. The hearing officer heard testimony from Thanner, Ciarpella, and another nearby resident, Wayne Walkman, Jr. Evidence consisting of advertisements highlighting the music offered at the Dock of the Bay also were introduced. The hearing officer issued "Findings of Fact and Conclusion[s] of Law." He found that the Dock of the Bay offered live and recorded music, both inside and outside. He

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[5]This was not the first complaint about the property. In the summer of 2005, Ciarpella and other nearby residents made numerous noise complaints.

[6]After the first of the citations, Thanner wrote to the inspector to request clarification as to the nature of his violation. He received no response to his letter.

then referenced the IBC and the IBC Commentary, concluding that the property "exhibits some of the listed characteristics" in the IBC Commentary for Subgroup A-2. He ruled that the Dock of the Bay was "being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use." He imposed a civil penalty of $5,000 and ordered FSLLC to "dismantle the outside speaker system and cease live and/or recorded entertainment immediately." He further concluded that the tent was erected without a permit in violation of IBC sections 3102.1, 3103.1 and 3103.1.1 and ordered it removed.

A two-day, public special hearing was held before the Zoning Commissioner ("Commissioner") to determine if the Dock of the Bay, "which provides music [] during the day, [is] a 'nightclub' as defined in [the Zoning Code]." Thanner testified at the hearing. Three past and present residents of Millers Island testified in support of FSLLC. Twenty-two nearby residents testified as protestants about the loud music, parking overflow, and noisy patrons leaving the property late at night. Finally, the CED officer who had cited the property and James H. Thompson, CED Supervisor, testified.

On May 30, 2007, the Commissioner issued his opinion. After reciting the "relatively simple" facts, the Commissioner addressed the question whether the Dock of the Bay is a "nightclub or simply a restaurant where ancillary entertainment is provided." He looked to the definition of "nightclub" in the Zoning Code and to the IBC and IBC Commentary. He concluded that, under the plain language of the Zoning Code definition, any establishment

that "provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub" under the IBC is an impermissible use in a B.L. zone. He further concluded that the use of the term "categorized" means only that the establishment necessarily falls under the IBC "Use and Occupancy Classification" category that includes "nightclubs." The Commissioner ruled that the Dock of the Bay is a "nightclub" under the Zoning Code and ordered "that the playing of outdoor music either by way of an outside speaker system, live/or recorded entertainment, must be discontinued."

After the special hearing, FSLLC was cited for continuing nightclub and tent violations. A second hearing before a hearing officer was held and the Dock of the Bay again was found in violation.

FSLLC appealed to the Board from the decision of the Commissioner, as well as from the decisions of the hearing officers. The cases were consolidated before the Board.

On January 15, 2008, a three-member panel of the Board took testimony and heard argument.[7] FSLLC called Thanner and also called Thompson, as an adverse witness. In addition to the facts already adduced concerning the nature of his business, Thanner testified that live entertainment was a significant draw for the Dock of the Bay, especially during the

[7]Pursuant to Zoning Code section 501.6, appeals from the Zoning Commissioner are heard "*de novo*." Accordingly, the Board took testimony on the issues presented at the special hearing. The appeal of the code enforcement rulings, however, were reviewed on the record before the hearing officer pursuant to section 3-6-303 of the Baltimore County Code (2003).

slower winter months, and that he would likely have to close down if forced to discontinue it.

Thompson testified that the CED operates on a "complaint basis only," meaning that it investigates alleged code violations only after receiving a complaint about a property or business. It does not undertake investigations of potential violations on its own initiative. He also testified that, in his opinion, based on his experience enforcing the Zoning Code, a property could operate as a "dual use," meaning that it could fit into multiple categories of use simultaneously. He explained that it was the practice of the CED to treat live music, but not recorded entertainment, as a code violation in the B.L. zone.

Numerous residents also testified. For the most part, their testimony was not relevant to the issues on appeal.[8] There was testimony that music played at the dock of the Bay was loud enough to be heard inside residents' houses.

At the conclusion of testimony and arguments, the Board allowed the parties to submit briefs. On June 4, 2008, a two-member majority of the Board issued an opinion concluding that the Dock of the Bay was operating as a nightclub and affirming the hearing officer's

[8]FSLLC filed a motion to limit testimony with respect to expected resident testimony concerning noise at the restaurant and related complaints about the establishment. The Board granted the motion, opining that this type of testimony generally was not relevant to the legal issue whether the business was a nightclub under the Zoning Code, the only issue under *de novo* review. Despite that ruling, many residents testified. Their testimony was cut short by relevance objections, however.

An employee of the Liquor Board also testified and counsel for Ciarpella attempted to introduce into evidence records related to prior noise complaints from 2005. The Board granted FSLLC's hearsay objections to this testimony and evidence, however.

rulings. The Board reduced the $5,000 fine imposed for operating as a nightclub to $1,000 and upheld a $1,000 fine imposed by the hearing officer for the tent violation. FSLLC was ordered to discontinue the "playing of music by way of speaker system" and "live or recorded entertainment."

In its opinion, after reciting the facts, the Board majority looked to the definition of "nightclub" in the Zoning Code. Having noted already that the Dock of the Bay offered "live or recorded entertainment," it turned to the IBC and the IBC Commentary to determine if the business was "categorized as a nightclub." Like the Commissioner, it considered whether the eight non-exclusive characteristics of Subgroup A-2 applied to the Dock of the Bay. It found that six of the eight factors were met: low light levels, entertainment by a live band or recorded music generating above normal sound levels, no theatrical stage accessories, later than average operating hours, service facilities for alcoholic beverages and food, and high occupant load density. It found that two factors – tables and seating arranged or positioned so as to create ill-defined aisles and a specific area for dancing – did not apply.

Based on its finding that the Dock of the Bay exhibited six of the eight characteristics of Subgroup A-2, the Board majority concluded that the restaurant was operating as a nightclub. Its decision closed as follows:

> The Board is not unmindful that the definition of a nightclub, under the [Zoning Code], can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.[L.] zones, might be considered "nightclubs" under the present criteria of the [Zoning Code]. It is not for the Board to change the definition but for the County Council to consider.

One of the three Board panel members issued a dissenting opinion. He emphasized the undisputed facts that characterized the Dock of the Bay as a family restaurant, such as the full-service menu, table seating for 150-160 persons, a pirate ship play area, no cover charge, and the vast majority of sales being food related. He described the "nightclub" definition in the Zoning Code as "exceedingly unclear and circuitous" and characterized the IBC as a "'one size fits all'" building code that fails to reflect the "particular realities and common sense observations of this jurisdiction." In particular, the dissenter took issue with the IBC's practice of grouping restaurants together with such "disparate uses" as banquet halls and nightclubs. He noted that the IBC Commentary even distinguishes between buildings in which people congregate for "*drinking and dancing* (e.g., nightclubs, dancehalls, banquet halls, cabarets, etc.)" and buildings in which people congregate for "food and drink consumption (e.g., restaurants)." (Emphasized in dissenting opinion.)

Finally, the dissenter stated that, even if it were appropriate to apply the Subgroup A-2 criteria, the evidence did not support the Board majority's findings with respect to several of the criteria. Specifically, he found from the testimony that the lighting only was dimmed occasionally, for ambiance; that the business never had been cited for allowing the music to generate above-normal sound levels; that there was no evidence that the business hours from 11:00 p.m. to 2:00 a.m. were "later than average operating hours"; and that "high-occupant load density" is too ambiguous a characteristic to be applied.

The dissenter closed by observing that the Board majority was turning "a blind eye to common sense," when, as here, the facts were clear that the Dock of the Bay was a restaurant offering some musical entertainment on the side. He also noted that "selective enforcement" of the Zoning Code, as testified to by Thompson, seem "contrary to the spirit and intent of any well-written regulation, [] arbitrary and capricious, and possibly an 'Equal Protection under the laws' violation."

FSLLC moved for reconsideration of the Board decision, asking the Board to clarify how many of the IBC Commentary criteria must be satisfied before a business is considered a nightclub; to amend its order to direct the Dock of the Bay to "discontinue its nightclub operation" as opposed to discontinuing all music and live or recorded entertainment;[9] to reconsider the imposition of any fine for the nightclub violation, given the difficulty the Board itself had in determining whether a violation had occurred; and to reconsider the finding of a tent violation. FSLLC also argued that testimony of a number of nearby residents should not have been allowed. The motion was denied in its entirety.

[9]FSLLC suggested certain changes it could make, short of discontinuing all live and recorded music, to reduce the number of Subgroup A-2 characteristics applicable to it. It stated that it would keep lighting levels at medium, use theatrical accessories, not remain open later than average, keep defined aisles, not have a dance area, close the kitchen during live entertainment so that there would not be "service facilities for food and drink," and not exceed the occupant load limit as set forth by the fire department.

FSLLC petitioned the circuit court for judicial review. Oral argument was heard,[10] and the circuit court issued a ruling on the record affirming the Board's decision. FSLLC timely appealed the judgment of the circuit court.

We shall include additional facts in our discussion of the issues.

STANDARD OF REVIEW

The Court of Appeals has described our circumscribed role in reviewing an agency decision as follows:

> A court's role in reviewing an administrative agency adjudicatory decision is narrow, *United Parcel v. People's Counsel*, 336 Md. 569, 576, 650 A.2d 226, 230 (1994); it "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel*, 336 Md. at 577, 650 A.2d at 230. *See also* [Md.] Code (1984, 1995 Repl. Vol.), § 10-222(h) of the State Government Article; *District Council v. Brandywine*, 350 Md. 339, 349, 711 A.2d 1346, 1350-1351 (1998); *Catonsville Nursing v. Loveman*, 349 Md. 560, 568-569, 709 A.2d 749, 753 (1998).
>
> In applying the substantial evidence test, a reviewing court decides """whether a reasoning mind reasonably could have reached the factual conclusion the agency reached."""" *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978). *See Anderson v. Dep't of Public Safety*, 330 Md. 187, 213, 623 A.2d 198, 210 (1993). A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. *CBS v. Comptroller*, 319 Md. 687, 698, 575 A.2d 324, 329 (1990). A reviewing court "'must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence' and to draw inferences from that evidence." *CBS v. Comptroller, supra*, 319 Md. at 698, 575 A.2d at 329, quoting *Ramsay, Scarlett & Co. v. Comptroller*, 302 Md. 825, 834-835, 490 A.2d 1296, 1301 (1985). *See Catonsville Nursing v. Loveman, supra*, 349 Md. at 569, 709 A.2d at 753 (final agency decisions "are *prima facie* correct and carry with them the presumption of validity").
>
> Despite some unfortunate language that has crept into a few of our opinions, a "court's task on review is *not* to ""substitute its judgment for the expertise of those persons who constitute the administrative agency,""" *United Parcel v. People's Counsel, supra*, 336 Md. at 576-577, 650 A.2d at 230, quoting *Bulluck v. Pelham Wood Apts., supra*, 283 Md. at 513, 390 A.2d at 1124. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. *Lussier v. Md. Racing Commission*, 343 Md. 681, 696-697, 684 A.2d 804, 811-812 (1996), and cases there cited; *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881, 886 (1989) ("The interpretation of a statute by those officials charged with administering the statute is . . . entitled to weight"). Furthermore, the expertise of the agency in its own field should be respected. *Fogle v. H & G Restaurant*, 337 Md. 441, 455, 654 A.2d 449, 456 (1995); *Christ v. Department of Natural Resources*, 335 Md. 427, 445, 644 A.2d 34, 42 (1994) (legislative delegations of authority to administrative agencies will often include the authority to make "significant discretionary policy determinations"); *Bd. of Ed. For Dorchester Co. v. Hubbard*, 305 Md. 774, 792, 506 A.2d 625, 634 (1986) ("application of the State Board of Education's expertise would clearly be desirable before a court attempts to resolve the" legal issues).

Bd. of Physician Quality Assurance v. Banks, 354 Md. 59, 67-69 (1999) (footnotes omitted).

In *Marzullo v. Kahl*, 366 Md. 158 (2001), the Court reaffirmed the principle that agencies are owed due deference in their interpretation of the zoning regulations they are tasked with enforcing. In that case, like the instant case, the agency was the Board and the regulations at issue were part of the Baltimore County Zoning Code. The Court opined that the Board's "expertise should be taken into consideration and its decision should be afforded

[10]The judge indicated to the parties that his main concern was "with the 14th Amendment to the United States Constitution that guarantees every citizen the right of due process."

appropriate deference in our analysis of whether it was 'premised upon an erroneous conclusion of law.'" *Id.* at 173 (quoting *Banks, supra*, 354 Md. at 68) (footnote omitted).

DISCUSSION

I.

FSLLC challenges the legal foundation for the Board's decision and the factual findings supporting it. We begin with the legal contentions. The Zoning Code's definition of "nightclub" is comprised of three elements: 1) a "tavern or other commercial establishment," 2) providing "live or recorded entertainment, with or without a dance floor" and 3) "categorized as a nightclub by the Building Code of Baltimore County." It is undisputed that the Dock of the Bay is a "tavern or other commercial establishment" that offers both live and recorded entertainment in the form of bands, karaoke, DJs, satellite radio, and television. Thus, the central focus of FSLLC's legal argument is that the Board erred in concluding that the Dock of the Bay is "categorized as a nightclub by the Building Code of Baltimore County."

FSLLC points out that the IBC does not define "nightclub." Rather, it groups certain structures, including nightclubs and restaurants, as fitting in Assembly Subgroup A-2. Therefore, according to FSLLC, a finding that the Dock of the Bay meets characteristics of Subgroup A-2 is of no moment because it does not answer the ultimate question: is the Dock of the Bay a nightclub?

Before we address this contention, some history is helpful. Since at least 1956, the Baltimore County Building Code ("BCBC") has adopted the standards of a model building code. *See Metius v. Julio*, 27 Md. App. 491, 497 n.3 (1975). Baltimore County is not unique in this practice. Since the early part of the 20th century, at both the municipal and state levels, building codes around the country have been based on model codes. Three regional model code groups promulgated the codes -- the International Conference of Building Officials ("ICBO"), the Building Officials Code Administrators International ("BOCA") and the Southern Building Code Conference International ("SBCCI"). *See* www.iccsafe.org/ABOUTICC/Pages/default.aspx. BOCA, a code designed for the east coast and the midwest, previously had been adopted by the Baltimore County Council. *See Swinson v. Lords Landing Village Condo.*, 360 Md. 462, 479 (2000) (noting that, since at least 1981, most counties in Maryland have had building codes patterned on the BOCA model code); *Metius, supra*, 27 Md. App. at 497 n.3 (noting that Baltimore County adopted the BOCA standards beginning in 1956).

In 1994, these three regional groups consolidated to form the ICC. The first version of the IBC was published in 2000.[11] The IBC does not differ substantially from the BOCA code that it replaced. As relevant to the instant case, however, the category in which a "restaurant" was placed changed. Under the BOCA code, a restaurant was categorized in

[11]Pursuant to Md. Code (2003, 2009 Supp.), section 12-503 of the Public Safety Article, the Maryland Department of Housing and Community Development is required to adopt the IBC as its model building code, subject to some permitted modifications.

Assembly Subgroup A-3.[12] *See* Building Officials Code Administrators, *The BOCA National Building Code/1999* 18 (14th ed. 1999). As discussed, *supra*, under the IBC, restaurants are categorized in Subgroup A-2. Under both BOCA and IBC, nightclubs are categorized in Subgroup A-2. The IBC Commentary, discussed *supra*, setting forth the eight non-exclusive characteristics of Subgroup A-2, appears to have been lifted verbatim from the BOCA Commentary that preceded it. *See In the Matter of the Application of Rampart Partnership (Club 101)*, Case No. 96-60-XA at 18-19 (Aug. 28, 1998) ("*Club 101*") (quoting from the Commentary to the BOCA Code with respect to Subgroup A-2).

Returning to FSLLC's argument, we agree that the IBC does not define a nightclub. The Zoning Code definition of "nightclub" merely requires that the IBC "categorize" an establishment as a "nightclub." The IBC (and the BOCA Code before it) do exactly that. They categorize structures for purposes of numerous safety regulations. That a restaurant and a nightclub fall into the same sub-category under the IBC "Use and Occupancy Classifications" does not affect the analysis under the Zoning Code, however. The Board correctly looked to the IBC and the characteristics of structures that fall within Subgroup A-2 to determine if the Dock of the Bay property is categorized in that grouping. If it is, then it met the Zoning Code definition of "nightclub."

Moreover, as mentioned above, we accord the Board "a degree of deference . . . in its application of the law." *Banks*, *supra*, 354 Md. at 69. In the instant case, the Board's

[12]Interestingly, that subgroup included "restaurants other than nightclubs."

decision was informed by its experience applying these characteristics, as evidenced by its *Club 101* decision.[13] In *Club 101*, the Board considered whether, under the Zoning Code, a club was operating as a nightclub or an after-hours club. It applied the eight non-exclusive criteria in the commentary to the then applicable BOCA code in analyzing the issue and determined that the club was operating as an after-hours club, in violation of the Zoning Code.[14] The decision reveals, as discussed *supra*, that the eight criteria applied in the instant case were developed at a time when restaurants were not included in Subgroup A-2, thus adding further support to the Board's conclusion that these factors are relevant to the determination whether a structure is "categorized as a nightclub" under the IBC.

FSLLC also maintains that the Dock of the Bay must be *either* a "nightclub" or a "standard restaurant" as those terms are defined under the Zoning Code. FSLLC focuses on the use of the word "primarily" in the definition of "standard restaurant," arguing that, if the Dock of the Bay is "primarily" engaged in "serving meals and beverages to persons seated at tables on the premises of the establishment," it must be deemed a standard restaurant. We disagree. Several types of restaurants are defined in the Zoning Code, including "carry-out," "fast-food," and "fast-food, drive-through only." *See* Zoning Code § 101. We read the

[13]The *Club 101* decision was cited by FSLLC both on appeal and before the Board in support of its argument that the Dock of the Bay must be either a "nightclub" or a "restaurant." We will discuss this argument further, *infra*.

[14]In that case, the property owner actively advocated for a finding that the property met the eight characteristics because a "night club" was a permitted use in the zone in question.

phrase "primarily for serving meals and beverages to persons seated at tables on the premises of the establishment" as being intended to distinguish a "standard restaurant" from the other types of restaurants defined in the Zoning Code. This conclusion is buttressed further by the fact that the definition specifically permits a standard restaurant to "offer a carry-out service, provided that such service is accessory to the principal restaurant operations." *Id.*

We also find support in the Zoning Code for the proposition that a property can operate as a "dual use." Section 230.1.A of the Zoning Code sets forth the permissible uses in a B.L. zone. Section 230.1.A.10 lists as a permissible use "combinations of the above uses." It is implicit in this section that properties may operate with dual permissible uses. It follows that a property also could be operating as a dual use with one use being permissible and one use being impermissible. Thompson also testified to this effect before the Board based on his experience in the CED.

Moreover, the only legal authority FSLLC cites for the proposition that a property cannot operate as a dual use actually supports the opposite position. In *Club 101*, the Board explicitly stated that the club could not be both a "night club" and an "after hours club." The then existing definition of an "after hours club" provided, however, that "[a]n after hours club is not a nightclub as defined in the zoning regulations or the building code of Baltimore

County." No such limitation appears in the definition of a "standard restaurant" in the Zoning Code.[15]

FSLLC also challenges the Board's factual finding that six of the eight characteristics of Subgroup A-2 were met. As discussed, *supra*, we review these findings under the deferential substantial evidence standard. We have reviewed the transcript and the record and are satisfied that there was substantial evidence in the record to support these findings.[16]

Finally, FSLLC echoes the concerns expressed by both the majority and dissenting members of the Board that the definition of a nightclub under the Zoning Code is extremely broad. We agree with the Board majority that this is a matter for the Baltimore County Council to address if it is deemed necessary. "The 'wisdom or expediency' of the [zoning ordinance] in its current form is not a matter for judicial intervention." *Lonaconing Trap*

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[15]Moreover, the Board found that, while Club 101 exhibited most of the eight characteristics in the BOCA Commentary, it nonetheless was an after hours club because of other characteristics that distinguished its operation. This is similar to the finding in this case that, while the Dock of the Bay may have met the definition of a restaurant, it nonetheless was operating as a nightclub because of distinguishing characteristics. We perceive no error in this conclusion.

[16]For example, the FSLLC challenges the finding of "low level lights." Thanner himself testified, however, that the lights were dimmed "every evening" for live entertainment; that they were turned down "for dinners as well"; and that they also were turned down "[o]n nights when we are open and do not have live entertainment."

Similarly, FSLLC challenges the finding of "above-normal sound levels" on the basis that there was no evidence in the agency record of prior noise violations. There was evidence, however, that the music that was being played at the Dock of the Bay was loud enough to be heard inside the homes of nearby residents. That evidence plainly supported a finding of "above-normal sound levels."

Club, Inc. v. Md. Dep't of the Env't, 410 Md. 326, 349 (2009) (quoting *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 48 (1973)).

II.

FSLLC contends the definition of "nightclub" under the Zoning Code is "arbitrary, unreasonable and confusing" and therefore the application of that definition is a violation of its due process rights. It also maintains that the County's practice of "discretionary enforcement" of the Zoning Code is unconstitutional.

FSLLC raises these arguments for the first time on appeal. Accordingly, they are not preserved for review.[17] *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *see also Heft v. Maryland Racing Comm'n*, 323 Md. 257, 273-74 (1991) (party may not obtain judicial review of an issue not raised before administrative agency); *Gonzales v. Ghinger*, 218 Md. 132, 135 (1958) (attack on validity of a section of the Baltimore City Code raised for the first time on appeal would not be

[17]As discussed, *supra*, the dissenting member of the Board suggested the possibility of a due process violation in his opinion. The circuit court judge presiding over this case on judicial review also commented on this issue during oral argument, but ultimately affirmed the Board's decision. FSLLC did not raise this issue in its appeal to the Board in its motion for reconsideration or in its petition for judicial review, however.

heard). Moreover, FSLLC cites to no Maryland authority for its propositions.[18] We decline to consider these arguments on appeal.

III.

Finally, FSLLC contends it was error for the CED to charge it with a violation of IBC section 3103 for erecting a tent without a permit. It follows that it was error for the hearing officer to find the violation and for the Board to affirm the finding. This contention is based on the letter of complaint to the CED from Ciarpella's counsel stating that FSLLC had "constructed a 40 X 60 foot reception tent . . . which has been on the property for approximately eight months." According to FSLLC, section 3103 of the IBC is inapplicable to structures in place for more than 180 days.

FSLLC received two citations related to the tent. On August 14, 2006, it was charged with violating section 3103 and ordered to "remove tent or obtain permit." A hearing before a hearing officer was held nine days later and a violation was found. On July 5, 2007, it was again charged with violating section 3103 for having a "tent erected without permit," in addition to continuing nightclub violations. A little over a month later, a hearing was held and a violation was found. In the first case, FSLLC was fined $5,000 both for the nightclub violation and the tent violation. As discussed, *supra*, the Board reduced this fine to $1,000.

[18]FSLLC instead relies upon section 18:11 of *The Law of Municipal Corporations* pertaining to the standards for discretionary enforcement. Eugene McQuillin, *The Law of Municipal Corporations* (3d ed. 2004). Our research reveals that this section has never been cited in a reported opinion of this Court or the Court of Appeals.

In the second case, a fine of $1,000 was imposed, again without distinction between the tent and nightclub violations.

FSLLC does not point us to any place in the record where it made the argument raised on appeal before the hearing officer.[19] It was raised before the Board, but the Board only reviewed the issue on the record before the hearing officer and found that the hearing officer's decision was supported by substantial evidence and was not premised on an erroneous conclusion of law.

Even if preserved, we find no error in this decision. IBC section 3103 governs "Temporary Structures." Section 3103.1 explains the applicability of this section as follows:

> The provisions of this section shall apply to structures erected for a period of less than 180 days. Tents and other membrane structures erected for a period of less than 180 days shall comply with the *International Fire Code*. Those erected for a longer period of time shall comply with applicable sections of this code.
>
> **Exception:** Provisions of the *International Fire Code* shall apply to tents and membrane structures erected for a period of less than 180 days.
>
> **3103.1.1 Permit Required.** Temporary structures that cover an area in excess of 120 square feet (11.16 m^2), including connecting areas or spaces with a common means of egress or entrance which are used or intended to be used for the gathering together of 10 or more persons, shall not be erected, operated or maintained for any purpose without obtaining a permit from the building official.

(Underlined emphasis added.)

[19]No transcript of those proceedings is provided in the record extract.

This provision states that tents erected for less than 180 days must comply with the *International Fire Code*, whereas tents erected for "longer periods of time" must comply with the "applicable sections of this code." In other words, contrary to FSLLC's argument, an exception is carved out of section 3103 for tents erected for less than 180 days, but a tent erected for longer must comply with the permit requirement found either in that section or in section 105.1. Accordingly, we find no merit in FSLLC's contention that it was charged under the wrong section of the IBC.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-07-134

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MAJORITY OPINION

These cases come to the Board on appeal from two decisions of the Code Enforcement Hearing Officer and a decision of the Zoning Commissioner. The two decisions of the Code Enforcement Hearing Officer found the Petitioner, Fifth Street, LLC, guilty of violations of the County Code and levied fines of $5,000.00 and $1,000.00. The appeal from the decision of the Zoning Commissioner found that the Dock of the Bay, operated by Fifth Street, LLC, was classified as a nightclub under the Baltimore County Zoning Regulations (BCZR) and was in violation of the BCZR for operating a nightclub within a Business Limited (B.L.) zone.

Since the cases basically involved an interpretation of the County zoning regulations and the same sets of circumstances, the Board consolidated the cases for hearing. A hearing on the merits was held on January 15, 2008. Testimony was taken in Case No. 07-144-SPH, and oral

argument was conducted in Cases No. CBA-06-044 and No. CBA-07-134. Petitioner, Fifth Street, LLC, and Lawrence Thanner, Legal Owner, was represented by J. Carroll Holzer, Esquire. Protestants, Matthew J. and Nancy Jean Ciarpella, Phil and Kay Sessa, Charlie and Darrell Wolinski, Michael and Robert Poleski, David and Vena Sheck, Ken Schoyl and Tammy Novak, Doug W. Waldmann, et al, Louis Petrovia, Robert Haas, David Znamirowski, David McWilliams, and Terri Poleski, were represented by Francis X. Borgerding, Jr., Esquire. Baltimore County was represented by Nancy C. West, Assistant County Attorney. The parties were given the opportunity to file briefs on February 19, 2008. A public deliberation was held on March 13, 2008.

Background

Fifth Street, LLC, and Lawrence J. Thanner, its Resident Agent, operates the Dock of the Bay restaurant offering dining facilities and services at its location at 9025 Cuckold Point Road, Millers Island, in Baltimore County, Maryland. On August 8, 2006, the Dock of the Bay was cited for a Code violation, with a proposed penalty of $5,000.00, for operating a nightclub in a B.L. zone. In addition, Fifth Street, LLC, was cited for erecting a tent on the premises without obtaining the required permit from the County. A hearing was held before the Code Enforcement Hearing Officer on August 23, 2006, and a decision was rendered on August 25, 2006, ordering the Respondent to remove the tent and finding that the property "is being used and operated as a restaurant with dancing and live entertainment allowing a building code violation to exist concurrently with the nightclub use and continued unabated despite receiving notice of violation on May 12, 2006. A restaurant with dancing and/or live or recorded entertainment is not a permitted use in a B.L. zone."

After that hearing, Fifth Street, LLC, filed a Petition for Special Hearing in Case No. 07-144-SPH. This Petition requested the Zoning Commissioner to interpret the zoning regulations for Baltimore County with respect to the operation of a nightclub.

The decision of the Zoning Commissioner finding that Fifth Street, LLC, and the Dock of the Bay was a restaurant providing music during the day and was a "nightclub" as defined in BCZR § 101, 102.1, and 230, was dated May 30, 2007. Subsequent to that date, Fifth Street, LLC, was again cited for violation of the *Baltimore County Code* (BCC) for failure to obtain a permit for a tent and also for violation of BCZR § 101, 102.1, 230, and 500.6 for failure to cease operation of a nightclub in a B.L. zone. A second hearing was held before the Code Enforcement Hearing Officer and, by decision dated August 16, 2007, the Code Enforcement Hearing Officer again found Dock of the Bay in violation of BCZR for operating a nightclub in a B.L. zone and erecting a tent without obtaining the required permit. The Hearing Officer imposed a $1,000.00 fine in that case.

Testimony and Evidence

Petitioner presented Lawrence J. Thanner, Managing Member of Fifth Street, LLC, as their principal witness. Mr. Thanner stated that the Dock of the Bay has been a restaurant since 1955 and, to his knowledge, always had music and on many occasions, providing live bands. Mr. Thanner opened the new Dock of the Bay restaurant in March of 2004 after refurbishing the building from the effects of Hurricane Isabel. Everything was completely refurbished and new equipment was installed in the restaurant.

Thanner stated that the restaurant has a 2,400 square foot rectangular bar at one end and has tables and chairs on the main floor to accommodate diners. He stated that the restaurant could seat about 150 to 160 patrons inside. In the summertime, he has an outside patio with an outside bar and tables with umbrellas and chairs for patrons to utilize. The restaurant has 14 boat

slips for transient boat customers. The restaurant also has a playground for children, with a wooden pirate ship to allow children to play on the playground. The restaurant opens every day at 11:00 a.m. and closes at 2:00 a.m. In the winter, the restaurant will close early when customers are gone. Thanner testified that the restaurant kitchen closes at 11:00 p.m., but that the bar will stay open until 2:00 a.m. He stated that the restaurant has a full commercial kitchen and provides a full menu of seafood, steaks, sandwiches, etc. He has licenses from the Baltimore County Health Department, which states that he is a restaurant, and a basic license from the State of Maryland, which also states that it is a restaurant.

The restaurant has ten television sets inside and two out on the patio. There is a house music system that plays radio and satellite radio inside and outside. There are outside speakers. The television sets are on all the time except when they have live entertainment.

Mr. Thanner stated that he does have live entertainment at the restaurant with a D.J. playing for karaoke participants and live bands on Friday and Saturday nights. On those occasions, the entertainment goes from 9:00 p.m. to 1:00 a.m. During the previous summer, he stated that he had live music on Saturday afternoon and Sunday afternoon from 4:00 p.m. to 8:00 p.m.

Mr. Thanner stated that he had stopped the music after 8:00 p.m. after the Liquor Board had told him to cease the music. He stated that he had full-scale bands in 2004 with no complaints, but in 2005, a Liquor Board inspector told him to "pipe down" and he still had the bands, but mostly duos or steel bands. He received complaints in May of 2006 from the outside music and wrote a letter to the County asking for clarification on May 14, 2006. This letter was sent to C. Raynor, inspector in the Baltimore County Department of Code Inspections and Enforcement. The letter listed a number of activities, which Mr. Thanner proposed to conduct at the Dock of the Bay and requested clarification as to how these items qualified as a nightclub

under the citation that he had received. This letter was presented as Petitioner's Exhibit #2 to the Board. Thanner stated that he received no response to his letter.

After he sent the letter, he contacted Attorney Carroll Holzer to file for a special hearing. Mr. Thanner stated that 70 percent of the sales at his restaurant were in food and 30 percent are beverages. He indicated that he does not charge for the live entertainment and is open until 2:00 a.m. when the live music is played. Mr. Thanner also stated that, when he has live entertainment, he does lower the lighting level in the restaurant. He stated that the live bands play quite loudly but that he has never been cited for having a noise level about 65 decibels at the property line. He also stated that he does not have any stage accessories for the bands except in the summertime when there is a small stage erected outside on the patio. His operating hours are 11:00 a.m. to 2:00 a.m., which he considered to be normal, but under State law, you cannot sell alcohol past 2:00 a.m. With respect to defined aisles for the tables and chairs, he stated that tables and chairs are set in certain ways to form aisles. He did admit that some time when the bands are playing inside people would move the tables and chairs and dance between the tables. He does have facilities for serving alcoholic beverages and, as previously stated, the restaurant will accommodate 150 to 160 patrons.

Mr. Thanner argued that his operation should not be considered a nightclub based upon the criteria set forth in the International Building Code which has been adopted by the County. It was Mr. Thanner's position that he could not survive in the wintertime without the live music because the restaurant would not pay for itself based solely on food and drinks served during normal times without the music being available.

Mr. James H. Thompson, Supervisor of Code Enforcement, was called by Protestants as a witness and testified that he has worked in Zoning for 31 years, 13 of which as Supervisor of Code Enforcement, and that his office cited Mr. Thanner for being a nightclub operating in a

B.L. zone. Mr. Thompson stated that his office operates on a complaint basis only. He stated that they had had no complaints about the restaurant property before Mr. Thanner took over the property. It was his testimony that his office only reviews a situation based upon a complaint and, if the operation being considered provides live entertainment in a B.L. zone, it would be considered a nightclub and would not be allowed to operate. This would include karaoke, a person playing a piano, and strolling minstrels.

The Protestants presented Matthew Ciarpella, who has resided on Sixth Street adjacent to the Dock of the Bay for 3 years. Mr. Ciarpella complained of hearing the music even though the band was inside and it was wintertime. He stated that Monday through Thursday there were no problems since no music was played, and that when the music was played, it was loud enough for him to hear in his house even though it was not played outside.

Kay Sessa also testified stating that she lived at Sixth Street, which is about 650 feet from the Dock of the Bay. She stated that she heard the karaoke being played and that, although the previous restaurant had live bands, they stopped playing in 1970. She stated that she has been bothered by the live bands of the Dock of the Bay since 2004.

Patricia Waldmann, Charles Wolinski, and Brad Metheny and Bonnie Metheny all testified that they were neighbors living approximately 100 to 250 feet from the Dock of the Bay and that the music played on Friday and Saturday nights was so loud that they could not enjoy a peaceful night's sleep. Wolinski testified that he had gone into the Dock of the Bay and had witnessed that the tables were moved when the bands were playing and that there were not always aisles for the tables.

Finally, George Abendschoen, the Administrator of the Baltimore County Liquor Board, testified that there had been a file opened by his office on the Dock of the Bay. Based upon complaints that were received by the Liquor Board concerning the music that was played, an

inspector, Dan Crockett, had gone to the Dock of the Bay to investigate the matter. There was no determination by the Liquor Board. The report by the inspector, Dan Crockett, was received for identification only but was not admitted as part of the evidence in this matter.

Cases No. CBA-06-044 and No. CBA-07-134

Subsequent to the evidence presented in the special hearing case, the parties argued with respect to the civil citations and the decisions of the Hearing Officer in the above matters. Mr. Holzer contended that, under § 500.6 and 7 of the BCZR, the Hearing Officer had no authority or jurisdiction to interpret the *Baltimore County Zoning Regulations* with respect to whether or not the Dock of the Bay fell under the definition of nightclub. He stated that that was restricted solely to the authority of the Zoning Commissioner. These cases should be determined on the basis of the decision that this Board makes with respect to finding as to whether or not the Dock of the Bay is a nightclub under the BCZR. Mr. Holzer argued that Mr. Thanner had, in good faith, sought clarification in the Baltimore County Department of Code Inspection and Enforcement and received no clarification from that office. He also stated that § 3103 of the *International Building Code*, which has been adopted by the County, applies to structures erected for less than 180 days. He stated that Counsel for the Protestants in his letter claims that, in addition to live music, the tent was up for over 8 months. If that is the case, he felt that his client was cited under the wrong citation. He stated that it was not clear what the fine of $5,000.00 covered and requested a reduction in the fine if the Board finds that the operation is a nightclub. There was no indication as to whether or not there was any evidence presented to the Code Enforcement Hearing Officer with respect to how long the tent was erected at the Dock of the Bay operation.

With respect to the second citation, Mr. Holzer indicated that the second charge should have been given the same file number, even though the first charge was on appeal to the Board.

He stated that the Code Enforcement Hearing Officer in Case No. CBA-07-134 found that the Zoning Commissioner had determined that the playing of outdoor music must be discontinued but did not address the playing of indoor music. The Code Enforcement Hearing Officer found the Dock of the Bay to be a nightclub and therefore in violation of the BCZR. Mr. Holzer wanted further clarification of the fine levied in the second hearing.

In addition, Mr. Holzer indicated that the Zoning Commissioner had received an inquiry from the Liquor Board with respect to his decision. Evidently, the Zoning Commissioner replied to the inquiry, stating that he had determined that the music being played inside and outside the building was prohibited. Mr. Holzer felt that he had to appeal this letter because it was his position that the Zoning Commissioner had not taken any position with respect to the inside music.

Counsel for the Protestants argued to affirm the decision of the Code Enforcement Hearing Officer. He argued that both decisions were affirmed by the decision of the Zoning Commissioner in which he found that the operation was a nightclub. There was no prejudice or reversible error committed and that the Hearing Officer should be affirmed on his findings with respect to the nightclub definition. With respect to the tent, he argued that the tent had been put up on two separate occasions and that the Hearing Officer was correct in finding a violation on both occasions.

Ms. West argued solely with respect to the jurisdictional aspect and it was her position that, under the Code, Article 3, § 6-101, the Hearing Officer had the authority to hear the two cases for finding and was correct in finding the violations.

Decision

There is no question that the Dock of the Bay restaurant is located in a B.L. zone. The B.L. zone uses permitted, as of right, include under § 230.4 a standard restaurant, tea room,

convenience store, and dairy barn. Section 101 of the BCZR defines a standard restaurant as "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment."

The definition of "nightclub" is found in BCZR § 101, List of Definitions, and states:

> A tavern or other establishment which permits live or recorded entertainment with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County.

Section 101 also defines a tavern as:

> An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of a nightclub, as defined in these regulations, shall be considered a nightclub.

A tavern and standard restaurant are allowed in a B.L. zone; a nightclub is not allowed.

The International Building Code, adopted in Bill No. 1-05 by the County Council, includes, in § 303.1:

> 303.1 Assembly Group A:
>
> Assembly Group A occupancy includes, among others, the use of a building or structure or a portion thereof, for the gathering together of persons for purposes such as civic, social, or religious functions, recreation, food or drink consumption, or awaiting transportation....

Following the major assembly group are the five sub-assembly groups. A-2 is the primary group with which we are concerned in this matter.

> A-2. Assembly uses intended for food and/or drink consumption, including but not limited to:
>
> banquet halls
> nightclubs
> restaurants
> taverns and bars

In a discussion of the various groups, the Code states:

> ...In the assembly group category, the potential for multiple fatalities and injuries from fire is comparatively high....Darkened spaces in theaters, nightclubs, and the like serve to increase hazards. In emergencies, the congestion caused by large numbers of people rushing to exits can cause panic conditions.

The characteristics for sub-assembly group A2 state:

> Group A-2 includes occupancies in which people congregate in high densities for social entertainment, such as drinking and dancing (e.g., nightclubs, dance halls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). The uniqueness of these occupancies is characterized by some or all of the following:
>
> - low light levels;
> - entertainment by a live band or recorded music generating above-normal sound levels;
> - no theatrical stage accessories;
> - later than average operating hours;
> - tables and seating arranged or positioned so as to create ill-defined aisles;
> - a specific area designated for dancing;
> - service facilities for alcoholic beverages and food; and
> - high occupant load density.

There follows an example which states:

> Example: The Downtown Club, a popular local nightclub /dance hall, features a different band every weekend [See figure 303.1(5)]. It is equipped with a bar and basic kitchen facilities so that beverages and appetizers can be served. There is a platform for a band to perform on, a dance floor in front of the platform, and numerous cocktail tables and chairs. The tables and chairs are not fixed, resulting in a haphazard arrangement such that there are no distinct aisles. When the band performs, the houselights are dimmed and spotlights are keyed in on the performers. The club is equipped with a sound system that is used at loud levels. The club is open until 3:00 a.m. – the latest time the local jurisdiction will allow.
>
> From this descript of The Downtown Club, one can readily see that the appropriate classification is Group A-2. Sometimes, however, it is not this easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building.

The Board recognizes that this decision could have far-reaching effects in the County. The definition of "nightclub" in the BCZR is certainly far from being crystal clear. As testified to by the Building Inspector, the inspection department operates solely on a complaint basis. Their criteria for finding a nightclub would be any restaurant, tavern or bar which provides live

entertainment. This could be anything from a piano player playing background music, a strolling minstrel, or a 12-piece orchestra.

In reviewing the characteristics for the group of facilities classified as A-2 in the Building Code, the Board finds as follows:

1. Low light levels.

Mr. Thanner testified that normally the restaurant is lit at what one would consider a normal level. However, when the band is playing, he did admit that the lights were turned down.

2. Entertainment by a live band or recorded music generating above-normal sound levels.

Mr. Thanner indicated that on Fridays, Saturdays, and Sundays, he has live entertainment, be it karaoke, a D.J., or a small band. In fact, this is a major part of his business and he feels that, without the music, the Dock of the Bay cannot survive during the winter months. The question of whether or not the band and the music is played above normal sound levels is one that would probably be determined by the persons listening to it. Certainly, the neighbors surrounding the Dock of the Bay feel that the sound level of the music is above normal, even during the winter months when music is played inside. There has been no indication that the restaurant has been declared to be in violation of noise levels under the Maryland Occupational Safety and Health Act. However, there is no question that the bands do play at sound levels which extend beyond the four walls of the restaurant.

3. No theatrical stage accessories.

Mr. Thanner testified that there are no theatrical stage accessories, particularly during the winter months. He did state that on weekends during the summer time there is a small stage for the bands that play outside until 8:00 p.m.

4. Later than average operating hours.

Mr. Thanner testified that normal operating hours of the restaurant are 11:00 a.m. to 2:00 p.m. He stated that during the winter the restaurant would close early if there were no patrons. He also indicated that his kitchen closes at 11:00 p.m.; however, the facility will stay open until 2:00 a.m., which is the normal closing hour required by the County for facilities serving liquor.

5. Tables and seating arranged or positioned so as to create ill-defined aisles.

Mr. Thanner again testified that the tables and chairs in the restaurant are generally fixed according to aisles for serving. However, he did state that when a band plays it is normal for individuals to move chairs and tables to allow for the band and also to allow people to dance in between the tables.

6. Specific area designated for dancing.

Mr. Thanner testified that there is no specific dance area. However, once again he did indicate that when the bands are playing people would move the tables and dance in the aisles among the tables.

7. Service facilities for alcoholic beverages and food.

There is no question that the Dock of the Bay serves alcohol and food. Mr. Thanner was quite emphatic that 70 percent of his business comes from the food operation and probably 28 to 30 percent from the alcoholic beverages.

8. High occupant load density.

There is no definition of what a high occupant load density is. Mr. Thanner testified that the restaurant would seat 150 to 160 individuals. On nights when there are bands playing, there appears to be a large crowd coming into the restaurant and one would probably find that it is filled to capacity.

The Board finds that the Dock of the Bay meets at least six of the criteria set forth in Group A-2. This would be criteria 1, 2, 3, 4, 7 and 8.

While our dissenting Member would find that there is no violation when the music is played inside the facility, he would find that it is a nightclub when music is played outside. The Majority finds that the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR. The second criterion does not differentiate between inside and outside noise. The fact that the Dock of the Bay does not provide music Monday through Thursday is not controlling in the opinion of this Board. Playing loud music on Friday through Sunday that can be heard by the neighbors makes the operation a nightclub under the present definition of the BCZR.

The Board is not unmindful that the definition of a nightclub, under the BCZR, can certainly have a far-reaching effect in the restaurant industry. Restaurants that meet some or all of the A2 criteria, and are located in B.M. zones, might be considered "nightclubs" under the present criteria of the BCZR. It is not for the Board to change the definition but for the County Council to consider.

Cases No. CBA-06-044 and No. CBA-07-134

The Board has considered the arguments and evidence presented to the Board and the Code Enforcement Hearing Officer in the above matters.

The Board finds that the Code Enforcement Hearing Officer is authorized to interpret the definition of a nightclub under his duties to hold hearings and issue final orders under § 3-6-206 of the BCZR. In any event, the Zoning Commissioner had found the Dock of the Bay to be a nightclub prior to the holding of the second Code Enforcement hearing. Therefore, the Code Enforcement Hearing Officer could rely on that decision to uphold his findings.

The Board will affirm the decision of the Hearing Officer in both matters but will reduce the penalty to a $1,000.00 fine for operating as a nightclub in a B.L. zone and a $1,000.00 for failure to obtain a permit to erect a tent on a temporary basis at the Dock of the Bay restaurant.

ORDER

IT IS THEREFORE this 4th day of June, 2008, by the Board of Appeals for Baltimore County,

ORDERED that the Petition for Special Hearing pursuant to § 500.6 and 500.7 of the Baltimore County Zoning Regulations requesting a determination as to whether the use of the B.L. zoned property at 9025 Cuckold Point Road is in violation of the zoning regulations, and, specifically, as to whether the facility which provides music at this location is a "nightclub" as defined in the BCZR §§ 101, 102.1 and 230 is hereby answered in the affirmative and the playing of music by way of speaker system, live or recorded entertainment must be discontinued; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-06-044 be and is hereby **AFFIRMED;** and further that the fine is reduced to $1,000.00 for operating a nightclub in a B.L. zone; and it is further

ORDERED that the decision of the Code Enforcement Hearing Officer in Case No. CBA-07-134 for operating a nightclub in a B.L. zone and for erecting a temporary tent without a permit be and is hereby **AFFIRMED**; and further that the fine of $1,000.00 for the erection of the tent is **AFFIRMED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules.*

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Wendell H. Grier

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-07-134

* * * * * * *

DISSENTING OPINION

I respectfully disagree with the opinion of the Majority.

In support thereof, I draw attention to the very arguments and content of the Majority Opinion. Based upon the testimony presented and summarized in the Majority Opinion, we are faced with a commercial enterprise described as follows:

- 150 to 160 seated patrons at tables and chairs with defined aisles
- a playground for children on the premises, including a wooden pirate ship
- operating hours of a commercial kitchen of 11 a.m. to 11 p.m. with a full menu of steaks, seafood, sandwiches, etc.

- Health Department and State of Maryland licenses as a restaurant
- 70% of total receipts related to food service, while only 30% is related to alcohol
- no cover charge or other entrance fee
- no stage accessories inside the premises

On its face, absent further imposed factors, the above would appear to be a common sense discussion of a restaurant.

In this particular care there is no question that there is live and musical entertainment provided on a limited basis at the location. There are TV sets in the premises, and there is karaoke and DJ music on two nights of the week. The definition of a restaurant in § 101 of the Baltimore County Zoning Regulations (BCZR) is a clear statement that "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment." However, the definition of "nightclub" is exceedingly unclear and circuitous. It is quoted on page nine of the Majority Opinion and is based upon the essential definition of a "tavern" which permits music and is further "characterized" as a nightclub by the Building Code.

Unfortunately, this is a situation of law in which Baltimore County has seen fit to adopt a "one size fits all" International Building Code (IBC) as opposed to creating or evolving a Building Code that reflects the particular realities and common sense observations of this jurisdiction. Once again, the Majority has appropriately quoted the salient portions of the adopted International Building Code in an effort to determine whether the subject site is indeed a nightclub. Group A2 is the subgroup of the IBC which is applicable to this discussion. Group A2, while providing a general description of "uses intended for food and/or drink consumption,"

includes such disparate uses as banquet halls, nightclubs, restaurants, taverns, and bars. Common sense cannot but reach the inalterable observation that there are significant differences (or should, in reality, be) between these different uses, notwithstanding the fact that the authors of the "one size fits all" IBC determined to lump them together. In a discussion of the characteristics for the sub-assembly Group A2, the Majority, on page ten of its Opinion, quotes the Code as follows:

> ...Group A2 includes occupancies in which people congregate in high densities for social entertainment such as drinking and dancing (e.g., nightclubs, dancehalls, banquet halls, cabarets, etc.) and food and drink consumption (e.g., restaurants). **[Emphasis added.]**

Clearly, even the generalists who produced the IBC recognized that facilities utilized for purely social gathering were different than those used primarily for food and drink.

There follows a list of characteristics in which "some or all" would be relevant to a determination of the actual identity of a particular site use. This writer disagrees with the evaluation of the Majority as to these characteristics and would note those disagreements:

1. Low light levels – There is no question that the vast majority of the time the subject site lighting is at a normal level for a restaurant. That the lighting is sometimes reduced as part of its ambience should not negate the general lighting scheme on most occasions.
2. Entertainment by a live band or recorded music generating above-normal sound levels – There is no question that there is live or recorded music both inside and outside the subject business on occasion. There is absolutely no testimony that the owners have ever been cited for allowing music or live entertainment to generate above-normal sound levels either inside or outside the premises of the restaurant. The Majority properly notes that there is no

indication "that the restaurant has been found to be in violation of noise levels under the Maryland Occupation Safety and Health Act." There is anecdotal testimony of neighbors, many of whom came into the area after the activities at this location had continued for many years, that there were levels of music and other sound that adversely affected their enjoyment of their property. None testified to filing complaints with the police, nor was there any information developed that the restaurant had been cited for violation of noise statutes. With all due respect to the neighbors, their determination is subjective to the extreme; nor does the record reflect any action taken regarding the restaurant by governmental enforcement agencies akin to that which has occurred over many years to limit and modulate above-normal generated sound levels at house parties, college fraternity events, and other occasions when the police were summoned for above-normal noise levels. On such occasions, there are recognized decibel levels that are acceptable, the violation of which will result in governmental action immediately. No such evidence of governmental action regarding this restaurant exists here.

3. There are no theatrical stage accessories in the subject premises.
4. Later than average operating hours – There is no testimony of any sort that there are any but normal restaurant and bar hours for this location. The restaurant's commercial kitchen is open 12 hours a day. As noted, the restaurant provides 70 percent of the income at the location. Clearly these activities are the primary purposes of the establishment.

5. Tables and seating arranged or positioned so as to create ill-defined aisles – There is no testimony that there is a special setup of tables or chairs (other then that appropriate to a restaurant) for the purpose of providing entertainment. In fact, it is simply a habit of some patrons to move their chairs and seating arrangements to fit the moment. One might also be able to say that there would probably be any number of occasions when music is played and no one determines to move chairs or tables. There is simply no on-going structural plan by the owner of the establishment to do so.
6. Specific area designated for dancing – There is no specific area designated by the owner for dancing. That occasionally action by customers to do so unofficially does not officially create such an area. Therefore, the absence of that clearly defined plan should indicate just the opposite conclusion.
7. Service facility for alcoholic beverages and food – As noted above, the vast majority of the income derived at the location is as the result of food service to patrons, including families.
8. High-occupant load density – Once again, the "one size fits all" Code gives us no indication as to what "high" means. There is undisputed testimony that the restaurant seats 150 to 160 individuals and that on occasion that maximum is reached. The seating limitation is for restaurant use and is another indicator of Baltimore County's "real life" views of the nature of the business.

It is the opinion of this writer that the criteria applied in the IBC does not clearly indicate that this location in any significant way meets the definition and requirements under the law to be termed a "nightclub." In fact, as is characteristic of most generalized and non-specific

criteria, the IBC itself (as quoted by the Majority on page ten of the Opinion) states that "sometimes however it is not easy to determine the appropriate classification. In such cases, the building official must seek additional information regarding the function(s) of the building and each area within the building." It essentially tells us that the criteria is so broad and determinedly subjective discussion and conclusion that it should not be utilized in a vacuum. The actual facts of the use and description of the site being addressed must be utilized in order to reach any viable conclusion as to the sites' status under the law. These additional factors and inquiries do not appear to have been utilized by the enforcement authorities or the Zoning Commissioner in their respective determined by in this case.

Baltimore County (as well as most jurisdictions in Maryland) has a history of primarily restaurant and other food related establishments utilizing various music and entertainment accoutrements to enhance both the ambience and experience of the patrons. Whether those accoutrements are physical (such as a playground for children at this location) or television sets or music or piano player, a strolling minstrel, a singing waiter, or a roving "in character" presentation by staff, these activities do not render such an establishment a nightclub but rather a restaurant with some additional entertainment provided. The position of the majority however, would result in a finding of "Nightclub" for any restaurant establishment utilizing these activities. Such a result turns a blind eye to common sense.

This writer believes that the result reached by the Majority, with its admitted, far-reaching effects, is the classic "untended consequences" situation. I believe that the Code Enforcement authorities should at the least have utilized the instruction in the IBC language that other factors, such as those existing here, should have been utilized and therefore the decision by

the Majority, that this is a nightclub as opposed to a restaurant, is incorrect; and, moreover, does not reflect the actual reality of the situation.

As a final note, Mr. Thompson, of the Enforcement agency for the County, testified that their actions in this matter and as to other establishments under this section and scenario would be generated on a "complaint only" basis. While I will not dwell on the point, such selective enforcement appears to me to be contrary to the spirit and intent of any well-written regulation, is arbitrary and capricious, and possibly an "Equal Protection under the laws" violation. I believe that the appellate court should revisit this particular situation in order to confirm that the subject site in this case is indeed a restaurant and not a nightclub, and further, that the criteria for such determinations must include factors in addition to the bare generalities of the IBC. Additionally, I believe that the County Council should, as quickly as possible, revisit the issue and adjust the County Code sections as they relate to the use of entertainment in restaurants and negate now and avoid in the future a result such as this, which is not in the best interests of the citizens or economy of Baltimore County.

For all of the above, I dissent in the Opinion of the Majority.

Lawrence M. Stahl, Board Member

DATE: 6-04-2008

IN THE MATTER OF THE APPLICATION OF FIFTH STREET, LLC; LAWRENCE THANNER - LEGAL OWNER /PETITIONER FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE SE/ COR OF CUCKOLD POINT ROAD AND FIFTH STREET; 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 07-144-SPH
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683 /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-06-044
AND	*	and
IN THE MATTER OF FIFTH STREET, LLC - RESPONDENT 9025 CUCKOLD POINT ROAD 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT RE: CIVIL CITATION # 06-3683-B /DECISION OF CODE ENF. HEARING OFFICER	*	Case No. CBA-07-134

* * * * * * *

RULING ON MOTION
FOR RECONSIDERATION AND CLARIFICATION

On June 4, 2008, the Board issued its decision in the above cases, finding that the Respondent was in violation of the Baltimore County Code (BCC) and levying a fine of $1,000.00 in lieu of the $3,500.00 that was levied by the Hearing Officer. A timely Motion for Reconsideration was filed by Counsel for the Respondent. The Motion raises five questions or issues.

Question 1 – How many of the criteria set forth in the Building Code can an establishment have before it is considered to be operating a nightclub?

Question 2 – Will the Board amend its Order to state that the Dock of the Bay Restaurant must discontinue its nightclub operations?

Question 3 – Should the Petitioners be held liable for not adhering to a law which no one except the Board of Appeals in a split decision could define?

Question 4 – How can the Petitioner be fined for erecting a tent without a permit when the Petitioner was never charged with that violation?

Question 5 – Was the testimony given by neighbors of Dock of the Bay proper testimony?

Decision

The Board held a public deliberation on the Motion on August 12, 2008. The Board finds that the issues raised in questions 1 and 2 request an advisory opinion, which the Board does not render.

With respect to question #3 concerning the $1,000.00 fine, the Board finds that the fine was appropriate and it will stand. The question of whether or not there was a split decision makes no difference with respect to the assessment of the $1,000.00 fine.

As to question #4, the Board finds that the Respondent was charged with failure to obtain a permit for the tent that it erected on the property. The Code Enforcement notice of May 20, 2006, states that the Respondent should obtain a tent permit or remove the structure. The notice of June 7, 2006, states a failure to obtain a permit for the tent. The notice of August 14, 2006, has an amendment, "Remove the tent or obtain permit." The Board finds that the Respondent had adequate notice that it was being charged with respect to failure to obtain a permit for the tent.

In regard to question #5, the Board considers that the testimony which it received from the neighbors was appropriate testimony and it will not grant any review with respect to that testimony. Should the Respondent feel that the testimony is improper, it may contest that in the Circuit Court for Baltimore County.

Therefore, the Board, having considered all of the questions raised by the Respondent, will deny the Motion for Reconsideration. The Board's Opinion and Order issued on June 4, 2008, remains this Board's final decision in this matter.

IT IS THEREFORE ORDERED THIS 12th day of September 2008 that the Motion for Reconsideration filed in this matter is **DENIED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chairman

Wendell H. Grier

Lawrence M. Stahl

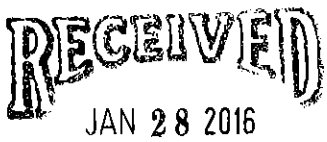
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January 28, 2016

Sent Via Hand Delivery
Krysundra L. Cannington
Administrator
Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204



Re: In the Matter of Boone Kondylas, LLC
9025 Cuckold Point Road
Case No. 2016-003-SPH

Dear Ms. Cannington:

Enclosed please find for filing a Trial Memorandum for the above captioned matter. As you are aware, this matter is scheduled before the Board for hearing on February 17, 2016.

The Petition for Special Hearing that is the subject of this case was denied below by Order of Administrative Law Judge John E. Beverungen. Administrative Judge Beverungen did not deny the petition on the basis of the merits of the issue presented (i.e. whether the existing restaurant should be able to provide music/entertainment to its' patrons) but rather on a preliminary issue involving the application of res judicata. It is anticipated that the Protestants will raise this defense as a preliminary issue at the Board's hearing and, under those circumstances, the enclosed is offered to set forth the Petitioner's viewpoint of the relevant facts and applicable law.

The Petitioner will be prepared to present facts and argument regarding the merits of the case at the hearing and also will be prepared to address the res judicata issue. I would appreciate if the panel assigned to this case is provided a copy of the enclosed prior to the hearing so that they may review the same in advance. In this regard, I have enclosed an original and three copies of the Memorandum.

As always, thank you for your cooperation in this regard and past courtesies. Please contact me should you have any questions regarding this matter.

Very truly yours,

Lawrence E. Schmidt

LES/amf
Enclosures
cc: Francis Borgerding, Esquire
Peter Max Zimmerman, Esquire, People's Council for Baltimore County
Carole DeMilio, Esquire, People's Council for Baltimore County
Ken Boone, Boone Kondylas, LLC

RECEIVED
JAN 28 2016
BALTIMORE COUNTY
BOARD OF APPEALS

IN THE MATTER OF: Boone Kondylas, LLC 9025 Cuckold Point Road	*	BEFORE THE BOARD OF APPEALS
	*	FOR
15th Election District 7th Councilmanic Districts	*	BALTIMORE COUNTY
	*	Case No. 2016-003-SPH

* * * * * * * * * * * * *

TRIAL MEMORANDUM

Boone Kondylas LLC, Petitioner/Appellant, through Lawrence E. Schmidt and Smith, Gildea and Schmidt, its attorneys, submits this Trial Memorandum and respectfully states the following.

Facts

This matter comes before the Board of Appeals ("Board") as an appeal by Boone Kondylas, LLC (property owner) of the denial of a Petition For Special Hearing by the County Administrative Law Judge ("ALJ"). By written decision dated October 22, 2015 ALJ John E. Beverungen denied the Petitioner's Petition for Special Hearing, holding that consideration of the same was barred by the doctrine of res judicata. Petitioner avers that such decision is erroneous and offers the following in support of its contention.

The relevant facts related to this case are largely not in dispute. The subject property is a water front property in the Millers' Island community of eastern Baltimore County. The property is zoned BL. The property is 55,594 square feet (1.276 acres) in area. The property is improved with a commercial building and associated parking

area. The business located thereon is known as "The Dock of the Bay". The Dock of the Bay has operated at this location since the 1950's. For years, the business operated (without dispute or incident) as a traditional restaurant. As an accessory component to the restaurant operation, the Dock of the Bay provided entertainment to its dining patrons. The restaurant closed following extensive damage that was sustained as the result of Hurricane Isabel in 2003. The property/business was thereafter acquired and re-opened under the ownership and management of Fifth Street, LLC. Lawrence Thanner was the managing member of Fifth Street, LLC. He changed the operation of the business, in that he introduced live music, dancing and a party type atmosphere at the facility. As specifically determined by the Board of Appeals in a prior case, the Board found (as a matter of fact) that Fifth Street, LLC's operation had the following characteristics:

- Lower interior lighting levels were in place when bands were playing (BOA Opinion, Pg. 5)
- Bands were playing "quite loudly" creating noise louder than would normally be associate with a restaurant use (BOA Opinion Pg. 5)
- A stage outside the restaurant was installed for use by entertainers (bands) when they play outside during warmer months (BOA Opinion, pg. 5)
- The business was open until 2:00 a.m. (BOA Opinion pg. 5)
- There were ill defined aisles between tables, particularly when music was played (BOA Opinion pg. 5)

- Dancing took place while bands were playing on a makeshift dance floor (BOA Opinion pg. 5)
- The serving of alcoholic beverages and food (BOA Opinion pg. 5)
- A high occupant load density (i.e. a crowded facility) (BOA Opinion pg. 5)

Due to these characteristics and the noise generated by the operation, there was a disruption to the neighborhood which resulted in complaints to the Code Enforcement Division of the Department of Permits, Approvals and Inspections. Ultimately, multiple citations were issued to Fifth Street, LLC. These civil code violation cases were heard by the County Code Citation Hearing Officer and Fifth Street, LLC was found to be operating in violation of the Baltimore County Zoning Regulations ("BCZR"). Fines were imposed. The citation cases were appealed to the Board to case numbers CBA-06-044 and CBA-07-134. Concurrently, Fifth Street, LLC filed a Petition for Special Hearing with the Zoning Commissioner seeking approval of live entertainment (as then conducted) on the Property. (Case No. 07-144-SPH). This Petition was denied by the Commissioner and also appealed to the Board. The two Code Citation cases and the special hearing case were consolidated for hearing before the Board of Appeals. By written decision issued through a 2-1 vote, the Board determined that Fifth Street's business was a "nightclub" and thus prohibited in the BL zone. The Board applied the definitions within BCZR" § 101 of "nightclub" and "restaurant" to the operation as conducted and determined that the Dock of the Bay was a nightclub.[1] Specifically, the Board analyzed the eight factors in the bullet points set forth above and determined that

[1] Several different types of restaurants are defined in BCZR § 101.1.

Fifth Street, LLC's operation was a nightclub based upon the definition of the same in the BCZR and also the characteristics of the operation as set out in the International Building Code. Further, the Board noted that a nightclub was not a permitted use in the BL zone, which at all relevant times was/is the zoning of the property.

The Board's determination was appealed to the Circuit Court, and then to the Court of Special Appeals. The decision was affirmed at all levels. Following the issuance of the decision by the Court of Special Appeals, Baltimore County instituted contempt proceedings in the Circuit Court for Baltimore County, alleging that Fifth Street, LLC and Mr. Thanner were operating the business as a night club and in violation of the prior decisions. The Circuit Court determined that Mr. Thanner had no personal responsibility and he was found not to be in contempt. However, Fifth Street, LLC was found to be in contempt. The court enjoined the playing of music at the Property and proposed a fine if its order were violated. The Court also indicated that its order banning "entertainment" at the Property "will remain for a period of one year." Being unable to operate in the manner Mr. Thanner desired, the Dock of the Bay closed.

In August 2014, Boone Kondylas, LLC acquired the property and business. After a period of interior building renovation, Mr. Boone (owner and manager) re-opened the business as a restaurant in October 2014. The business operates seven days a week serving lunch and dinner. There is a brunch on Sundays. Typically the restaurant closes by midnight on weekends (earlier during the week) as the clientele is mature and family oriented. The Dock of the Bay has a liquor license and sells alcohol but the main focus of the business is serving meals. The Dock of the Bay has operated for the past year

without incident. The primary focus of the business is to serve meals to its patrons. Indeed, more than three quarters of the restaurant's revenue is derived from food sales, the rest from sales of alcohol.

It is proffered that the current operation of the restaurant is different from Fifth Street's operation, including but not limited insofar as to the following characteristics:

- Lighting levels do not change when entertainment will be provided.
- The nature of the entertainment is markedly different. The owner anticipates "solo acts" of adult contemporary music geared towards a mature crowd and not live rock and roll bands.
- There will be no stage or stage accessories.
- The restaurant typically stays open until midnight and closes earlier on weekdays. The restaurant operates year round.
- The tables and seating are laid out to create defined aisles.
- There is no dance floor or dancing.
- The primary focus of the business is to serve meals, not provide entertainment.
- The restaurant is typically not over crowded or even at capacity.

In April 2015, the operator of the Dock of the Bay arranged for a solo acoustic guitar solo player to provide music one weekend night to enhance the patrons dining experience. Shortly thereafter, an inspector from the Department of Permits, Approvals and Inspections (Code Citation Division) appeared at the restaurant and advised the manager that the playing of any music was not allowed and that "you'll be shut down"

if any music was played. The Dock of the Bay retained undersigned counsel and filed a Petition for Special Hearing. That Petition contended that the Dock of the Bay was no longer a nightclub, was now a restaurant and, that under the BCZR, restaurants may have (as a legitimate accessory use) music/entertainment. The Petition sought a ruling from the ALJ as to how much/when and under what circumstances accessory entertainment might be allowed. By order dated October 22, 2015, the ALJ dismissed the claim, holding that the petition was barred by res judicata. This timely appeal followed.

Res Judicata: An Overview.

The doctrine of *res judicata* bars the litigation of a cause of action after it has already been litigated to a final judgment. *Gertz v. Anne Arundel County,* 339 Md. 261, 269 (1995); *DeLeon v. Slear,* 328 Md. 569, 580 (1992). Furthermore, *res judicata* may be applicable in administrative (quasi judicial) proceedings. *Batson v. Shiflett,* 325 Md. 684 (1992). *Res judicata* also bars re-litigation of claims that were, or could have been litigated in an earlier proceeding between the parties. *Batson* 325 Md. 684 (1992). In order to successfully establish a claim for *res judicata,* the following elements must be satisfied: (1) The parties in the present litigation should be the same or in privity with the parties to the earlier case; (2) the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction. *DeLeon,* 328 Md. at 580. It is the first and second elements of res judicata that are not present here.

Argument: Res Judicata does not apply because there is a change in the material facts.

Res judicata does not apply if the cause of action or claim is different from the first case to the second. The nature of the claim is determined by the relevant facts as presented in each case.

A leading case on the application of res judicata to administrative (zoning) decisions is *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n 192 Md. App. 719 (2010)*. This was a Baltimore County case, in which the Board of Appeals considered two separate cases involving a commercial property located in Lutherville. The operative facts were as follows:

The "Galleria" commercial property is a 211,635 square foot commercial center primarily leased for offices, with retail on the first floor located adjacent to the intersection of York Road and Seminary Avenue in Lutherville. In 2003, the Galleria petitioned for variance and special hearing relief, seeking the approval of an amendment to its zoning/subdivision plan which had been approved in 1983. The requested zoning relief related to the parking provided at the site, including 14 spaces that had been added by the Galleria shortly before the filing of the petitions and without County approval. The petitions requested approval of the property's parking layout, including the newly added spaces. Ultimately, after proceedings before the Zoning Commissioner; and then the Board and Circuit Court on appeal, the relief requested was denied. The final decision on this case (a/k/a as "Seminary Galleria I") was issued on September 19, 2005.

On February 23, 2006, the owner of the center instituted "Seminary Galleria II" by the filing of zoning petitions (variance and special hearing). Again, the petitions related to parking. The owner contended that Seminary Galleria II was not barred by the doctrine of res judicata because the Galleria (in the second case) was identified as a "shopping center" under the BCZR and that the regulations governing parking which were applicable to shopping centers were different than those applicable to a non-shopping center (which it was the prior designated use of the property).

Seminary Galleria II wound its way through hearing before the Zoning Commissioner, the Board of Appeals, the Circuit Court and the Court of Special Appeals. In a reported decision, the Court of Special Appeals affirmed the decision of the Circuit Court and found Seminary Galleria II barred by res judicata. In its comprehensive written opinion, the Court concluded that neither the facts nor law had changed in the time between Seminary Galleria I and Seminary Galleria II and that the second case was thus barred. Citing a prior decision of the Court of Appeals (*Whittle v. Board of Zoning Appeals 211 Md. 36 (1956)*, the Court of Special Appeals opined that "where the facts are subject to changes which might reasonably lead to an opposite result from that arrived at in an earlier case, and if there have been substantial changes in fact and circumstances between the first case and the second, the doctrine of res judicata would not prevent" a subsequent zoning application. See *Seminary, 192 Md. App. at 737* (citing *Whittle v. Board of Zoning Appeals, 211 Md. 36, 45 (1956)*).

The Seminary galleria opinion also concluded that the changes to the operative facts must be substantial. Citing *Woodlawn Ass'n v. Board 241 Md. 187* the Court of

Appeals has stated that "substantial changes in fact and circumstances must be, indeed, substantial." Pg. 197. Similarly, in *The Chatham Corp v. Beltram 243 Md. 138 (1966)* the Court rejected a second suit because "the facts underlying the previous denial remained unchanged" (Cited in *Seminary at 738*). Thus, it is clear that a substantial change in the material facts from one case to a second will preclude the operation of res judicata in an administrative proceeding.

The facts are substantially different in the first case (Fifth Street, LLC) than the second case (Boone Kondylas, LLC). Further, the facts which have changed are operative and material to the controversy. In the first case, the Board of Appeals determined that the Dock of the Bay was a nightclub based upon the facts presented at that time regarding the operation as then conducted by its then owner. The Board specifically considered the eight enumerated factors identified in the International Building Code as referenced herein above. Based upon the nature of the prior operation (and specifically its findings as to these eight enumerated factors) the Board determined the prior operation to be a nightclub. As noted above, the Boone Kondylas, LLC operation of the Dock of the Bay is substantially different than the Fifth Street, LLC operation. The current operation has no dancing or dance floor, no changes in the lighting when entertainment is provided, no proposed rock and roll bands, no stage, and does have a defined dining area, etc. The operation of the Dock of the Bay by Fifth Street, LLC was a nightclub with accessory food and drink. The operation of the Dock of the Bay by Boone Kondylas, LLC is a restaurant with proposed accessory

entertainment to enhance the dining experience. The material facts support this significant difference between the distinct uses of this property.

Given this clear and unmistakable difference between the facts in these two cases, res judicata cannot apply. The prior ruling did not say that entertainment could never be provided at business at this Property. Indeed, in addition to restaurants, hotels, country clubs and theatres are all uses permitted by right in the BL zone. These uses frequently provide entertainment (e.g. wedding receptions) as an accessory component to their primary use. Such accessory component is appropriate and may be allowed. If, based upon the material facts which now apply (which are different than before) the Board may determine that accessory entertainment at the Dock of the Bay is appropriate and warranted. It may further define and even limit that entertainment. But, it is contended, the Board must consider this issue and cannot wrongly apply the doctrine of res judicata to prohibit the current owner from having his "day in court" to fairly and objectively consider the issue presented.

CONCLUSION

Wherefore Boone Kondylas LLC respectfully requests:

1. That the Board of Appeals schedule this matter for public hearing whereat it might receive testimony confirming the differences in operation (material facts) between Dock of the Bay's operation under Fifth Street LLC and its current operation by Boone Kondylas, LLC;
2. That the Board of Appeals find that Dock of the Bay is a restaurant and may have accessory entertainment to enhance the dining experience of its patrons;

3. That the Board of Appeals set the limits and conditions in the providing of entertainment by the Dock of the Bay to ensure that the use is appropriate for the locale; and

4. For such other and further relief as the nature of its cause may require.

Respectfully submitted,



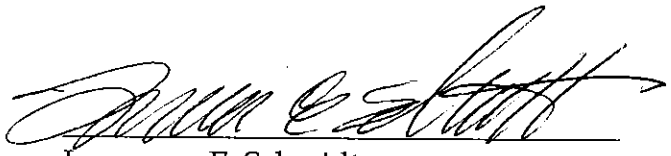
Lawrence E. Schmidt
Smith, Gildea & Schmidt, LLC
600 Washington Ave., Suite 200
Towson, MD 21204
410-821-0070
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2016 a copy of the foregoing document was mailed via first class mail, postage prepaid to:

Francis X. Borgerding, Jr., Esquire
Law Offices of Francis X. Borgerding, Jr.
409 Washington Avenue, Suite 600
Towson, MD 21204

Peter Max Zimmerman, Esquire
Carole DeMilio, Esquire
People's Counsel for Baltimore County
The Jefferson Building105 West
Chesapeake Avenue, Room 204
Towson, MD 21204



Lawrence E. Schmidt

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

November 24, 2015

NOTICE OF ASSIGNMENT

IN THE MATTER OF: Boone Kondylas, LLC
9025 Cuckold Point Road
16-003-SPH 15th Election District; 7th Councilmanic District

Re: Petition for Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044, and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music

11/7/13 Opinion and Order issued by the Administrative Law Judge wherein the requested relief was DENIED.

ASSIGNED FOR: WEDNESDAY, FEBRUARY 17, 2016, AT 10:00 A.M.

LOCATION: Hearing Room #2, Second Floor, Suite 206
Jefferson Building, 105 W. Chesapeake Avenue, Towson

NOTICE: This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.

Please refer to the Board's Rules of Practice & Procedure, Appendix B, Baltimore County Code.

IMPORTANT: No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

If you have a disability requiring special accommodations, please contact this office at least one week prior to hearing date.

For further information, including our inclement weather policy, please visit our website www.baltimorecountymd.gov/Agencies/appeals/index.html

Krysundra "Sunny" Cannington
Administrator

---

c: Counsel for Petitioner/Appellant : Lawrence E. Schmidt, Esquire
Petitioner/Appellant : Boone Kondylas, LLC/Ken Boone

Counsel for Protestants : Francis X. Borgerding, Esquire
Protestants : Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella, and Tammy Waldmann

Office of People's Counsel
Arnold Jablon, Director/PAI
Nancy West, Assistant County Attorney

Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Michael Field, County Attorney, Office of Law

KEVIN KAMENETZ
County Executive

LAWRENCE M. STAHL
Managing Administrative Law Judge
JOHN E. BEVERUNGEN
Administrative Law Judge

November 16, 2014

Lawrence E. Schmidt, Esq.
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

Francis X. Borgerding, Jr., Esq.
409 Washington Avenue, Suite 600
Towson, Maryland 21204

RECEIVED
NOV 16 2015
BALTIMORE COUNTY
BOARD OF APPEALS

RE: **APPEAL TO BOARD OF APPEALS**
Case No. 2016- 0003-SPH
Location: 9025 Cuckold Point Road

Dear Counsel:

Please be advised that an appeal of the above-referenced case was filed in this Office on November 13, 2015. All materials relative to the case have been forwarded to the Baltimore County Board of Appeals ("Board").

If you are the person or party taking the appeal, you should notify other similarly interested parties or persons known to you of the appeal. If you are an attorney of record, it is your responsibility to notify your client.

If you have any questions concerning this matter, please do not hesitate to contact the Board at 410-887-3180.

Sincerely,

LAWRENCE M. STAHL
Managing Administrative Law Judge
for Baltimore County

LMS/sln

c: Baltimore County Board of Appeals
People's Counsel for Baltimore County

APPEAL

Petition for Special Hearing
9025 Cuckold Point Road
15th Election District – 7th Councilmanic District
Legal Owner: Boone Kondylas, LLC
Case No.: 2016-0003-SPH

Petition for Special Hearing (July 6, 2015)

Zoning Description of Property

Notice of Zoning Hearing (August 3, 2015)

Certification of Publication – (September 8, 2015)

Certification of Posting (Linda O'Keefe – September 6, 2015)

Entry of Appearance by People's Counsel – (July 23, 2015)

Petitioner(s) Sign-In Sheet – (1 Page)

Citizens(s) Sign-In Sheet – (1 Page)

Zoning Advisory Committee (ZAC) Comments

Petitioner's Exhibits:
1 – Site Plan
2 – 2"A"-2"O" color photos
3- 3A-3C Aerial Photos

Protestants Exhibits:
1- CBA Opinion-07-144 et al
2- Circuit Court Order 03-C-08-9996
3- Unreported CSA Opinion No. 810
4- Photos

Miscellaneous: Not Marked as Exhibits

Cover Letter and Administrative Law Judge's Opinion and Order –
(DENIED – October 22, 2015)

Notice of Appeal received on November 13, 2015 filed by Lawrence E. Schmidt, Esq.

NOV 16 2015
BALTIMORE COUNTY
BOARD OF APPEALS

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET AND FINANCE
MISCELLANEOUS CASH RECEIPT

No. 138630

Date: 11/13/15

Fund	Dept	Unit	Sub Unit	Rev Source/ Obj	Sub Rev/ Sub Obj	Dept Obj	BS Acct	Amount
331	8010	0777		1650				265.00

Total: 265.00

Rec From: [illegible]

For: H 2011-0003-SPH

9625 Chickadee Point Rd

CKE 11/9/15

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER GOLD - ACCOUNTING
PLEASE PRESS HARD!!!!

PAID RECEIPT
[illegible] ACCOUNT TIME PERIOD
11/13/2015 11/13/2015 14:58:09 2
[illegible]
[illegible] 11/13/2015 RECEIPT
[illegible]
Rcpt Tot 265.00
[illegible] CK 265.00
Baltimore County, Maryland

CASHIER'S VALIDATION

SMITH, GILDEA & SCHMIDT LLC

MICHAEL PAUL SMITH
DAVID K. GILDEA
LAWRENCE E. SCHMIDT
MICHAEL G. DEHAVEN
JASON T. VETTORI
DAVID W. TERRY*
*Admitted in MD, MO, IL, AR

RECEIVED
NOV 13 2015
OFFICE OF ADMINISTRATIVE HEARINGS

NOV 13 2015

LAUREN DODRILL BENJAMIN
CHRISTOPHER W. COREY
MARIELA C. D'ALESSIO**
ELYANA TARLOW
SARAH A. ZADROZNY
of counsel:
JAMES T. SMITH, JR.
EUGENE A. ARBAUGH, JR.
DAVID T. LAMPTON
**Admitted in MD, FL, PA

November 13, 2015

Via Hand Delivery
Arnold Jablon, Esquire
Director
Baltimore County Department of Permits, Approvals and Inspections
111 West Chesapeake Ave, Suite 105
Towson, MD 21204

Re: Notice of Appeal
Property: 9025 Cuckold Point Road
Case No. 2016-0003-SPH

Dear Mr. Jablon,

Enclosed herewith please find an original and four (4) copies of the Notice of Appeal on behalf of Appellant, Boone Kondylas, LLC, to be filed in the above referenced matter. Please date stamp the copies and return the same to our courier. Also enclosed, please find a check in the amount of $265.00 to cover the filing fee for such appeal.

Please contact me should you have any questions.

Very truly yours,

Lawrence E. Schmidt

LES/amf
Enclosures
cc: Administrative Law Judge John E. Beverungen
Francis X. Borgerding, Jr., Esquire
Peter Max Zimmerman, Esquire
Krysundra Cannington, Board of Appeals
Boone Kondylas, LLC

IN RE: **PETITION FOR SPECIAL HEARING** **9025 Cuckold Point Road**	*	BEFORE THE
	*	COUNTY BOARD OF APPEALS
15th Election District 7th Councilmanic District	*	OF
	*	BALTIMORE COUNTY
Boone Kondylas, LLC, *Legal Owner* Appellant	*	
	*	**Case No.: 2016-0003-SPH**
	*	

* *

NOTICE OF APPEAL

The Appellant, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea, and Schmidt, LLC, feeling aggrieved by the decision of the Administrative Law Judge for Baltimore County from the Opinion and Order dated October 22, 2015, in the above-captioned matter, hereby note this appeal to the County Board of Appeals for Baltimore County in accordance with Baltimore County Code §32-3-401 by filing this Notice of Appeal with the Director of the Baltimore County Department of Permits, Approvals & Inspections.

Respectfully submitted,

LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of **November, 2015,** a copy of the foregoing Notice of Appeal was mailed first-class pre-paid postage to:

Francis X. Borgerding, Jr., Esquire
Law Offices of Francis X. Borgerding, Jr.
409 Washington Avenue, Suite 600
Towson, MD 21204

John E. Beverungen, Esquire
Administrative Law Judge for Baltimore County
Office of Administrative Hearings
105 West Chesapeake Avenue, Suite 103
Towson, MD 21204

Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County
The Jefferson Building
105 West Chesapeake Avenue, Room 204
Towson, MD 21204

LAWRENCE E. SCHMIDT

SMITH, GILDEA & SCHMIDT LLC

MICHAEL PAUL SMITH
DAVID K. GILDEA
LAWRENCE E. SCHMIDT
MICHAEL G. DEHAVEN
JASON T. VETTORI
DAVID W. TERRY*
*Admitted in MD, MO, IL, AR

LAUREN DODRILL BENJAMIN
CHRISTOPHER W. COREY
MARIELA C. D'ALESSIO**
ELYANA TARLOW
SARAH A. ZADROZNY
of counsel:
JAMES T. SMITH, JR.
EUGENE A. ARBAUGH, JR.
DAVID T. LAMPTON
**Admitted in MD, FL, PA

November 13, 2015

Via Hand Delivery
Arnold Jablon, Esquire
Director
Baltimore County Department of Permits, Approvals and Inspections
111 West Chesapeake Ave, Suite 105
Towson, MD 21204

Re: Notice of Appeal
Property: 9025 Cuckold Point Road
Case No. 2016-0003-SPH

Dear Mr. Jablon,

Enclosed herewith please find an original and four (4) copies of the Notice of Appeal on behalf of Appellant, Boone Kondylas, LLC, to be filed in the above referenced matter. Please date stamp the copies and return the same to our courier. Also enclosed, please find a check in the amount of $265.00 to cover the filing fee for such appeal.

Please contact me should you have any questions.

Very truly yours,

Lawrence E. Schmidt

LES/amf
Enclosures
cc: Administrative Law Judge John E. Beverungen
Francis X. Borgerding, Jr., Esquire
Peter Max Zimmerman, Esquire
Krysundra Cannington, Board of Appeals
Boone Kondylas, LLC

RECEIVED
NOV 16 2015
BALTIMORE COUNTY
BOARD OF APPEALS

IN RE: **PETITION FOR SPECIAL HEARING** **9025 Cuckold Point Road**	*	BEFORE THE
	*	COUNTY BOARD OF APPEALS
15th Election District 7th Councilmanic District	*	OF
	*	BALTIMORE COUNTY
Boone Kondylas, LLC, *Legal Owner* Appellant	*	
	*	**Case No.: 2016-0003-SPH**
	*	

* *

NOTICE OF APPEAL

The Appellant, Boone Kondylas, LLC, by and through their attorneys, Lawrence E. Schmidt and Smith, Gildea, and Schmidt, LLC, feeling aggrieved by the decision of the Administrative Law Judge for Baltimore County from the Opinion and Order dated October 22, 2015, in the above-captioned matter, hereby note this appeal to the County Board of Appeals for Baltimore County in accordance with Baltimore County Code §32-3-401 by filing this Notice of Appeal with the Director of the Baltimore County Department of Permits, Approvals & Inspections.

Respectfully submitted,

RECEIVED
NOV 16 2015
BALTIMORE COUNTY
BOARD OF APPEALS

LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of **November, 2015,** a copy of the foregoing Notice of Appeal was mailed first-class pre-paid postage to:

Francis X. Borgerding, Jr., Esquire
Law Offices of Francis X. Borgerding, Jr.
409 Washington Avenue, Suite 600
Towson, MD 21204

John E. Beverungen, Esquire
Administrative Law Judge for Baltimore County
Office of Administrative Hearings
105 West Chesapeake Avenue, Suite 103
Towson, MD 21204

Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County
The Jefferson Building
105 West Chesapeake Avenue, Room 204
Towson, MD 21204

LAWRENCE E. SCHMIDT

KEVIN KAMENETZ
County Executive

LAWRENCE M. STAHL
Managing Administrative Law Judge
JOHN E. BEVERUNGEN
Administrative Law Judge

October 22, 2015

Lawrence E. Schmidt, Esq.
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

Francis X. Borgerding, Jr., Esq.
409 Washington Avenue, Suite 600
Towson, Maryland 21204

RE: Petition for Special Hearing
Property: 9025 Cuckold Point Road
Case No.: 2016-0003-SPH

Dear Counsel:

Enclosed please find a copy of the decision rendered in the above-captioned matter.

In the event any party finds the decision rendered is unfavorable, any party may file an appeal to the Baltimore County Board of Appeals within thirty (30) days of the date of this Order. For further information on filing an appeal, please contact the Baltimore County Office of Administrative Hearings at 410-887-3868.

Sincerely,

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln
Enclosure

IN RE: **PETITION FOR SPECIAL HEARING** **(9025 Cuckold Point Road)** 15th Election District 7th Council District Boone Kondylas, LLC *Legal Owner* Petitioner	*	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS FOR BALTIMORE COUNTY **Case No. 2016-0003-SPH**

* * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Boone Kondylas, LLC, legal owner. The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

Ken Boone appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioner. Several neighbors, represented by Francis Borgerding, Esq., attended and opposed the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Bureau of Development Plans Review (DPR). Neither agency opposed the request, but suggested certain conditions be imposed if relief is granted.

The subject property is 1.27 acres and zoned B.L. The property is improved with a restaurant known as "Dock of the Bay." The restaurant has new ownership, which proposes to offer limited music and live entertainment as an "accessory" use to the food and beverage service. This property and business have been the subject of protracted litigation concerning loud music and unruly patrons which disturbed the neighborhood. The operation was found by the court of

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Date 10/22/15
By DLD

special appeals to constitute a "nightclub," a use prohibited in the B.L. zone. Protestants contend the petition is barred by *res judicata,* while Petitioner argues that unlike the former operation the current business is first and foremost a restaurant, with music offered to compliment the dining experience.

Under Maryland law, an agency determination affirmed on appeal is entitled to preclusive effect. Esslinger v. Balto. City, 95 Md. App. 607, 621 (1993). This is the case, and *res judicata* will apply, unless there is a significant change in circumstances between the earlier and subsequent action. *See, e.g.*, Alvey v. Hedin, 243 Md. 334, 340 (1966). In light of this authority I believe the doctrine of *res judicata* mandates that the petition in this case be dismissed.

As an initial matter, I do not believe the OAH has the authority to "amend" restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the board of appeals, circuit court and then the court of special appeals. In an unreported opinion (No. 810, September Term, 2009) the appellate court affirmed the agency findings, which necessarily included the conditions and restrictions found in those orders. To amend those restrictions at this juncture would be akin to reversing the appellate court, which an administrative agency cannot do.

I believe the Petition must also be denied based on *res judicata.* As discussed above, *res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard. For example, if the owner of the subject property was now proposing to operate a barbershop or beauty salon at the site, that would constitute a significant change and *res judicata* would not apply. But here, I do not believe there

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Date 10/22/15
By

have been significant changes; Petitioner is still proposing to operate a restaurant that would offer live and/or recorded music.

The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010).

THEREFORE, IT IS ORDERED this **22nd** day of October, **2015** by this Administrative Law Judge, that the Petition for Special Hearing pursuant to B.C.Z.R. § 500.7 to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music, be and is hereby DENIED.

Any appeal of this decision must be filed within thirty (30) days of the date of this Order.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln

ORDER RECEIVED FOR FILING
Date 10/22/15
By sln

John E. Beverungen

From: Lawrence Schmidt <lschmidt@sgs-law.com>
Sent: Wednesday, October 14, 2015 3:20 PM
To: John E. Beverungen
Cc: borgerdinglaw@aol.com; Ken Boone (kboone@tidewaterdirect.com)
Subject: Dock of the Bay (Case 2016-003-SPH)

Judge Beverungen: In view of my longstanding friendship with him and respect for Mr. Borgerding, I hesitantly write this email to you regarding the Post Hearing Memorandum that he has submitted in the above case. Certainly, counsel is free to argue any point of law and offer any legal argument that he thinks appropriate as it relates to the issues in this case. But I must object to the offering of new evidence as part of a post hearing/closing memo. Mr. Borgerding's inclusion of Mr. Wolinski's factual affidavit and the letter from Mr. and Mrs. Kondylas (Mr. Boones' former business partners) is, in my judgment, inappropriate. How am I to cross examine them or offer rebutting evidence at this point in time? The Kondylas letter was penned after the hearing (October 8).The affidavit (dated October12) states that Mr. Wolinski didn't have the opportunity to respond to Mr. Boone's comments as they were made at the end of the hearing but such opportunity is provided through rebuttal. Indeed, even with the informal nature of the conduct of this hearing you indicated at the conclusion "does anyone have anything else" or words to that effect. Because Mr. Wolinski or Mr. Borgerding forgot or otherwise failed to offer testimony then does not justify an attempt to introduce it now.

I am certainly appreciative of the administrative nature of the hearings before you and that any appeal would be de novo. But you are presumably deciding this case on the record made in open hearing and the applicable law. I feel it incumbent on me to protect my client's interests in view of this submission.

I certainly have confidence in your judgment and that you will fairly consider this matter. I do not wish to reopen the case and reconvene the hearing. However, if you decide to consider this new evidence and deem it relevant, I would appreciate being so advised and some opportunity to respond. Please do not hesitate to contact me if you deem necessary. I have copied Mr. Borgerding on this email correspondence.

Thank you,
Larry Schmidt

Lawrence E. Schmidt
SMITH, GILDEA & SCHMIDT, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
(410) 821-0071 - fax
lschmidt@sgs-law.com

This email contains information from the law firm of Smith, Gildea & Schmidt, LLC which may be confidential and/or privileged. The information is intended to be for the exclusive use of the individual or entity named above. If you are not the intended recipient, be advised that any disclosure, copying, distribution or other use of this information is strictly prohibited. If you have received this email in error, please notify Smith, Gildea & Schmidt, LLC by telephone immediately.

IN RE:

PETITION FOR SPECIAL HEARING SE CORNER CUCKOLD POINT ROAD AND FIFTH STREET (9025 Cuckold Point Road) 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	BEFORE THE ADMINISTRATIVE LAW JUDGE FOR BALTIMORE COUNTY CASE NO.: 2016-003-SPH
BOONE KONDYLAS, LLC, KEN BOONE Petitioner	

RECEIVED
OCT 13 2015
OFFICE OF ADMINISTRATIVE HEARINGS

* * * * * * * * * *

PROTESTANTS' MEMORANDUM

Now comes Francis X. Borgerding, Jr., attorney for Protestants in the above-captioned case, and files this Memo in Opposition to the relief requested in the above-captioned case and says:

Counsel forwarded to the Administrative Law Judge a copy of the Court of Special Appeals Opinion in the case of *Back River, LLC, et al. v. Baltimore, MD, et al.*, No. 2495, September Term 2013, before the Court of Special Appeals. The case lays out the Doctrine of Res Judicata and the relevant case law thereto. It is Protestants position that Petitioner's relief cannot be granted because of the Doctrine of Res Judicata in that the thing is already decided. At the hearing of the above-referenced case Petitioner seemed to indicate through questioning that his use was different from the previous use by the owner, Larry Thanner, of the Dock of the Bay. Contrary to Petitioner's assertions, one of the Protestants, Charlie Wolinski, was in the Dock of the Bay restaurant many times while it was operated by the previous owner and has been in the current Dock of the Bay. Attached please find Affidavit of Charlie Wolinski as to the similarities between the use of the Dock of the Bay under Larry Thanner and the similarities presently. Please also find

a letter received from Donna and Mike Kondylas, former partners of Boone-Kondylas, LLC regarding this matter. In light of the attached, Protestants assert that the use of the Dock of the Bay remains largely unchanged and, therefore, the Doctrine of Res Judicata should apply.

Assuming, for the sake of argument, that the Administrative Law Judge disagrees with Protestants' interpretation. Protestants hereby request that if any of the Petitioner's relief is granted, that said grant shall not include outdoor music. The Administrative Law Judge heard much testimony about the disruptiveness of the outside music with regard to the previous operation of the Dock of the Bay. After seven years of litigation, which consummated an Opinion before the Court of Special Appeals, the Dock of the Bay was precluded from having disruptive music on their property. Since then the neighbors have lived in peace and have been able to raise their kids without disruptive noise coming from the Dock of the Bay use. Any consummation of live music outside will resume the nightmare that they have gone through before. In addition, under the Code of Maryland Regulations, specifically Title 26, Subtitle 2, Chapter 3.03, noise levels are only allowed to be 65 decibels at a residential property line during the day and 55 decibels at night. See attached Regulations and Table 1 chart. Also see Handout from the Department of Environment. This standard is basically impossible to meet with outside music. Mr. Thanner was cited for violation of this Regulation by the Baltimore County Liquor Board as they enforce those regulations numerous times and he was found guilty of violating same and fined. If Your Honor were to allow live music outside, it would simply start another cycle of the residents having to call the Liquor Board Inspectors when and if they feel this Regulation is violated and having Liquor Board hearings to enforce this Regulation. The

Protestants ask that you not approve outside music and, therefore, they do not have to get back into the same pattern of trying to enforce this Regulation. Under Section 10-403, Rule Number 2, of the Baltimore County Liquor Board Regulations, entitled Prohibitive Practices, it states in pertinent part:

> "No licensee shall commit or allow on his premises of any act which shall be contrary to any federal, state, local statute, law or ordinance or against the public peace safety, health, welfare, quiet and morals."

The Dock of the Bay is, therefore, subject to this 65 decibel restriction and 55 decibel from 10:00 p.m. to 7:00 a.m.

Protestants also had many problems with live music emanating from inside. Mainly, when the door opened the decibel level would spike and, in fact, the violations of the decibel restriction emanated from music coming from the inside when patrons when patrons would open or shut the door.

Rule 3B of the Baltimore County Liquor Board Regulations (see attached copy of said Regulation) states in pertinent part:

> "All licenses shall operate their establishments in such a manner as to avoid disturbing the peace, tranquility, safety, health and quiet the neighborhood where located. It shall be the responsibility of the licensee(s) to take precautionary measures to comply with the subsection."

Accordingly, the property owner, the owner of the Dock of the Bay, has music inside and it exceeds the above decibel limits, it is the owner's responsibility. Protestants request that the Administrative Law Judge not approve any live music inside so as not to cause a potential problem in this regard. If the Administrative Law Judge is entertaining allowing any live music inside, Protestants would request that the Petitioner condition such relief on the construction of vestibules so that when one door opens another door protects from the

spike in sound and, therefore, the above decibel limits are not violated.

In addition, Protestants would ask that the Administrative Law Judge approve no weekday indoor music and allow indoor music only on the weekends which would end at 10:00 p.m. on Friday and Saturday night and 9:00 p.m. on Sunday. Protestants request for no weekday music is based upon several of the Protestants having young children who go to bed approximately 9:00 p.m.

WHEREFORE, Protestants pray that this Honorable Court:

A. Deny the Petitioner's requested relief for music live or music indoor or outdoors; and

B. For such other and further relief as the Protestants' cause may require.

FRANCIS X. BORGERDING, JR.
409 Washington Avenue, Suite 600
Towson, Maryland 21204
410-296-6820
ATTORNEY FOR PROTESTANTS

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 13 day of October, 2015, a copy of the foregoing was mailed, postage prepaid, to:

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

FRANCIS X. BORGERDING, JR.

October 12, 2015

Honorable Judge Beverungen;

I, Charles Wolinski, am writing this affidavit to dispute some of the responses that Mr. Boone gave when questioned by Lawrence Schmidt at the zoning hearing on Monday, September 28, 20156. Mr. Boone was questioned at the end of the hearing, so I was not afforded the opportunity to dispute them before we left.

Mr. Boone answered "No" to all questions regarding whether or not Dock of the Bay met the criteria for a nightclub according to International Building Code. The previous owner, Mr. Thanner, also denied meeting the same criteria for being considered a nightclub by the International Building Code. Mr. Boone testified that he did not meet the criteria under Group A2 of the International Building Code for becoming a nightclub, however, since I was in the Dock of the Bay on numerous times when it was operated by Larry Thanner and I have been in the establishment within the last month and I assert that all the factors listed by the Court of Special Appeals to determine that the previous operation of the Dock of the Bay was a nightclub remains exactly the same. The level of lighting. The previous Dock of the Bay operation did not have a stage. The present Dock of the Bay operation does not have a stage. The tables and seating is arranged exactly as it was in the present Dock of the Bay operation as it was in the previous Dock of the Bay operation. The previous Dock of the Bay operation did not have a specific area for dancing and the present Dock of the Bay operation does not have a specific dancing area. The previous operation had a facility for service of alcoholic beverages and food and the present does. The occupant load density has not changed. After many inspections by code enforcement and years

of trials and appeals in the court system, it was determined that Dock of the Bay was, in fact, a nightclub.

The only thing that has changed from when Mr. Thanner owned Dock of the Bay then, to now, is that there is no music. All other criteria have remained the same. If it is determined that Mr. Boone is permitted to have music again, Dock of the Bay would again meet the criteria for being considered a nightclub. It is my hope that my family and our neighbors do not have to relive years of code enforcement inspections, hearing and appeals only to confirm what has previously been determined.

Mr. Boone and Mr. Schmidt talked about the music being permitted as an accessory use. Mr. Boone stated that he needed live entertainment to draw people to his restaurant and said that he would like to have a Frank Sinatra impersonator sing at his restaurant. I can't imagine Frank Sinatra or any other entertainer ever considering themselves as an accessory. More importantly, I question how Mr. Boone feels that live entertainment would be an accessory use when he stated that it was a necessity for his business to be successful.

Mr. Boone is attempting to do the same thing at Dock of the Bay that Mr. Thanner did until the courts stopped him. Mr. Boone is simply calling it something else.

I solemnly affirm under the penalties of perjury that I have personal knowledge that the contents of the foregoing paper are true.

Thank you for your time and consideration.

Charles Wolinski
9019 Cuckold Point Road
Sparrows Point, Maryland 21219
443-850-9431

October 8, 2015

To: Honorable Beverungen

Ref: Dock of the Bay

We are former partners of Boone-Kondylas LLC and the Dock of the Bay LLC.

We affirm that all parties involved were aware of the zoning restrictions regarding music and entertainment at 9025 Cuckold Road, Sparrows Point, MD 21219 at the time of partnership.

This is to also affirm the we rec'd the notification letter from Frank Borgerding reminding us of the restrictions that are in place on the property at 9025 Cuckold Pt. Road, zoned BL and personally brought it immediately to Ken Boone's attention.

Sincerely,

Donna Kondylas

Mike Kondylas

26.02.03.02

.02 Environmental Noise Standards.

A. Precepts.

(1) It is known that noise above certain levels is harmful to the health of humans. Although precise levels at which all adverse health effects occur have not definitely been ascertained, it is known that one's well-being can be affected by noise through loss of sleep, speech interference, hearing impairment, and a variety of other psychological and physiological factors. The establishment of ambient noise standards, or goals, must provide margins of safety in reaching conclusions based on available data which relate noise exposure to health and welfare effects, with due consideration to technical and economic factors.

(2) The environmental noise standards set forth here represent goals expressed in terms of equivalent A-weighted sound levels which are protective of the public health and welfare. The ambient noise levels shall be achieved through application, under provisions of laws or regulations or otherwise, of means for reducing noise levels including, but not limited to, isolation of noise producing equipment, dampening of sound waves by insulation, equipment modification and redesign, and land use management.

B. Standards for Environmental Noise — General.

(1) A person may not cause or permit noise levels which exceed those specified in this table except as provided in §B(2) or (3), or §C, of this regulation.

Table 1
Maximum Allowable Noise Levels (dBA)
for Receiving Land Use Categories

Day/Night	Industrial	Commercial	Residential
Day	75	67	65
Night	75	62	55

(2) A person may not cause or permit noise levels emanating from construction or demolition site activities which exceed:

(a) 90 dBA during daytime hours;

(b) The levels specified in Table 1 during nighttime hours.

(3) A person may not cause or permit the emission of prominent discrete tones and periodic noises which exceed a level which is 5 dBA lower than the applicable level listed in Table 1.

(4) A person may not cause or permit, beyond the property line of a source, vibration of sufficient intensity to cause another person to be aware of the vibration by such direct means as sensation of touch or visual observation of moving objects. The observer shall be located at or within the property line of the receiving property when vibration determinations are made.

(5) A person may not operate or permit to be operated an off-road internal combustion engine powered recreational vehicle, including, but not limited to, a dirt bike, an all terrain vehicle, a go cart, a snowmobile, or a similar vehicle, on private property closer than 300 feet to a neighboring residence or the associated curtilage, without the written permission of the affected resident, unless it can be demonstrated to the Department that the vehicle can be operated within the noise limits specified in Table 1 under §B(1) of this regulation.

C. Exemptions.

(1) The provisions of this regulation may not apply to devices used solely for the purpose of warning, protecting, or alerting the public, or some segment thereof, of the existence of an emergency or hazardous situation.

(2) The provisions of this regulation do not apply to the following:

Md. Dept. of Environment.

Key Points of the Noise Control Program

Effective July 1, 2005, the Maryland Department of the Environment Noise Control Program was de-funded by action of the Maryland Legislature. MDE continues to provide advice to the public concerning noise problems, but as directed by the legislative action, noise issues are being referred to local governments for action.

Background

The Noise Control Program was established by the legislature in the mid 1970's to provide technical assistance and enforcement help to citizens and local jurisdictions across the State regarding noise issues. Noise has become an increasingly contentious "Quality of Life" issue as the State's population increases and urban sprawl progresses. MDE's role is to direct affected parties to the appropriate local government office or, in certain instances, to one of our sister agencies that have the authority and funding to address specific forms of noise pollution. MDE stresses local government involvement, for two main reasons. First, most issues have their origin in local zoning and permitting decisions, and secondly, response to the often brief and variable nature of events can most readily be handled by local responders.

Authority

State Law: Environment Article, Title 3 - see www.mlis.state.md.us and http://www.nonoise.org/lawlib/states/maryland/maryland.htm
State Regulations: Code of Maryland Regulations (COMAR), Title 26.02.03.

Basic considerations for the application of noise control rules and regulations are provided below for use by local jurisdictions in administering local ordinances:

1. State noise regulations set maximum intruding sound level limits statewide for three different land uses (industrial, commercial, and residential) for both day and night. The residential limits, which are most often of concern, are:

    a. Daytime (7:00 a.m. to 10:00 p.m.) 65 dBA - for residential receiving properties
    b. Nighttime (10 p.m. to 7:00 a.m.) 55 dBA - for residential receiving properties

2. These limits were established as the upper bounds of annoyance acceptance for a majority of people, but were not expected to provide for 100% acceptance by all people. Experience has shown that 50% of the complaints investigated are not found to exceed the limit applicable limits.

3. Local jurisdictions are encouraged to establish more restrictive standards where circumstances so indicate.

4. Measurements for determining compliance are generally taken at the edge of the complainant's property. Reasonable consideration is given to the actual use at that location.

5. Responsible parties should be notified of the violation and instructed to take corrective actions.

6. Exemptions are granted in the regulations for a number of essential sources, such as emergency warning systems, and activities that cannot be readily abated (construction), are of a short duration (parade), or are of general public interest (sporting events). Details of these exemptions are contained in the regulations and below. Procedures are also established to seek a variance for conditions not specifically exempted.

7. Examples of common noise complaints include:

a. Dirt Bike noise
b. Commercial Heating, Ventilating, Air Conditioning (HVAC) systems
c. Nighttime dumpster emptying
d. Loud music from bands; clubs, taverns, bars, restaurants,
e. Swimming pool pumps;
f. Early morning (prior to 7 AM) construction noise;
g. Landscaping and lawn maintenance prior to 7 AM;
h. Street and shopping center power sweepers at night
i. Truck mounted refrigeration units in parking and loading areas;
j. Off road truck noise,
k. Gun clubs: nine counties are subject to the noise regulations / 14 Counties are exempt;
l. Commercial and industrial equipment and machinery;
m. Loudspeakers at car dealerships, fast food restaurants, swim clubs;
n. Church bells;
o. Barking dogs at commercial kennels - MDE does not address household pets.

8. Exemptions from the COMAR noise regulations:

a. Emergency sirens and warning signals;
b. Railroads;
c. Motor vehicles on public roads (these are addressed by MSP and SHA);
d. Aircraft and airports (these are addressed by FAA and MAA);
e. Construction noise 7 AM -10 PM, but not to exceed 90 dB(A)
f. Boats on State-controlled waters (addressed by DNR);
g. Residential heat pumps and air conditioners, but not to exceed 75 dB(A) and 70 dB(A) respectively;
h. Construction on public property at any time;
i. Sanctioned auto racing facilities from 7 a.m. to midnight; and
j. Parades, public celebrations, amusement parks, sporting events; etc.

9. MDE information: 410-537-3906 or 1-800-633-6101, x-3906.

F. No licensee shall lock or secure the entrance doors to his licensed premises during the operation hours of the licensed establishment from 6:00 a.m. to 2:00 a.m. while any customers or patrons of said licensed establishment are an the premises; nor shall he prohibit any law enforcement officer or duly authorized inspector of any federal, state or county government department from entering his licensed premises any time It Is occupied.

G. No licensee shall allow open containers of alcoholic beverages to be carried in or out of the licensed establishment.

RULE 3 - NOISE AND MUSIC

A. All holders of Alcoholic Beverage Licenses in Baltimore County shall cease the playing of mechanical music boxes, live music and sound-making devices at 11:00 p.m. every day unless such licensed establishments are sufficiently enclosed or located in an area where the sound will not disturb the peace of nearby residents.

B. All licensees shall operate their establishments in such a manner as to avoid disturbing the peace, tranquility, safety, health, and quiet of the neighborhood where located. It shall be the responsibility of the licensees) to take all precautionary measures to comply with this subsection.

RULE 4 - POSSESSION OF LIQUOR FORBIDDEN IN BEER ESTABLISHMENTS

No license holder shall have in his possession, nor shall there be in the possession of his agents, servants or employees, at any place on the licensed premises or in the building in which the licensed premises are located any alcoholic beverages not permitted to be sold under his license.

RULE 5 - AGE OF EMPLOYEES

In Baltimore County, it shall be unlawful for any alcoholic beverage licensee to employ any person under the age of twenty-one (21) years in the sale or service of alcoholic beverages except as otherwise provided herein.

A. The holder of an Alcoholic Beverage License may engage musicians or entertainers between the ages of eighteen (18) and twenty-one (21) years to perform on the licensed premises, provided that said musicians or entertainers have registered (See Rule 14B) with the Board of Liquor License Commissioners for Baltimore County; and

B. The owner of any Class B Alcoholic Beverage License may employ any person between the ages of eighteen (18) and twenty-one (21) years of age; said employees may serve as bus personnel and may participate in the serving of beer, wine and liquor to customers seated at tables for dining. All other persons who are employed and are under twenty-one (21) years of age for any reason by or for any licensed establishment must register for approval at the Board of Liquor License Commissioners for Baltimore County according to the procedures heretofore adopted by the Board (See Rule 14B). A person under the age of twenty-one (21) is strictly prohibited from selling any alcoholic beverages or from working behind a bar (except for cleaning purposes only) where liquor is sold, mixed or dispensed.

RECEIVED

OCT 13 2015

OFFICE OF ADMINISTRATIVE HEARINGS

PETITION FOR SPECIAL HEARING 9025 Cuckold Point Road Boone Kondylas, LLC, Legal Owner	*	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS FOR
15th Election District 7th Councilmanic Districts	*	BALTIMORE COUNTY
	*	Case No. 2016-003-SPH

* * * * * * * * * * * * *

CLOSING MEMORANDUM

This matter comes before the Administrative Law Judge as a Petition for Special Hearing for the property located at 9025 Cuckold Point Road located on Millers Island in eastern Baltimore County. The Petition was filed by Ken Boone, managing member of Boone Kondylas, LLC, owner of the subject property. This LLC owns the real estate which is the subject of the Petition and operates thereon a business known as the Dock of the Bay Restaurant. The Special Hearing requests an amendment of restrictions previously imposed in Cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit the use of the property as a restaurant with limited accessory music.

FACTS

The relevant facts are largely not in dispute. The Dock of the Bay restaurant has operated at this location since the 1950's. For years, the business operated (without dispute) as a restaurant. The restaurant closed following extensive damage that was sustained as the result of Hurricane Isabel in 2003. The business was thereafter acquired and re-opened under the ownership and management of Lawrence Thanner. Mr. Thanner changed the operation of the business, in that he introduced live music, dancing and a party type atmosphere at the facility. The noise generated by Mr. Thanner's operation disrupted the neighborhood and resulted in

complaints to the Code Enforcement Division of the Department of Permits, Approvals and Inspections. Ultimately, citations were levied against the business and civil fines imposed. The civil code violation cases (CBA-06-044 and CBA-07-134) and a preemptive zoning case filed by Mr. Thanner (Case No. 07-144-SPH) were ultimately consolidated for hearing before the Board of Appeals. The Board determined that Mr. Thanner's business was a nightclub. The Board applied the definitions within Baltimore County Zoning Regulation ("BCZR") § 101 of "nightclub" and "restaurant" to the operation as conducted and determined that the Dock of the Bay was a nightclub.[1] Further, the Board noted that a nightclub was not a permitted use in the BL zone, which at all relevant times was/is the zoning of the property. The Board's determination was appealed to the Circuit Court, and then to the Court of Special Appeals. The decision was affirmed at all levels. Ultimately, being unable to operate in the manner Mr. Thanner desired, the Dock of the Bay closed.

In October 2014, Boone Kondylas, LLC acquired the property and business. After a period of renovation, Mr. Boone (owner and manager) has re-opened the business as a restaurant. The business operates seven days a week serving lunch and dinner. There is a brunch on Sundays. Typically the restaurant closes by midnight on weekends as the clientele is mature and family oriented. The Dock of the Bay has a liquor license and sells alcohol but the main focus of the business is serving meals. As the ALJ stated at the conclusion of the public hearing, the Dock of the Bay is clearly (as operated presently) a restaurant use under the BCZR. This conclusion is beyond any dispute.

[1] Several different types of restaurants are defined in BCZR § 101.1.

ISSUES PRESENTED/ARGUMENT

I. DOES RES JUDICATA BAR THE INSTANT MATTER?

At the hearing for the instant case, counsel for the Protestants raised as an issue the doctrine of res judicata; contending that the request under the instant zoning petition was barred from consideration based thereon. The ALJ is no doubt familiar with this legal principle. In at least two cases involving the undersigned counsel, the ALJ has considered the application of res judicata in a zoning case (See *In re: 810 Back River Neck Road,* Case No. 2008-531-SPHX and *In re: 4512 Old Court Road*, Case No. 2013 147-SPHA). Thus, the undersigned will not repeat the essential principles of this doctrine; other than to state that the principle bars litigation between the same parties when the issue presented was resolved with finality in prior litigation. As is well settled, in order to successfully establish a claim for res judicata, the following elements must be satisfied: (1) The parties in the present litigation should be the same or in privity with the parties to the earlier case; (2) the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction. See *DeLeon v. Slear*, 328 Md. 569, 580 (1992). In the instant case, the controversy is over the second element of res judicata; whether the claim is the same "claim" or "cause of action" that arose before the Board of Appeals involving Mr. Thanner's business. Maryland has adopted the "transaction test" of § 24 of the Restatement (Second) of Judgments as the test for determining whether two claims or causes of action are the same for purposes of res judicata. See *Gertz v. Anne Arundel County*, 339 Md. 261, 269-70 (1995). The transaction test has been stated as follows:

> What factual grouping constitutes a "transaction"...are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the

parties' expectations or business understanding or usage. *Id.* at 270. (Emphasis added).

A review of all four of the prior decisions (Zoning Commissioner, Board of Appeals, Circuit Court and Court of Special Appeals) leads to the unmistakable conclusion that the issue presented therein was "what is the nature of the use?" That is; "is Dock of the Bay a nightclub?" That question was answered in the affirmative and is entirely different then the issue presented here. The Dock of the Bay no longer operates as a nightclub. The ALJ determined as much when he stated, at the conclusion of the hearing, "the Dock of the Bay is a restaurant." Thus, the issue presented in the instant case is not to identify the use; but to determine if an accessory use is permitted for the restaurant use. Res Judicata simply does not apply in this case as the cause of action (as well as the actual operation on the Property) is different..

Moreover, the underlying and relevant facts are different. Where there is a material change in relevant facts between the first and second cases, Maryland Courts have established that the transaction test will not be satisfied, thus precluding the application of res judicata. See *Gertz*, 339 Md. at 270-72. Specifically, the Court of Special Appeals has opined that "where the facts are subject to changes which might reasonably lead to an opposite result from that arrived at in an earlier case, and if there have been substantial changes in fact and circumstances between the first case and the second, the doctrine of res judicata would not prevent the granting of the special permit sought by the appellees." See *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719, 737 (2010) (citing *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1956)). The facts relevant in the first case (what business was then conducted by Mr. Thanner) are different to those which are germane in the instant matter (should accessory entertainment be allowed at a restaurant).

For all of these reasons, res judicata surely does not apply.

II. CAN A RESAURANT PROVIDE MUSIC FOR THE BENEFIT OF ITS PATRONS?

The answer to this question is undoubtedly "yes." First, the providing of music and other limited forms of entertainment by restaurants is something that everyone (in our common experience) has personally seen and experienced. Italian restaurants provide the traditional strolling violinist or a tenor singing Italian songs. Mexican restaurants frequently provide a strolling troubadour as part of the dining experience. Other forms of entertainment abound in the restaurant industry. Restaurants provide recorded music, play the radio, have televisions and feature live entertainment. Dock of the Bay seeks only to conduct an activity that is commonplace in the industry. It does not propose to morph into a nightclub. There will be no dancing, battles of the band and similar activities which characterize a nightclub use.

From a zoning regulation standpoint, the BCZR recognizes the legitimacy of "accessory uses" that effectively supplement a primary use. Indeed, that term is defined in BCZR § 101.1 as an activity which is "customarily incidental and subordinate to and serves a principle use." This is precisely the nature of the entertainment proposed to be provided at the Dock of Bay to its customers. Indeed, the music/entertainment will be subordinate to the purpose of the primary use of serving meals. Finally, as specifically provided in the definition, the providing of music as an accessory use will contribute to the "comfort", "convenience" and "necessity" of the primary business (ie. the serving of meals). As Mr. Boone testified without contradiction, patrons come to the Dock of the Bay to dine, not to be entertained. But the providing of limited entertainment will greatly enhance the dining experience. Clearly, the providing of entertainment (music) at a restaurant is a permissible accessory use under the BCZR.

III. WHAT IS THE APPROPRIATE LEVEL OF MUSIC FOR THE DOCK OF THE BAY?

Having determined that Dock of the Bay is a restaurant and may have music, the ultimate question is establishing the extent/limits of the accessory use. The facts of this case present an unusual scenario. On the one hand, the property on which the Dock of the Bay is located is zoned BL, a business zone. The restaurant use (as is an accessory use thereto) is permitted by right. This is not a special exception case where the ALJ is required to consider whether the proposal is "detrimental to the health, safety and general welfare of the locale (BCZR 502.1) Moreover, as noted above, the Dock of the Bay has been here since the 1950's, well before all the neighbors lived here or, in some cases, were even born. This is not the case of a new business moving into an exclusive and tranquil residential neighborhood. There is an active boat yard immediately next door which has an outdoor "tiki bar" with loud outdoor music. Other restaurants and businesses are nearby. Just as individuals living next to a farm can expect to smell fertilizer, those living next to a restaurant can expect to hear the sounds associated therewith. Allowing music at this location is fair and appropriate. On the other hand, Mr. Boone acknowledged that he wants and needs to be a good neighbor. Homes are in the immediate neighborhood. No one disputes that the neighbors are entitled to the peaceful enjoyment of their homes.

There is no zoning requirement or standard which regulates noise. The limits of music/entertainment are left to the sound discretion of the ALJ. However, the ALJ does not have jurisdiction over the Dock of the Bay's liquor license and whether the establishment operates in accordance with the requirements attached thereto. Obviously, any alleged violation of the State's/County's liquor laws would be monitored, enforced and determined by the County Liquor Board. It is respectfully submitted that the ALJ does not have jurisdiction to enforce

liquor laws and any assertion by the Protestants to the contrary should be disregarded by the ALJ.[2]

Although noise regulation is absent in the BCZR, noise is addressed in Article Seventeen, Title Three of the Baltimore County Code. That section defines noise broadly and includes noise produced by radio, instrument or voice (singing). Although the section appears to be focused toward disruptive noise by one neighbor to another in a residential setting, the language could conceivable apply here. The title does not regulate noise from a time standpoint (e.g. prohibited during certain hours) nor a level standpoint (decibels). Instead it applies what the Petitioner urges to be considered by the ALJ; to wit, what is "reasonable." That is, this Title prohibits a person from creating noise which "unreasonably disturbs the peace, quiet and comfort of the neighboring inhabitants."

The Department of Planning, in its Zoning Advisory Committee comment, considered the matter and issued recommendations to the ALJ. The Petitioner has reviewed and accepts those recommendations. They set out time limitations when music can be played, both inside and out. This recommendation, if adopted by the ALJ, could be easily followed and monitored. It is a reasonable and workable restriction that can be easily understood and followed. Arguably, other restrictions could be imposed, such as a limitation on decibel level. But this restriction is more difficult to monitor and enforce and could be cumbersome. Opportunities for dispute are ripe (e.g. where and how will the decibel measurements be taken?) However, whatever limitations are ultimately imposed, the Petitioner will abide by them. But the Petitioner believes that the comment offered by the Planning Department is reasonable and makes sense.

---

[2] Insofar as liquor laws, Rule 3 of the Baltimore County Rules of the Liquor Commission provides that uncontrolled music (outdoor) must cease at 11p.m. Music enclosed within a building (indoor) can continue to later hours. Interestingly, this rule is consistent with the ZAC comment and recommendation for this case from the Department of Planning.

CONCLUSION

As Mr. Boone testified, he wants to be a good neighbor. He is not Larry Thanner and will not run his business as the prior owner did. As he indicated, he has operated the restaurant for nearly a year without serious issue or complaint. On one occasion, he attempted to provide live entertainment and was threated by a Code Enforcement Officer that he would be "shut down" if any music was played. This petition, seeking clarification of the issue and the allowance of the reasonable use of the premises, followed. As he further testified, the Dock of the Bay's clientele is a mature crowd. As Mr. Boone also said, "nothing good happens at a restaurant between midnight and 2:00 a.m." He typically closes at midnight. He does not want any heavy metal, battle of the bands, dance halls or concerts. Simply the ability to provide enrichment to the dining experience he offers and the opportunity to fairly compete with other similar business. The Petition should therefore be granted within the limits herein suggested.

Respectfully submitted,

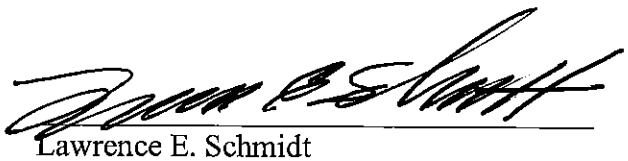
Lawrence E. Schmidt
Smith, Gildea & Schmidt, LLC
600 Washington Ave., Suite 200
Towson, MD 21204
410-821-0070
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of October, 2015 a copy of the foregoing document was mailed via first class mail, postage prepaid to:

Francis X. Borgerding, Jr., Esquire
Law Offices of Francis X. Borgerding, Jr.
409 Washington Avenue, Suite 600
Towson, MD 21204

Peter Max Zimmerman, Esquire
Carole DeMilio, Esquire
People's Counsel for Baltimore County
The Jefferson Building105 West
Chesapeake Avenue, Room 204
Towson, MD 21204



Lawrence E. Schmidt

PLEASE PRINT CLEARLY

CASE NAME Dale of the Bay
CASE NUMBER 16-003
DATE 9/28/15

PETITIONER'S SIGN-IN SHEET

NAME	ADDRESS	CITY, STATE, ZIP	E- MAIL
Lawrence E Schmidt	600 Washington Ave	Towson, MD 21204	lschmidt@sp-law.com
Kevin Doane	9025 Lochside Point N	Pleasure Point MD 21219	kdoane@tidewaterproject.com

PLEASE PRINT CLEARLY

CASE NAME
CASE NUMBER 2016-0003-SPH
DATE 9-28-2015

CITIZEN'S SIGN - IN SHEET

NAME	ADDRESS	CITY, STATE, ZIP	E - MAIL
Charles Wolinski	9019 Cuckold Point Rd	Sparrows Point MD 21219	cwolinski@bcps.org
BRAD METHENY	2704 6TH ST.	SPARROWS PT. MD. 21219	bradmet@hotmail.com
MATT CIARPELLA	2716 6th St	Sparrows Pt. Md 21219	mattciarpella@comcast.net
BONNIE METHENY	2704 6th Street	Sparrows Pt. Md. 21219	bonniemetheny@hotmail.com
Tami Wahlmann	9014 Cuckold Point Rd.	Sparrows Pt. MD 21219	wayne.wahlmann@hotmail.com
Francis X. Borgerding	409 Washington Ave Suite 660	Towson, MD 21204	Borgerdingfrancis@aol.com

KEVIN KAMENETZ
County Executive

ARNOLD JABLON
Deputy Administrative Officer
Director, Department of Permits, Approvals & Inspections

September 23, 2015

Boone Kondylas LLC
Ken Boone
9025 Cuckold Point Road
Sparrows Point MD 21219

RE: Case Number: 2016-0003 SPH, Address: 9025 Cuckold Point Road

Dear Mr. Boone:

The above referenced petition was accepted for processing **ONLY** by the Bureau of Zoning Review, Department of Permits, Approvals, and Inspection (PAI) on July68, 2015. This letter is not an approval, but only a **NOTIFICATION.**

The Zoning Advisory Committee (ZAC), which consists of representatives from several approval agencies, has reviewed the plans that were submitted with your petition. All comments submitted thus far from the members of the ZAC are attached. These comments are not intended to indicate the appropriateness of the zoning action requested, but to ensure that all parties (zoning commissioner, attorney, petitioner, etc.) are made aware of plans or problems with regard to the proposed improvements that may have a bearing on this case. All comments will be placed in the permanent case file.

If you need further information or have any questions, please do not hesitate to contact the commenting agency.

Very truly yours,

W. Carl Richards, Jr.
Supervisor, Zoning Review

WCR: jaw

Enclosures

c: People's Counsel
Lawrence E Schmidt, Esquire, 600 Washington Avenue, Suite 200, Towson MD 21204

Larry Hogan, *Governor*
Boyd Rutherford, *Lt. Governor*

SHA State Highway Administration
Maryland Department of Transportation

Pete K. Rahn, *Secretary*
Douglas H. Simmons, *Acting Administrator*

Date: 7/14/15

Ms. Kristen Lewis
Baltimore County Office of
Permits and Development Management
County Office Building, Room 109
Towson, Maryland 21204

RE: Baltimore County
Item No 2016-0003-SPH
Special Hearing
Boone Kondylas LLC, Ken Boone.
9025 Cuckold Point Road.

Dear Ms. Lewis:

Thank you for the opportunity to review your referral request on the subject of the above captioned. We have determined that the subject property does not access a State roadway and is not affected by any State Highway Administration projects. Therefore, based upon available information this office has no objection to Baltimore County Zoning Advisory Committee approval of Item No. 2016-0003-SPH

Should you have any questions regarding this matter, please contact Mr. Richard Zeller at 410-229-2332 or 1-866-998-0367 (in Maryland only) extension 2332, or by email at (rzeller@sha.state.md.us).

Sincerely,

David W. Peake
Metropolitan District Engineer
Baltimore & Harford Counties

DWP/RAZ

9/28

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon
Deputy Administrative Officer and
Director of Permits, Approvals and Inspections

DATE: August 4, 2015

FROM: Andrea Van Arsdale
Director, Department of Planning

RECEIVED

AUG 26 2015

OFFICE OF ADMINISTRATIVE HEARINGS

SUBJECT: 9025 Cuckold Point Road

INFORMATION:

Item Number: 16-003

Petitioner: Ken Boone

Zoning: BL

Requested Action: Special Hearing

SUMMARY OF RECOMMENDATIONS:

The Department of Planning has reviewed the Petition for a Special Hearing to determine whether the Administrative Law Judge should approve amendments to previous restrictions imposed in Zoning Cases 07-144-SPH, CBA-06-044, CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music and other and further relief as may be required.

Testimony in the aforementioned cases established the fact of the prior use of the property as a "nightclub" which is not listed as an allowed use in the zone. Upon a site visit and discussions with the petitioner's counsel, the Department understands the future use of the property will be as a permitted restaurant that will have music, both live and reproduced, as an accessory component.

The Department has no objection to the granting of the petitioned zoning relief conditioned upon the following:

There shall be no dance floor, nor shall the restaurant become a "nightclub" as defined in the BCZR Section 101.1 and the Building Code of Baltimore County.

All accessory music shall be limited to reasonable sound levels so as not to disturb adjacent properties.

All accessory music shall be limited to the following hours or as may be otherwise established by the Administrative Law Judge:

a. No outdoor music after 10:00 p.m. Monday thru Saturday.

b. No indoor music after 12:00 a.m. (midnight) Monday thru Saturday.

c. No music after 8:00 p.m. on Sundays.

For further information concerning the matters stated herein, please contact Bill Skibinski at 410-887-3480.

Division Chief: Kathy Schlabach

AVA/KS

C: Bill Skibinski

BALTIMORE COUNTY, MARYLAND

INTEROFFICE CORRESPONDENCE

TO: Arnold Jablon, Director
Department of Permits, Approvals
And Inspections

DATE: July 17, 2015

FROM: Dennis A. Kennedy, Supervisor
Bureau of Development Plans Review

SUBJECT: Zoning Advisory Committee Meeting
For July 20, 2015
Item No. 2016-0003

The Bureau of Development Plans Review has reviewed the subject zoning item and we have the following comment.

The property and business is within Zone VE8 (coastal flood zone with velocity hazard with base flood elevation 8), Zone AE7 (base flood elevation 7) and is subject to wave action in excess of 3 feet based upon Flood Insurance Rate Map, FIRM, 2400100560G dated May 5, 2014.

If you have any questions please contact Terry Curtis @410-887-3117.

Landscape and Lighting Plans are required.

* * * * *

DAK:CEN
cc:file

ZAC-ITEM NO 16-0003-07202015.doc

THE BALTIMORE SUN MEDIA GROUP

501 N. Calvert St., P.O. Box 1377
Baltimore, Maryland 21278-0001
tel: 410/332-6000
800/829-8000

WE HEREBY CERTIFY, that the annexed advertisement of Order No 35

Sold To:
Smith Gildea & Schmidt LLC - CU00433777
600 Washington Ave Ste 200
Towson,MD 21204

Bill To:
Smith Gildea & Schmidt LLC - CU00433777
600 Washington Ave Ste 200
Towson,MD 21204

Was published in "Jeffersonian", "Bi-Weekly", a newspaper printed and County on the following dates:

Sep 08, 2015

NOTICE OF ZONING HEARING

The Administrative Law Judge of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County will hold a public hearing in Towson, Maryland on the property identified herein as follows:

Case: # 2016-0003 SPH
9025 Cuckold Point Road
SE/s of Cuckold Point Road, 15 ft. SW of the centerline of 5th Avenue
15th Election District - 7th Councilmanic District
Legal Owner(s) Boone Kondylas, LLC Ken Boone

Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music; and for such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Hearing: Monday, September 28, 2015 at 10:00 a.m. in Room 205, Jefferson Building, 105 West Chesapeake Avenue, Towson 21204.

ARNOLD JABLON, DIRECTOR OF PERMITS, APPROVALS AND INSPECTIONS FOR BALTIMORE COUNTY

NOTES: (1) Hearings are Handicapped Accessible; for special accommodations Please Contact the Administrative Hearings Office at (410) 887-3868.

(2) For information concerning the File and/or Hearing, Contact the Zoning Review Office at (410) 887-3391.

JT 9/660 Sept. 8 3553350

The Baltimore Sun Media Group

By S. Wilkinson

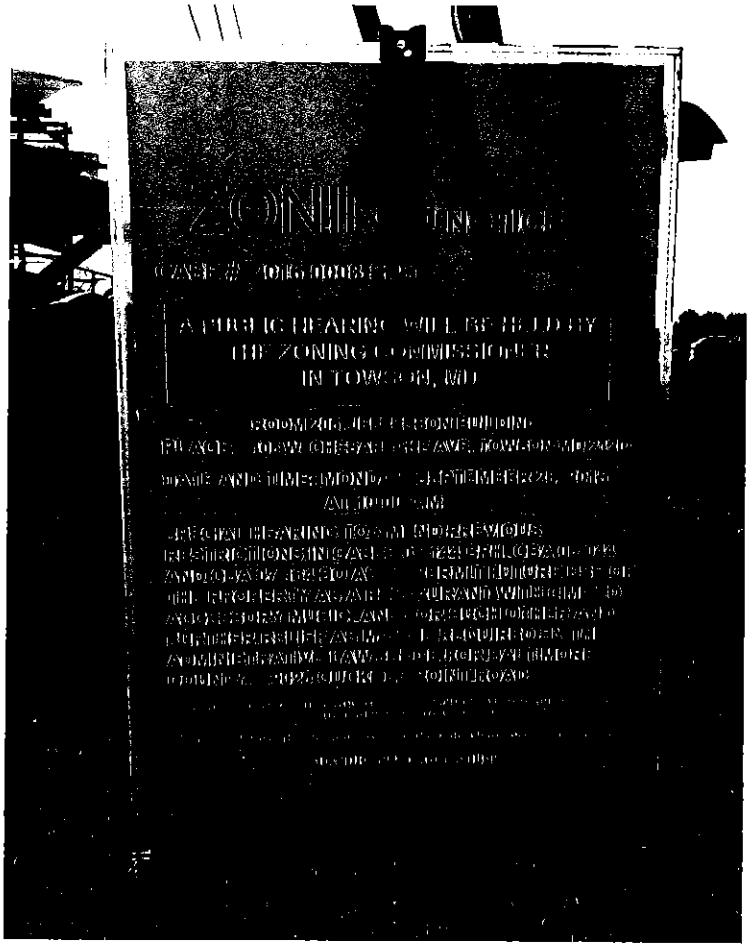
Legal Advertising

CERTIFICATE OF POSTING

ATTENTION: KRISTEN LEWIS
DATE: 9/6/2015
Case Number: 2016-0003-SPH
Petitioner / Developer: LAWRENCE SCHMIDT, ESQ. ~ KEN BOONE
Date of Hearing (Closing): SEPTEMBER 28, 2015

This is to certify under the penalties of perjury that the necessary sign(s) required by law were posted conspicuously on the property located at:
9025 CUCKOLD POINT ROAD

The sign(s) were posted on: SEPTEMBER 6, 2015



Linda O'Keefe
(Signature of Sign Poster)

Linda O'Keefe
(Printed Name of Sign Poster)

523 Penny Lane
(Street Address of Sign Poster)

Hunt Valley, Maryland 21030
(City, State, Zip of Sign Poster)

410 – 666 – 5366
(Telephone Number of Sign Poster)

KEVIN KAMENETZ
County Executive

ARNOLD JABLON
Deputy Administrative Officer
Director, Department of Permits,
Approvals & Inspections

August 3, 2015

NOTICE OF ZONING HEARING

The Administrative Law Judges of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 2016-0003-SPH
9025 Cuckold Point Road
SE/s of Cuckold Point Road, 15 ft. SW of the centerline of 5th Avenue
15th Election District – 7th Councilmanic District
Legal Owners: Boone Kondylas, LLC, Ken Boone

Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music; and for such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Hearing: Monday, September 28, 2015 at 10:00 a.m. in Room 205, Jefferson Building, 105 West Chesapeake Avenue, Towson 21204

Arnold Jablon
Director

AJ:kl

C: Lawrence Schmidt, 600 Washington Ave., Ste. 200, Towson 21204
Ken Boone, 9025 Cuckold Point Road, Sparrows Point 21219

NOTES: (1) **THE PETITIONER MUST HAVE THE ZONING NOTICE SIGN POSTED BY AN APPROVED POSTER ON THE PROPERTY BY TUESDAY, SEPTEMBER 8, 2015**
(2) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMMODATIONS PLEASE CALL THE ADMINISTRATIVE HEARINGS OFFICE AT 410-887-3868.
(3) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

RE: PETITION FOR SPECIAL HEARING 9025 Cuckold Point Road; SE/S Cuckold Point Road, 15' SW of c/line of 5th Avenue 15th Election & 7th Councilmanic Districts Legal Owner(s): Boone Kondylas, LLC By Ken Boone Petitioner(s)	*	BEFORE THE OFFICE OF ADMINSTRATIVE HEARINGS FOR BALTIMORE COUNTY 2016-003-SPH

* * * * * * * * * * * * *

ENTRY OF APPEARANCE

Pursuant to Baltimore County Charter § 524.1, please enter the appearance of People's Counsel for Baltimore County as an interested party in the above-captioned matter. Notice should be sent of any hearing dates or other proceedings in this matter and the passage of any preliminary or final Order. All parties should copy People's Counsel on all correspondence sent and all documentation filed in the case.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

RECEIVED
JUL 23 2015

Carole S Demilio

CAROLE S. DEMILIO
Deputy People's Counsel
Jefferson Building, Room 204
105 West Chesapeake Avenue
Towson, MD 21204
(410) 887-2188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 2015, a copy of the foregoing Entry of Appearance was mailed to Lawrence Schmidt, Esquire, 600 Washington Avenue, Suite 200, Towson, Maryland 21204, Attorney for Petitioner(s).

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

CBCA

FLOOD

PETITION FOR ZONING HEARING(S)

To be filed with the Department of Permits, Approvals and Inspections

To the Office of Administrative Law of Baltimore County for the property located at:

address 9025 Cuckold Point Road **which is presently zoned** BL

Deed Reference 35488/00133 10 Digit Tax Account # 1 5 0 8 7 9 0 1 1 0

Property Owner(s) Printed Name(s) Boone Kondylas, LLC

CASE NUMBER 2016-0003-SPH **Filing Date** 7/6/15 **Estimated Posting Date** / / **Reviewer** RJD

(SELECT THE HEARING(S) BY MARKING X AT THE APPROPRIATE SELECTION AND PRINT OR TYPE THE PETITION REQUEST)

The undersigned legal owner(s) of the property situate in Baltimore County and which is described in the description and plan attached hereto and made a part hereof, hereby petition for:

1. ✓ **a Special Hearing** under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

Please see attached.

2. ____ **a Special Exception** under the Zoning Regulations of Baltimore County to use the herein described property for

3. ____ **a Variance** from Section(s)

of the zoning regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons: **(Indicate below your hardship or practical difficulty or indicate below "To Be Presented At Hearing". If you need additional space, you may add an attachment to this petition)**

TO BE PRESENTED AT HEARING

Property is to be posted and advertised as prescribed by the zoning regulations.
I, or we, agree to pay expenses of above petition(s), advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.
Legal Owner(s) Affirmation: I / we do so solemnly declare and affirm, under the penalties of perjury, that I / We are the legal owner(s) of the property which is the subject of this / these Petition(s).

ORDER RECEIVED FOR FILING
Date 10/22/15
By DLW

Contract Purchaser/Lessee:

Name- Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

Legal Owners:

Boone Kondylas, LLC
Ken Boone

Name #1 – Type or Print Name #2 – Type or Print

Signature #1 Signature # 2

9025 Cuckold Point Road, Sparrows Point, MD

Mailing Address City State

21219 kboone@tidalwaterdirect.com

Zip Code Telephone # Email Address

Attorney for Petitioner:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name- Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

Representative to be contacted:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name- Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

REV. 2/23/11

ATTACHMENT TO PETITION FOR ZONING HEARING

9025 Cuckold Point Road
15th Election District
7th Councilmanic District

Special Hearing:

1. To amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music; and

2. For such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Item #0003

CENTURY ENGINEERING

10710 Gilroy Road
Hunt Valley, MD 21031

Zoning Description for
9025 Cuckold Point Road*

Beginning at a point on the southeast side of Cuckold Point Road which is 30 feet wide, at the distance of fifteen feet southwest of the centerline of Fifth Street which is 30 feet wide. Being Lots 500 through 505 in the subdivision of Swan Point as recorded in Plat Book L.McL.M. # 9, Folio #5. Containing 1.031 acres of land, more or less. Also known as 9025 Cuckold Point Road and located in the 15th Election District and the 7th Councilmanic District.



W/file/login2/ld/ld06/descriptions/9025 Cuckold Point Road-08-17-06
* Legal Description from Case No. 07-144-SPH

II-144

Item #0003

FRANCIS X. BORGERDING, JR.
ATTORNEY AT LAW

409 WASHINGTON AVENUE, SUITE 600
TOWSON, MARYLAND 21204
(410) 296-6820
FAX: (410) 296-6884

September 24, 2014

Mr. Mike Kondylas
Ms. Donna Kondylas
8909 Miller Island Boulevard
Baltimore, Maryland 21219-1642

RE: Dock of the Bay Restaurant

Dear Mike and Donna Kondylas:

I represent neighbors of the Dock of the Bay who were in long running court battles over the previous use of the Dock of the Bay. It has come to our attention that you may be interested in purchasing the Dock of the Bay. Enclosed please find correspondence from Baltimore County indicating that all previous zoning decisions still apply to the property. This is being sent for your information.

If you have any questions, please contact me. Thank you.

Very truly yours,

FRANCIS X. BORGERDING, JR.

FXBJr:bjk
Enclosure
cc: Mr. Charles Wolinski

FRANCIS X. BORGERDING, JR.
Attorney at Law
MERCANTILE BUILDING - SUITE 600
409 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
(410) 296-6820
FAX (410) 296-6884

August 20, 2014

Mr. Arnold Jablon
Baltimore County Zoning Review Office
111 West Chesapeake Avenue
Towson, Maryland 21204

RE: Dock of the Bay Restaurant
9025 Cuckold Point Road, Sparrows Point, MD 21219

Dear Mr. Jablon:

Please be advised that I represent residents who have longstanding previous issues with the music emanating from the Dock of the Bay Restaurant. My clients have heard that a new owner is potentially interested in buying the Dock of the Bay and are very concerned that they will have the same disturbance from music which they had in the past. This letter is being written to ask your Department to clarify that all decisions rendered in the past concerning 9025 Cuckold Point Road, Sparrows Point, MD 21219 run with the land and any potential new purchaser of the Dock of the Bay Restaurant will be held by all previous decisions including the Court of Special Appeals' decision with regard to the previous operator of the property and the contempt petition filed in the Circuit Court for Baltimore County also related to the previous operator. Enclosed herewith please find a check in the amount of $150.00 to cover the filing cost in this matter.

Thank you for your anticipated cooperation with regard to this matter. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

FRANCIS X. BORGERDING, JR.

FXBJr:bjk
Enclosure
cc: Mr. Charles Wolinski

KEVIN KAMENETZ
County Executive

ARNOLD JABLON
Deputy Administrative Officer
Director, Department of Permits,
Approvals & Inspections

September 12, 2014

Francis X. Borgerding, Jr., Esq.
409 Washington Avenue
Suite 600
Towson, MD 21204

Re: Zoning confirmation letter
Dock of the Bay Restaurant
9025 Cuckold Point Road
Sparrows Point, MD 21219

Mr. Borgerding:

This correspondence is in response to your recent request for confirmation that the prior legal decisions regarding the above-captioned property run with the land and bind future owners. As you are well aware, a zoning case proceeded through the Court of Special Appeals and it was held that Dock of the Bay was maintaining an impermissible night club on the property due to their playing of music, among other factors. The owner was then fined by both the Baltimore County Liquor Board and Circuit Court for Baltimore County for failure to abide by the ruling in the zoning case.

By this letter, Baltimore County is confirming that the zoning on the property remains the same and any future owner would be bound by the ruling handed down by the courts in the prior zoning cases. The specific fines issued in the contempt and liquor board proceedings were geared towards the prior owner and will not transfer to any future owners, but the prohibition against a night club on the property remains in effect.

Sincerely,

Adam M. Rosenblatt
Assistant to the Director and
Assistant County Attorney

111 West Chesapeake Avenue , Room 319 | Towson, Maryland 21204 | Phone 410-887-3251 | Fax 410-887-3270
www.baltimorecountymd.gov

IN RE: **PETITION FOR SPECIAL HEARING*** BEFORE THE
S/E corner Cuckold Point Road and
5th Street * ZONING COMMISSIONER
(9025 Cuckold Point Road)
* OF
15th Election District
7th Council District * BALTIMORE COUNTY

Fifth Street, LLC *
d/b/a Dock of the Bay
Petitioner * **Case No. 07-144-SPH**

* * * * * * * * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of a Petition for Special Hearing filed by the owner of the subject property, Fifth Street, LLC, by Lawrence J. Thanner, Jr., managing member, and through their attorney, J. Carroll Holzer, Esquire. In accordance with Section(s) 500.6 and 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), the Petitioner requests a determination as to whether the use of the B.L. zoned property at 9025 Cuckold Point Road is in violation of the zoning regulations and specifically, is the restaurant, which provides music at this location during the day, a "nightclub" as defined in B.C.Z.R. Sections 101, 102.1 and 230. The subject property and improvements are more particularly described on the site plan submitted which was accepted into evidence and marked as Petitioner's Exhibit 1.

Appearing at the public hearing in support of the request were several of the past and present residents of Millers Island, namely Mike Kondylas, Dorothea M. Reilly, and Judith Kurek. As indicated above, the Petitioner and Lawrence Thanner were represented by J. Carroll Holzer, Esquire. This request generated significant public interest and numerous residents from the surrounding locale appeared, including Patricia A. and Wayne E. Waldmann, Sr., Wayne E. Waldmann, Jr., Tammy Lynn Waldmann, Doug W. Waldmann, Philip and Kay Sessa, Charlie and

Daryl Wolinski, Robert Poleski, Terri Poleski, and Michael Poleski, Louis Pertrovia, David McWilliams, David and Vena Steck, Robert Haas, Ken Schoff, Tammy Novak, and David Znamirowski. Matthew J. Ciarpella and his wife, Nancy Jean Ciarpella, who live at 2716 Sixth Street, adjacent to the Dock of the Bay, were represented by Francis X. Borgerding, Jr. Esquire. Most of the Protestants voiced an overwhelming concern with the live bands and loud outdoor music being played in their backyards, parking overflow and traffic leaving the Dock of the Bay late at night. Also appearing were James H. Thompson, Supervisor, Bureau of Code Enforcement, and Chip Raynor, Code Enforcement Officer, within the Division of Code Inspections and Enforcement.

As a preliminary matter, Mr. Borgerding argued that the petition, as filed, should not be allowed as it is subject to the doctrine of judicial estoppel (*See Board of County Com'rs of Cecil County v. Racine* 24 Md. App. 435, 332 A.2d 306 [1975] and *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 125 A.2d 41 [1956]). He points out that the Baltimore County Code (B.C.C.) Section 3-6-201 et seq. sets up the mechanism and procedure to be followed for Code Enforcement hearings and those procedures were followed in the underlying Violation Case No. 06-3683. That case involved the same property, parties and nightclub issues. Allegations of a nightclub enterprise were made by neighbors, an investigation as authorized by the Department of Permits and Development Management was conducted, correction notices issued, a public hearing held and findings of fact made by the Code Enforcement Hearing Officer Raymond S. Wisnom, Jr. *See* Protestant's Exhibit 10. According to Mr. Borgerding, allowing the Petitioner, under these circumstances, a "second bite of the apple" would launch a new and undesirable precedent. Petitioner's remedy, he asserts, is an appeal to the Board of Appeals not a new hearing before the Zoning Commissioner. Mr. Holzer countered by pointing out that the Petitioner filed the instant petition prior to the issuance of the Code Enforcement Hearing Officer's Order, that he (Holzer) had

requested a postponement of the enforcement proceedings until after a determination/interpretation of the regulations of the B.C.Z.R. was made. He points out that Mr. Wisnom is not designated by the County Charter to interpret zoning definitions and regulations. At the conclusion of hearing Counsels' arguments, Mr. Borgerding's Motion was denied.

At issue in the instant case is not whether a zoning violation exists, but a determination, through a clear analysis of the B.C.Z.R. and its definitional section as to what constitutes a nightclub. In this regard, Section 500.6 of the B.C.Z.R. vests the Zoning Commissioner with the authority to conduct hearings involving any violation or alleged violation/non-compliance with any zoning regulation. Additionally, that section allows the Zoning Commissioner to conduct a hearing to determine the proper interpretation of the B.C.Z.R. Similarly, Section 500.7 of the B.C.Z.R. allows the Zoning Commissioner to conduct such hearings and pass such Orders as shall be necessary for the proper enforcement of all zoning regulations.

As is often the case with cases presenting difficult legal issues, the facts are relatively simple and largely not in dispute. As noted above, Fifth Street, LLC purchased the property in October 2003 and due to Hurricane Isabel damage did not open until March 2004. The property is rectangularly shaped, 600' wide x 1,200' deep with frontage on the Chesapeake Bay. The property as shown on Petitioner's Exhibit 1 contains a gross area of 1.03 acres, more or less, zoned B.L. The land is improved with a large existing restaurant and tavern, pavilions, wood pier, as well as a parking lot and an overflow parking lot located on the north side of Cuckold Point Road. The subject site is on Millers Island situated between the Back River and the Chesapeake Bay, referred to as Swan Point. Lawrence Thanner described the Dock of the Bay's long history of commercial uses beginning in 1955 and indicated that since the subject property was established, there has always been music played. In the 1960's, it was owned by the Hicks family and known as the "Fisherman's

Inn" and music was played inside and on a partially open patio. Later, after becoming the Dock of the Bay, the two brothers who then owned it built a pavilion and live band music was played outside. This testimony was corroborated by three long-time residents of the area – Mr. Kondylas, Ms. Reilly, and Ms. Kurek, who indicated most all of the waterfront restaurants on Millers Island played music which historically included Ramona's, Worchester's, The Islander Inn, White Swan and Rum Runners. Ramona's was the first to initiate live bands, Worchester's in the 1990's (later named as Rum Runners) played music on the pier. The Islander and White Swan provided disc jockey entertainment inside. The Dock of the Bay, however, is the only remaining waterfront establishment on the island today with a live band playing outdoors. Mr. Thanner describes the current operation as primarily a food service/restaurant business accounting for 70% of the revenues derived and the other 30% from the sale of alcoholic beverages. He delineates the entertainment provided as follows:

- 10 television sets inside and 2 television sets outside. These televisions, for the most part, are used for showing sporting events and shows such as MTV and American Idol, which contain music.

- The house music sound system has 8 speakers inside and 4 speakers outside. The system plays music continuously except when other forms of entertainment are being utilized. The system is used to play either satellite music or compact discs.

- On Friday and Saturday nights, after 9:00 PM, usually a disc jockey plays music or karaoke and occasionally a band plays inside until about 1:00 AM. Mr. Thanner says this is exactly what many bars and taverns do throughout the County, including two other bars located on Millers Island.

- On Saturday and Sunday afternoons, a band plays outside from 4:00 PM until 8:00 PM during daylight hours from the beginning of May through September. Again, Thanner indicates that's exactly what the River Watch and Wild Duck waterfront establishments do as well.

- The live music and entertainment enumerated above consists of approximately 7.5 percent of the total time that the restaurant is open for business.

Mr. Thanner, as managing member of the business, therefore, has requested a special hearing in order for a determination to be made whether such use occurring on the property is that of a nightclub or simply a restaurant where ancillary entertainment is provided. The reason for drawing this distinction is that a restaurant is a use permitted as a right on the property, whereas a true nightclub use is not permitted. Therefore, this distinction is very important to this particular business owner who submits that the definition of nightclub, as contained within the B.C.Z.R., is overly broad and encompasses almost every type of restaurant, diner, café and other similar type of commercial establishment.

The Protestants testified on the second day of the hearing, and as noted above explained the inconveniences they endure as a result of the loud music being played on the weekends and to a lesser extent during the weeknights. Mr. Ciarpella discussed the activities and the impact it had on his wife and three children. In September when his children are in school, the loud music which he testified goes into the night, and the people coming and going (leaving after 2:00 AM) is most disturbing. He described the sound level, even with the doors closed as *loud*. His family and other neighbors, Charlie Wolinski, Kay Sessa and Wayne Waldmann put up with this 40 days out of 365 a year, mostly Saturdays and Sundays in spite of numerous complaints. Messrs. Znamirowski (7 blocks away), Hass (1 mile away), Schoff (1 block away) and McWilliams (3-4 blocks away) each state they can hear the band music when played.

In rebuttal, Mr. Thanner testified that in the winter, music is played from 9:00 PM to 1:00 AM inside on Fridays and Saturdays, and in the summer, music is played from 9:00 PM to 1:00 AM

inside and on Saturdays and Sundays, the music is played outside from 4:00 PM to 8:00 PM. He explained that as a result of complaints the County Liquor Board inspectors have measured the noise level at the property line which allows for 65 decibels until 10:00 PM and then 55 decibels to 11:00 PM with no music thereafter. He thinks he is doing much better and explains just how important it is for a waterfront restaurant business to provide music entertainment.

It has been stated that it is the responsibility of the Zoning Commissioner to determine the intent of the legislature when construing any regulation/statute. [*Marzullo v. Kahl* 36 Md. 158, 175 (2001)] Interpretation of the regulations is a daunting task and made even more difficult given the excellent arguments presented by counsel. There are a number of land uses defined in Section 101 of the B.C.Z.R. that are relevant to rendering a decision in this case. Initially, it is to be noted that "Restaurant, Standard" is defined in the B.C.Z.R. as "a facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term includes cafes, cafeterias, tea rooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principle restaurant operations. ..." Next a "Tavern" is "an establishment which has a Baltimore County Class D Liquor License. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub. The term "Nightclub" is defined in Section 101 of the B.C.Z.R. as "a tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County".[1] Baltimore County Council Bill No. 1-05 adopted the International

[1] Although interpreted in the B.C.Z.R., the Petitioner urges this Commission to use Webster's Third New International Dictionary (Unabridged) definition of Nightclub, "a restaurant open at night usually serving liquor, having a floor show, and providing music and space for dancing." To apply the B.C.Z.R. definition literally, they submit, would open a *Pandora's Box* in that it encompasses both live or recorded entertainment. Recorded would include house systems and jukeboxes. In that situation, every restaurant and bar in a B.L. zoning classification providing some form of live or recorded entertainment would be classified as a "nightclub". This would include restaurants such as Denny's, International House of Pancakes (IHOP) and the Bel-Loc Diner.

Building Code (I.B.C.) 2003 as the Building Code of Baltimore County. The I.B.C. provides in Section 303 Category A-2, A Certain Assembly Group. Group A-2 is Assembly uses intended for food and/or drink consumption, including but not limited to banquet halls, *nightclubs*, restaurants, taverns and bars. The characteristics of Group A-2 are categorized by some or all of the following: low lighting levels; entertainment by a live band or recorded music generating above-normal sound levels; no theatrical staged accessories; later-than-average operating hours; tables and seating arranged or positioned so as to create ill-defined aisles; a specific area designated for dancing; service facilities for alcoholic beverages and food; and high occupant load density. While the Protestants and Petitioner argue as to whether The Dock of the Bay includes all of the characteristics 1-8 or just some of the characteristics is of little consequence. The B.C.Z.R. definition of nightclub only states that it be "categorized as a nightclub" in the I.B.C. It falls within this Group A-2 for fire protection and crowd control due to the potential for multiple fatalities and injuries from fire or other sudden emergency.

In ascertaining the County Council's intent, I must look to the language in the regulation itself, giving that language *its ordinary and natural meaning* and avoiding a construction that is illogical, unreasonable or inconsistent with common sense. *Papillo v. Pockets, Inc.* 119 Md. App. 78, 83-84 (1997).

Mr. Wolinski and Mr. Waldmann, a neighbor next to the Fisherman's Inn and Dock of the Bay for some 43 years, emphasize emphatically that the law is the law and adherence to the regulations should be strictly enforced. *See* Protestants' Exhibits 14 and 15 for commentary on the live bands performing at 9025 Cuckold Point Road and the physical affects on the residents. Mr. Ciarpella's testimony corroborated by Code Enforcement Supervisor James H. Thompson makes it clear under Section 101 of the B.C.Z.R. that they believe the Petitioner is conducting a nightclub on

the subject property and that this use is not a permitted use in the Business, Local Zone (B.C.Z.R. Section 230). In considering this unrefuted testimony, there is little to suggest that "provides live or recorded entertainment, with or without a dance floor" is ambiguous or means anything other than that learned from reading the plain language of the nightclub definition. This Commission's goal is to discern and implement legislative intent, and, to do that, I must begin with the plain meaning of the statutory language. If the intent is clear from that language, there is no need to search further. *Walker v. Dept. of Human Res.*, 379 Md. 407, 420 (2004). I find that that is the case here.

Mr. Holzer argues that Section 230 provides permitted uses in the B.L. zone that envision the playing of music by the County Council. *See* B.C.Z.R. Sections 230.7 providing for dancing schools and conservatories for music and the arts. His argument that I should avoid a construction that is inconsistent with common sense is fully addressed in Petitioner's written memorandum. He notes that the definition in Merriam-Webster's Dictionary of "nightclub" as a place of entertainment open *at night*, usually serving food and liquor and providing music and space for dancing and often having a floor show - would assist in separating out water oriented uses such as marinas and waterfront restaurants that are dependant on accessory entertainment in recreational areas of the County vis-à-vis other cafes and restaurants located next to residential uses.[2] However, this I cannot do. The General Provisions of B.C.Z.R. Section 101 Definitions are clear on this point and mandate that "any word or term not defined in this section shall have the ordinary accepted definition as set forth in the most recent addition of Webster's ... ". As noted above, the B.C.Z.R. defines a Night Club. Moreover, the definition of Tavern again, refers the reader back to "the criteria of a nightclub, as defined in these regulations" further neutering Petitioner's argument that Webster's Dictionary

[2] Mr. Thompson's testimony on cross-examination illustrated confusion on what constitutes a nightclub. He focused on the playing of *live* music in the B.L. zone but side stepped the hundreds of restaurants that play *recorded* music. Likewise, this Commission found it convenient to not open a "Pandora's Box" in Case No. 02-074-SPHA involving a "non conforming nightclub use" in the B.L. zone.

definition of nightclub be used.

This finding is of no comfort to the Petitioner and its managing member, Larry Thanner, since what they seek is to play live music during daylight hours as has been the custom in the area for many years. To Mr. Thanner and the many restaurant owners similarly situated, I can only offer a quote from Dickens Classic "Oliver Twist" and as uttered by one "Mr. Bumble" (which seems appropriate here) "If the law supposes that, ... [providing music during the day is a nightclub] ... then the law is an ass – an idiot". Mr. Bumble was referring, of course, to a legal fiction that had no basis in reality. No doubt many restaurant owners, as aptly pointed out by Mr. Holzer will believe that Mr. Bumble was right, however, I am obligated to apply the applicable law.

Based on counsel's arguments and evidence presented and examination of the words contained in the regulations and definitions, I find that the Petitioner's use of the property at 9025 Cuckold Point Road, Millers Island, to be in violation of the B.C.Z.R.; and further that Fifth Street, LLC's Dock of the Bay restaurant by providing music during the day is a "nightclub" as defined in the B.C.Z.R. Sections 101, 102.1 and 230.

Pursuant to the advertisement, posting of the property and public hearing on this Petition held, and for the reasons set forth above, it is my opinion that the Petitioner is conducting a nightclub on the subject property and, further, that Petitioner's use of the property is not permitted pursuant to Section 230 of the Baltimore County Zoning Regulations (B.C.Z.R.).

THEREFORE, IT IS ORDERED, by the Zoning Commissioner for Baltimore County, this 30th day of May, 2007, that the Petition for Special Hearing pursuant to Sections 500.6 and 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), requesting a determination as to whether the use of the B.L. zoned property at 9025 Cuckold Point Road is in violation of the zoning regulations and specifically, is the restaurant, which provides music at this location during the day, a

"nightclub" use as defined in the B.C.Z.R. Sections 101, 102.1 and 230, is hereby answered in the affirmative and that the playing of outdoor music either by way of an outside speaker system, live/or recorded entertainment, must be discontinued.

Any appeal of this decision must be taken in accordance with Section 32-3-401 of the Baltimore County Code.

WJW:dlw

WILLIAM J. WISEMAN, III
Zoning Commissioner for
Baltimore County

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INVOICE

December 5, 2016

COPY

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IN THE

MATTER OF

BOONE KONDYLAS, LLC

Hearing Dates: 2/17 & 4/28/16

Case No.: 16-003-SPH

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IN THE MATTER OF:

BOONE KONDYLAS, LLC
CASE NUMBER: 16-003-SPH

Hearing Date: February 17, 2016

Pursuant to Notice, the above-entitled hearing was held before the Board of Appeals for Baltimore County at the Jefferson Building, Second Floor, Suite 203, 105 West Chesapeake Avenue, Towson, Maryland 21204, commencing at 10:00 AM.

PANEL PRESIDING:

MAUREEN E. MURPHY, CHAIRMAN

BENFRED B. ALSTON, BOARD

JANE M. HANLEY, BOARD

PRESENT ON BEHALF OF THE PARTIES:

LAWRENCE E. SCHMIDT, ESQUIRE

FRANCIS X. BORGERDING, ESQUIRE

PETER M. ZIMMERMAN, ESQUIRE

Christine R. Leary
9529 Fox Farm Road
Baltimore, Maryland 21236

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(ON RECORD - 10:26:30 AM)

CHAIR: Okay. Good morning, everyone. We are here in the matter of Boone Kondylas, LLC, 9025 Cuckold Point Road, case number 16-003-SPH. This is a Petition for Special Hearing to amend previous restriction imposed in case, cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited, let's see, limited music, it looks like. Opinion and order of the ALJ was denied on 11/7/2013. Let's have counsel for the record identify themselves.

MR. SCHMIDT: Good morning, Chairman, Chairwoman Murphy and members of the Board, I'm Lawrence E. Schmidt with the Law Firm of Smith, Gildea & Schmidt, with offices in Towson at 600 Washington Avenue, on behalf of the Petitioner below, Boone Kondylas, LLC.

MR. BORGERDING: Good morning, Your Honor. Francis X. Borgerding, I'm on behalf of Charlie Wolinski and several other neighbors here (inaudible).

CHAIR: Okay.

MR. ZIMMERMAN: Peter Max Zimmerman, People's Counsel for Baltimore County, Towson. I'd like to alert the Board that I will have a preliminary Motion (inaudible).

CHAIR: Okay. We did have trial memorandums, I think, filed and we got information, got the response from the Protestants and we had something submitted by People's Counsel,

the case law, an e-mail and I'm, I'm guessing that your preliminary Motion has to do with that?

MR. ZIMMERMAN: Yes.

CHAIR: Okay. It's on the res judicata issue, did, were you, okay, let me, I'll let you make the Motion. We're probably going to reserve on that issue.

MR. ZIMMERMAN: All right.

CHAIR: But just so, let you know, so we'll put the case on.

MR. ZIMMERMAN: All right and, and if the Board decides to reserve on it, this may substantially be most of my opening statement so it won't be repetitive, although I was hoping despite the late start, the Board might see an early end would be appropriate. So, my position is that, and the Board knows res judicata very well, and the last five res judicata cases have been disposed of on Motions to Dismiss, three of them on oral Motions, two of which, Madam Chair, you presided over, namely, Galasso, which I, on Friday, forgot about when I submitted copies of previous cases. But I --

CHAIR: I think Ms. Demilio was on that one, that's why you --

MR. ZIMMERMAN: Well, actually it was Nancy West from the County Attorney's Office and myself. But Carol Demilio successfully (inaudible) then argued the (inaudible) case, which was an oral Motion to Dismiss and she also successfully

argued the, the *Sprint* case, in which actually it was Adam Rosenblatt, then of the County Attorney's Office, who made the oral Motion. I think Mr. Belt, Andrew Belt chaired that case and Ms. Demilio then proceeded to successfully argue (inaudible) sustain the Board's decision in the Court of Special Appeals with Judge Kevin Arthur's opinion last year, which of course we think was an excellent decision. So, my point is that it's, it's been the pattern for the Board to consider Motions to Dismiss, even if the Board decides to reserve on this one. But those Motions were all granted without the necessity of a hearing. It is my position, as I've now reviewed the memos and Judge Beverungen's decision below once again, that even taking the proffer that the Petitioner has made in its trial memorandum, even if you take that at its most favorable to the construction to the Petitioner, it doesn't add up to a sufficient change in circumstances to overcome the Board of Appeals' majority decision in 2008 and Judge Deborah Eiler Court of Special Appeals' decision sustained it. And I've provided, I have a package to explain my reasons and I've already provided this morning Mr. Schmidt and Mr. Borgerding copies. I have a copy for each Board member. And what it consists of is the, the definition of night club, which then refers to the BOCA Code that was central to the Board's decision in 2008. I have pages two thou, nine and ten of the, the Board's majority decision and have marked

in yellow the, the characteristics, the eight characteristics, that, that are, that are listed in the BOCA Code and the way it works is to be a night club, you don't have to meet all the eight criteria you just have to meet some of them and the Board actually found six of the eight were met in 2008. I then have the Petitioner's trial memorandum, page five, which lists their proffer and the proffer, among other things, includes words anticipate and typical. So, I have the thesaurus for those words and then I have the full majority opinion of the Board of Appeals in 2008, then the key pages of Judge Debra Eiler's Court of Special Appeals' decision, 2010, beginning with page eighteen, then Judge Beverungen, who (inaudible) in the current case and also the first page of the Dock of the Bay restaurant's current website. So, so here is my, my point, okay? We know that a night club is a tavern or other establishment with live or recorded music and then it references to the, the BOCA Code. The BOCA Code has not changed. I don't think there's any dispute on that. Everyone is looking at the BOCA Code and the Petitioner, in the trial memorandum, is claiming that there has been some significant change that should have caused this Board to come to a different conclusion. So, let's take a look at each of their claims and, and compare it to the, to the 2008 situation. So, we look at page five, the proffer, they say, okay, first, they say lighting levels do not fine when entertainment will be

provided. Well, this isn't perhaps the major factor. The major factor is the, the music but the criteria is low light levels, okay? Whether or not the light levels change or not is not the point, it certainly most likely at twelve midnight or later, or even 11:00 p.m., you're not going to have extremely bright light levels and, so to say that they're not changing the lighting level really doesn't mean anything. That's number, number one. Number two, which is, I think, one of the two most important points, they claim the nature of the entertainment is marketed different. The owner anticipates solo acts of adult contemporary music geared towards a mature crowd and not live rock and roll bands. Now, the criterion is basically in, in the BOCA Code, having entertainment of live, live bands or recorded music above normal sound levels. That's the criterion and, and first of all, anticipates, I, I, that's a conjectural word, okay?

CHAIR: Let me stop you because what, in the trial memo I do see where you're reading from page five. These are proffered and that's why I suggested that we hear the case because it, I mean, what they proffered it may be that what they put into evidence, that's why we wanted to hear it.

MR. ZIMMERMAN: All right.

CHAIR: To see, may, you know, and, and you certainly could ask those good questions but rather than go through the list, I don't want to prevent you from making your Motion.

MR. ZIMMERMAN: All right.

CHAIR: Because you, for the record, you need to make your Motion.

MR. ZIMMERMAN: All right. I'll do it, then I'll, I'll be rather --

CHAIR: Since we're --

MR. ZIMMERMAN: -- quick about it but the, the key p point here is anticipates is a conjectural word but most important, if one looks at the Board of Appeals' majority from 2008, even then, the former owner tried to, to tone things down, (inaudible) duos or reggae music, no rock, no R&B implicitly, none of the loud stuff. That was his claim. So, he was claiming he was toning it down. No, and the Board in 2008 also said there was, was actually no proof that State regulations were being violated. You don't have to violate State regulations to, to have a (inaudible) and, you know, solo performers can be quite loud also, okay? If you listen to Adele or, I mean, I listened to the Grammys the other night was so loud with, with these solo people I had to turn the channel. But, just because you have a solo person doesn't mean that it's going to be really quiet. And what Judge Beverungen in this current case below said that there was nothing in the Board of Appeals' 2008 decision or Court of Special Appeals' decision to say that if you have a different type of late night music, you're okay. He said, there was nothing to differentiate

between Frank Sinatra and rock music. He said that on page three and he's right. So, you don't, you don't get out of it and, you know, to say a mature crowd, he anticipates a mature crowd, I mean, it's not as if they're going to bar anyone under fifty or forty from going to this place. And I'll say third criterion, no stage or stage accessories. That was the same in 2008 as the Board found. A restaurant typically stays open until midnight. Well, typically is, is another one of these soft words and midnight, well, guess what? Their website, current website which we checked the other day, says they're open till 1:00 a.m. on weekends. So, they are, and the criterion is later than average operating hours, that's, and that's later than average for a restaurant and it's pretty close to what Mr. (inaudible) was, in 2008 he was (inaudible) open till 2:00 a.m., so now the website says 1:00 a.m. The next, number five, tables and seating in defined aisles or undefined aisles. They say they have defined aisles. Well, that was the situation with (inaudible) back in 2008. He had defined aisles, the Board found (inaudible). No dance floor. Same thing with the 2008 case, no difference there. And the seventh criterion, it's important, they claim the primary and focus of the business is to serve meals, not provide entertainment. Well, basically the same argument was made in 2008 and Judge Eiler really dealt with that very well in her opinion because she said you can have a duel use situation.

You could have a restaurant and a night club and, of course, the restaurant hours are going to be more extensive then the night club hours by definition because the restaurant is open during the day but that doesn't prevent it from being called a nightclub. So, that, that proffer doesn't work. And then they say the rest of the, the eighth criterion, was high occupant, low density, well, they still have the same capacity and they, they're giving us the spin that the restaurant is typically not overcrowded or even at capacity. I mean, that's speculation but are they, are they telling us that they want the restaurant to fail, that they don't want too many people in there? I don't think they're going to bar people from coming in. So, what I'm suggesting comparable to a, the case in Circuit Court where it's a Motion to Dismiss the Complaint or, in effect, summary judgment, even if you take their proffer at its most favorable, okay? Putting aside all the evidence that the citizens may have as to what happened, I don't think that their proffer, proffer works and I understand the Board wants to reserve on it so that, that, if that's so, then let that be the majority of my opening statement. I think there's going to be other evidence which negates many of the things the Petitioner was saying and I think that, my understanding from interacting with the citizens, that Mr. Borger, Borgerding has a fair amount of evidence so. So, there's more to it but I think the Board could, if it so determined to dismiss this Petition, even

without a hearing, I would have no trouble with that (inaudible) that the Circuit Court and Court of Special Appeals. So, that's my Motion.

CHAIR: Okay. All right. Thank you very much. Anybody want to respond to or add or join?

MR. BORGERDING: Your Honors, I'd just like to, and I do apologize, I didn't make enough copies for everybody but I'm going to put in the Court of Special Appeals' opinion and Judge Beverungen's decision below.

MR. ZIMMERMAN: And could my package be considered a Motion exhibit for the record?

BOARD: Okay.

MR. ZIMMERMAN: By the way, for the tape, do we have to identify who's speaking?

CHAIR: When we have a lot of people, sometimes that is helpful.

MR. ZIMMERMAN: All right.

CHAIR: Although you all have distinctive voices, so maybe we'll be able to figure it out.

MR. ZIMMERMAN: Okay and am I close enough to the microphone?

CHAIR: Is that the only microphone on your, you don't have one on your table?

MR. ZIMMERMAN: No.

CHAIR: Okay. Move it over.

MR. ZIMMERMAN: All right.

MR. BORGERDING: Your Honors, I would just (inaudible) support (inaudible) requesting a finding of res judicata in this case. The only other thing I would like to bring to your attention is on page two of Judge Beverungen's decision, he states, as an initial matter, I do not believe the OAH has the authority to amend restrictions found in previous cases, at least under the circumstances presented here. As Petitioners requested, the zoning violation and special hearing cases cited in the Petition was appealed to the Board of Appeals, Circuit Court and Court of Special Appeals. It is an unreported opinion and he states that, the number and term. The Appellate Court affirmed the agency findings, which necessarily included the conditions and restrictions found in those Orders. To amend those restrictions at this juncture would be reversing the Appellate Court, which the Administrative Agency could not do. I would ask you to keep that in mind and I believe that logic applies to the Board's consideration (inaudible). So, in addition to res judicata, I think there's a second hurdle that the Petitioner should not be able to overcome and I would ask (inaudible) that. Thank you.

CHAIR: So we should make these two exhibits, again, Motion exhibits, would that be --

MR. BORGERDING: That would be great.

CHAIR: Motion, motion. Mr. Schmidt, would you like

to respond?

MR. SCHMIDT: Thank you, Chairwoman Murphy. Maybe in the interest of, I guess, judicial economy, I'm going to try to respond to the Motion and also present my opening statement, if that would be okay. First of all, I would just ask, there were certain exhibits below before Mr. Beverungen that were submitted and I know the Board's policy and practice is anything that is in your file is evidence in this case. I may be offering some of those documents again and I'll put a copy of the plan that was offered below and accepted below on the board. Although, there's no proposed construction here, it may be helpful as witnesses are called upon to testify.

MR. ZIMMERMAN: Do we get a chance to object to any of the (inaudible) now or should I want until the hearing? Because the site plan is something (inaudible). I can do it now or we can, I don't mind --

CHAIR: Are you offering it now or --

MR. ZIMMERMAN: -- I don't mind waiting, I don't mind --

MR. SCHMIDT: Well, it's, it's in, it's in Judge Beverungen's, it was accepted below.

CHAIR: Right.

MR. SCHMIDT: My understanding is if it's accepted below, it's part of the file that is transmitted to the Board and is part of the record of the case that you would consider.

I did not call, because there is no construction proposed, although the plan, as indicated, you can see, it's indicated by, prepared by Morris & Ritchie, I do not have a witness from there. I didn't anticipate the objection and, obviously, Mr. Zimmerman didn't let me know but if he wants to object, he can do it now, I guess.

MR. ZIMMERMAN: Yeah, I don't think it's a question whether somebody comes from Morris Ritchie but I believe the Code indicates, and I don't have the Code in front of me, but--

MR. SCHMIDT: Which Code is that, Mr. Zimmerman?

MR. ZIMMERMAN: The County Code.

MR. SCHMIDT: Okay.

MR. ZIMMERMAN: The Baltimore County Code, I believe there's, always been a provision that the evidence from the lower, the ALJ hearing, can be considered but there's also an opportunity to object to it.

MR. SCHMIDT: What section of the Code is that, Mr. Zimmerman?

MR. ZIMMERMAN: I don't have it in front of me. We, we can, we can, I'm sure I can provide that. I believe there is a Code provision.

MR. SCHMIDT: I'm unfamiliar with it but, okay.

MR. ZIMMERMAN: But we'll, I believe it's the same Code provision that refers to the ability of the Board to consider evidence from, what used to be (inaudible) but we'll,

we'll get, we'll, we'll take a look at that and if I'm wrong, I'm wrong. I think I'm right, but my, my point, whether or not anyone from Morris Ritchie shows up is that the site plan does not meet the, the various criteria in the zoning checklist for non-residential building permits and/or zoning public hearing applications.

MR. SCHMIDT: And is that, is that a law in Baltimore County, Mr. Zimmerman? Is that a requirement in the County Code?

MR. ZIMMERMAN: In my, in my opinion, it's a requirement, in my opinion. So, I think Mr., I think I have an extra copy for Mr. Schmidt. I have a copy for the Board.

CHAIR: But this is not a development plan, this is a special hearing to amend previous restrictions.

MR. SCHMIDT: Right.

CHAIR: We're not here to talk about setbacks and variances and, so I'm not sure I understand why, why there would be an objection to that, because this is for, I guess, I mean, I'm, you know, for explanation, I mean, for descriptive purposes --

MR. ZIMMERMAN: Well, my, my reasoning is that the site plan doesn't actually show the layout of the, the establishment, where the tables and chairs are, where the, where the music is --

MR. SCHMIDT: That's not required. That's not even

required in, under the --

MR. ZIMMERMAN: I think in the context of this case, plus it doesn't show the adjoining land owners, in my opinion, sufficiently, doesn't show the height of the building, I, I don't think --

CHAIR: But, I guess, but evidence could be submitted by the Protestants and by, by People's Counsel to show, even through photographs, what the chairs look like.

MR. ZIMMERMAN: All right.

CHAIR: Or what the other, I mean, this is, has it, you know, it's being submitted for whatever it has on it, maybe it doesn't have the neighbors' property, maybe it does.

MR. ZIMMERMAN: Well, I don't think --

MR. SCHMIDT: It does.

MR. ZIMMERMAN: I don't think the site plan really, in the context of, the question of nightclub and so on, it doesn't really show us anything about --

CHAIR: Well, that's argument so.

MR. ZIMMERMAN: All right.

CHAIR: Okay, that's argument.

MR. ZIMMERMAN: I've made my point.

CHAIR: Okay.

MR. SCHMIDT: Just responding to that, I would say two things briefly. You're exactly right, Ms. Murphy. There's, there's a provision in the County Code that talks

about development plans being sealed by a professional engineer, a surveyor, registered landscape architect, but those are development plans. We're not here on any development plan. This is a zoning case. The other thing is and we, we will testify about this, there is no proposed construction at all. I mean, we're not proposing to do anything in terms of building. We're not building a new building, we're not adding an addition, we're not putting a second story on. We do have photographs which we'll submit and I think this was just submitted to sort of give the Board some information about how the property lays out, where it is, the neighbors are all identified, the immediate neighbors, by both deed reference and name and obviously anyone who's here who wants to testify and say where they live would be wiling to do that. So, I don't know what the problem is. If the Board has any problem, I'll try to get somebody from Morris & Ritchie to come over and authenticate that they prepared the plan but it, it is, it's sort of basically is what it is. By way of opening statement and sort of response to the Motion that's been made, if I can, and I just wanted to give you a little bit of background. This property, the subject property is about an acre and a quarter, just by way of background. It is a waterfront property down on the Chesapeake Bay and it's on Millers Island, which is well known, older community in eastern Baltimore County. The property is zoned BL, which is the business local designation,

which allows among uses that are permitted in the BL is, are restaurants. And as you are, of course, aware, the County zoning regulations define a number of different kinds of restaurants, carry-out, fast food, what are called standard restaurants, which are the typical sit down meal restaurants, which is what this property indeed is and the type of business that is here. The Dock of the Bay, which is the name of the restaurant, has been here and it was previously known I believe back in the fifties and sixties as the Fisherman's Inn, but this has been a place that's been serving food since the 1950's, at least that's what I proffer our evidence will be and you'll hear testimony from my client, Mr. Boone as well as there are other folks who are familiar with this area. And for many years, the Dock of the Bay operated as a, as a restaurant. I don't think there's any dispute as to that. You would go in there, you would get a hamburger, a crab cake and it was your typical restaurant. Obviously because of its location on the water and because there's a pier, it was a very popular summer destination. People would arrive by boat and could, could dock there and come in and get something to eat and it operated in that fashion. Things changed when Hurricane Isabel struck Baltimore County in 2003 and this area suffered a lot of damage. I represented some other people who live in this area who told me that there was water all over the place and, and a lot of degree of flooding and the building was, was damaged.

Ultimately, the building, the operations ceased and it was reopened later and came under the ownership of a gentleman by the name of Lawrence Tanner, who was a principal in an LLC called Fifth Street, LLC. While we're offering exhibits and so that the record is clear, I heard Mr. Borgerding offer some exhibits. These were offered below. I do have copies for everybody but I guess if I could have the plan offered and I'll mark it as exhibit number one for the Petitioner.

CHAIR: We did hear Mr. Zimmerman's objection, understood your objection, Mr. Borgerding and --

MR. ZIMMERMAN: Yeah, I mean, I don't need to repeat it, I just thought I should show really what the (inaudible).

CHAIR: Understood. Mr. Borgerding, any objection?

MR. BORGERDING: I have no objection.

CHAIR: No objection. Okay, we're going to submit Petitioner's Exhibit 1, which is the site plan.

MR. SCHMIDT: Okay. Thank you. I have copies of these for the other parties, but I think they may have them. If, gentlemen, if you don't, let me know. In any event, the business came under the ownership of Mr. Tanner. I think most of the folks in this room, although I don't live there, would say there was quite a difference in Mr. Tanner's operation than had been the historic Dock of the Bay operation. The business changed from sort of a neighborhood restaurant and it morphed into a business that had a lot of music. I'm going to say a

lot of music, my understanding is a lot of electronic music, rock and roll, hard rock, loud music, that kind of music. Additionally, the music, there's an area of outdoor seating now, there was a stage out there before, a stage, stage type structure, there was a tent that was out there and there was a lot of music that was being played at this facility. That music, obviously, generated concerns by the folks who live around here. As you can see from the plan, Mr. Zimmerman's comments notwithstanding, there are buildings and houses nearby and the, some of these are residential. There's a boatyard next door, which is not residential, there's other restaurants nearby but there is a mix on Millers Island of both residential and business uses and the folks who live there, I think rightfully so, became concerned that Dock of the Bay had become a nightclub. They filed a series of complaints with Baltimore County, Code enforcement complaints as you know, the process in Baltimore County is if the County Code Enforcement Division gets a complaint, they send an inspector out to investigate what's going on. The inspector in this case went to Dock of the Bay and issued to Mr. Tanner and Fifth Street, LLC, his company, several citations and he was ultimately fined. In addition to that, Mr. Tanner filed a zoning case through his attorney at the time, to basically address the use of the, of the, of the property and ultimately those violation cases and that zoning case were all appealed to you, to the Board of

Appeals, not you individually because I don't think any of the members of this panel heard the case, but the case ended up here in, in, at the Board of Appeals. The Board of Appeals issued a split decision, interestingly, and I'll submit as Petitioner's 2-A and Petitioner's 2-B a copy of the majority and the dissenting opinion that was authored by the Board of Appeals and as you can see from just the caption and the first page, it was actually three cases again that had been consolidated, the two Code violation cases and the zoning case. And the Board basically concluded, in its majority opinion, that Mr. Tanner was operating a night club at this facility, at this location. A night club is a separately defined use in the County zoning regulations, as Mr. Zimmerman has pointed out. A night club is not a restaurant, a restaurant is not a night club and the Board determined that Mr. Tanner was operating, operating a, a restaurant, excuse me, operating a night club. Based on that, and if you check the BL zoning regulations, you will find that a night club is not permitted in the BL zone so it was determined that Mr. Tanner's use was, therefore, illegal. There was a Motion for Reconsideration filed in that case and the Board denied that. I'll give you a copy in the interest of completeness, Petitioner's Exhibit 2-C, Mr. Alston, which is the denial of the Motion for Reconsideration that was filed by Mr. Tanner. Mr. Tanner was undeterred. He appealed the decision of the Board. It went to the Circuit Court of

Baltimore County, as you know, under a Petition for Judicial Review and Petitioner's Exhibit 3, which I'm going to give you, is a short Order by Judge Daniels of the Court at the time. Mr. Zimmerman was counsel in that case, as was Mr. Borgerding and Judge Daniels affirmed the decision of the Board of Appeals.

MR. ZIMMERMAN: Is there a date on that?

MR. SCHMIDT: It is dated, actually Mr. Zimmerman, I'll give you a copy. May the 14th of 2009 and I've marked that as Exhibit 3. Mr. Tanner wouldn't give up though. He wanted to keep going so he filed another appeal further up the chain and as Mr. Zimmerman has indicated and I think this is already in evidence but I'll submit it as a Petitioner's exhibit as well, number four, he went to the Court of Special Appeals and the Court of Special Appeals said, affirmed, the Board is affirmed. Mr. Tanner is operating a night club not permitted in the BL zone, business is not allowed here as it is operated and described and determined based on the findings of the fact of the Board of Appeals, which the Court obviously had to give deference to under the substantial evidence rule. Obviously, that didn't work out too well for Mr. Tanner's business plans. Shortly thereafter, the business was closed and Mr. Tanner went away, I'm sure much to the relief of many of the citizens of Millers Island. Enter my client, Ken Boone and his LLC, Boone Kondylas, they purchased the property a couple years ago in

2014 and reopened the business as Dock of the Bay. That brings us to the case today. Our testimony is going to be and I'm not going to take more time than I have to, is that the business here that is currently operating is not a night club, it is a restaurant, it is not what Mr. Tanner did, it is what Mr. Boone did and, in fact, we would say is much more like what Dock of the Bay had been back in the fifties and sixties when it was operated before Hurricane Isabel. It is not, we believe, a night club at the present time. The testimony that we're going to present is about the business operation and you will hear how the business works and that we don't have heavy metal rock and roll bands. I would point out to you and Mr. Boone will testify that last fall, after being in operation for a little less than a year, he decided it would be a nice touch, like a lot of restaurants, I think we've probably all been out to restaurants at one time or another, to have a single acoustic guitar player come to the restaurant facility. And so, he lined that up to happen on a Saturday night and shortly after that performance, he was visited by an inspector from Department of Baltimore County's Code Enforcement saying we heard you had a musician down here this weekend. Mr. Boone said, yes, I did. They said, can't do it, therefore, it's impermissible.

VOICE: He came before the performance.

MR. SCHMIDT: Okay, before the performance.

VOICE: He stopped the performance.

MR. SCHMIDT: Stopped the performance and this Petition resulted where we have asked for the approvals that you've already, you've already discussed. There are really two issues in this case that we see. One of them Mr. Zimmerman has already touched upon, which is the res judicata issue and I've already submitted a trial memorandum on it and you may very well require briefs on it, Ms. Murphy, or the parties may wish to brief it, but basically our position is very simple. We all know, I've been a, unfortunately, the attorney representing the litigants in some of the res judicata cases that this Board has been involved with, the Backriver Neck Road, Sprint Cell Tower case, the Matis (phonetic) case, involving a couple of crabbers down on the east side of the County and there have been some others that Mr. Zimmerman points out in his e-mail to you. We all know what res judicata is and there's no dispute that res judicata, as we informally call it, is the one bite of the apple rule, that a litigant gets one shot to make his case and if you're unhappy with that, you can file an appeal but when that case is over, you are done. So, Mr. Zimmerman's argument, essentially, here is Mr. Tanner took his shot. The property owner here took his shot, it was determined that this was a night club, end of story, it was a night club then, it's always been a night club, it'll always be a night club and no matter what else happens it's the end of the story and we can't even

present our case. Mr. Zimmerman, however, ignores what is also, what we believe is the persuasive and more appropriate application of res judicata and the language in my, is in my trial memo from both I think it's the Whittle case and also the case for the Seminary Galleria, which is up here on York Road and Seminary Avenue, which the Courts have said in those cases, if there is a change in the facts of the case, then res judicata doesn't apply. And indeed, that is what we submit has happened here. We're not Larry Tanner, we're not proposing to represent Larry, or to produce Larry Tanner's business. What Mr. Boone wants to do, what he's proposing to do, is not to run a night club here, but to run a restaurant here. The facts, what is proposed, is different. You're not going to have heavy metal bands playing until 2:00 a.m. out on, out by the pier, which is what Mr. Tanner did. That's not what he has in mind. So, we believe that we would be entitled to bring this case and that we're not barred by res judicata. Really, if you're following Mr. Zimmerman's arguments to its logical conclusion, it really gets to be ridiculous because you could have another user come in here under a BL, another BL use, whatever it would be, a bank, whatever it is, and if they played music while you're standing in line to deposit your check, they would be considered a night club because that's what the Court of Special Appeals has decided for this case, that music can't be played here under any circumstances, or so say Mr. Zimmerman

and I think, by extension, Mr. Borgerding and obviously that's not what res judicata is all about and intended to be. So, we don't think there's res judicata because we think what's proposed and what existed are different things. The second issue in this case, we believe that you have to address, is what I would call the accessory component of the restaurant operation. Now, I think we've all been to restaurants and I think this Board can take judicial notice of restaurants. I've been in Italian restaurants where a musician playing a violin and Italian music walks around from table to table. I have been in Mexican restaurants where a two or three-piece Mariachi band, guys in big hats, come around and play Mexican music. I have been in Michael's restaurant, Timonium Road, High Topps, the Riverwatch, numer, down in this area, Carson's Creekside, Sunset Cove, Sue Island Grill, Riverwatch, I can go on, and there are, there is music, either live, by a DJ, radio or whatever it might be. In our estimation, that does not mean that those businesses are not restaurants. The Baltimore County zoning regulations allow accessory uses. For example, a church can have a pre, pre-school, it can have a daycare operation but the nature of that use is a church with an accessory component. I hear on the radio driving in this morning that one of the car dealerships, you can get a manicure when you take your car, car up there. I would submit to you that Jones Toyota, or whatever the name of that business is, is

not a beauty salon, it is a car dealership. But there is an accessory component of that use which is in place to allow patrons of that use to have an amenity, that's exactly what we're proposing here. We're not suggesting that this is a night club. People aren't paying cover charges, they're not buying tickets, they're not coming down here to listen to music, to watch bands, that's not performances which draws them there. What draws them there is getting something to eat and maybe having a Coke or a beer or whatever they like to drink. But while they're there, they would have reasonable opportunity, we submit, to have some limited music and not be barred and prevented from having any music, which is what the Court of Special Appeals did in the, in the context of the Larry Tanner case. So, we're here seeking an Order from this Board and obviously, we think this Board has jurisdiction and Mr. Boone will testify and tell you to set the limits on the music, how loud it can be, can it be inside, can it be outside, how late it can go, can it be past twelve o'clock on a weekend, eleven o'clock on a weekday, whatever it might be. You clearly, under the provisions of Section 500.7, which is the section which allows you and allows the zoning commissioner, to hear special hearings, which is what this is, have the authority to grant whatever restrictions and limitations that you deem appropriate to safeguard the neighborhood. And Mr. Boone is fine with that. He wants to be a good neighbor. He

doesn't want to have a problem with his neighbors. But he does want to be able to do what every other restaurant, maybe not every other, but the majority of restaurants, and I think what your common knowledge will tell you, because I'm sure you've all been in a restaurant where there's some kind of music playing, whether it's the strolling violinist, the Mexican band, the radio or a guitar player who comes on at 9:00 on a Friday night, whatever it is, and we think that is a legitimate and proper accessory use. Now, I'll say one other thing. I think those are the two issues that you have to decide. Mr. Borgerding, I think I follow his final argument, that you don't have the authority to issue this Order. Well, sure you do. Zoning commissioner, there are plenty of cases, plenty cases when I was a zoning commissioner and plenty cases that you've seen on the Board, where somebody comes in and asks you to change a restriction to allow additional variance or whatever it might be and that's all we're asking for here. We're just asking that this user for this property be allowed to do what he wants to do and that is to have some reasonable accessory use and I think that's well within the Board's discretion. With that being said, I've offered those exhibits and I'm prepared to call my first witness.

MR. ZIMMERMAN: Madam Chair?

CHAIR: All right.

MR. ZIMMERMAN: Mr. Schmidt went, I think, beyond my

Motion. I just would like to make a (inaudible) observation.

CHAIR: And it was supposed to be a response to the Motion plus an opening statement.

MR. ZIMMERMAN: Right.

CHAIR: Can we be brief and not repeat?

MR. ZIMMERMAN: Absolutely going to be brief.

CHAIR: No res judicata.

MR. ZIMMERMAN: Yes. First of all, the holding of the Court of Special Appeals was not that this was a night club and not a restaurant, which Judge Eiler said is this is both a night club and a restaurant. The idea that the music use is accessory, that was essentially brought up by Mr. J. Carroll Holzer representing the Dock of the Bay in 2008 and the holding was that you, you can have two principal uses. You can't get away from it just by saying you're mostly a restaurant. The idea of the strolling guys in the Italian restaurants and, well, you know, the music in all other sorts of restaurants, I mean, that, that was brought up in 2008. They claimed the night club definition was over broad, that it would close down so many places in Baltimore County and, and the dissenting member, Lawrence (inaudible), more or less bought that argument. But the majority wasn't buying it and Judge Eiler wasn't buying it. Judge Eiler said if you think the statue is overbroad, the County Council can change it and the County Council has not changed that definition. So, so we went

through that sort of, you know, nightmare, equitable, how horrible, how horrible it's going to be to, to rule (inaudible) and Tanner didn't have cover charges either, that's in the opinion. And basically, what, they're making a kind of Goldilocks argument, that, you know, the music was too hot and now we're going to do it just right. I mean, that, there's nothing in the previous decisions that, that allows that and it's, it's impractical as far as implementation or enforcement. Once you start allowing the late night music, I mean, it, it's going to be above normal sound levels and to say oh, we're just going to have a real quiet acoustic guitar, they haven't even bound themselves to that, but once you have the late night music, you know, it's, it's opening up, it's opening up the box and as Judge Beverungen said, he, he can't, the opinions don't differentiate between Frank Sinatra and, and rock music. So, I guess it's, you know, to say that it's a Yogi Berra, it's dejavu all over again, despite all the, whatever you're going to hear. I think in the end, there, there's just no, there's no lawful and practical way to, to say that this Petitioner can kind of slide, slide through because, you know, he's, he's the Goldilocks that's just right and the other guy easily, the other guy was the bad guy, the other guy was the ugly guy with the music and this is the good guy. That's really, but that doesn't square with the earlier decision of (inaudible) so that's, that's my brief preliminary observation.

CHAIR: Okay. Any opening from you? I don't want to cut you off.

MR. BORGERDING: Yeah, just briefly, Your Honors. I would ask if you speak with my, hear testimony from Protestants here today about what it was like to endure seven years of Larry Tanner and with all due respect, this gentleman was a bull in a china shop. He basically wrote, waved the red flag at the neighbors and just, a lot of them have children, they'll testify to that, and the children couldn't sleep at night and Mr. Tanner took it all the way for seven years to the Court of Special Appeals, lost, and then he was still undeterred. He tried to have a barge and put live bands on the barge and the County filed a contempt Petition against him and threatened to throw him in jail and only then did it stop and the, the business (inaudible). This was a nightmare for the people in the, this community and they are very gun shy about going through something like that again so I ask you to keep that in mind. The other thing I'd ask you to keep in mind, if you read the Court of Special Appeals' opinion, it does, it prohibits live music and that is exactly what they're asking for, live music. And that's the fear of the residents. Once you get the live music in, are you going to get a higher occupant density load there or are you going to get more people there, are they going to be loud again, you know, so on and so forth. Especially if you have outside music, you're going to attract a

certain amount of, certain type of person who is going to drink, who is going to get loud, you know, they're worried about that. And what happened repeatedly when Mr. Tanner owned the place is, was not only the bands and the music but at two, three o'clock in the morning, you'd have people in the parking lot talking loud, urinating, you know, just doing things that were incompatible with them living in peace and quiet of a residential area. So, I'd ask you to just think about that and you're going to hear testimony from the Protestants about what it was like to go through that. And that's why we're so gun shy, they don't want to go through that again. When Mr. Schmidt respectfully says, you know, that our argument for res judicata if taken for the logical conclusion is just, is kind of crazy, the bottom line is, the Court of Special Appeals, read their opinion, prohibited live music and that's exactly what's being requested here. Now, at this moment, is everything exactly the same? No, but if you put the music in, are you going to attract those crowds again? Are you going to make them relive this nightmare and that's what the fear of the community is. So, I'd just ask you to keep that in mind. Thank you.

CHAIR: Okay.

MR. SCHMIDT: Ms. Murphy, just because Mr. Borgerding referenced it and I've got a copy, there was the contempt proceeding that he mentioned when Mr. Tanner was in contempt.

There was an opinion by the Circuit Court and just since that's been mentioned, I'll offer that. I think we're at number five, Mr. Alston?

BOARD: Yeah.

MR. SCHMIDT: And that's, again, against the evil Mr. Tanner. Hopefully he's not sitting here.

CHAIR: Now, the exhibits that you just submitted.

MR. SCHMIDT: Yes.

CHAIR: They're for the merits of the case, as opposed to the Motions?

MR. SCHMIDT: Yes.

CHAIR: Mr. Zimmerman wanted his two exhibits as motions.

BOARD: Oh, okay. So, your exhibits are for --

MR. SCHMIDT: Yeah, mine would be as to the merits. Yes, if that's okay, yes.

MR. ZIMMERMAN: I think I, did I have one exhibit?

CHAIR: You had two exhibits.

MR. ZIMMERMAN: Oh, the second was the zoning hearing checklist.

CHAIR: Checklist?

MR. ZIMMERMAN: Right, right.

CHAIR: Okay. We'll just, we'll mark that as People's Counsel Motion Exhibit.

MR. SCHMIDT: I have no objection whether they're

considered as to the merits or whatever, Mr. Zimmerman. Mine are as to the merits, particularly since, Chairwoman Murphy, you're indicating you're reserving and you're going to hear the, the case.

CHAIR: That's right, but for whatever reason Mr. Zimmerman wants his exhibits the way, and he likes it that way, that's fine.

MR. SCHMIDT: That's fine.

CHAIR: We'll, we'll accommodate and, and Mr. Borgerding also has Motion exhibits and now he can put in exhibits as to the merits. Okay. Eleven-fifteen. Can we get a witness on?

MR. SCHMIDT: Let's do it. Mr. Boone, if you could go up to there and you'll be sworn in.

BOARD: Okay. Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. BOONE: I do.

BOARD: Would you please state your name and address for the record?

MR. BOONE: Kenneth J. Boone, 250 South President Street, Baltimore, Maryland 21202.

BOARD: And spell your last name for the record.

MR. BOONE: B-O-O-N-E.

BOARD: Thank you.

MR. SCHMIDT: Mr. Boone, as I indicated in my opening, through the LLC, Boone Kondylas, LLC, you are the managing member of that LLC?

MR. BOONE: That is correct.

MR. SCHMIDT: And that is the, now the current owner of the Dock of the Bay property?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. What's your occupation, sir, other than owning a restaurant?

MR. BOONE: In addition to owning the restaurant, I own two printing copies, direct marketing, or, I'm sorry, American Direct, which is located just inside Baltimore City and Tidewater Direct, which is located in Centerville, Maryland.

MR. SCHMIDT: Okay. Do you own any other businesses in Baltimore County?

MR. BOONE: I own a property, 4545 Annapolis Road, which is now occupied by a company called (inaudible), I sold a direct mail firm to them in 1999. It's a, probably a three hundred and sixty thousand square feet. I pay $175,000 in Baltimore County taxes on that property and employed as many as six hundred people in that building.

MR. SCHMIDT: Okay. For either that property or any other property in Baltimore County, including Dock, the Dock of

the Bay property, have you ever or any of your companies ever been cited by any, the zoning authorities or code enforcement of Baltimore County for any violations?

MR. BOONE: I've never been cited for a zoning violation in any of my years of owning properties in Baltimore County.

MR. SCHMIDT: Okay. Let me, let me go back, if I can, maybe take this chronologically. When did you purchase this property, Mr. Boone, the Dock of the Bay property?

MR. BOONE: It was in August of 2014.

MR. SCHMIDT: Okay and was the restaurant or the business in operation at that time or had it been shut down?

MR. BOONE: It had been closed for slightly less than two years.

MR. SCHMIDT: Okay and who did you buy the property from when you bought it in 2014?

MR. BOONE: Bought it from Larry Tanner.

MR. SCHMIDT: Okay and that was actually Fifth Street, LLC was the name of his company?

MR. BOONE: That's correct.

MR. SCHMIDT: Do you know how long Mr. Tanner or Fifth Street, LLC had owned the property?

MR. BOONE: I think from 2006.

MR. SCHMIDT: Okay.

MR. BOONE: Or maybe sooner.

MR. SCHMIDT: Okay.

MR. BOONE: I'm not sure when he, when he bought it.

MR. SCHMIDT: Okay. I've got a couple of aerial photos that were taken. I would offer to the Board that these are taken from the County data base called My Neighborhood. So, they are in the public domain. I'll give one to Mr. Zimmerman and Mr. Borgerding and just to give the Board a sense, since the site plan is allegedly incomplete, this might help the Board and I would offer this, if I can, to Petitioner's exhibit number six, I believe, Mr. Alston?

BOARD: Six.

MR. SCHMIDT: And while the Board has that one, I'll show you this one. Mr. Boone, this is an aerial photograph. Can you tell us if the Dock of the Bay is shown on this photograph?

MR. BOONE: Yes, it is.

MR. SCHMIDT: Okay and where is it shown? Can you put an X maybe, actually after the Board members, after Ms. Hanley looks at that, I'll have the witness mark this one. If you could maybe put an X on the Dock of the Bay restaurant or Dock of the Bay facility? Okay. Let it reflect that the witness has marked that with an X and I would offer that. Now, this property is down on Miller's Island?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. I'm going to show you another

photograph I'll mark as Petitioner's exhibit number seven, again, taken from the same data source. Mr. Borgerding, if you would hand one of those over?

MR. BORGERDING: Sure.

MR. SCHMIDT: And can you tell us, I don't need him (inaudible), can you tell us generally what this is, what, this, this area?

MR. BOONE: That's a map of, of Miller's Island.

MR. SCHMIDT: Okay and there's a thumb tack, thumb tack pre-printed, is, what's the significance of that, what property is that thumb tack located on?

MR. BOONE: That's located on Dock of the Bay.

MR. SCHMIDT: Dock of the Bay, okay and I would offer that as number seven.

MR. ZIMMERMAN: Just different scale?

MR. SCHMIDT: Yes, obviously. One is, they're both taken from My Neighborhood, Mr. Zimmerman, the County website.

MR. ZIMMERMAN: Right, no, I, I don't object to it.

MR. SCHMIDT: Mr. Boone, since you bought the property, have you made any exterior changes to the building, put an addition on, put a second floor on, anything like that?

MR. BOONE: We, we poured a pad outside of the kitchen to expand our kitchen operating so we can steam crabs out there, we can pull pork --

MR. SCHMIDT: In the summer?

MR. BOONE: -- for summer and so forth.

MR. SCHMIDT: But that's a concrete pad?

MR. BOONE: It's a concrete pad. It just expanded the kitchen. We eliminated the tent that was once there, that's been removed. We spent $3,000 restoring the play area for the children, where the children play on the pirate ship and so forth.

MR. SCHMIDT: Okay, we'll get to that.

MR. BOONE: We dismantled the little stage they had out there, took that out.

MR. SCHMIDT: Okay. So, there was a stage outside that was dis, that you dismantled?

MR. BOONE: Yeah, a small stage.

MR. SCHMIDT: And a tent outside at one, during Mr. Tanner's ownership, that you removed?

MR. BOONE: That's correct.

MR. SCHMIDT: Any changes though to the building in terms of put an addition on or second floor?

MR. BOONE: No, the four walls are still the four walls.

MR. SCHMIDT: Okay. Same size?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. If, if you know, do you know how big the property is?

MR. BOONE: No, I don't.

MR. SCHMIDT: If you don't, okay, it's on the plan. I showed you the photos, can you tell us a little bit about the neighborhood of Miller's Island? We have people who live here but just a little bit so the Board understands what surrounds you and what's in the immediate area, what, what type of activities and uses are there, residences, businesses or whatever?

MR. BOONE: There's a combination of both. Coming down Cuckold Point Road there are two bars and right beside me is a, an additional, it's a, called Rowboat Willy's, which they have, which is a bar/restaurant beside me. Once Isabel came through and destroyed a lot of properties, many, one of many of the ones which were once summer homes are now permanent residence, were rebuilt as permanent residence, so there's a mixture of residence from before and after Isabel.

MR. SCHMIDT: Okay. Now, let me take you back, you have some familiarity by virtue of your ownership and familiarity with the historic use of this property, is that correct?

MR. BOONE: Yes.

MR. SCHMIDT: If you know, when did a restaurant start on this property? When did a bus, a restaurant use business start, if you know?

MR. BOONE: I'm told it's been a restaurant since the sixties.

MR. SCHMIDT: Okay.

MR. BOONE: The name prior, some of my employees worked in a place called Fisherman's Inn, which is the same restaurant prior to it being called Dock of the Bay.

MR. SCHMIDT: Okay and at that time, could you describe the nature of the business at that time during the sixties when it was Fisherman's Inn?

MR. BOONE: I was never there but --

MR. ZIMMERMAN: Objection.

MR. BOONE: -- several people here --

CHAIR: I'm sorry, one second.

MR. ZIMMERMAN: How, how would this witness know?

MR. SCHMIDT: If, if you know.

CHAIR: I'm sorry, what, what --

MR. ZIMMERMAN: How would he know? I don't see any foundation --

CHAIR: The, the question was about Fisherman's Inn prior, right?

MR. SCHMIDT: Yeah, Fisherman's Inn is the name of the business that operated here. I'm just asking him if he, if he knows, if you know, Mr. Boone, can you, do you know how the business was operated when it was the Fisherman's Inn?

CHAIR: Okay, overruled. Go ahead, if you know.

MR. BOONE: It was operated as a, as a bar with, with music and it had a skating rink for, or a skateboard ramp for

people to skateboard, catered to young people and, and had music that the young people liked to listen to and I'm, I'm told by some of the neighbors who are here to testify to the music was quite loud back when Fisherman's Inn owned it.

MR. SCHMIDT: Okay.

MR. BOONE: Back when it was owned by the other family.

MR. SCHMIDT: Okay and there came a time when the business was owned by, became, came under the ownership of Mr. Tanner, who we've heard about?

MR. BOONE: Yeah, there was a separate operator for a number of years, someone in between the time that, that the people who owned the property owned it and Larry Tanner bought it, someone else operated it for a few years as Dock of the Bay and then after Isabel, Larry Tanner bought it as Dock of the Bay.

MR. SCHMIDT: Okay and then he operated it until he sold it to you?

MR. BOONE: Until the time he closed it in 2012 and sold it to me in 2014.

MR. SCHMIDT: Okay. When did you actually acquire it?

MR. BOONE: August of 2014.

MR. SCHMIDT: Okay and when did you re-open?

MR. BOONE: In October 2014.

MR. SCHMIDT: Okay. I'm going to show you some photographs. Again, I'll, these were in the file previously, but I'll give a copy to Mr. Borgerding and Mr. Zimmerman. And, Mr. Alston, do you want me to mark these or will you mark them as submitted?

BOARD: Either way.

MR. SCHMIDT: Either way? Okay. I'll then maybe hand them up one at a time.

BOARD: Okay.

MR. SCHMIDT: If I can, offer them as 7-A.

BOARD: No, (inaudible).

MR. SCHMIDT: I'm sorry, eight. I apologize. And I'll hold them up so the Board can see them. Mr. Boone, if I can, we're going to go through these and if you could just describe to the Board what, what we're looking at?

MR. BOONE: That's the entrance to our, our Dock of the Bay.

MR. SCHMIDT: Okay. Now, in the background of this photos, I see a bunch of boats on boat racks.

MR. BOONE: That's our neighbor, Bill's Boats.

MR. SCHMIDT: Okay. Is that, that's not the Dock of the Bay property?

MR. BOONE: That's not part of the Dock of the Bay, no.

MR. SCHMIDT: Okay. But you are right next to a

boatyard?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. Offer that as 8-A, okay.

BOARD: 8-A, okay.

MR. SCHMIDT: Mr. Alston will like this in view of my prior case with him. This one shows a zoning sign. But it, what, what are we looking at here?

MR. BOONE: That's the zoning notice that went out in September that was preamble to the, to the, to the hearing we had on September 28th regarding this Petition.

MR. SCHMIDT: Okay. Now, and to the left in this photograph are the boats, that's the Bill's Boats operation?

MR. BOONE: That's, that's correct.

MR. SCHMIDT: Okay. Is the Dock of the Bay restaurant building visible in this photograph?

MR. BOONE: Yes, it is.

MR. SCHMIDT: What, what is that?

MR. BOONE: It's the salmon colored building right there.

MR. SCHMIDT: Okay. So, the Dock of the Bay is the salmon colored building. Okay. Next one is, again, I think it speaks for itself, but is it a boatyard next door?

MR. BOONE: That's correct.

MR. SCHMIDT: And the macadem or gravel area, is that your parking lot or Bill's Boats' parking lot?

MR. BOONE: That's our parking lot.

MR. SCHMIDT: Okay. 7-D, and I think these speak for themselves, but a close up, more close up view of the building?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. Now, Dock of the Bay is on the water, correct?

MR. BOONE: That's correct.

MR. SCHMIDT: And does it have a pier that extends into the water?

MR. BOONE: Yes, it does.

MR. SCHMIDT: How many slips are on there, if you know?

MR. BOONE: Fourteen.

MR. SCHMIDT: Okay and are those for rental or how are they used? How, how does --

MR. BOONE: No, those, those are used for customers who come by boat to Dock of the Bay.

MR. SCHMIDT: Okay. So, if I'm out boating in the summer and I want to get something to eat, I can pull up if there's room to one of the fourteen slips?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and the next photograph I'm showing you, can you tell us what we're looking at here?

MR. BOONE: That's a view from the end of the dock looking at the Dock of the Bay from water.

MR. SCHMIDT: Okay. From the pier, obviously in the foreground?

MR. BOONE: From the pier, yes.

MR. SCHMIDT: Okay. Now, do you have seating inside the restaurant and outside or one or the other or both?

MR. BOONE: We have both.

MR. SCHMIDT: Okay and let me show you this photograph and ask you what this is?

MR. BOONE: That's outdoor seating.

MR. SCHMIDT: Okay and generally, when is this outdoor seating available in terms of times of the year? Can I go out there now?

MR. BOONE: You can if you have a coat on.

MR. SCHMIDT: Okay.

MR. BOONE: We, we serve people generally out there from April through October.

MR. SCHMIDT: Okay and again, what are we looking at in the next photograph?

MR. BOONE: We're looking at outdoor seating looking into a patio area.

MR. SCHMIDT: Okay. Now, when you bought the property, was there a tent outside from Mr. Tanner?

MR. BOONE: The, the tent had been taken down but it was right there to be put back up, yeah, there was a tent outside.

MR. SCHMIDT: And is that in this area that we're looking at in this photograph?

MR. BOONE: This entire area was at one time under tent, that's correct.

MR. SCHMIDT: Okay. And the next photograph, which one, what are we up to, Mr. Alston?

BOARD: This is 8-G, so you'd be at 8-H.

MR. SCHMIDT: H, H, again, the outdoor seating area?

MR. BOONE: Outdoor seating, that's correct.

MR. SCHMIDT: The boats that are docket and the piers that are in the background, are those Dock of the Bay or are they neighbors?

MR. BOONE: No, those are Bill's Boats.

MR. SCHMIDT: Bill's Boats, okay, the boatyard. Okay. And I believe your plan shows that you're on the Chesapeake Bay?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and I am assuming, I, I believe this is 8-I, is the pier looking out into the bay?

MR. BOONE: That's correct. That's the Craig Hill Lighthouse in the background.

MR. SCHMIDT: Okay. 8-J, can you tell us what we're looking at in 8-J?

MR. BOONE: That's again a view from the dock, but it's looking towards what is now Rowboat Willy's and Bill's

Boatyards.

MR. SCHMIDT: Okay. Now, you've referred to Rowboat Willy's. Is, is that on the Bill's Boats' property or is that a separate property or what?

MR. BOONE: It's on Bill's Boat, Bill Boats' property, Bill's Boats.

MR. SCHMIDT: Okay. So, Bill's Boats has a boatyard?

MR. BOONE: That's correct.

MR. SCHMIDT: And they have, what is it called, Rowboat Willy's?

MR. BOONE: It's called Rowboat Willy's, it's this structure right here and it's an outdoor restaurant/bar.

MR. SCHMIDT: Okay and is it the structure that has the sort of the salmon colored roof?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. So, there is a establishment next door as part of the boatyard where you can get something to eat and drink as well, just like Dock of the Bay?

MR. BOONE: Eat, drink and you can listen to live music there if you like.

MR. SCHMIDT: Okay. They have live music at, at Rowboat Willy's?

MR. BOONE: Yes, they do.

MR. SCHMIDT: That's right next door?

MR. BOONE: Right next door.

MR. SCHMIDT: Okay. Okay. The next one, I think, is the outdoor seating of your restaurant, is it not? It's sort of self-explanatory because it has a name there?

MR. BOONE: Yes, it is.

MR. SCHMIDT: Okay. Now --

MR. BOONE: You can also, in that picture, you can see the proximity of Rowboat Willy's. We, many of our patrons will ask to be seated over here in the summertime so they can listen to the music at --

MR. SCHMIDT: At Rowboat Willy's?

MR. BOONE: Yeah.

MR. SCHMIDT: Okay, okay. Since you've, good point, since you've owned the restaurant, have you had any live music or entertainment at Dock of the Bay, since you've owned it since 2014?

MR. BOONE: I had a, I, I wasn't familiar with the zoning law, there was no manual that came with the restaurant regarding zoning laws and I had a disc jockey on New Year's Eve 2014. Other than that disc jockey in 2014, there's been no live entertainment, no karaoke or disc jockey or anything else.

MR. SCHMIDT: Okay. So, you don't, you haven't heard any karaoke, haven't had any live acts?

MR. BOONE: No.

MR. SCHMIDT: You haven't had any disc jockey, you haven't had anything like that?

MR. BOONE: No.

MR. SCHMIDT: How about recorded music, do you do that? Have you done any of that?

MR. BOONE: We have a radio that plays inside.

MR. SCHMIDT: You have a radio inside?

MR. BOONE: Right.

MR. SCHMIDT: Okay. Televisions inside?

MR. BOONE: Yes, we do.

MR. SCHMIDT: Okay. Okay. The next photograph, you mentioned there's a children's play area in association with the Dock of the Bay?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and I'm showing you a sign which reflects the pirate ship rules and it appears to be sort of a play pirate ship in the background.

MR. BOONE: That's correct.

MR. SCHMIDT: And what is that?

MR. BOONE: That's a play area for the children. While the parents are eating, their children can play on the pirate ship and we set up little games for them out there and so forth. So, it's a place for children to, to occupy themselves while their parents are eating.

MR. SCHMIDT: Okay. Now, you talk about, in addition to the outdoor photograph, or the outdoor seating, which you've described and we've had some photographs, there's an area of

indoor seating?

MR. BOONE: That's correct.

MR. SCHMIDT: Tell us a little bit about that. What's inside the facility in terms of tables, bars, whatever it might be?

MR. BOONE: There's a bar that I believe was built in the two thousands in there that remains and we seat about ninety-eight people inside.

MR. SCHMIDT: Okay. How many can you seat outside?

MR. BOONE: A little bit over a hundred outside.

MR. SCHMIDT: Okay. If it's fully occupied?

MR. BOONE: If it's fully occupied.

MR. SCHMIDT: Okay.

MR. ZIMMERMAN: Excuse me, how, how many inside, I didn't --

MR. SCHMIDT: Ninety-eight and that would be at the bar and the tables inside?

MR. BOONE: I'm sorry, table seating is ninety-eight, there's probably another twenty-five around the bar.

MR. SCHMIDT: Okay. So, say a hundred and twenty-five to a hundred and thirty at the bar?

MR. BOONE: Sure, sure.

MR. SCHMIDT: If people are standing.

MR. BOONE: Right.

MR. SCHMIDT: And I see in this photograph of the bar

that there are televisions over the bar?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. Oh, I'm sorry, Mr. Alston. Is there one room inside for seating or are there several different dining rooms?

MR. BOONE: There's just one room inside.

MR. SCHMIDT: Okay and this photograph purportedly inside, which includes a television, looks like the Orioles were playing that day, is that the seating area inside other than around the bar?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and finally, I do have a photo, we do have a photograph of the bar and that reflects just the bar in the, in the dining room seating area?

MR. BOONE: Yeah, that's a, yeah, that's one of our patrons in here, that's Jack there.

MR. SCHMIDT: Is he here today?

MR. BOONE: No, his son is.

MR. SCHMIDT: Oh, okay.

MR. BOONE: Okay.

MR. SCHMIDT: Okay. I would collectively offer all these exhibits as Exhibit 8.

MR. ZIMMERMAN: Last one is 8-O?

BOARD: Yes.

MR. SCHMIDT: Thank you for marking those, Mr.

Alston. I appreciate it. Now, tell us, I'm going to ask you, Mr. Boone, if I can, about the operation. How many days of the week are you open, every day or just limited hours?

MR. BOONE: We're open seven days a week.

MR. SCHMIDT: Okay and what are the hours?

MR. BOONE: We generally open for lunch at 11:00 a.m., in the summertime we serve breakfast, we open at 9:00 on weekends but right now we open 11:00 a.m. seven days a week.

MR. SCHMIDT: Okay. What time do you close?

MR. BOONE: We've, we have it posted on our sign midnight, but we've, basically have had lights out anywhere from 9:00 to 10:00, including Fridays and Saturdays for the last six months.

MR. SCHMIDT: Okay.

MR. BOONE: Over the winter, the lights have been out about 9:00 or 10:00.

MR. SCHMIDT: Okay. You basically close when there are no more people there?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and how about your typical clientele, young, old, family, singles, pick up place?

MR. BOONE: No, we, we, we cater to the community, which is a, a mature community. Our average patron is probably fifty years old. The, the number of patrons who generally, you'll see from forty to seventy years old.

MR. SCHMIDT: Okay. Now, I can obviously get, you indicated, lunch there and dinner there.

MR. BOONE: That's correct.

MR. SCHMIDT: And I can also consume an alcoholic beverage if my desire would be to do that, correct?

MR. BOONE: That's correct.

MR. SCHMIDT: After this hearing, I think that will be my desire but, in any event, in terms of a breakdown, let's just take last weekend was Valentine's Day weekend, so it was somewhat of a holiday on Valentine's Day was Saturday, what kind of ratio, if you know, percentage of food sales versus percentage of alcohol sale?

MR. BOONE: I do know. Valentine's weekend we ran eighty-two percent food and eighteen percent alcohol.

MR. SCHMIDT: Okay. So, four out of every five dollars that people spend there are on food?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. Is that, you said that's Valentine's Day, is that consistent with other times of the year or was that remarkably different on Valentine's Day?

MR. BOONE: No, the, the, the lowest number I've ever seen is seventy-five percent food.

MR. SCHMIDT: Okay.

MR. BOONE: So we're, we're consistently in the eighty percent food, twenty percent alcohol range.

MR. SCHMIDT: Okay. Now, you corrected me on my opening statement before, but there came a time when, I understand, when you scheduled some live entertainment.

MR. BOONE: That's correct.

MR. SCHMIDT: At the, at, at the, at Dock of the Bay. When was that?

MR. BOONE: It was, I believe, in April of 2015, I announced that we hired an acoustic guitar player, Mark Allen (phonetic), who was here but had to leave, to, to play on a Saturday night.

MR. SCHMIDT: Okay.

MR. BOONE: I put on the front sign that we were having Mark Allen and the day before his appearance a young zoning official came in and threatened to pull the liquor license right off the wall if he happened to play there on Saturday night, so we had to cancel the, cancel the performance.

MR. SCHMIDT: Okay. Have you had any live music or live entertainment of any type at the Dock of the Bay?

MR. BOONE: Well, that was my first lesson in, lesson in zoning and when he came in, and since then we've been, we've obliged by the law. We've not had any live entertainment.

MR. SCHMIDT: Okay. What, what type of, I know Mr. Zimmerman indicated that apparently Frank Sinatra is the same as Black Sabbath or something but what type of music do you,

would you like to have? Or tell us, tell the Board what you would like to do?

MR. BOONE: Keeping a look at our demographic --

MR. ZIMMERMAN: I, I object the characterization of what I said. I didn't say they're exactly alike, what I said was the decision before the Court of Special Appeals would cover any sort of late night music.

CHAIR: Understood.

MR. SCHMIDT: I, I stand corrected. What, what would you like to do? Tell the Board what you would like to do?

MR. BOONE: Well, in actuality, what I had planned for was, everybody knows I had Mark Allen planned as an acoustic guitar player to play there on Saturday night. I engaged a seventy-three-year-old Italian man who sings Frank Sinatra to play one weekend, I had to cancel him and in anticipation of a positive response on September 28th, I had engaged an Oompah band to play for Octoberfest.

MR. SCHMIDT: Okay.

MR. BOONE: Those are the three, three music, act, acts that I had to cancel.

MR. SCHMIDT: Okay. Mr. Allen, is he a solo act or does he have an entourage or a band behind him?

MR. BOONE: He, he generally plays as a solo act but he could bring a band if I wanted to pay for a band.

MR. SCHMIDT: Okay.

MR. BOONE: I only engaged him as a soloist.

MR. SCHMIDT: Okay and he plays an acoustic guitar?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and you said an Oompah band and a guy who sings Frank Sinatra?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. If you can, do you, do you propose any type of stage or anything like that where any musician would play?

MR. BOONE: I have, I have no plans for anything beyond what I've just described.

MR. SCHMIDT: Okay, all right. And the type, the type of music, to characterize it, is it, do you, do you propose to have heavy metal, rock and roll, amplification, those kinds of things?

MR. BOONE: I intend to cater to the demographic so that people who are coming into the restaurant, which are the fifty-year-old and, and, from an economic standpoint, soloists are much easier to pay than bands.

MR. SCHMIDT: Okay.

MR. BOONE: From an economic standpoint, I want complimentary music to the, and then have soloists.

MR. SCHMIDT: Okay and if the Board proposed limitations on the type of music or the volume of music, you would, you would be amenable to those and follow those

limitations?

MR. BOONE: I'd be very happy to live within sound restrictions on outside music, time restrictions of both indoor and outdoor music and I do not want to cater to the young crowd and I'd be happy to live with time restrictions, both inside and outside.

MR. SCHMIDT: Okay. Well, the Board obviously has the authority to determine that but what do you anticipate? And I know, unfortunately, I'm going to use this word anticipate because we are talking about the future and so since we can't travel to the future and see, what is it that you would like to do? What is your plan so the Board knows exactly and precisely what it is you would like to do and when I say that, Mr. Boone, if you could express it in terms of inside, outside, days of the week, how late it would go and all those issues that I'm sure people are concerned about.

MR. BOONE: Our, our customers are working people and they don't, they're not out to 2:00, 3:00 in the morning. What I would anticipate would be music on Friday and Saturday night from 6:00 till 10:00, I'd have last call for alcohol at midnight and hopefully have the place completely cleared out by 12:30.

MR. SCHMIDT: Okay.

MR. BOONE: On outside, I would expect Sunday afternoons, it's pretty traditional in the boating community,

to have Sunday afternoons and the majority of our people sit outside in the summer time so I would expect music six, probably 5:00 till 8:30 outside. I don't expect music to go outside long, we have a mosquito problem on Miller's Island. No matter what I plan to do, mosquitos are sending everybody inside once it gets dark. So, I don't, I don't expect to have music outside after dark.

MR. SCHMIDT: Okay. So, that's what you would like to do and if the Board restricted you to that hours and those places, you would be amendable to that?

MR. BOONE: I'm very amenable to that. I'm very amenable to a sound level.

MR. SCHMIDT: Okay.

MR. BOONE: I am, I'm perfectly happy with a sound level. I don't, our customers want to be able to talk while music is playing. I don't ever want to have a band in there that prohibits the conversation from going on. We, we'll be, we're very amenable to a sound level and to a time restriction.

MR. SCHMIDT: Okay. Mr. Tanner, you indicated that the Rowboat Willy's, I'm sorry, I called him Mr. Tanner.

MR. BOONE: Gee.

MR. SCHMIDT: Sorry about that. Mr. Boone, boy, my bad. I'm reading my notes. Mr. Boone, you indicated that Rowboat Willy's next door has music, is that correct?

MR. BOONE: That's correct.

MR. SCHMIDT: Are there other, who, who basically for the dining dollar in Miller's Island area, who do you, who do you compete with? What other establishments are there?

MR. BOONE: Well, because I'm a waterfront, I complete with more than just Miller's Island. I compete with the other eight restaurants all in Baltimore County area that do have music outside.

MR. SCHMIDT: Okay.

MR. BOONE: But locally we compete with a facility called the White Swan, the Islander and Rowboat Willy's.

MR. SCHMIDT: Okay.

MR. BOONE: All, all three of whom are not living with the restriction I'm living with. All three of whom, the Islander has a sign up right now for karaoke on Tuesday night and live mike on Monday night or whatever it may be. The White Swan is always packed at 10:00 at night when I'm leaving, they're filling up then. I'm not sure what they do inside.

MR. SCHMIDT: Do they have music?

MR. BOONE: I'm not sure.

MR. SCHMIDT: Okay.

MR. BOONE: I have not been inside. I have not been inside that, that facility for ten years.

MR. SCHMIDT: Okay.

MR. BOONE: But I do know that next door, Rowboat Willy's, has, has music at decent sound levels. I mean, music

that, outside usually on Fridays and Saturday nights.

MR. SCHMIDT: Okay.

MR. BOONE: My customers appreciate their music.

MR. SCHMIDT: Okay. All right. You, you, presently, I know you discussed the hours of operation for the music when I asked you to tell the Board what it is you'd like to do. What's your hours of operation right now without the music?

MR. BOONE: Generally 11:00 a.m. till about 10:00 p.m. seven --

MR. SCHMIDT: On, is that weekdays or weekends or both?

MR. BOONE: That would be weekends and weekdays except Sunday, Sunday we're usually out of there by 8:30, 9:00.

MR. SCHMIDT: Okay. You have a dance floor?

MR. BOONE: No.

MR. SCHMIDT: Do you propose a dance floor?

MR. BOONE: No.

MR. SCHMIDT: Do you propose moving any of the tables or chairs that are in the restaurant or even outside the restaurant to create a stage kind of area or build a stage?

MR. BOONE: No plans.

MR. SCHMIDT: Okay. If you know, how late did Mr. Tanner's operation go?

MR. BOONE: I was never at his operation when it was open late, I don't know.

MR. SCHMIDT: You don't know? Okay. Mr. Boone, you do have a, a business license from the State of Maryland, do you not?

MR. BOONE: Yes, I do.

MR. SCHMIDT: I believe we're up to Petitioner's exhibit number nine, Mr. Alston?

BOARD: Yes.

MR. SCHMIDT: I've pre-marked this as Petitioner's exhibit number nine and I'd ask Mr. Boone if you can identify that, please, sir?

MR. BOONE: That's a business license issued by the State of Maryland to be a restaurant.

MR. SCHMIDT: Okay and you're licensed as a restaurant according to the State of Maryland?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay. I would offer that as Petitioner's exhibit number nine. You have a liquor license as well, obviously?

MR. BOONE: That's correct.

MR. SCHMIDT: That allows you to sell liquor?

MR. BOONE: That's correct.

MR. SCHMIDT: Did you acquire that from Mr. Tanner as part of the, and Fifth Street, LLC?

MR. BOONE: Yes, I did.

MR. SCHMIDT: Okay. Now, Mr. Boone, you indicated

that, let me ask you this, since you, you've operated the business, have you had any problems with, with your neighbors? Have there been any issues with the operation of Dock of, Dock of the Bay?

MR. BOONE: We've had four phone calls that I'm aware of.

MR. SCHMIDT: In the, what, year and a half you've been operating?

MR. BOONE: In the year and a half, that's correct.

MR. SCHMIDT: Related to what?

MR. BOONE: Noise.

MR. SCHMIDT: What kind of noise?

MR. BOONE: In one case it was, the Orioles were playing and somebody hit a homerun and people cheered and I got a phone call.

MR. SCHMIDT: Okay. They were Yankee fans, huh?

MR. BOONE: I guess, it was outdoors.

MR. SCHMIDT: Okay and what else, what other kinds of issues?

MR. BOONE: There was one occasion where an employee celebrated his birthday at the restaurant and drank a little bit too much and got into an argument with his wife, the argument went out onto the parking lot and we got a phone call from, we don't know which neighbor it was, but we got a phone call from a neighbor threatening to call 911 if we didn't deal

with it.

MR. SCHMIDT: Okay. What did you do?

MR. BOONE: We got them to stop and leave and, and as a result of the policy that I have, you have in your hand there, we suspended the employee for a week.

MR. SCHMIDT: Okay.

MR. BOONE: So it was a week without pay.

MR. SCHMIDT: Okay. So, you had a homerun being hit and an employee in a domestic dispute?

MR. BOONE: That's correct.

MR. SCHMIDT: What other types of problems? You said you had four phone calls over the year and a half.

MR. BOONE: The other two, the other two phone calls were just noise related from outside patrons being too loud.

MR. SCHMIDT: Talking? I mean, not music related.

MR. BOONE: Well, there's never been live entertainment, but it was outside noise.

MR. SCHMIDT: Okay.

MR. BOONE: Related to the operation of the restaurant.

MR. SCHMIDT: Okay. Do you have a policy with your patrons in terms of trying to respect your, your neighbors?

MR. BOONE: Well, keep in mind, the patron we're looking for is the forty to sixty-year-old working person, we're not looking for the twenty-two-year-old or twenty-one-

year-old. We don't want people there that will be leaving the restaurant late at night making noise.

MR. SCHMIDT: Okay.

MR. BOONE: And, and that's not the, the patron we're looking for.

MR. SCHMIDT: Okay. I'm going to show you, if I can, a photograph of, I guess this is a sign or a posting of some type?

MR. BOONE: That's a posting that, as you're leaving the restaurant, it's the last thing you see as you're leaving the restaurant.

MR. SCHMIDT: Okay. As you're leaving by car or you're walking out the door?

MR. BOONE: As you're walking out the front door, it's the last sign you see as you're walking out the front door.

MR. SCHMIDT: And if you can, what does that, can you read that to the Board and then we'll submit it as Petitioner's exhibit number ten.

MR. BOONE: Please be respectful of our neighbors and their sleeping children. Please leave peacefully. Failure to comply will result in suspended privilege, suspended privileges at this establishment.

MR. SCHMIDT: Have you ever had to enforce that where you've had --

MR. BOONE: The one week suspension of the employee.

MR. SCHMIDT: Okay. This will be Petitioner's exhibit number ten. Where, where do most of your clientele come from, Mr. Boone, if you know? Are they local folks from Miller's Island or you get a mix of people from Miller's Island and also from elsewhere or one or the other or both?

MR. BOONE: Well, seasonally, this time of year, before boating season, it's heavily the Edgemere, Dundalk, Miller's Island area, some people from Essex, but mostly Dundalk, Edgemere and Miller's Island. Once, once boating season starts, then we attract people from all over the County.

MR. SCHMIDT: Okay and did you, did you circulate a Petition among your customers and clients and neighbors and others who patronize for their support?

MR. BOONE: Yeah, I posted, I posted a letter on Facebook letting everybody know about the, the hearing and so forth and a lot of people reached out and said how can we show our support and so we put a Petition at the bar for people to sign if they wanted to show their support by signing a Petition.

MR. SCHMIDT: Okay and I'm going to show you what I'm going to mark as Petitioner's Exhibit 11, I believe, Mr. Alston. Am I correct?

BOARD: Yes.

MR. SCHMIDT: And I'll mark this 11-A and 11-B and I

think these are self-explanatory. I realize it's hearsay and I understand that the Board typically gives these, they will admit them and give them the weight that you deem appropriate. But these are Petitions, one is for residents of Miller's Island who support your request and the other is for non-residents, is that correct?

MR. BOONE: That's correct.

MR. SCHMIDT: Okay and these were kept at the restaurant and then people would come in and --

MR. BOONE: As people came in and requested to sign and we, we had them sign, even the one that says non-residents, you'll see that there's a zip code there and you'll see the majority of the people, even though they're not residents of Miller's Island, live somewhere close in the area, 21219, 21222.

MR. SCHMIDT: Okay. How long were you collecting these signatures? There's quite a few, how long it take you to get that, that many signatures?

MR. BOONE: We collected them, I believe we started in December.

MR. SCHMIDT: Okay.

MR. BOONE: So that's from December till now.

MR. SCHMIDT: Okay. Okay. I don't believe I have any further questions of Mr. Boone. Mr. Boone, you're subject to questioning by Mr. Borgerding or Mr. Zimmerman.

MR. BOONE: Thank you.

CHAIR: Who's going to be first? Go ahead, Mr. Borgerding.

MR. BORGERDING: I'll start first.

MR. BOONE: I'm getting double teamed.

MR. BORGERDING: Mr. Boone, would you describe yourself as an experienced business man?

MR. BOONE: Yes, I would.

MR. BORGERDING: Okay. You, if I heard correctly, you had six hundred employees at one property?

MR. BOONE: That's correct.

MR. BORGERDING: Okay. So, you were a patron of the Dock of the Bay when Mr. Tanner owned it?

MR. BOONE: I would, the majority time I came to Dock of the Bay was to eat crabs but, yes, I had visited the Dock of the Bay at least twelve occasions.

MR. BORGERDING: And then you became interested in purchasing the property?

MR. BOONE: I became interested in purchasing the property after it was closed.

MR. BORGERDING: Okay. Didn't, being an experienced businessman, didn't you think it made sense to check out the litigation history of the Dock of the Bay ahead of time?

MR. BOONE: I was getting advice at the time from both Mr. Tanner and from my operating partners at the time

(inaudible) both of whom expressed an opinion that, that this was a hurdle that they could easily navigate.

MR. BORGERDING: The, the music hurdle?

MR. BOONE: That's correct.

MR. BORGERDING: Okay. I'm going to show you some correspondence that I sent to your partner (inaudible) and your partners were Mike Kondylas and Donny Kondylas, that's the Kondylas in Boone Kondylas?

MR. BOONE: That's correct.

MR. BORGERDING: Okay. So, this correspondence was sent in September of 2014, which is about the time you --

MR. SCHMIDT: Mr. Borgerding, before you offer that, can I see it, to see if I might have any objection?

MR. BORGERDING: Oh, I'm sorry. I'm sorry.

MR. SCHMIDT: Thank you. Okay, thank you. You have a copy for me or no?

MR. BORGERDING: No, unfortunately, I --

MR. SCHMIDT: You want to leave me in the dark.

MR. BORGERDING: My bad.

MR. ZIMMERMAN: What are the exhibit numbers?

BOARD: This will be Protestant one for his case in chief.

MR. ZIMMERMAN: Which, which --

BOARD: I don't know which one is which.

MR. ZIMMERMAN: Yeah, can we find out which one is

which?

BOARD: He has to tell me. Which is, this is one?

MR. BORGERDING: Right.

BOARD: This is two?

MR. BORGERDING: Yeah.

BOARD: Okay.

MR. SCHMIDT: And, and I'll just --

MR. ZIMMERMAN: Can we (inaudible).

BOARD: I'm going to let him identify his document and then give it to me, that's --

MR. ZIMMERMAN: Right.

BOARD: -- typically (inaudible).

MR. SCHMIDT: Okay, sure.

MR. BORGERDING: Okay. So, this, indeed, is the correspondence dated September 24th of '14 to Mike Kondylas and Donny Kondylas from myself, correct?

MR. BOONE: Yes, it is.

MR. ZIMMERMAN: That's number one?

MR. BORGERDING: Number one. Okay and attached to that is a letter from the County from Adam Rosenblatt, who used to be with the County, correct?

MR. BOONE: That's on here, yes.

MR. BORGERDING: And the date of that?

MR. BOONE: September 12th.

MR. BORGERDING: Okay. That would be number two, I'd

move both of those into evidence.

CHAIR: Any objection?

MR. SCHMIDT: I'm just going to tech, technically object. I mean, I know we're in an administrative proceeding but I find, I just find it interesting and Mr. Rosenblatt is not here, that the letter from Mr. Rosenblatt is not on any kind of County stationary. And it's not signed either, so I, just from an authenticity standpoint, I'm just not quite sure--

MR. BORGERDING: I will proffer to the Board, I had that discussion with my secretary this morning and she said, well, maybe he sent it by e-mail and that's why it doesn't have the letterhead.

CHAIR: Well, wouldn't it have the e-mail information then (inaudible)?

MR. SCHMIDT: Or the signature or something? I, I don't know.

MR. ZIMMERMAN: You know, it doesn't really matter because the letter (inaudible) 24th he attached to the letter from Mr. Rosenblatt and the purpose was to give notice so it really doesn't matter.

CHAIR: Well, I'm not sure it doesn't matter. I'm not sure it doesn't matter. It, I mean, I mean, typically we get these and we say they're from County files, it'll have County letterhead with the seal, you've been doing this for so long, you've been in front of us many times and so could you

get another copy of this --

MR. BORGERDING: I, certainly, I'm sure the County does have a copy.

CHAIR: Right.

MR. BORGERDING: I could get that and --

CHAIR: Why don't we mark this as Protestant's one, we'll, we'll say Exhibit 2 is I, for i.d. only, for right now and then you could get a copy of that and maybe one that's signed.

MR. BORGERDING: Okay.

CHAIR: That would be helpful. Sure --

MR. SCHMIDT: Yeah, and I'm not doubting Mr. Borgerding's integrity.

CHAIR: -- and I understand --

MR. SCHMIDT: But it's just unusual.

CHAIR: That's correct.

MR. SCHMIDT: Because it's not a, it's not a, it's not on County letterhead, it's not signed, it's just, it's just --

MR. BORGERDING: Well, Your Honors, I assume will take a lunch break and I will go ahead and do that.

CHAIR: Sure, or, or you can, we might need another day, I'm not sure how this is going to work but, you know, at some point, if you could submit that and the bottom of it does have a, you know, a file identification and it appears to be,

has, (inaudible) letter to Frank Borgerding dot, dot doc x. I don't know. It appears to look like it has been typed.

BOARD: It's a word document.

CHAIR: Word document as it, so if you could do that, we'll, how about that? We'll just, for now.

MR. SCHMIDT: That's fine.

CHAIR: Okay?

MR. ZIMMERMAN: But either, the main thing is that Borgerding's letter to Kondylas gives notice.

CHAIR: I understand. Okay, that's your argument. Okay. But just for identifying the document and putting it into evidence. All right.

BOARD: But there's an objection to this document?

CHAIR: Yes.

MR. SCHMIDT: Yes, there is.

BOARD: There's an objection raised to this document.

CHAIR: I.d. only.

MR. SCHMIDT: Yes.

BOARD: All right, i.d. only, okay.

CHAIR: Okay.

MR. ZIMMERMAN: To, just to the second one, not to the first.

CHAIR: Correct.

BOARD: That's correct.

CHAIR: The first one was --

MR. BORGERDING: So Mr. Kondylas, or Mr. Kon, Mr., Mr. Boone, did you see this correspondence before you purchased the property?

MR. BOONE: No, I did not.

MR. BORGERDING: Did you have any knowledge of the prior, you, I, I guess you did say that you did, you thought the hurdle could be overcome so you did have knowledge that there was a Court of Special Appeals prohibiting live music before you purchased the property?

MR. BOONE: I was not familiar at all with the, with, with the, any of the restrictions. I was familiar, the operators had at the time, Donna and Mike Kondylas told me they got a letter from the attorney and that's the extent of my knowledge.

MR. BORGERDING: Okay. When you say the hurdle could be overcome, what was the hurdle, in your opinion?

MR. BOONE: At the time they were operating the restaurant, they, they, they thought or they advised me that once liquor license transferred that the hurdle would go away and that's how they advised me. They, they then scheduled music to commence on November 23rd and they hired Mark Allen. Unfortunately, Mark had to leave, he had to go to a viewing, they hired Mark Allen to play New Year's Eve 2014. So, they were fully, they were completely moving forward with music at that facility when they were managing it in, in October,

November 2014.

MR. BORGERDING: Do you happen to know whether Mr. Tanner hired Mark Allen?

MR. BOONE: I don't know if he ever played there or not.

MR. BORGERDING: Okay.

CHAIR: But you said the hurdle to overcome and then you said if the license, the liquor license had transferred the hurdle would go away but he, the question was, what was the hurdle?

MR. BOONE: They, they made me aware that it was a music restriction, that it was, they led me to believe that it was levied against the liquor license and that once, once the Tanner liquor license transferred, that the hurdle would go away, that the, that the restriction would be removed because it was on the liquor license, not on the building. They clearly didn't understand it.

MR. ZIMMERMAN: Excuse me, are they the Kondylas, I'm having trouble following this chain? They, the, who is --

MR. BOONE: The, the Kondylas and also Mr. Tanner.

MR. BORGERDING: Okay. But being an experienced businessman, didn't this raise some, raise your suspicion? Didn't you think you should look into this yourself?

MR. BOONE: No.

MR. BORGERDING: And why not?

MR. BOONE: They had convinced me that it was a, something that could be overcome rather easily.

MR. BORGERDING: Okay. Do you still feel that way? Obviously not if you're here.

MR. BOONE: Remember, I'm the deaf, dumb and blind guy.

MR. BORGERDING: Well, let me ask you that. Did you have any knowledge of, of the litigation that went on with Mr. Tanner and the community?

MR. BOONE: No, I didn't.

MR. SCHMIDT: Object, I'm just, what's the, what's the relevance? I mean, I don't dispute that I put those cases in.

MR. BORGERDING: He just said he was the deaf, dumb and (inaudible), dumb and blind.

MR. BOONE: Well, that's what you called me at the last hearing.

CHAIR: Overruled.

MR. BORGERDING: No, I said if you had no knowledge of what happened in the history here, you must be deaf, dumb and blind to buy a place and not know that, that's why I said--

MR. BOONE: So your, second time you're calling me deaf, dumb and blind. Thank you very much.

CHAIR: Well, wait a minute. There was a question about knowledge of litigation. I think he responded to that.

I think I what I heard him say is that --

MR. BORGERDING: Did you have any knowledge of litigation between --

CHAIR: What I heard him say --

MR. BORGERDING: -- Mr. Tanner and the neighborhood before you bought this property?

MR. BOONE: I was told there was a music restriction. I was told that music restriction would be removed when the liquor license transferred. I was working under the advice of people who were giving me bad advice. They've also given you bad advice. They've got some affidavits that they've signed for you which aren't truthful.

MR. BORGERDING: Okay. So, so, what you're saying is, you didn't think that you should check into that further?

MR. BOONE: I did not check into it further.

MR. BORGERDING: Do you know what the zoning of Rowboat Willy's is?

MR. BOONE: BM.

MR. BORGERDING: It's different than yours?

MR. BOONE: That's correct.

CHAIR: It's BL?

MR. BOONE: Rowboat Willy's is BM.

CHAIR: BM, okay.

MR. BOONE: Yeah.

CHAIR: You just might want to keep your voice up

because this is all being (inaudible).

MR. BOONE: I'm sorry.

CHAIR: And, and if it gets transcribed later, they might not be able to hear you, yeah.

MR. BORGERDING: Are you aware of any State restrictions of noise levels at the property line?

MR. BOONE: No, I'm not.

MR. SCHMIDT: You don't have a copy of that for me either?

MR. BORGERDING: No, I do not.

BOARD: I have an extra (inaudible).

MR. BORGERDING: So I'm showing you a document which indicates that there is, in fact --

MR. SCHMIDT: Thank you.

MR. BORGERDING: -- restrictions at the property line for noise emanating from your property of either sixty-five decibels, excuse me, during the day or fifty-five at night. So, I'd give you a chance to look at that.

MR. BOONE: Okay.

MR. BORGERDING: Do you have any idea what kind of noise levels would meet those thresholds?

MR. BOONE: No, I'm not.

MR. BORGERDING: Okay. Would you be surprised to know --

MR. SCHMIDT: Objection. The witness said he doesn't

know, I mean, how can he ask him again?

MR. BORGERDING: Next question.

CHAIR: All right, go ahead. It's all right, it's cross.

MR. SCHMIDT: Okay.

MR. BORGERDING: This is a decibel level counter. Would you be surprised that during your testimony with Mr. Schmidt, your noise levels ranged from sixty to sixty-six decibels?

MR. SCHMIDT: Objection.

CHAIR: Yeah, that's be hard to, I'll sustain that only because that appears to be something that perhaps an expert might testify to I suppose but we can't have counsel saying that there was, I mean, a test performed while he's on the witness stand. I would have to sustain the objection. You did ask him the question though before and he said what kind of noise level meet the threshold and he said, I think he said he didn't know.

MR. BORGERDING: Okay. Would you be surprised to learn that normal conversation would emanate to those levels of noise or (inaudible)?

MR. SCHMIDT: Objection. I think that's the same thing, Chairwoman Murphy. I mean, these are, he's not an expert witness, he doesn't know and, I mean, first of all, I don't even know what, what this is and whether this is some

State regulation or not, hasn't been offered at this, to this point but --

CHAIR: The Board hasn't seen the document so I don't, I'm not --

BOARD: Yeah, I mean, do you plan on introducing that as evidence or what?

MR. BORGERDING: Yes, yes, if I could.

CHAIR: I haven't seen the document, I don't know what it is. Is there a copy somewhere or, maybe the witness has it?

MR. BORGERDING: With that I would move it into evidence.

CHAIR: Okay. I have, I'm not sure what it is.

MR. ZIMMERMAN: Can we find out what it is?

MR. SCHMIDT: I have no idea what it is.

MR. ZIMMERMAN: Okay. We just, we just need to have it described.

CHAIR: It's not a Code section, it's not a Maryland Code section, it appears to be something from a website.

MR. BORGERDING: It's from COMAR section, Title 26, Subtitle 2, Chapter 3.003.

CHAIR: Where does it say that?

BOARD: Do you have that? Do you have that?

MR. BORGERDING: No, I do not have that.

MR. ZIMMERMAN: It's available online. Maybe Mr.

Borgerding could get it for you.

BOARD: I'll tell you what, I'll, I'll mark this as three and I'll hold it --

CHAIR: For i.d. and perhaps --

BOARD: -- for i.d. and then you'll get us a document that'll, that says what this is as identified as.

CHAIR: And just for the record, we're talking about a document, it's a one page, it looks like it's from the Maryland Department of the Environment, it appears be something printed perhaps from a website for the Department of the Environment talking about House Bill 190 and if it does reference a COMAR section, easy just to print that COMAR section, submit that or we don't even need it as evidence. I mean, if it's argument, we (inaudible), I mean, but this has been handed to the witness and I'm not sure the witness authenticated the document, the piece of paper is in front of him so we could i.d., we could mark this for i.d. perhaps and then if there's a replacement for it, until then, I don't think the witness is, is, can identify this document.

MR. SCHMIDT: Now, just let the record reflect that I would object to it for all those reasons plus it's dated May 2012, so it's coming up on four years old and it looks, so, I don't even know if it's current and it looks to me like it's a, almost an article that's written by Matthew Rowe, whoever he is.

BOARD: Well, it looks like it was printed from a website on May 19, 2014, that's what's in the corner.

MR. SCHMIDT: Yes, down at the bottom.

BOARD: Right.

MR. SCHMIDT: Yes, sir.

BOARD: So this is, this is, it was printed on May 19, 2014.

MR. SCHMIDT: So it's only, the date of its printing is two years old, or almost, coming up, twenty months.

BOARD: So we'll just hold this for i.d. purposes and if you'd like to update this, which you said there was a COMAR reg for this, right? So, if you could just (inaudible) the COMAR reg, we'd be more than happy to --

MR. BORGERDING: Okay, no problem.

BOARD: I'm going to hold it though.

MR. BORGERDING: Right. I'm going to show another document after counsel (inaudible). So, this document purports to be a noise decibel comparison level. I'd just ask you to look at that for a moment.

MR. BOONE: Okay.

MR. BORGERDING: Okay. So, can you tell me what the decibel level of a violin playing is?

MR. SCHMIDT: Objection. I mean, this witness isn't an expert. He's not a sound expert, he doesn't know what this doc, unless, I mean, there's no foundation that he knows what

this is, he's asking Mr. Boone to read some piece of paper that I don't even know where it's from or what it is.

CHAIR: Right, that's the same problem we have with the other, with the document which is marked as Protestant's three, is that it, I guess what you have in your hand there is one page, it appears to be again, I mean, I'm looking at it from a distance, something, again something MD website, is that, is that right?

MR. BORGERDING: Um hm.

CHAIR: So, I mean, but the witness is just being handed a piece of paper, he can't authenticate the document, it was printed, I suppose, by you and he's not an expert in any of those things so he would just be reading what's on the page. So, it doesn't help the Board in any sense, I mean, if there's an expert that testifies about it or perhaps it's something that could be used in argument.

MR. BORGERDING: Okay, all right.

CHAIR: I'm not sure.

MR. BORGERDING: I understand.

CHAIR: I don't want to --

BOARD: All right and it may be helpful to give it to counsel so that he can offer any objection he has before you get the witness to read it because that would be --

CHAIR: Did you see the document yet? Do, do you have the other document, Protestant's four?

MR. SCHMIDT: No, no, he showed it to me as he was walking by.

MR. ZIMMERMAN: I haven't seen it. I'm wondering if Mr. Borgerding could ask the question without the document.

CHAIR: Well, let's let Mr. Borgerding cross examine the witness and then maybe Mr. Zimmerman will cross examine the witness.

MR. BORGERDING: Now, you had said that you put out on facebook if anyone was interested in supporting you to chime in. Did you receive any facebook posts that were negative to the neighbors?

MR. BOONE: We received many, many positive comments. I don't recall seeing any negative comments regarding our appeal to, and, and there were some people that, that spouted off that, that was inappropriate.

MR. BORGERDING: Okay. No further questions.

CHAIR: All right. Mr. Zimmerman?

MR. ZIMMERMAN: Mr. Boone, just to be clear, where, again, do you live?

MR. BOONE: 250 South President Street, downtown Baltimore.

MR. ZIMMERMAN: That's in downtown Baltimore?

MR. BOONE: That's correct.

MR. ZIMMERMAN: Have you ever lived on Miller's Island?

MR. BOONE: No, I have not. I did, I grew up in West Inverness, a community not far.

MR. ZIMMERMAN: Excuse me?

MR. BOONE: I grew up in West Inverness, a community just a few miles away.

MR. ZIMMERMAN: A few miles away, that's in Dundalk, isn't it?

MR. BOONE: That's correct.

MR. ZIMMERMAN: That's not on a peninsula, that's, that's not right, it's on what is --

MR. BOONE: It's considered part of the peninsula.

MR. ZIMMERMAN: -- on a creek, on a creek? West Inverness?

MR. BOONE: West Inverness is, well, Bear Creek, but it's part of the peninsula, what I consider the peninsula.

MR. ZIMMERMAN: Not the Miller's Island peninsula?

MR. BOONE: Miller's Island is an island, it's not a, the, the, I consider the Dundalk, Sparrows Point, Patapsco High School area, one landmass.

MR. ZIMMERMAN: Yeah, how many miles away is West Inverness, two, three, four, do you know?

MR. BOONE: We had one employee walking to work from West Inverness so it's far enough, it's, it's close enough to walk to work.

MR. ZIMMERMAN: You can walk two or three miles to

work, can't you?

MR. BOONE: Yeah.

MR. ZIMMERMAN: Okay and when did you grow up in West Inverness?

MR. BOONE: I was born in 1953, I lived there until I went away to college in 1971.

MR. ZIMMERMAN: Okay. Where'd you go to college?

MR. BOONE: Sheppard University.

MR. ZIMMERMAN: In West Virginia?

MR. BOONE: That's correct.

MR. ZIMMERMAN: What did you major in?

MR. BOONE: Business.

MR. ZIMMERMAN: Okay.

MR. BOONE: Business management.

MR. ZIMMERMAN: Okay. You're not an expert in music, right?

MR. BOONE: Never purported to be.

MR. ZIMMERMAN: And after college, did you get any graduate degrees?

MR. BOONE: Excuse me?

MR. ZIMMERMAN: Did you get any graduate degrees?

MR. BOONE: No, I haven't.

MR. ZIMMERMAN: Okay. You went into business after college?

MR. BOONE: That's correct.

MR. ZIMMERMAN: What sort of businesses have you been in?

MR. BOONE: I started a firm called Direct Marketing Associates in 1998, which is the firm which I grew to, to grow into the building, the three hundred and sixteen thousand square foot building with six hundred employees located in Baltimore County on Annapolis Road. That business I sold to a company called Harthanks (phonetic) in 1999.

MR. ZIMMERMAN: You had that for one year, in other words?

MR. BOONE: Twenty-three years.

MR. ZIMMERMAN: Let me get the year straight. You started in 1998?

MR. BOONE: No. Started the business in 1978.

MR. ZIMMERMAN: Nineteen seventy-eight and you owned it till 1999?

MR. BOONE: Sold it in 1999, twenty-one years.

MR. ZIMMERMAN: Did you have lawyers helping you with that business?

MR. BOONE: When I needed lawyers, I hired lawyers, that's correct.

MR. ZIMMERMAN: Do you currently have a law firm other than Mr. Schmidt for the zoning case?

MR. SCHMIDT: I'm trying to think of what possibly this could be relevant to but, so I'll object.

CHAIR: Sustained.

MR. ZIMMERMAN: Okay. After you sold, what is it, the direct marketing firm, then what other business did you get into, if any?

MR. BOONE: In 2003, I founded a company called American Direct. We print roll to roll continuous forms for the direct mail industry. I have about forty-five employees located on Duncan's Wood Road, it's an active liable, viable business today.

MR. ZIMMERMAN: Where is Duncan Woods Road?

MR. BOONE: Right off, between Erdman Avenue and, right off Federal Street, near Curley High School.

MR. ZIMMERMAN: Okay and do you get legal advice from time to time relating to that business?

MR. BOONE: Certainly.

MR. ZIMMERMAN: What law firm?

MR. BOONE: Schwartz & Greenbaum.

MR. ZIMMERMAN: And how many properties have you owned, how many properties have you bought and sold?

MR. BOONE: Commercial or residential?

MR. ZIMMERMAN: Commercial, residential, anything.

MR. BOONE: Do you have some time?

MR. ZIMMERMAN: Yes.

MR. BOONE: Is it relevant?

CHAIR: Well, he --

MR. SCHMIDT: Well, I'll object for the record. I mean, I'm not, I'm not, just trying to figure out what the relevance of any of this would be.

MR. ZIMMERMAN: The relevance is that this is an experienced person and to suggest that he would not either know or be able to know or should have known what the restrictions were on this property is, is not very --

MR. SCHMIDT: But --

MR. ZIMMERMAN: -- appropriate, let's put it that way. So, I want to get a sense of how many properties he's bought and sold.

CHAIR: But I --

MR. SCHMIDT: But, Ms. Murphy, I'm not alleging that the restriction isn't valid because he didn't know about. I mean, it's, it was entered, I entered the restrictions, I mean, I, we haven't, I'm not making that argument.

CHAIR: That, that's right, and I agree, I mean, that's the --

BOARD: Yeah, Mr. Zimmerman, are you trying to show that he knew or should have known what the zoning restrictions are?

MR. ZIMMERMAN: I think that's an aspect of the case.

BOARD: And if, if he had known, then what?

MR. ZIMMERMAN: I, my, I think a reasonable person wouldn't have thought to purchase the property --

BOARD: Wouldn't have purchased the property?

MR. ZIMMERMAN: -- thinking that he could have late night music, that's right.

MR. SCHMIDT: And I guess my question would be, so what? What's that got to do with whether this Board should allow --

BOARD: Is there an objection on the floor, is there an objection on the floor?

MR. SCHMIDT: Yes, there is.

CHAIR: Yes.

BOARD: What, what is it?

MR. SCHMIDT: Well, my objection is, I just don't see any relevance, Mr. Alston. I mean, why, I'm not asserting, I mean, I'm not asserting that because he didn't know or should have known or whatever this argument is, that, that the Court of Special Appeals Order is invalid.

BOARD: I agree, sustained.

CHAIR: Right, right.

MR. ZIMMERMAN: I think, just for the record, I think it's, it's part of res judicata and it's an indication that he disregarded the previous situation and when confronted with the fact that he had a use that conflicts with the prior situation now he's just trying to say something to claim a change, to get around the law.

BOARD: Well, you can save that for your closing or

your brief, Mr. Zimmerman.

MR. ZIMMERMAN: All right.

BOARD: Next question.

MR. ZIMMERMAN: Yeah. Who is Mr., Mr. and Mrs. Kondylas? Who are they?

MR. BOONE: They're, they're Miller's Island residents who have operated bars on Miller's Island for years and were original partners in this, in this venture.

MR. ZIMMERMAN: Were they partners with Mr. Tanner also or did they manage his place?

MR. BOONE: I'm not aware of any relationship they had with Mr. Tanner.

MR. ZIMMERMAN: Well, how did you get to know them?

MR. BOONE: They became interested in the property, they didn't have the financial wherewithal to purchase the property and sought me out as an investor.

MR. ZIMMERMAN: And how did they know you or you know them?

MR. BOONE: I've been in, they had, they had a property called Sail Inn that I had been to on a couple occasions, friends of mine, Dave Motta knew them, Russ McClellan knew them, so I was one, in their company on a number of occasions prior to the, us getting together and, and forming a partnership.

MR. ZIMMERMAN: Okay. Are they still your partners?

MR. BOONE: No, they're not.

MR. ZIMMERMAN: Is that due in part to the, that you believe they gave you bad advice, not sufficient advice, about the legal issues concerning the property?

MR. BOONE: No, it was primary due to operational differences of opinion.

MR. ZIMMERMAN: Okay. What is the fire department maximum occupancy status?

MR. BOONE: One forty.

MR. ZIMMERMAN: And were you aware of that when you bought the property?

MR. SCHMIDT: Objection. Same objection. What's the difference if he knew what the fire document occupancy restriction is? What's that got to do with this case?

CHAIR: I'm not sure that's the restriction in any of the cases that either we, but --

MR. ZIMMERMAN: And that's indoor, presumably?

MR. BOONE: Yes.

MR. ZIMMERMAN: You indicated you could get about a hundred outdoor?

MR. BOONE: There's a hundred seats outside.

MR. ZIMMERMAN: Hundred seats outside. People can stand outside too, can't they?

MR. BOONE: They can stand on their heads.

MR. ZIMMERMAN: And your proposal for music would

include outdoor music at certain times, wouldn't it?

MR. BOONE: That's correct.

MR. ZIMMERMAN: And how many employees do you have at the, at the Dock of the Bay?

MR. BOONE: In the, we're a seasonal business and in the summertime, we had sixty employees, eighteen of whom lived on Miller's Island.

MR. ZIMMERMAN: Sixteen or eighteen, I'm sorry?

MR. BOONE: Eighteen, eighteen Miller's Island residences, residents worked at Dock of the Bay this summer.

MR. ZIMMERMAN: All right.

MR. BOONE: We're currently in the middle of the winter, we don't have as many patrons, they're, the current employee level is probably twenty total and of that maybe seven of them live on Miller's Island.

MR. ZIMMERMAN: And how many during the summer total?

MR. BOONE: It was roughly sixty.

MR. ZIMMERMAN: Okay and some of them are on different shifts?

MR. BOONE: We're a bar restaurant, we open at 11:00, we close at, we have two shifts every day, we work seven days a week. No one works all seven days.

MR. ZIMMERMAN: I get it. Okay. And your current website indicates you're open till 1:00 a.m. on weekends, isn't that correct?

MR. BOONE: We've not had our doors open past 10:00 in six months. I'm not sure what the website says. I haven't been on it for a while. If you'd like for me to change that, I'll have it changed this afternoon.

MR. ZIMMERMAN: The fact is, the website is (inaudible).

MR. BOONE: I haven't seen the website, I haven't looked at our website in a while.

MR. ZIMMERMAN: It doesn't (inaudible).

MR. BOONE: Show me a copy, show me a copy, if you like.

MR. ZIMMERMAN: This is part of the package of the Motion exhibit, it's the last page of the Motion exhibit. First page is your website, Monday to Thursday, 11:00 a.m. to 11:00 p.m., Friday, Saturday 11:00 a.m. till 1:00 a.m., Sunday 9:00 a.m. breakfast buffet, close at 8:00 p.m.

MR. BOONE: Okay.

MR. ZIMMERMAN: Did you have anything to do with arranging that website?

MR. BOONE: Yes, I did.

MR. ZIMMERMAN: And did you review the website before it was actually put online?

MR. BOONE: I'm sure I approved that.

MR. ZIMMERMAN: Okay. Let's make this as a People's Counsel Exhibit, (inaudible) one.

MR. SCHMIDT: Mr. Zimmerman, do you have a copy of that for me or is --

MR. ZIMMERMAN: You have a copy in, it the package, Motion package, it's the last page.

MR. SCHMIDT: Is that this, this?

MR. ZIMMERMAN: Okay, yes, yes, it is.

MR. SCHMIDT: Okay, thank you.

MR. ZIMMERMAN: And how often are you personally at the Dock of the Bay restaurant or institution or whatever we call it?

MR. SCHMIDT: You're right, it's Dock of the Bay restaurant.

MR. BOONE: I probably average a hundred hours a week there.

MR. ZIMMERMAN: Okay. So, your other businesses run by themselves?

MR. BOONE: I've got three other businesses, I can't be in all three of them. I operate them from my office at Dock of the Bay.

MR. ZIMMERMAN: Okay. Do you have a sound engineer on staff?

MR. BOONE: No.

MR. ZIMMERMAN: So, if somebody plays music there, there's no way of knowing how loud it's going to be.

MR. BOONE: I've got the same device he has. I'll

say they were both purchased from Radio Shack.

MR. ZIMMERMAN: And you're going to be there full-time, measuring the sound levels of every musician that you hire?

MR. BOONE: No.

MR. SCHMIDT: Unless the Board requires that, Mr. Zimmerman. Obviously, there's no music being played there now.

MR. ZIMMERMAN: No music being played there now because you were told by County authorities that it was inappropriate, correct?

MR. BOONE: I was told by County authorities they'd rip my liquor license off the wall.

MR. ZIMMERMAN: If not for that, you would have music there?

MR. BOONE: I would.

MR. ZIMMERMAN: And it would be both outside and inside at various times?

MR. BOONE: That's correct.

MR. ZIMMERMAN: And do you have anyone on staff who would be hiring musicians if you were permitted?

MR. BOONE: I haven't hired a musician. I do not have anyone on staff to hire musicians.

MR. ZIMMERMAN: The ones you were going to hire, that you did that personally?

MR. BOONE: That's correct.

MR. ZIMMERMAN: Now, if anyone under forty comes into your institution, do you tell them they can't, they can't, they're not permitted?

MR. SCHMIDT: Objection. I mean, come on.

MR. BOONE: First of all, it's a restaurant, not an institution --

CHAIR: Wait a minute, wait a minute. There is an, there was an objection.

MR. SCHMIDT: It's, it's just argumentative. That's all.

MR. ZIMMERMAN: No, it isn't. You've indicated you want your people forty, forty years old to sixty years old, correct?

CHAIR: We'll, we'll overrule it. You have an answer to the question?

MR. BOONE: Our demographic is forty to sixty.

MR. ZIMMERMAN: So, if somebody thirty-five comes in, do you check their driver's license to make sure they're --

CHAIR: Are you restricting people by age?

MR. BOONE: We're not restricting people by age.

MR. ZIMMERMAN: And if you have music there, there's a good chance you will get younger people, won't you?

MR. SCHMIDT: Objection.

MR. BOONE: That's your speculation, not mine.

MR. ZIMMERMAN: You don't know the answer?

MR. BOONE: That's your speculation, not mine.

MR. ZIMMERMAN: Can you guarantee that your demographic will not change if you have music?

MR. BOONE: There are no guarantees.

MR. ZIMMERMAN: And if the Board indicated that your establishment has to close at 10:00 p.m. every night, is that a limit you could live with?

MR. BOONE: I don't believe the Board would require me to close. The Board may require me to, to stop playing music at 10:00 at night and I would certainly have not done anything to, in violation of any of those zoning restrictions that I've been aware of.

MR. ZIMMERMAN: Why do you think the Board couldn't, if it so, if it so chose, assuming the law allowed it to, putting aside res judicata for a moment, what makes you think that the Board couldn't impose a, a restriction on hours to 10:00 p.m.?

MR. SCHMIDT: Objection. It's got nothing --

MR. BOONE: You're an attorney, not me.

MR. SCHMIDT: Mr., Mr. Boone, hold on.

CHAIR: Let him --

MR. SCHMIDT: Objection. It's argumentative, it's irrelevant, it's not whether he has a right to operate. This case is about whether he can have music or not and it's not, he's not a lawyer. Whether the Board would have the ability to

impose such a restriction, whether that would be, pass constitutional muster, it's just nothing designed other than to antagonize Mr. Boone and argue with him, that's the whole purpose of the question.

CHAIR: Now, let me, let me just rephrase. It was the question, should the question have been or was this your question, if we had a restriction that you'd stop music at 10:00 --

MR. SCHMIDT: No, close the restaurant at 10:00.

CHAIR: I, I heard him say close but did you --

MR. ZIMMERMAN: Close the establishment, whatever it is.

CHAIR: Oh, it was close the establishment.

MR. SCHMIDT: Yes.

CHAIR: Okay. Well, then that's not, that's not, I mean, close the establishment? We're talking about the music, that's the issue. The music, whether or not he can play music.

MR. ZIMMERMAN: Well, one way you make sure you don't get loud music is to close the place. Anyway, I'm asking him, would it, would it be acceptable to him to have a condition that he would have to close the establishment at 10:00 p.m.

MR. SCHMIDT: Objection.

CHAIR: Okay.

MR. SCHMIDT: Objection, because it's not relevant, I don't believe you have the authority to do it, it's a permitted

use in the BL zone, I mean, there's been no violation. He's just trying to argue with the witness.

CHAIR: Well, we're, yeah, we're not restricting the restaurant. We can't restrict the, I mean, we're not restricting the restaurant to operate. The restaurant is operating. So, we're not here in, in, in a Code violation case of the restaurant, you know, and so we're just talking about whether or not the issue is lifting restrictions on, on music. So, I'm going to sustain that objection because I don't think, I don't think it's relevant, specifically, if you're asking a question about whether he would agree to a restriction on --

MR. ZIMMERMAN: My, my point is --

CHAIR: Wait a minute. If you're going to ask a question about whether he's restricting it, if he's agreeing to a condition on time periods involving playing of music, that's relevant because he did testify about it on direct. Okay, go ahead.

MR. ZIMMERMAN: I respect the Board's decision.

CHAIR: I understand.

MR. ZIMMERMAN: My point was, that was an effective way to make sure that you're not going to get the loud, late music.

CHAIR: Okay.

MR. ZIMMERMAN: That was my point.

CHAIR: Okay, understood.

MR. ZIMMERMAN: Okay. So, so you're saying you would agree to it, part of your proposal is it's okay with you, assuming it were legal, putting aside the legal issues for a moment, to have all music stop at 10:00 p.m. on weekends, every night?

MR. BOONE: That's not what I proposed.

MR. ZIMMERMAN: Okay. So, you're not proposing the music ends at 10:00?

MR. BOONE: What I said is that music inside would stop at 11:00 p.m. on Fridays and Saturdays, stop at 7:00 p.m. on Sundays, music outside would stop at dusk.

MR. ZIMMERMAN: Every day during, when it, weather permitting?

MR. BOONE: Well, I'm not going to have music every day but, yes, it would be --

MR. ZIMMERMAN: But if some musician wanted to come in on a Thursday and wasn't very expensive, you might, you wouldn't necessarily say no.

MR. BOONE: It would be my right to have a musician on a Thursday if someone wanted to come in on Thursday. Many of my competitors have music Wednesday, Thursday and Friday.

MR. ZIMMERMAN: So, you'd like to have that, you'd like to have music if you feel it appropriate Monday, Wednesday (inaudible)?

MR. BOONE: That's not at all what I said. I told

you what my competitors are doing. It's nothing that I said.

MR. ZIMMERMAN: Well, you'd like to have that, right?

MR. BOONE: I do not --

MR. ZIMMERMAN: So, if the Board said no outside music at all Monday through Friday, that would be okay with you?

MR. SCHMIDT: Objection. That's not what he's saying. Why does Mr. Zimmerman want to argue with the witness?

MR. ZIMMERMAN: I'm asking.

MR. SCHMIDT: He said twice what he, he is proposing in terms of the hours. Say it again, Mr. Boone, what are you proposing?

MR. BOONE: Music up till 11:00 inside, music up to dusk outside.

MR. ZIMMERMAN: Every day of the week?

MR. BOONE: Every day of the week.

MR. ZIMMERMAN: And dusk, during the summer, could be 9:00 p.m.?

MR. BOONE: That's correct.

MR. ZIMMERMAN: And your proposal is that you accept not more than one musician, no back up, no, no machines that, you know, those machines that create the music like one person can play five different instruments?

MR. BOONE: I'm not sure what proposal you've looked at, but I've not proposed anything regarding the type or kind

of music I'm proposing or the background or anything else.

MR. ZIMMERMAN: So, that's open, that's left open?

MR. BOONE: Yes, it is.

MR. ZIMMERMAN: So, if it was your judgment, you could have a three-piece band, if you thought it was acceptable?

MR. BOONE: Well, there's some jazz quartets that I'd like to have, which are four pieces, but they play softly and I'm okay with that.

MR. ZIMMERMAN: Well, you're not a music expert, you don't know what's soft and what's not soft, do you?

MR. SCHMIDT: Objection. You have to be an expert to know what soft is and not soft? Come on, Mr. Zimmerman. Objection, Ms. Murphy.

CHAIR: Overrule. We'll overrule.

MR. SCHMIDT: Okay.

CHAIR: This is cross examination and the whole issue is sound and how loud it is so, do you, you, I guess the question was, --

MR. ZIMMERMAN: What was the last question?

CHAIR: Well, he --

MR. SCHMIDT: Does he know what soft is, was the last question.

MR. ZIMMERMAN: Yeah, I mean, have you ever heard When the Saints Go Marching In? Have you ever heard that

played?

MR. BOONE: Sure.

MR. ZIMMERMAN: That can be really loud, can't it?

MR. BOONE: Yes, it can. It can be loud or soft.

MR. ZIMMERMAN: One, a single jazz player can be pretty loud, can't, can't he?

MR. BOONE: A single loud, a single jazz player can be very loud and can be very soft, you're very, exactly right. Thank you for bringing that up.

MR. ZIMMERMAN: Right.

CHAIR: So, let me just ask. So, you, one of the things you said was you would agree to a condition that there was some sound regulation. How would the Board regulate sounds?

MR. SCHMIDT: Can I answer that?

CHAIR: Can I, let me ask him.

MR. SCHMIDT: Okay.

CHAIR: And maybe you can answer --

MR. SCHMIDT: Because it's a legal question as much as anything.

CHAIR: Okay. Closing argument. Do you have any idea, I mean, maybe you don't know the answer? Maybe it's not fair for me to ask the question but do you have any idea how would we, how do we regulate, I mean, we're three lawyers sitting up here.

MR. BOONE: It's, it's, I would assume by a decibel letter, level using the type of device he has there on the table.

CHAIR: Mr. Borgerding's device that I said was, he couldn't use on you?

MR. BOONE: Right, yeah. A decibel level which, which tells you how loud everything is.

CHAIR: And you say you have one of those devices?

MR. BOONE: Yes, we do.

CHAIR: And is it your, is, are you proposing that you're going to use that device every time you have a band or you have, I mean, how, how is the Board supposed to know whether --

MR. BOONE: Well, what I would suggest is that we come to an agreement what decibel level was agreeable and then we limit it to that decibel level and each, each night, anytime music was being played outdoors, we would measure what the decibel level is and make sure that the band complied to be with inside that decibel level.

MR. BORGERDING: Can, can it change though, the decibel level, depending on what notes or what they're playing? I mean, we're not sound experts either here.

MR. BOONE: Yeah. No, I'm assuming it is and I, and I would want to keep it on the, on the lower side, well within the range of the decibel level.

CHAIR: Well, how about the inside music, because one of the things we discussed in our former opinion was people had problems with the music inside. How, I mean, is there, would you suggest there would be also a regulation of that?

MR. BOONE: The loudest our facility has gotten is when the Ravens scored a touchdown against the New England Patriots.

CHAIR: I understand but like if you have music, it would be a different story.

MR. BOONE: I went outside during that time and our doors seal up pretty tight, I couldn't hear a thing outside. We, our, our music inside is, cannot be heard outside unless the doors are opened. It's pretty tight inside.

CHAIR: Okay and you might want to follow up with that. Maybe in closing or something or maybe argument (inaudible) --

MR. SCHMIDT: And closing the, let me just say, there may or may not be State regulations that might come into play and so that might be something that the Board may choose to adopt or may say we're going to defer to the State regulations as it relates to that. I think the point is, Ms. Murphy, just to, what Mr. Boone has said is he's running a restaurant where people are eating so the idea is that people are not going to be, are going to be able to eat and converse, that's what he said on direct examination.

CHAIR: I understand, right.

MR. SCHMIDT: So I think by nature, if that's what he's trying to do, most people who are, unless, I mean, you either go to hear a band or you go to eat.

CHAIR: Understand, but you're, but there might be an objection only because now you're testifying.

MR. SCHMIDT: I'm sorry.

CHAIR: But I, I understand your point, I understand, I don't want you to get the, but I understand what you're saying. I understand what you're, because we did hear him say that. Okay.

BOARD: Can we get to the next question?

CHAIR: Yes.

MR. ZIMMERMAN: Yeah, and having live music obviously is very, very important to you, isn't it?

MR. BOONE: Yes, it is.

MR. ZIMMERMAN: Did you read, have you ever read the Board of Appeals 2008 decision?

MR. BOONE: I read a number of decisions, I can't identify is that one particular one I've read, but I've, I have read a few.

MR. SCHMIDT: Now, if Mr. Zimmerman is going to get him to read and play lawyer or whatever he's going to do --

MR. ZIMMERMAN: No.

MR. SCHMIDT: -- with the Board of Appeals' decision,

I'm going to object right now. It's got no relevance. He's not an attorney, it says what it says.

MR. ZIMMERMAN: My question is, have you ever read this decision from 2008 in the Larry Tanner history --

MR. SCHMIDT: And my, objection. Who cares whether he has or not? What admissible evidence is that going to lead us to? Whether he's read that or not?

CHAIR: I'm not sure either. I mean, it speaks for itself. It's in evidence. We've read it, I can tell --

MR. ZIMMERMAN: It's an indication of how much regard he has for what he's doing.

MR. SCHMIDT: Baloney. That's a huge leap. Objection.

CHAIR: Yeah, we, yeah, sustain the objection.

MR. ZIMMERMAN: Okay. I would, I would proffer, based on Mr. Schmidt's objection, the witness probably has never read the decision.

CHAIR: Okay.

MR. SCHMIDT: How does he know? How do you know? How are you making that proffer, Mr. Zimmerman?

CHAIR: Okay, let's, let's, let's play nice in the sandbox.

MR. ZIMMERMAN: Why would you object?

MR. SCHMIDT: Because I'm trying to have --

CHAIR: Come on, okay, okay, okay. All right.

Listen, we sustained the objection.

MR. ZIMMERMAN: All right.

MR. SCHMIDT: Thank you.

MR. ZIMMERMAN: Since you're not a music expert, you have no idea what a normal sound level is, do you?

MR. BOONE: You're correct, I'm not a music expert.

MR. ZIMMERMAN: And assuming that the 2008 decision found that Mr. Tanner was operating above normal allowed sound levels, even though he wasn't violating State law, how are you going to figure out what an acceptable sound level is, especially since you're not a music expert?

MR. SCHMIDT: Do you understand that question, Mr. Boone? If you can, can understand it, take a shot at answering.

MR. BOONE: Yeah, it's my, it's my, it's my intent, intention to monitor the sound level by using the same kind of device he has there on the table.

MR. ZIMMERMAN: Okay. Is it your view that as long as you're not violating State law that it's an acceptable sound level?

MR. BOONE: I'm not familiar with State law, so I can't answer that question.

MR. ZIMMERMAN: So, what decibel level are you proposing as a maximum?

MR. BOONE: I have not made that proposal.

MR. ZIMMERMAN: So, what I would suggest to you is that what you're asking the Board to do is impractical and unenforceable.

MR. SCHMIDT: Objection. Argumentative.

MR. ZIMMERMAN: Do you disagree with me?

MR. SCHMIDT: Objection.

CHAIR: That, that is argumentative. Sustained. I mean, that's argumentative and you can say that in closing.

MR. ZIMMERMAN: Okay.

CHAIR: You can't really answer the question so --

MR. ZIMMERMAN: Okay and, and are you saying at all times that live music is being played, you're going to be personally in attendance with a sound meter?

MR. BOONE: I never said that.

MR. ZIMMERMAN: So how is all this going to be monitored?

MR. BOONE: I'll have an army of people with sound meters.

MR. ZIMMERMAN: Do you expect us to believe that?

MR. BOONE: I don't ex, I don't know what's coming out of your mouth.

MR. ZIMMERMAN: That you're going to have an army of people with sound meters?

MR. BOONE: They'll be a sound meter on presence every night, the manager will have full working knowledge of

how to use it.

MR. ZIMMERMAN: And what will be the acceptable level?

MR. BOONE: That'll be determined at a later time.

CHAIR: Yeah, he said he didn't propose a certain --

MR. SCHMIDT: By the Board of Appeals.

MR. ZIMMERMAN: And it sounds, sounds, music sounds spike, they vary, right?

MR. BOONE: I'm sorry, repeat the question.

MR. ZIMMERMAN: Music sounds, when somebody is playing music, during the same musical piece, the sound level will vary, won't it?

MR. BOONE: Most of the sound will be controlled by the level of amplification.

MR. ZIMMERMAN: And as far as your weekend afternoon hours, when weather permitting, what are the hours of live music precisely that you're proposing? You said until dusk, well, what are we talking about?

MR. SCHMIDT: Objection. I think it's asked and answered again, but go ahead, Mr. Boone.

CHAIR: Dusk.

MR. SCHMIDT: Do it again, dusk, that's when the sun goes down.

MR. BOONE: Most, most of the people on the dock bar business have Sunday afternoon music from 1:00 to 5:00, 1:00 to

6:00.

MR. ZIMMERMAN: And what's your, you said dusk.

MR. BOONE: Dock.

MR. ZIMMERMAN: D-U-S-K?

MR. BOONE: D-O-C-K, dock bar. Most of the people, there's, there's eight dock bars in the eastern Baltimore County area, they all have outdoor music, they all have Sunday afternoon music.

MR. ZIMMERMAN: Okay, that wasn't my question.

MR. BOONE: Okay. What was your question?

MR. ZIMMERMAN: My question is, your proposal is to be able to have live music on afternoons till dusk any day of the week?

MR. BOONE: Any day of the week.

MR. ZIMMERMAN: And we've already established that dusk, the longest days of the summer, could be up till close to 9:00 p.m., correct?

MR. BOONE: That's correct.

MR. ZIMMERMAN: And what is there to guarantee that the music won't keep on going after dusk?

MR. BOONE: If it's, if it's a, if it's written into the Order, I will comply.

MR. ZIMMERMAN: At an undetermined sound level to be determined later by you?

MR. SCHMIDT: Objection.

CHAIR: No, that's not what he said.

MR. SCHMIDT: Objection. That's not what he said.

CHAIR: He didn't propose a certain sound level. I think he was suggesting to the Board if the Board was imposing a sound level that he would live with that and monitor it.

MR. SCHMIDT: Right.

CHAIR: And he would monitor it either by himself or through managers, is what he said.

MR. ZIMMERMAN: But he had no idea what that sound --

CHAIR: He didn't suggest or propose a sound level, correct.

MR. ZIMMERMAN: Okay.

CHAIR: I mean, so we, we're --

MR. ZIMMERMAN: So how could the Board find --

CHAIR: Okay. He's, well, he hasn't suggested one but that doesn't mean, you know, go ahead.

MR. SCHMIDT: The Board can determine it, we can submit it in closing argument, any number of things.

MR. ZIMMERMAN: I disagree totally with Mr. Schmidt, absolutely no way.

CHAIR: Okay, I understand. But that's argument. But, go ahead. Any more questions? We're going to try to break for lunch.

MR. ZIMMERMAN: Right, I get --

CHAIR: Trying to get this witness finished.

MR. ZIMMERMAN: I'm close, I'm close, I'm close.

CHAIR: Okay.

MR. ZIMMERMAN: Have you had --

MR. SCHMIDT: Is he done, oh, I --

MR. ZIMMERMAN: Have you had music at any of your previous businesses?

MR. BOONE: Yes.

MR. ZIMMERMAN: Which one?

MR. BOONE: I've had Christmas parties with music, grand opening parties with music.

MR. ZIMMERMAN: But, I mean, have you ever operated--

MR. BOONE: I've never had music for hire, never had, never had music in there for commercial purposes. I've had music to have celebrations within my businesses.

MR. ZIMMERMAN: You've never previously operated a facility like this one?

MR. BOONE: No, I have not.

MR. ZIMMERMAN: Just to get, just to pin down, does your property have several tax accounts?

MR. SCHMIDT: For the record, it's comprised, I think, as shown on the plan, it might be two different, several different lots. It's the original plat of Bowley's Quarters. Let me see if it shows on there.

MR. ZIMMERMAN: I want to show you State Department of Assessment & Taxation real property data for what appears to

be your property. We're going to make this People Counsel Exhibit 2, it's four pages actually. Would you like to take a look at this? It's the only copy I have. Would you like to see?

MR. SCHMIDT: Why start showing me exhibits now? I, I believe, I'm not sure what the point is but I know it's, the property is comprised, Bowley's Quarters was platted back in the twenties and there are all these lots and he owns, I guess, according to this, what, lot, does it say on here, Mr. Zimmerman?

MR. BOONE: It, it's four or five lots.

MR. SCHMIDT: Four, it's four --

MR. ZIMMERMAN: Right.

MR. SCHMIDT: Lot 504, 500 --

MR. BOONE: Yeah.

MR. SCHMIDT: -- 502 and 501.

MR. BOONE: Right.

MR. ZIMMERMAN: Okay. So --

MR. SCHMIDT: They've been used in conjunction with one another, I would say that they probably merged into one legally.

MR. ZIMMERMAN: Let's mark this and then I'd have, just have one or two questions for Mr. Boone.

BOARD: This is your, I'll tell you what, I'm going to do 2-A.

MR. ZIMMERMAN: Okay.

CHAIR: Any objection to the SDAT records?

MR. SCHMIDT: They speak for themselves. I have no objection.

MR. ZIMMERMAN: Okay and according to this exhibit, all these different lots were in one deed. Would you like to look at this? Can you agree with me? It looks like you acquired, you had one deed and those included all these different lots.

MR. BOONE: I, it sounds correct.

MR. ZIMMERMAN: Okay and according to this, the date, the date of the deed was October 21st, 2014, is that, does that fit with your recollection?

MR. BOONE: That sounds a little bit late.

MR. ZIMMERMAN: Okay, we can get the deed.

MR. BOONE: Where's October 21st there?

MR. ZIMMERMAN: On seller, Fifth Street, LLC, date October 21st, 2014.

CHAIR: Most likely the recording date for the deed.

MR. ZIMMERMAN: All right.

CHAIR: Even if you purchase it in August, your sales contract might have said August.

MR. BOONE: Okay.

CHAIR: By the time the deed got recorded.

MR. ZIMMERMAN: All right.

MR. BOONE: Okay.

CHAIR: But we believe he owns the property. I don't think there's any dispute (inaudible).

MR. ZIMMERMAN: No, we can get the deed. I wanted to get the timing of it. We'll get the deed. I just wanted, I wanted to see exactly when the transaction occurred.

MR. SCHMIDT: Accor, according to the plan, and, it shows Lots 500, 501 and 502, which are three lots that were perpendicular to Cuckold Point Road, and then there are three other lots that are parallel to the road, 503, 504 and 505.

MR. ZIMMERMAN: Yeah, no, the point was just to get the timing of the transaction, that's all.

MR. SCHMIDT: Maybe Mr. Zimmerman doesn't believe we own the property or --

MR. ZIMMERMAN: No, no, it wasn't a question of not believing you owned the property.

MR. SCHMIDT: We stole it from someone or whatever it would be.

MR. ZIMMERMAN: No, that's, that's not the point. The point is to show the timing. We can get the deed. We'll, we'll, we'll get the deed.

CHAIR: If you think you need it, I mean, I'm not sure why we need that either but.

MR. ZIMMERMAN: Well, I think, I think it, I think to the extent it's relevant to the correspondence that Mr.

Borgerding showed.

CHAIR: Are you almost finished with your --

MR. ZIMMERMAN: I just, I am, I am.

CHAIR: -- and, and I, I don't want to rush you because I (inaudible).

MR. ZIMMERMAN: No, I'm really, I'm cognizant of the Board's schedule and everybody's interest (inaudible). I think we're (inaudible).

CHAIR: You're finished, okay. Is there --

MR. BORGERDING: Your Honor, if I could just have a couple more questions?

CHAIR: Okay, then are you going to have rebuttal?

MR. SCHMIDT: No, I --

CHAIR: Okay.

MR. SCHMIDT: I have about two questions just to clarify something for the Board.

CHAIR: Okay.

MR. BORGERDING: Mr., Mr. Boone, you testified that you own one of these devices?

MR. BOONE: That's correct.

MR. BORGERDING: And you know how to operate it?

MR. BOONE: I've never tried.

MR. BORGERDING: You've never operated it?

MR. BOONE: No.

MR. BORGERDING: No further questions.

CHAIR: You say one of these devices, why don't you just describe for the record what you're holding up?

MR. BORGERDING: It is a decibel monitoring device.

MR. SCHMIDT: Can I see it, Mr. Borgerding?

MR. BORGERDING: It tells you the amount of decibels in a conversation.

MR. SCHMIDT: And this has an on or off button, I'm assuming, Mr. Borgerding?

MR. BORGERDING: I do not know.

VOICE: It's a dial.

MR. SCHMIDT: It's a dial. Oh, an on and off dial, okay.

VOICE: Not on or off but it sets the rate of decibel on the side.

MR. SCHMIDT: Okay. Just, Mr., are you done, Mr. Borgerding? Excuse me.

MR. BORGERDING: Yep.

MR. SCHMIDT: Mr., just so you're clear, when you, when the LLC, which you're a member, bought the business, you were, you were members of that with Mr. and Mrs. Kondylas and you?

MR. BOONE: That's correct.

MR. SCHMIDT: Then, there then came a time that you severed that relationship with them so that you are now the entire owner of the LLC?

MR. BOONE: That's correct.

MR. SCHMIDT: No other questions. Just to make that clear.

CHAIR: Okay. Why don't we do this, take a lunch break. I think we're finished with this witness unless we have --

BOARD: He's got some re-direct.

CHAIR: Oh, you have, that was his --

MR. SCHMIDT: I did, that was it.

BOARD: Oh, that was it?

MR. SCHMIDT: That was it.

BOARD: That was it, okay.

CHAIR: Yeah, don't encourage him.

MR. SCHMIDT: Can, we can go off the record but can we approach?

CHAIR: One second.

MR. SCHMIDT: Yeah. I just want to ask about scheduling.

(RECORD PAUSED - 12:45:33 PM)

(ON RECORD - 01:36:29 PM)

CHAIR: Okay. We're back on the record after lunch. We're a few minutes late, tried not to be late but we, you know.

MR. SCHMIDT: It's hard.

CHAIR: Try to be on time. We were in the

Petitioner's case still. You have a next witness?

MR. SCHMIDT: Yeah, we have a couple of people who have shown up from the community who wanted to speak and I told them to try to make it quick, so.

CHAIR: Sure.

MR. SCHMIDT: Cheryl Gowers. Ms. Gowers, if you want to come up?

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MS. GOWERS: I do.

BOARD: Okay. Can you please state your name and address for the record?

MS. GOWERS: Cheryl Gowers, 2812 Bay Drive, Miller's Island, Maryland.

BOARD: And spell your last name for the record.

MS. GOWERS: G-O-W-E-R-S.

BOARD: Thank you.

MR. SCHMIDT: Ms. Gowers, so you live on, on Bay Drive, on Miller's Island?

MS. GOWERS: Yes, sir.

MR. SCHMIDT: How long have you lived there?

MS. GOWERS: Since '93.

MR. SCHMIDT: Okay. So, I assume you are familiar

with the Dock of the Bay property?

MS. GOWERS: Yes, I am.

MR. SCHMIDT: And did you live there, you lived there when Mr. Tanner owned it?

MS. GOWERS: Yes, sir.

MR. SCHMIDT: You've heard it described that he had very loud music going to very late at night?

MS. GOWERS: Yes, sir.

MR. SCHMIDT: Can you tell the Board a little bit about what his operation was as a resident, how you perceived it, just tell us a little bit about it?

MS. GOWERS: Very loud, heavy metal. He also didn't really care about the residents. I actually came to Court for, with the Miller's Island Association because of Mr. Tanner. He had no respect for the residents whatsoever.

MR. SCHMIDT: When you say heavy metal, rock and roll, electronic instruments and --

MS. GOWERS: Loud band, you know, full size bands and --

MR. SCHMIDT: How many people?

MS. GOWERS: Five, possibly.

MR. SCHMIDT: Okay. Outside?

MS. GOWERS: Yes.

MR. SCHMIDT: And inside or just outside?

MS. GOWERS: I know, only have known the outside.

MR. SCHMIDT: Okay. Could you hear it from your property?

MS. GOWERS: Sometimes, yes.

MR. SCHMIDT: How far away are you as the crow flies?

MS. GOWERS: Five blocks.

MR. SCHMIDT: Okay and till how late at night did he have music playing?

MS. GOWERS: Twelve, 1:00, sometimes.

MR. SCHMIDT: Okay. On weekends or weekdays?

MS. GOWERS: Mostly weekends.

MR. SCHMIDT: Okay.

MS. GOWERS: I don't recall too much during the week.

MR. SCHMIDT: All right. Now, have you been to the Dock of the Bay since Mr. Boone has owned it?

MS. GOWERS: I have been working for Mr. Boone since he opened.

MR. SCHMIDT: Okay. You work there. What do you do?

MS. GOWERS: I am a waitress.

MR. SCHMIDT: Okay and the business at the Dock of the Bay is what? What's, what do you do?

MS. GOWERS: I'm a waitress, it's very family oriented, Ken is an awesome guy. He, you know, he talks to the customers, he interacts with them, it's a wonderful establishment.

MR. SCHMIDT: Okay. Family type atmosphere?

MS. GOWERS: Yes, sir.

MR. SCHMIDT: You heard him describe the clientele as mainly older, forty to sixty, is that accurate from your experience?

MS. GOWERS: Yes, sir.

MR. SCHMIDT: Okay. Obviously, you don't throw out people who are under forty years of age?

MS. GOWERS: No.

MR. SCHMIDT: Okay. All right. Anything else you'd like to tell the Board? I know you came all the way out here today to testify.

MS. GOWERS: I've been, my father-in-law actually built his house in 1985, so I've actually been on Miller's Island since 1985 because I was with my boyfriend, which is now my husband, and Fisherman's was a lot worse than what Larry Tanner had it as and Ken is not that type of person. That's not what he wants, that's not what he's looking for and I just wish the residents of Miller's Island would just give him a chance.

MR. SCHMIDT: Now, Fisherman's is the old Dock of the Bay, just so the Board understands.

MS. GOWERS: Yes.

MR. SCHMIDT: Okay.

MS. GOWERS: Yes.

MR. SCHMIDT: I forgot to ask you too, are there any

other establishments on Miller's Island that have music?

MS. GOWERS: Yes.

MR. SCHMIDT: Which ones?

MS. GOWERS: There's the Islander and the White Swan and I have worked at both places.

MR. SCHMIDT: Okay. Now, are they restaurants?

MS. GOWERS: They are restaurant/bars, yes.

MR. SCHMIDT: Okay and do they have music inside or outside or both?

MS. GOWERS: Inside.

MR. SCHMIDT: Okay. Do they ever have it outside?

MS. GOWERS: No.

MR. SCHMIDT: Okay. How about, how about Rowboat Willy's next door at Bill's Boats?

MS. GOWERS: That is an outside.

MR. SCHMIDT: Okay and it has different zoning and different approvals but --

MS. GOWERS: Correct.

MR. SCHMIDT: -- there is outdoor music there next door?

MS. GOWERS: Correct.

MR. SCHMIDT: Okay. Okay. I don't think I have any other questions. Thank you, ma'am.

MS. GOWERS: Thank you.

MR. SCHMIDT: They can ask you questions so.

MR. BORGERDING: You don't have any bars or restaurants adjacent to your property where you live?

MS. GOWERS: As of right now, no. But when I built my house, we did. We had Woyster's (phonetic), which was all the way down at the end of Cuckold Road and Bay Drive.

MR. BORGERDING: Okay. But right now you don't?

MS. GOWERS: No.

MR. BORGERDING: So you don't have to contend with any noise from any establishments?

MS. GOWERS: As, as of right now, no. But like I said, when I built my house, yes, we did and when we built our house, there were five or six bars that would have music outside and you could hear the whole island was loud and playing music the whole time.

MR. BORGERDING: It was disturbing as a resident, right?

MS. GOWERS: I wouldn't say it was disturbing because it was, you could tell people were out and were having fun.

MR. BORGERDING: Okay. But you could hear it?

MS. GOWERS: Yes.

MR. BORGERDING: In your normal residential life?

MS. GOWERS: Yes, I mean, you got to also remember, you're on the water and water, the sound carries on the water.

MR. BORGERDING: Okay. Okay and you earn your livelihood from the Dock of the Bay now?

MS. GOWERS: I, that is a part-time job, yes, sir.

MR. BORGERDING: Okay. No further questions.

CHAIR: Mr. Zimmerman, anything?

MR. ZIMMERMAN: Yeah, just a few. Do you know whether any formal complaints have been filed against any of these other places that you mentioned?

MS. GOWERS: When I worked at the Islander, there were complaints there, yes, sir.

MR. ZIMMERMAN: Do you know what happened with those complaints?

MS. GOWERS: They went to Court and I don't un, I don't know what happened after that.

MR. ZIMMERMAN: And you don't, you know what the zoning is on those other restaurants?

MS. GOWERS: No, sir, I do not.

MR. ZIMMERMAN: Or establishments. How, and you've been working for the last year or so at Dock of the Bay?

MS. GOWERS: Yes, sir.

MR. ZIMMERMAN: Okay and has it been operating as a restaurant/bar?

MS. GOWERS: It has been operating as a restaurant, yes.

MR. ZIMMERMAN: Has it been well attended?

MS. GOWERS: Yes.

MR. ZIMMERMAN: And when does it close on, in your

experience, both summer and winter, when, when is it closed on --

MS. GOWERS: They're, they're usually, in the summer time 11:00, 11:30. During the week, I mean, during the winter months, we're closed by 9:00, 9:30. Sometimes 10:00.

MR. ZIMMERMAN: And that's with, so far at least, no music?

MS. GOWERS: Correct.

MR. ZIMMERMAN: When you say close 11:00, 11:30, that means no new people coming in?

MS. GOWERS: Correct.

MR. ZIMMERMAN: But people who are already there --

MS. GOWERS: They are leaving.

MR. ZIMMERMAN: Okay and when, when do the doors totally get locked?

MS. GOWERS: When the last person leaves.

MR. ZIMMERMAN: And that could be what, midnight, 12:30, depends?

MS. GOWERS: It's never been that late.

MR. ZIMMERMAN: Yeah, and how large a staff, in your experience, have you had in the summer and winter? How many waitresses at a time?

MS. GOWERS: I don't know because we all work in different shifts and we don't all work seven days a week.

MR. ZIMMERMAN: I mean, when you are there, how many

are there?

MS. GOWERS: In the summertime, there could be seven waitresses at one time.

MR. ZIMMERMAN: And busboys and?

MS. GOWERS: We also have busboys, food runners, and we also have two hostesses.

MR. ZIMMERMAN: And bartenders?

MS. GOWERS: Yes.

MR. ZIMMERMAN: How many bartenders?

MS. GOWERS: One.

MR. ZIMMERMAN: So, so far so good with the restaurant and the bar, you're happy with it?

MS. GOWERS: Yes, sir, I am. Ken, like I said, Ken is a very family oriented man. His family is there once a month, sometimes twice a month having dinner with him. He, like I said, I just wish everybody would just give him a chance and know the Ken that I know.

MR. ZIMMERMAN: And some restaurants don't have music that you've worked in, aren't there?

MS. GOWERS: I'm sorry?

MR. ZIMMERMAN: Did you ever work in a restaurant that has no music or an establishment that serves food and liquor?

MS. GOWERS: Yes, I have.

MR. ZIMMERMAN: Thank you. That's all I have.

CHAIR: Okay. Anything else?

MR. SCHMIDT: Nothing else. Thank you.

CHAIR: Thank you.

MS. GOWERS: Thank you.

MR. SCHMIDT: Russ McClelland.

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. MCCLELLAND: Yes, I do.

BOARD: Could you please state your name and address for the record?

MR. MCCLELLAND: Russell McClelland, 9011 Miller's Island Boulevard, it's 21219.

BOARD: Spell your last name.

MR. MCCLELLAND: M-C-C-L-E-L-L-A-N-D.

BOARD: Thank you. You can be seated.

MR. SCHMIDT: Mr. McClelland, you're also a Miller's Island resident?

MR. MCCLELLAND: Yeah, as the crow flies, I probably live about four hundred yards from the, from the restaurant.

MR. SCHMIDT: Okay. How long you been on Miller's Island?

MR. MCCLELLAND: Since '01.

MR. SCHMIDT: Okay. You were there when Larry Tanner

was there?

MR. MCCLELLAND: Yeah, I was a patron there and I'm a patron, patronized all the bars in the area.

MR. SCHMIDT: I don't know if that's a good thing or --

MR. MCCLELLAND: Well, I could walk to all of them. I can.

MR. SCHMIDT: We know what you mean. If you can, you've, you've been here all day.

MR. MCCLELLAND: Um hm.

MR. SCHMIDT: Tell us a little bit about the operation when Mr. Tanner was running it, in terms of noise, activity, how it worked.

MR. MCCLELLAND: Well, like I said, I was a patron there. I'd stop in maybe once a week, twice a week and he would have music and then I learned of the, of the fines and the complaints and this and that and the other thing and I'm not personal friends with him or anything like that, but, you know, he, he got in a lot of trouble with the, with the music. I was there a lot of times when the liquor board or people would come by, you know, and actually, you know, be on call for the complaints.

MR. SCHMIDT: Okay. Music outside under Mr. Tanner?

MR. MCCLELLAND: Yeah, yeah.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: I can remember a lot of outside music, he had a, like a stage built out there.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: And big speakers out there by the fence.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: Yeah.

MR. SCHMIDT: And what kind of music, what type, type of entertainment? Rock and roll, Sinatra, country/western?

MR. MCCLELLAND: I remember a lot of reggae but it was pretty loud, pretty loud.

MR. SCHMIDT: Okay. Amplified?

MR. MCCLELLAND: Yeah.

MR. SCHMIDT: How late did it go?

MR. MCCLELLAND: It would go on into the night.

MR. SCHMIDT: When you say that, after midnight?

MR. MCCLELLAND: After dark, I can't remember how late but it would be late, eleven, maybe twelve.

MR. SCHMIDT: Okay. Weekdays and weekends?

MR. MCCLELLAND: Yeah, it could be all times of the day, yeah.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: All times of the week.

MR. SCHMIDT: Okay. Now, you've patronized Mr. Boone's place since he's been there?

MR. MCCLELLAND: Oh, yeah, yeah.

MR. SCHMIDT: Tell us about what you find and how the operation is there?

MR. MCCLELLAND: Well, it's, it's family oriented. I help out there in the evenings and the weekends and, like I said, I'm, I'm in the neighborhood, I know pretty much ninety percent of the people that live on that peninsula, you know, I, I know them.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: So --

MR. SCHMIDT: What do you do for a living?

MR. MCCLELLAND: I run an auto body shop.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: For Koons Chevrolet.

MR. SCHMIDT: Okay, so that's your full-time job?

MR. MCCLELLAND: Correct.

MR. SCHMIDT: You said you occasionally help out Mr. Boone at night?

MR. MCCLELLAND: Yeah, night and weekends, yeah.

MR. SCHMIDT: What do you do for him?

MR. MCCLELLAND: Everything, cut the grass, police the lot at night, police the, the boat slips. People leave at night, make sure they're quiet, you know, when they're leaving.

MR. SCHMIDT: So I guess you could be, if there was a restriction put on noise, you, you may very well be the person

that Mr. Boone may ask you to help enforce that?

MR. MCCLELLAND: Yes, yes, I would be willing to take that on, it would be no problem at all.

MR. SCHMIDT: Okay, okay. You support Mr. Boone's request in this case?

MR. MCCLELLAND: Oh, yes, yeah.

MR. SCHMIDT: Okay.

MR. MCCLELLAND: I'm behind it a hundred percent.

MR. SCHMIDT: Find him to be trustworthy, do what he says he's going to do?

MR. MCCLELLAND: Oh, yeah, he's, he's there, like he says, a hundred hours a week and I would see no problem, problem with what he's going to do and what he's going to, you know, delegate and control.

MR. SCHMIDT: Okay. Anything else? I appreciate you coming in, anything else that you want to tell the Board?

MR. MCCLELLAND: No, I don't see any problems with music there.

MR. SCHMIDT: Okay. Thank you, sir.

CHAIR: Mr. Borgerding?

MR. BORGERDING: Yes, sir, do you, you receive a pay check from Mr. Boone for what you do for him, correct?

MR. MCCLELLAND: Correct, yeah.

MR. BORGERDING: Okay.

MR. MCCLELLAND: I just started. I was volunteering

probably for about six months.

MR. BORGERDING: So he just started paying you?

MR. MCCLELLAND: Um hm.

MR. BORGERDING: Why, do you know why that switched? Why you went from volunteering to getting paid?

MR. MCCLELLAND: He volunteered to pay me.

MR. BORGERDING: Okay. No further questions.

MR. MCCLELLAND: I'd still be doing it for free.

MR. ZIMMERMAN: I'm sorry, Mr. McClelland, do I have it correct? I'm sorry, your name?

MR. MCCLELLAND: Yeah, Russell McClelland.

MR. ZIMMERMAN: McClelland. So, how long have you been working there, whether it's a volunteer or not?

MR. MCCLELLAND: A little over a year.

MR. ZIMMERMAN: And has it been successful based on your observation in the last year to the extent of the food and beverage and bar operations?

MR. MCCLELLAND: Oh, yeah. I think the, the, the restaurant has been well recepted by, you know, by everybody in the community and a lot of people coming from Pikesville and Glen Burnie, stopped by.

MR. ZIMMERMAN: Of course, during that time there's been no music, right?

MR. MCCLELLAND: No.

MR. ZIMMERMAN: I'm wrong?

MR. MCCLELLAND: No, I, I don't, I wasn't there when any music was playing, any live music or DJ's, no.

MR. ZIMMERMAN: What about recorded radio, what does he --

MR. MCCLELLAND: Radio, I've heard the radio.

MR. ZIMMERMAN: With the XM radio, Pandora?

MR. MCCLELLAND: Pandora.

MR. ZIMMERMAN: Is that indoor, outdoor, both?

MR. MCCLELLAND: Yes.

MR. ZIMMERMAN: Both?

MR. MCCLELLAND: Um hm.

MR. ZIMMERMAN: You're not a sound engineer, are you?

MR. MCCLELLAND: No.

MR. ZIMMERMAN: You mentioned your experience with Mr. Tanner. Do you know whether or not at a previous hearing he told the Board of Appeals he was going to tone down his music to duos, reggae, not, not having any rock, that kind of thing?

MR. MCCLELLAND: No, I don't recall any kind of dealings with that, no.

MR. ZIMMERMAN: Okay. That's all I have, Madam Chair.

MR. SCHMIDT: No further questions.

CHAIR: Thank you. You can step down.

MR. SCHMIDT: Charles Boland.

BOARD: Raise your right hand. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct --

MR. BOLAND: I do.

BOARD: -- to the best of your knowledge and belief?

MR. BOLAND: Sorry, I do.

BOARD: That's okay. State your name and address for the record, please.

MR. BOLAND: Charles Boland, B-O-L-A-N-D, 2414 Eugene Avenue 21219.

BOARD: Thank you. You can be seated.

MR. SCHMIDT: Mr. Boland, that's not Miller's Island, your address?

MR. BOLAND: No, it's about probably what, mile and a half out of Miller's Island.

MR. SCHMIDT: Okay. Okay and what's that, what community are you a part of?

MR. BOLAND: Edgemere, I would imagine.

MR. SCHMIDT: Okay. Are you employed at the present time?

MR. BOLAND: Retired now.

MR. SCHMIDT: Okay. What, what did you do?

MR. BOLAND: Sergeant, Baltimore County Police.

MR. SCHMIDT: How long were you with the police department?

MR. BOLAND: Thirty-five years.

MR. SCHMIDT: Okay. When did you retire?

MR. BOLAND: Last year, November.

MR. SCHMIDT: Okay. Either professionally or personally, are you familiar with the Dock of the Bay property?

MR. BOLAND: Yes, I am.

MR. SCHMIDT: How's that? How are, how do you know about the Dock of the Bay? What's your --

MR. BOLAND: Well, my son is employed there.

MR. SCHMIDT: Okay.

MR. BOLAND: So, I go down maybe four or five times a week and have dinner down there.

MR. SCHMIDT: Okay.

MR. BOLAND: It's a nice place to have dinner and then see my son too.

MR. SCHMIDT: Okay and when you were on the police force, did you ever have any connection with Dock of the Bay?

MR. BOLAND: No, I didn't work in that area.

MR. SCHMIDT: You didn't work in that area.

MR. BOLAND: Well, actually I did maybe fifteen years ago.

MR. SCHMIDT: Okay.

MR. BOLAND: And I never had a call down there. The only time I was in there is when Katrina rode through and I was in the bar itself.

MR. SCHMIDT: When Hurricane Katrina came in?

MR. BOLAND: Um hm.

MR. SCHMIDT: Okay. Took refuge --

MR. BOLAND: Maybe longer.

MR. SCHMIDT: -- took refuge in the bar?

MR. BOLAND: Not when it had the water in it, it was up to your waist.

MR. SCHMIDT: Okay, okay. Tell us, you've heard, you've been here and I don't want to be repetitious but tell us a little bit about the operation now, family kind of restaurant or tell, just, what, how does it go now? How's it work now?

MR. BOLAND: It is family oriented, that's the, that's why I go down there.

MR. SCHMIDT: Okay.

MR. BOLAND: To see my son and to enjoy a good meal.

MR. SCHMIDT: Okay. How old is your son?

MR. BOLAND: Twenty-four.

MR. SCHMIDT: Okay and you've never heard any music down there now?

MR. BOLAND: Just on the speaker.

MR. SCHMIDT: Just, just on the radio speaker?

MR. BOLAND: Right.

MR. SCHMIDT: Okay. Were you ever there when Mr. Tanner owned it?

MR. BOLAND: No.

MR. SCHMIDT: Okay. You have any objection to the request that Mr. Boone is making now, to have music now?

MR. BOLAND: No, I don't.

MR. SCHMIDT: Okay. Any, anything else that you'd like to tell the Board?

MR. BOLAND: No, the only thing I want to say, it's an, it's an enjoyable restaurant, I like going down there. It's like he said, people that go down there, it's, I mean, I'm sixty and there's young people that go in there but they're, some, most of them are with their, their families.

MR. SCHMIDT: Okay. Family oriented kind of place?

MR. BOLAND: Yes.

MR. SCHMIDT: Okay. Okay. I don't have anything further.

CHAIR: Cross?

MR. BORGERDING: No questions, Your Honor.

CHAIR: No questions.

MR. ZIMMERMAN: Well, you'll continue to go there whether or not he gets live music permission?

MR. BOLAND: Of course. I like it. That's the only reason I go there, I like it. I think music would bring a --

MR. ZIMMERMAN: Thanks. I have no further questions.

MR. SCHMIDT: What, what did you start to say? You think music would bring what?

MR. BOLAND: It would be more enjoyable to, instead

of hearing it over the radio a lot of times.

MR. SCHMIDT: Okay.

MR. BOLAND: And nothing loud because I, I don't like nothing loud, it's, something mellow, and that's nice.

MR. SCHMIDT: Okay, okay. Thank you, sir.

MR. ZIMMERMAN: Of course, if he gets permission, there's no way of knowing precisely what kind of music it's going to end up as, is there?

MR. BOLAND: No, I couldn't see that, no.

MR. ZIMMERMAN: Thank you. That's all I have.

CHAIR: Thank you, sir.

MR. SCHMIDT: Okay. I, I know the folks who are here, I know are, you know, you're going to hear the same thing, so unless anyone would like to speak that it hasn't been covered, you want to speak, ma'am?

VOICE: I would, yeah, I would like to.

MR. SCHMIDT: Okay. I just don't, didn't want to be repetitious but they're, let the record reflect there's some other people in the room.

CHAIR: Okay.

MR. SCHMIDT: Okay.

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MS. BOLAND: Yes, I do.

BOARD: Can you please state your name and address for the record?

MS. BOLAND: Gerry Boland, 2414 Eugene Avenue, Baltimore, Maryland 21219.

BOARD: Okay, thank you. You can be seated.

MR. SCHMIDT: Ms. Boland, I assume you're --

MS. BOLAND: Yes.

MR. SCHMIDT: -- Charles' wife?

MS. BOLAND: Yes.

MR. SCHMIDT: Okay. So --

MS. BOLAND: It's my husband.

MR. SCHMIDT: -- and is it your son as well?

MS. BOLAND: Yes, yes, indeed.

MR. SCHMIDT: You have the same son. What would you like to --

MS. BOLAND: Well, I am from the area, I am from not Miller's Island, but I'm from Fort Howard, a little further down so I was born and raised and I went to Fisherman's and I never urinated in the parking lot, I would never do anything like that, but, and I did go when Larry Tanner had it and never went back, I didn't like that stuff. But I will tell you this. I worked at Chesapeake Terrace and I had some of the children who are absolutely wonderful, wonderful families and, of the community and I don't, and I wish just the best but I do think

that Mr. Boone is a wonderful man and I think the Dock of the Bay is a wonderful place and not just because he employs my son, I mean, that's a plus, you know, I'm going to tell the truth. But, I, myself, have volunteered hours to Mr. Boone's establishment to pitch in when he had a little Christmas party for the kids. It, I have sat on the water to hear Rowboat Willy's music because I like to listen to nice music too when you're eating and it, and I do think it's a great thing to have. Now, I don't want to hear rock and roll because I'm fifty-three and I, and I do think it's a plus. My mother is seventy-eight years old and she brings her friends, Janet Yateman and Peggy Fultz and they go to have dinner and they like to listen, you know, to, of course not rock and roll, but it is nice to listen to soft music and, and talk and I think we should give him a chance and I, I think that Mr. Boone is a, a responsible man and, and I, and it's a nice place and I've been to the other places there and I think Dock of the Bay is a wonderful establishment and I would love to see it succeed even further and I, I hope that you give him this opportunity and I think he deserves it and I think he has shown that he should have the opportunity to have this. I really do.

MR. SCHMIDT: Okay.

CHAIR: All right.

MR. SCHMIDT: I couldn't say anything better. No other questions.

MS. BOLAND: Yes, Mr. Zimmerman?

CHAIR: Mr., well, Mr. Borgerding first.

MR. BORGERDING: Ma'am?

MS. BOLAND: Yes?

MR. BORGERDING: Do you have a bar/restaurant next to where you live?

MS. BOLAND: No, I don't.

MR. BORGERDING: Okay. So, you don't have anything emanating music?

MS. BOLAND: No, I don't.

MR. BORGERDING: Do you think that might be disturbing?

MS. BOLAND: When it was rock and roll, I'm sure, I'm sure. I'm sure, but I do believe in my whole heart that Mr. Boone does care and I do, do believe that he would not allow that to happen and if I did think that it, that he would allow it, I wouldn't stand up here and say that, sir.

MR. BORGERDING: Okay. But you don't know for sure what's going to happen if he gets approval?

MS. BOLAND: No, I can't, but I can, I, I would put my word on Mr. Boone, I would.

MR. BORGERDING: Okay. No further questions.

CHAIR: Okay.

MR. ZIMMERMAN: I appreciate your mentioning my name but, actually, I don't have any questions for you.

MS. BOLAND: Okay.

MR. ZIMMERMAN: Thank you.

MR. SCHMIDT: Okay. Thank you.

MS. BOLAND: Thank you.

MR. SCHMIDT: Anyone else? Yes, ma'am? I'm sorry. The folks just came in so I didn't know if they wanted to testify or not.

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MS. REILLY: Yes.

BOARD: Okay. Please state your name and address for the record.

MS. REILLY: My name is Dorothy O. Reilly, I live at 2809 Third Street, Miller's Island 21219.

BOARD: Okay and spell your last name for the record, please.

MS. REILLY: Excuse me?

BOARD: Spell your last name.

MS. REILLY: Oh, Reilly, R-E-I-L-L-Y.

BOARD: You can be seated.

MR. SCHMIDT: Ms. Reilly, how long have you been on Miller's Island?

MS. REILLY: Let me see, I built my residence in

1984.

MR. SCHMIDT: Okay. So, you've been there and I assume, how far are you from Dock of the Bay?

MS. REILLY: Two blocks.

MR. SCHMIDT: Okay. So, you were there when it was Fisherman's?

MS. REILLY: Yes.

MR. SCHMIDT: And then when it was Mr. Tanner's Dock of the Bay?

MS. REILLY: Yes.

MR. SCHMIDT: Okay and now, since Mr. Boone has owned it?

MS. REILLY: Yes.

MR. SCHMIDT: Okay. Just, what would you like to tell the Board?

MS. REILLY: Well, let me see, Miller's Island has done, has had a lot of changes. When I first moved there, there was music all the way down Worcester's, they had two bands every night. Fisherman's had music, the Swan had music, the Islander had music, you had Anderson's, they had music, they had live bands there. It was all inside, but he had music outside also, that is now closed down.

MR. SCHMIDT: Okay.

MS. REILLY: Okay, there's a lot of bars that were there, that are not, no longer there, okay? I mean, you had

music all over the island. Now, you don't. You have, now you do have Rowboat Willy's, Rowboat Willy's never had music but there was never a Rowboat Willy's, it was just a boat place, you know, where you went and rented boats, took them out and there was never no music there. There was never no restaurant there but there is now.

MR. SCHMIDT: How long has that been next door?

MS. REILLY: Next door, was, actually they, they started that up after Larry got closed down.

MR. SCHMIDT: Okay.

MS. REILLY: Okay, they started building, it started small and then it's gotten a little bit bigger, you know, and now they have restaurant and they have food there now and they have live music there.

MR. SCHMIDT: Right, and they have a different zoning there?

MS. REILLY: Yes, yes.

MR. SCHMIDT: Okay.

MS. REILLY: They have B&M.

MR. SCHMIDT: Right.

MS. REILLY: Okay and like I said, I mean, there was a lot of, different places and now you still, you still have the Swan, who has music, that's loud music and they have the Islander, has music and then you have Rowboat Willy's, that's all the music on Miller's Island no more, anymore, that's it.

MR. SCHMIDT: Okay.

MS. REILLY: So, I mean, like I said, I mean, I lived there, I mean, I moved, I moved away and then I came back in 2005 after Isabel and we had to rebuild so it's an enjoyable place. Mr. Boone has done very good with the Dock of the Bay. The Dock of the Bay is, has come up a lot of degrees, in a lot of degrees. I mean, it is family oriented. You have Brian, he, there's a lot of people that have moved in, that have children, they want to bring their children there and play, have fun.

MR. SCHMIDT: At the pirate ship?

MS. REILLY: At the pirate ship, yes. A lot of my neighbors, my next door neighbors, both of them, they all have children, they all come over there and they all enjoy the Dock of the Bay in the summer time. In the winter time, you know, children, they don't want to play, they want to stay inside.

MR. SCHMIDT: Too cold.

MS. REILLY: It's too cold and plus they're young so to me, I think it's a great improvement and plus, I don't really want it closed no more. I mean, my, my property is there and people come down and say, well, why is this so vacant, you know? Why is it closed? It looks so horrible, why you live here, you know? I mean, that's what I got before he opened up, you know? My mother will come down she's like, why's that so vacant, say, well, that's horrible. I don't want

that closed. I want it to stay opened. I want this man to progress. I, and I don't think he's going to have loud music. I, for one, do not like loud music. I go in there, I go in there quite a bit so I don't want no loud music. I want nice music.

MR. SCHMIDT: Okay. Thank you, ma'am.

CHAIR: Mr. Borgerding?

MR. BORGERDING: No questions, Your Honor.

CHAIR: Mr. Zimmerman?

MR. ZIMMERMAN: Just to clarify, the Islander what, what was the other?

MS. REILLY: The Swan.

MR. ZIMMERMAN: The Swan, they have indoor music only?

MS. REILLY: Yes.

MR. ZIMMERMAN: And, in any event, the Dock of the Bay is now open, right?

MS. REILLY: Yes.

MR. ZIMMERMAN: And you patronize it?

MS. REILLY: Yes.

MR. ZIMMERMAN: And you enjoy it?

MS. REILLY: Yes.

MR. ZIMMERMAN: Thank you. I have no further questions.

CHAIR: Okay. Any re-direct?

MR. SCHMIDT: Nothing further. Thank you.

CHAIR: Thank you, ma'am.

MR. SCHMIDT: Thank you, Ms. Reilly. Thanks to everyone. Is there anyone else who needs to testify? Okay. Thank you.

CHAIR: All right.

MR. SCHMIDT: That would be the Petitioner's case.

CHAIR: Thank you. Okay. Do you have anyone needed to testify for the Protestants?

MR. BORGERDING: Yes.

MR. ZIMMERMAN: Before we do that, I just wanted to indicate, Madam Chair, that I did obtain the Deed, the actual Deed document so we have the timing. I gave a copy to Mr. Schmidt so I think, are we up to number four?

BOARD: You're at three.

MR. ZIMMERMAN: Oh, only three. So, three would be the September 30th, 2014 Deed between Fifth Street, LLC and Boone Kondylas LLC, which comprises the various lots or parcels or tax i.d. numbers. And his, and as far as history goes, just for the sake of completeness.

BOARD: Have you seen this?

MR. SCHMIDT: I did, yes. No objection.

MR. ZIMMERMAN: Just for the sake of completeness, we have the Deed in 1999 from Josephine Harnicka (phonetic) to Fifth Street, LLC, so that's a bit of (inaudible).

BOARD: That's four?

MR. ZIMMERMAN: That would be number four. Mr. Schmidt has copies. Just to show the dates of the transfer of the property.

CHAIR: Okay. Anything else, Mr. Zimmerman?

MR. ZIMMERMAN: No.

CHAIR: Okay. Mr. Borgerding, you have witnesses?

MR. BORGERDING: Yes, I'd call Mr. Wolinski to the stand, Charlie Wolinski.

VOICE: I just want to put up a couple pictures of the proximity of like our houses.

MR. SCHMIDT: Sure. Okay, thank you, Mr. (inaudible). Is that yours too?

VOICE: Yes.

CHAIR: You might want to just --

BOARD: Are you planning on introducing those, because he's going to have to introduce those to you.

VOICE: Oh, I'm sorry. I think most of them --

CHAIR: You want to take the stand and then be sworn in first and then if you could do the pictures, and you don't need to put them on the board because you probably can't see them.

VOICE: Okay.

CHAIR: Probably just want to hold them up.

BOARD: Raise your right hand, please. Do you swear

and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. WOLINSKI: Yes, ma'am.

BOARD: Okay. Can you please state your name and address for the record?

MR. WOLINSKI: Charles S. Wolinski, 9919 Cuckold Point Road, Miller's Island, Maryland, or Sparrows Point, Maryland 21219.

BOARD: And spell your last name, please.

MR. WOLINSKI: Wolinski, W-O-L-I-N-S-K-I.

BOARD: Thank you. Please be seated.

MR. WOLINSKI: Thank you.

MR. BORGERDING: Mr. Wolinski, how close are you, is your property to the Dock of the Bay?

MR. WOLINSKI: It's adjacent to the property. It's about --

MR. BORGERDING: Okay. I'm going to give you a series of pictures, starting, I'll mark them as Protestant's number --

BOARD: It would be your five.

MR. BORGERDING: Okay. Five, five and forward. If you can hold them up to the Board so they can see them and describe what they show.

MR. WOLINSKI: Okay. This is a, this is an --

CHAIR: Go ahead.

MR. WOLINSKI: This is an aerial view of our properties, just to show the proximity. This is my house, this is Matt's house, excuse me, this is Dock of the Bay here. This is Brad and Bonnie and this is where Billy lives. Brad and Bonnie also own this property, it was Bonnie's mom's. But you can see that from this, the, the properties are very, very close to Dock of the Bay, especially the, the outside area where the, the entertainment would set up. I mean, literally, you're fifty feet from the property line to the, to the next house. My house is, is about two hundred feet. In the last hearing, it was all marked off. We had it measured and stuff like that, just to show how close it was. This is a, this is a picture from, from my deck, just to show you how close that is.

MR. ZIMMERMAN: Excuse me, we're going to need to know the exhibit numbers on these at this point.

BOARD: Yeah, and --

MR. ZIMMERMAN: And I wonder if the witness, when he says this is something, the record is not going to reflect what --

BOARD: Well, I'm not being helped very much up here so.

MR. WOLINSKI: Oh, I'm sorry.

BOARD: That's okay, the first one you showed --

MR. WOLINSKI: This is just the aerial view.

BOARD: You have to give that to me.

MR. BORGERDING: (inaudible) Protestant's number five and I move (inaudible).

MR. WOLINSKI: Sorry about that.

MR. BORGERDING: Can you describe for the Board Protestant's number six?

MR. WOLINSKI: Yeah, this is just a shot from my, my deck, just shows the close proximity of my home to where the outdoor entertainment is typically set up. It has the, the lady stated earlier, down by the water, the, the noise and the sound travels very, very quickly.

MR. BORGERDING: Also Protestant's number six be entered into evidence.

MR. SCHMIDT: No objection.

MR. WOLINSKI: And this, this one here is from Bonnie's mother's house. You can see just how close it is. Like I said, that one's about fifty feet.

CHAIR: Who, who's Bonnie?

MR. WOLINSKI: Bonnie is, is the lady, she's one of the other neighbors right there, I'm sorry.

MR. ZIMMERMAN: I'm sorry, I can't --

MR. WOLINSKI: Bonnie Metheni (phonetic).

CHAIR: Okay, Bonnie what, Metheni?

MR. WOLINSKI: Yes, Bonnie Metheni.

MR. ZIMMERMAN: I can't hear the witness very well.

I wonder if it's going to get on tape.

MR. WOLINSKI: Bonnie Metheni.

MR. BORGERDING: That I'd ask that Protestant's number seven be entered in evidence.

CHAIR: Have you seen that one?

MR. SCHMIDT: Yes.

CHAIR: All right.

MR. SCHMIDT: No objection.

CHAIR: All right.

MR. SCHMIDT: To the photographs collectively. Mr. Alston, when you're done marking those, could I, could I take a look at them.

BOARD: Sure.

MR. SCHMIDT: Just when you're, let me know when you're done.

BOARD: Sure.

MR. SCHMIDT: Go ahead, Mr. Borgerding. I didn't mean to interrupt you.

MR. BORGERDING: Okay. Yes, can you describe Protestant's number eight?

MR. WOLINSKI: Just another shot of the outdoor seating area from Bonnie's mother's house, just again, to show how close the entertainment is from our actual homes.

MR. BORGERDING: That I'd ask that Protestant's number eight be entered in evidence. Mr. Wolinski, do you have

children?

MR. WOLINSKI: Yes, I do.

MR. BORGERDING: How many?

MR. WOLINSKI: I have three children.

MR. BORGERDING: What are their ages?

MR. WOLINSKI: My youngest is, is four, my middle is ten and my oldest is thirteen.

MR. BORGERDING: Okay. So, I'm just going to ask you, we've sort of talked about Larry Tanner and his operations at Dock of the Bay. Can you describe generally, without spending too much of the Board's time, the impact that seven years of fighting him in litigation had and the noise emanating from the property?

MR. WOLINSKI: Yes. Fighting through this for seven years was an absolute nightmare. Every weekend it was, not if it was going to be bad, it was how bad is it going to be and then all the legal battles and the postponements and the appeals for, you know, seven years, time out of work, money spent, over and over and over again, it was just a relentless bombardment of our senses, you know, my, my children would be, you know, jerked out of bed, essentially, at, at all hours of the night, you know, eleven, twelve, one, two o'clock in the morning, sometimes later, disorderly leaving the parking lot, disorderly in the parking lot and we went through this for, like I said, about seven years of, of loud music and everything

comes with it. The patrons, the loud patrons, the, it wasn't just the band, it was after the band, all the clapping and the, the hoorahs and all that kind of stuff. You know, sometimes that was actually worse than the music. It was just the, the response after the fact, you know. Mr. Boone has a radio, there's nobody clapping at the end of a song when the radio, when a radio is finished. I mean, that's, that's it so it was the, it was the music was loud to the point that I never opened my house. Like my house stays closed year round, I run heat until air conditioning and then air conditioning until heat and it, it was so loud I could hear the music in my shower with the fan running, with the exhaust fan running, I could still hear the music outside. And it was years and years and years of this, appeals, appeals, appeals, until the end when they finally said enough is enough. Now, I've been in Dock of the Bay before when Mr. Tanner owned it, I've been in Dock of the Bay now that Ken Boone owns it. Everything about the business is exactly the same. The table, the chairs, everything. The only thing that is different is that he doesn't have live music and if he has live music then it will be identical, there's nothing different about it. So, when you, when you look at what Larry did and how he, he tried to change and he tried to get around the rule, so he decided to put a barge in and tried to play music from a barge and they said absolutely not, you're just trying to get around the ruling and that's when they

finally said, you know, that's the end and put an end to Mr. Tanner's music. After that, the last few years that Larry owned the place, to be honest with you, it's very similar to what Ken has. It wasn't, after the music stopped, there wasn't a single complaint filed against Dock of the Bay to my knowledge. I've never filed one against Dock of the Bay after the music stops or against Ken for that matter. It was very similar then as it is now. Our fear is that if Mr. Boone is granted live entertainment again, we will go through the exact same thing again. In fact, his, his first, you know, act was supposed to be Mark Allen. Mark Allen played at Dock of the Bay when Larry Tanner owned it. He is an acoustical player but that means something different then what it used to mean. It's not a guy sitting with a single guitar that's not hooked up. His guitar is, is miked and amped and all that stuff and it is very, very loud. It, it is loud to the point that, it is loud to the point that he's not allowed to play at Rowboat Willy's anymore for being too loud. So, the owners of that establishment said that he is not welcome back because of how loud his music was.

MR. SCHMIDT: Objection. Move to strike as hearsay. That portion of the testimony.

CHAIR: Okay. You can't tell us what the owners or someone else told you about.

MR. WOLINSKI: Okay, that's fine.

CHAIR: If you have personal knowledge of it.

MR. WOLINSKI: No.

CHAIR: So, we'll strike that testimony.

MR. WOLINSKI: That's fine. But I, I can say that he, he did play at, at Dock of the Bay prior to, when Larry Tanner owned it and he is, he was going to be the first act at Mr. Boone's Dock of the Bay is, I think that's okay.

CHAIR: Yep, understand, okay.

MR. WOLINSKI: So, our, our fear is that it's going to be the exact same thing, loud, disorderly and everything that comes with the live music. You're talking about the, the large number of people, obviously, it's going to stay open later than the, then the 9:00 that it's been closing down now. You know, I don't know of any business that's going to shoo people to the door and say, okay, well, we're, we're done for the evening and, and that's, that's what we'd be facing all over again.

MR. BORGERDING: So, what is your response to the people that have testified that either work at the Dock of the Bay or have relatives that say he's a nice guy, let him have the music?

MR. WOLINSKI: Well, all I would say is, the way Mr. Boone operates the business now is not disturbing, okay? It's fine, it doesn't, it doesn't interfere. He's running a restaurant and it's all well and good and chances are, you

know, they, they worked there since he opened so that, that is the case, I'm sure. But once you add the element of music, that changes everything completely. That's the same way it was with Larry. When Larry owned it and, and he's been demonized by anybody that's ever spoke about him, oh, he was terrible, he was evil, he was this and that, and I won't dispute that but what I will say is that even though all that is the case, when he didn't have music, he ran a quiet business just like Mr. Boone. You, it's very difficult to control, you know, that kind of, that kind of crowd, that kind of number when you get such large people coming down, you know, there's nowhere to park, they get blocked in. When I first, well, when Mr., Mr. Tanner first started with the live music, somebody was pinned in, you know, somebody blocked in their car and the person left by driving through my yard and so that was, that was an eye-opening experience to me because my children are playing out in my backyard and this person drives right through my yard. Obviously, shortly after, I installed a, a, you know, a fence down the property line to keep that kind of thing from happening. But I would have never, never thought that in a million years that somebody would drive in my yard just because of this. So, you have large number of people, you know, the crowds, the parking issues and everything that comes with the, having the live music and that's what we're so terrified of. I mean, the neighbors and I, you know, we fought this for, for

seven years. We thought it was put to bed, we thought it was done and our lives could continue to normal and now, you know, it's starting all up again, you know, over, it's the exact same thing that Larry did. Well, I'm doing it differently, you know, it's not going to be this. And then it morphs into, to, to something and that's what happened to Larry and, and unfortunately, once you kind of, once you kind of let it out, it's seven years for, for the, for the residents. It's not like you just go back and say, oh, that's it. It, it doesn't work that way. They appeal, they appeal, they appeal over and over and over again and then we end up in Annapolis, you know, like I said, six or seven years later and it's, it's a very difficult and life altering experience. You know, Wayne Waldman, the neighbor, he can't be here today, he was at, his family was at the hearing, the last hearing so I guess any testimony would be entered in from that but, you know, he had a heart attack in this whole process. His wife testified to that on the stand last time, so I guess that would be in evidence. But that's how dramatic it effects our lives. And, and I, you know, I understand that the, the other residents around the community say okay, well, you know, it doesn't bother me, well, sure it doesn't, because you live a mile away or five blocks away or something like that and it, it doesn't bother you. But when you live right next door to it and have to deal with it on a daily and weekly basis, it becomes, it becomes daunting, you

know. So, that, that's, that's kind of where you're at with it.

CHAIR: Excuse me, ma'am.

MR. BORGERDING: Were you aware of --

CHAIR: Can you, one second, ma'am. Can you please stop making comments because it's been like that throughout the hearing and we can't hear up here and it also interrupts the transcript, picks up all the noise.

VOICE: Sorry.

CHAIR: Thank you. Okay, go ahead.

MR. BORGERDING: Were you aware that the liquor board (inaudible) regulations against Dock of the Bay?

MR. WOLINSKI: Yes. Don Crockett would come out all the time and, with his meters and his, his meter is a little bit better than the one that Mr. Boone and that's actually Brad Metheni's meter, then the one we have and he would take readings throughout the evening.

MR. SCHMIDT: Objection. If he's going to test, if he's going to testify about what these readings were, they were taken by someone who is not here. I would object.

CHAIR: Okay.

MR. SCHMIDT: If that's where he's going.

CHAIR: Understand. Okay, we don't know where he's going yet but that is true.

MR. WOLINSKI: Okay. I mean, I have, I do have his

paperwork from the liquor board, if that would help. I don't know if you want to submit that.

CHAIR: I mean, we haven't seen it.

MR. ZIMMERMAN: Well, they took in petitions which were --

CHAIR: Wait a minute, wait a minute, this is not your witness right now.

MR. BORGERDING: I'll show you after I show Mr. Schmidt, I'll show you some documents.

MR. WOLINSKI: I don't know if you want to submit them or --

CHAIR: This is during Mr. Tanner's --

MR. WOLINSKI: Yes, during Mr. Tanner's.

MR. SCHMIDT: Okay. So, this is, this is about conditions when Mr. Tanner was operating the restaurant?

MR. BORGERDING: Correct.

MR. WOLINSKI: Yes.

MR. SCHMIDT: I don't have any objection.

CHAIR: Okay.

MR. SCHMIDT: You're going to put that in, that's fine.

MR. BORGERDING: Can you describe, starting with Protestant's number nine, they'll be individually marked, can you describe to the Board what the first document shows?

MR. WOLINSKI: Yeah, the, the first document shows

that, that basically the noise would rise up to sixty-eight decibels from the establishment. This was when music was played inside the building. When the doors would come open and closed, when people would come and go or walk outside to smoke or something like that, the noise would spike up to, in this one here it's sixty-nine and it says in approximately twenty-five minutes sitting at Mr. (inaudible)'s home, the door open and closed twenty times. So, you can, you can imagine that every minute for twenty-five, almost every minute for twenty-five minutes, the door opens up and the, and the noise spikes and then closes back up. So, it's one of those things, is right when you're trying to fall back to sleep, then it's loud again, then you go back and it's loud again. So, it, it is just, it's a daunting experience to, to have to go through.

MR. BORGERDING: I'd ask that Protestant's number nine be entered into evidence.

CHAIR: There was no objection.

MR. WOLINSKI: These are basically the same, just giving different readings, sixty, sixty-three to seventy-three decibels, you know, over here, loud noises from the parking lot registering sixty-nine decibels and these are, you know, at ten and twelve o'clock at night, this one here is at 12:05.

MR. BORGERDING: With that I'd ask that Protestant's number ten and eleven be entered into evidence.

CHAIR: Okay. There was no objection.

MR. BORGERDING: Now, Mr. Wolinski, do you have an understanding of what decibel levels are permitted from the prop, at the property line?

MR. WOLINSKI: The liquor board, what they would base their, their numbers on is sixty-five decibels during the day and fifty-five at night. On the Maryland Department of Environment website, I couldn't print out anything else other than that. It talks about sixty-five decibels during the day and fifty-five decibels at night. I'm in the process of buying a new dishwasher at this point in time and a good dishwasher is right around fifty decibels and that's based on, you know, like when you buy a dishwasher it'll tell you, this is the decibel readings. So, the fact that Mr. Boone feels that he will be able to, to have outside music and keep it quieter than a dishwasher at the property line, I, I just don't understand how that's going to be a possibility. To me, it's, it's something that is just impossible to do and, and it would just, it would just open us up to this exact same fight again that we had with Larry. Oh, it's not too loud. Well, it is when it's that disturbing. So, that, that's, that's the, that's the road that I'm afraid we're going to go down again.

MR. BORGERDING: Have you personally taken any sound level decibel readings from your meter?

MR. WOLINSKI: Yes, yes, I --

MR. BORGERDING: Okay. So, the average conversation,

just conversation, human conversation, what does that register?

MR. SCHMIDT: Objection. I just don't think it's that simple. I mean, the man, I haven't heard any qualification that he's a noise expert, how it was done, whether the machine was properly calibrated and all the rest of that. I think he is getting into expert testimony that someone who is an acoustical engineer or something may know. I have no idea what kind of machine he used, whether it was calibrated correctly, whether he knows how to use it correctly and all the rest of that. So, I would object to the testimony on that, on that basis.

MR. ZIMMERMAN: May I comment? The Petitioner was allowed to testify about what he thought was loud or not loud without any qualification whatsoever.

MR. SCHMIDT: That's because you asked him the question, Mr. Zimmerman.

MR. ZIMMERMAN: No, no, it was presented in Petitioner's case. Anyway, I think, I think it's an administrative hearing and (inaudible) then the Board can give it what weight it deserves.

CHAIR: Well, it, I mean, asking the witness, you know, what they think is loud or not is different than asking him to, you know, asking questions about a device that he, when he's not an expert in using it and so from that standpoint, we would sustain that question.

MR. BORGERDING: (inaudible).

MR. WOLINSKI: Well, with, without a question, then, then the --

CHAIR: Wait a minute. You have to wait for a question.

MR. WOLINSKI: Oh, I'm sorry.

CHAIR: Next question, Mr. Borgerding.

MR. BORGERDING: Is there something else you'd like to say, Mr. Wolinski?

MR. WOLINSKI: Well, just simply about the, the meter, just that, that makes me nervous then because Mr. Boone says that he's going to be monitoring it. Well, you know, I'm not an expert but neither is he so that, that's my fear and, and, and it's like, okay, well, this is, this is good and I don't know what his meter is or who's calibrating it and he's, you know, going to be the fox guarding the hen house, so to speak, not to, to make light of it. You know, he's going to say, well, my meter said this and if I said, well, my meter was twenty, twenty decibels higher, it'd be like okay, well, my meter said this and, and that's the, unfortunately, the, the shaky road that we go down. The liquor board isn't going to be there, code enforcement isn't going to be there every day making sure that he's going to be doing what's said and we've already went down this with Larry saying oh, I'm going to take care of this and take care of that and we all know how that

went. So, now we're back at the same exact situation, trying to ask for the exact same thing that Larry had and we're going to run into the exact same problems all over again. And, and that's why I'm afraid, you know, if the decibel meter, if I can't work it then, then neither can he and, you know, he's not going to hire a sound engineer to come in every weekend to insure that he doesn't go loud and, I mean, that that's my, that's my fear.

MR. SCHMIDT: How do you know that?

MR. BORGERDING: The documents that we just put into evidence, they were decibel readings from inside music, not outside?

MR. WOLINSKI: Inside music, yes.

MR. BORGERDING: Okay. So, obviously you would assume, it would be fair to say that you think the decibel readings would be louder if it was outside?

MR. WOLINSKI: Yes, yes, if the door is opening up and the, the music is spiking to seventy and seventy, you know, sixty-nine and seventy, inside the building, I can imagine, I, I can only imagine how loud it would be, you know, next to the, the, outside and next to the property lines with no obstruction whatsoever.

MR. BORGERDING: Do you feel in your opinion that you could have outside music and meet those decibel levels under the (inaudible)?

MR. WOLINSKI: I, I don't see how it would --

MR. SCHMIDT: Objection. It's assuming in evidence some decibel requirements of the State, of which we do not have any testimony about.

CHAIR: We don't. We don't have testimony about it, I'm going to guess we're thinking --

MR. BORGERDING: You have testimony about it, you don't have evidence.

CHAIR: -- maybe in, in conclusion --

MR. ZIMMERMAN: Well, we do have evidence. He says sixty-five and fifty-five and we can, I mean, those are the State regs.

MR. SCHMIDT: I disagree. We haven't, the COMAR, the COMAR regulations are not in.

CHAIR: And, and so --

MR. ZIMMERMAN: You don't have to have it in evidence, that's law, okay? We can cite that, we don't have to (inaudible).

CHAIR: That's going to be done in closing, we're assuming, something to that effect will be done by everybody in closing, because we don't know either.

MR. SCHMIDT: Agreed.

CHAIR: I'm sorry.

MR. SCHMIDT: The form of the question was, will it meet the State law.

CHAIR: Right, okay, so --

MR. SCHMIDT: And I, I think that's an objectionable question.

CHAIR: Right, so we don't know. We don't know. I mean, he, the question was before, is outside music going to be loud and it's (inaudible).

MR. BORGERDING: Do you feel that outside music would be too loud, it would be disturbing to you as a neighbor?

MR. WOLINSKI: Oh, absolutely. Absolutely. I don't see how --

MR. BORGERDING: Why, why do you say that?

MR. WOLINSKI: Because there would be nothing to suppress the, the noise and, and even if it was, like I said earlier, even if it was a situation where the band was extremely quiet, I don't see how you're going to control the crowd after the fact. I mean, we've all seen concerts, like Mr. Schmidt was talking about earlier, you go into restaurants and this, we've seen concerts and, and at the end of the song it's not like there's crickets, you know? Everybody gets up and claps and applauds and there's hooting and hollering and, and, you know, that, that's going to be, going to be there whether, you know, the band is quiet or not.

MR. BORGERDING: Now, you (inaudible) there's type of structure outside that you claim modulates the sound. Can you explain that?

MR. WOLINSKI: Well, there's the, there's an awning over the side bar that, that is directional. So, like when sound, instead of sound emanating outward, in all, all directions, when you, just like when you cup your hands and talk in that direction, the awning shoots the, shoots the noise out sideways and I'm not sound expert but that's just the way it appears to occur.

MR. BORGERDING: Now, is there anything else you'd like to tell the Board?

MR. WOLINSKI: Well, the only thing that, that, that I think the Board really needs to know is that whether or not it's, you know, the lighting is this and the tables are that, and that's, that's all really moot. I know it's part of the law and everything but what it boils down to is it's the, the live music, is, is why we're here today. Mr. Boone wouldn't be here if it wasn't live music, we wouldn't be here if it wasn't live music. So, his table arrangements and all that stuff are all come in second to what we're really fighting about and that is the live music is having a huge detriment on our life. It, it's, it's so disrupting to us, you know, that, you know, I sleep with earplugs when, when this happens just to, just to be able to go to sleep and that's not, that's not fair to me or my family or to the rest of the neighbors. The, the patrons and the witnesses and things like that, they, they get to go home and I, I know Mr., Mr. Boone had pages of, of people signing

saying, you know, we're in support, we're in support but, but that's a very slippery slope that we, we've seen throughout history. When you let the majority decide the rights of the minority, then the minority has no chance of real justice. I mean, you know, women's right to vote would have never passed if that was the case. You just never, you're not going to, you know, civil rights isn't going to happen if the majority is determining for the minority and that's kind of where we're at. You know, I, I can't get a hundred people to come in here and say oh, yeah, you know, we don't want music there. It's easy to get, you know, a hundred or two hundred people to say, well, sure, it doesn't have any impact on me whatsoever. Me signing this doesn't affect me negatively in any way and that's essentially what has happened here. You know, the people that, that it affects negatively are only the, the very few residents that, that are immediately around the Dock of the Bay and we fought it for years and years and years and not because we wanted to. My gosh, I mean, we tried to work with Larry for years and it just got to the point where, you know, he just, he just wouldn't hear us and, and now we are here again for the exact same thing that we went to Annapolis for and, when I first found out, I, I couldn't understand why. I was like this has been decided, I thought this would have been, been put to bed long ago and, you know, and here we are all over again and I, unfortunately, I feel that, you know, this is, we're going

to do it again for seven years, we'll be back in Annapolis. It's, and, and it's horrible to me. I don't know why we have to be put through it again so.

MR. BORGERDING: No further questions.

CHAIR: Okay. All right.

MR. ZIMMERMAN: My turn.

CHAIR: Okay.

MR. ZIMMERMAN: Okay. Mr. Wolinski, what exactly is your address?

MR. WOLINSKI: 9019 Cuckold Point Road, it's directly, Sparrows Point, Maryland 21219.

MR. ZIMMERMAN: And how long have you lived there?

MR. WOLINSKI: Probably twelve, twelve years, I would imagine, eleven, twelve years.

MR. ZIMMERMAN: How old are you?

MR. WOLINSKI: I am forty-four.

MR. ZIMMERMAN: Okay. What's your educational background?

MR. WOLINSKI: I, I'm a school teacher. I have a, I have a, I'm a school teacher. I have a degree in Biology.

MR. ZIMMERMAN: From which college?

MR. WOLINSKI: Towson.

MR. ZIMMERMAN: Okay and where do you teach?

MR. WOLINSKI: Sparrows Point High School, right down the street from where I live.

MR. ZIMMERMAN: Biology?

MR. WOLINSKI: Yes, I teach Biology, Zoology, Environmental Science. My wife is a teacher there as well.

MR. ZIMMERMAN: All right. I want to show you Petitioner's Exhibit 6, the aerial photo. I think the Board just has one copy of it. Can you identify your house?

MR. WOLINSKI: Here, that's my house right here.

MR. SCHMIDT: You, you want him to mark it, Mr. Zimmerman?

MR. ZIMMERMAN: Well, it says 9019, would it help the Board if --

MR. WOLINSKI: No, it's, it's 9019.

MR. ZIMMERMAN: 9019 is marked right on the exhibit, just show my copy to the Board.

MR. WOLINSKI: I think it's the same one.

MR. ZIMMERMAN: And, okay. So, you are, are you right next to the Dock of the Bay?

MR. WOLINSKI: Yes, my, my house is adjacent to the parking lot.

MR. ZIMMERMAN: And you mentioned some other houses that are near to the Dock of the Bay. Are some of those on Sixth Street or, or --

MR. WOLINSKI: Yes, they are on Sixth Street and that would be Matt (inaudible).

MR. ZIMMERMAN: Can you give me the, there's some

addresses on this Petitioner's Exhibit 6.

MR. WOLINSKI: Yes, twenty, excuse me, 2716 Sixth Street.

MR. ZIMMERMAN: Hold on, that's Mr. Carpela?

MR. WOLINSKI: Yes, that --

MR. ZIMMERMAN: He couldn't be here, is he here today?

MR. WOLINSKI: He's right there, um hm.

MR. ZIMMERMAN: Okay. He was the, like the named party in the previous case.

MR. WOLINSKI: Yes, he was the named party, yes.

MR. ZIMMERMAN: And who else, among others, were, are, have houses very close --

MR. WOLINSKI: This 2712, is Bonnie's mother's house, she is there in the back.

MR. ZIMMERMAN: Bonnie Metheni?

MR. WOLINSKI: Bonnie and Brad, I'm sorry. Bonnie Metheni, she's there. And then this is a vacant property, they started --

MR. ZIMMERMAN: Twenty-seven, give me the number.

MR. WOLINSKI: 2703.

MR. ZIMMERMAN: All right.

MR. WOLINSKI: I think it's three. That is a vacant property.

MR. ZIMMERMAN: And 2704?

MR. WOLINSKI: And 2704 is also Brownie, Bonnie and Brad in the back there.

MR. ZIMMERMAN: Okay and they're on Sixth Street, which is perpendicular to Cuckold's Point Road.

MR. WOLINSKI: Yes, it is.

MR. ZIMMERMAN: Now, across Sixth Street, is that a park area?

MR. WOLINSKI: No, this is, this is a, just the woods that's owned by multiple people.

MR. ZIMMERMAN: Okay. All right and the Rowboat Willy's, that's shown on Petitioner's Exhibit 6?

MR. WOLINSKI: Yes.

MR. ZIMMERMAN: You need to see it again?

MR. WOLINSKI: No, I'm good.

MR. ZIMMERMAN: Okay and that's actually zoned business major?

MR. WOLINSKI: Yes, it is business major.

MR. ZIMMERMAN: Okay. Which would allow a nightclub.

MR. WOLINSKI: Which would allow them to have live music, with restrictions.

MR. ZIMMERMAN: And, okay and then there are several other houses across Cuckold's Point Road, correct?

MR. WOLINSKI: Yes, Wayne Waldman, he's the, the man that had the heart problem during the Larry Tanner --

MR. ZIMMERMAN: Well, where does he live?

MR. WOLINSKI: He is right here. He is at 9016 Cuckold Point Road.

MR. ZIMMERMAN: Right across from the parking lot?

MR. WOLINSKI: Right across the, yes.

MR. ZIMMERMAN: And the Board can see (inaudible).

MR. WOLINSKI: And his, his wife testified in the earlier hearing, but they couldn't be here today unfortunately.

MR. ZIMMERMAN: And this is, what, in general, what type of neighborhood is this?

MR. WOLINSKI: It's a quiet, residential neighborhood.

MR. ZIMMERMAN: Okay and of course, the Rowboat Willy's has been mentioned. I'm looking at Petitioner's Exhibit 7, a wider shot of the Miller's Island area, right?

MR. WOLINSKI: Yes.

MR. ZIMMERMAN: So there are a few other business major zones.

MR. WOLINSKI: Yes.

MR. ZIMMERMAN: Are any of those the restaurants that have been mentioned?

MR. WOLINSKI: No, they are not.

MR. ZIMMERMAN: They're not, okay. So, the Islander, where's the Islander?

MR. WOLINSKI: The Islander is across the street here, in this BL, and it, it is BL as well.

MR. ZIMMERMAN: When you say, okay, so, is the Islander a problem for you?

MR. WOLINSKI: No, they don't have live music.

MR. ZIMMERMAN: Okay. Do they have outdoor music?

MR. WOLINSKI: No, they do not.

MR. ZIMMERMAN: And as far as Rowboat Willy's goes, even though it's business major, do you have any problem with, with them?

MR. WOLINSKI: No, I don't.

MR. ZIMMERMAN: Because?

MR. WOLINSKI: I guess where they set their music up, it's on the other side of their buildings, their building kind of blocks it away from us.

MR. ZIMMERMAN: The other side of their boats too?

MR. WOLINSKI: Yeah, and then there's boat racks and all that kind of stuff in between.

MR. ZIMMERMAN: So, you haven't felt a need to complaint about, but anyway they're business major?

MR. WOLINSKI: No, yeah, well, Rob, Rob (inaudible) he keeps a pretty good handle on it.

MR. ZIMMERMAN: Okay. I'll leave my exhibit up there for a moment. Now, you mentioned Mark Allen as being acoustic, acoustic with an amplifier. You've heard Mark Allen play?

MR. WOLINSKI: Yes.

MR. ZIMMERMAN: When you say he's got an amplifier,

is this one of these amplifiers that produces sounds of other instruments?

MR. WOLINSKI: Yes, it can.

MR. ZIMMERMAN: So, it's like some of these solo people have the capacity to sound like a band?

MR. WOLINSKI: Yes, sir.

MR. ZIMMERMAN: And that's Mark Allen, would be one of those who, who --

MR. WOLINSKI: Yes, sir.

MR. ZIMMERMAN: -- it's an efficient way to get more music out, right?

MR. WOLINSKI: Yes, I would think.

MR. ZIMMERMAN: But it also means it's louder than you can imagine, of a single guitar player without any amplification?

MR. WOLINSKI: Absolutely, that, that's, that's the point. The acoustic used to be just a guy playing a guitar, like no amplifier and now when you look at acoustic, you know, it's, it's, they use a microphone to amplify the acoustic guitar.

MR. ZIMMERMAN: And apparently, there's no doubt that that was going to be the first player that Mr. Boone was going to have?

MR. WOLINSKI: That's what the sign said, yes, sir. That's what the sign said, yes.

MR. ZIMMERMAN: So, that wouldn't make you feel particularly comfortable (inaudible)?

MR. WOLINSKI: No, sir, it would not. No, sir.

MR. ZIMMERMAN: Now, there's been a lot of talk about State regulations and we'll, we'll pin that down but do you recall that the actual criterion under the law is above normal sound levels, not whether it violates State regulations or not?

MR. SCHMIDT: Objection.

CHAIR: Yeah, let's not ask him what the law says. I mean, he's not an attorney. The law does say what it says.

MR. ZIMMERMAN: Well, whether, whether or not you also believe that this, for various reasons, the music will likely violate State law, putting that aside for a minute, can you tell us your observation as to whether this kind of music would be above normal sound levels?

MR. SCHMIDT: Objection.

CHAIR: How's he going to know?

MR. SCHMIDT: How can he possibly speculate as to that?

CHAIR: We don't know, we don't know the type of music, we don't know the, the sound level, we don't know, I mean --

MR. ZIMMERMAN: Well, Mark Allen. He doesn't, it's not speculation, he's heard the music.

CHAIR: Okay, okay. So, if you're going to ask the

question about Mark Allen's sound level.

MR. ZIMMERMAN: Right.

CHAIR: Is, the question is, have you heard the gentleman, Mark Allen, play?

MR. WOLINSKI: Yes, I have.

CHAIR: Okay and in your opinion, was his, the playing of his music above normal sound levels?

MR. WOLINSKI: In my opinion, yes.

CHAIR: Okay.

MR. WOLINSKI: To simplify it, if he were playing outside next to my house, it would definitely disturb us.

CHAIR: Okay.

MR. ZIMMERMAN: Okay and let me ask you this. Not with, we've heard Mr. Boone's statement of the, if I heard him correctly and correct me if I'm wrong, that he would probably close by, I don't know, around midnight, I don't know. Mr. Schmidt will correct me if I've gotten the time wrong. And yet the website says 1:00 a.m. on weekends. What's your thought process on that? How do you respond to his statements that he's going to close relatively early?

MR. SCHMIDT: Close the restaurant or the music?

MR. ZIMMERMAN: Close the facility.

MR. WOLINSKI: I, I, I have no idea what time he would close. In my, my mind though, I'd have to imagine, based on what he said earlier, when people leave they, they would

close. So, if people weren't leaving, I'd say that he would stay open until the people left or until the maximum time that he could stay open. I mean, if people are buying drinks at 10:00, 11:00 or 12:00 or 1:00, I think he would still continue to sell them.

MR. ZIMMERMAN: If the website says 1:00 a.m., is that something you think most people can rely on when they're--

MR. SCHMIDT: Just, just objection to the extent that is he talking about how long the restaurant is open or the music is playing, because it's entirely two different things. I mean, the restaurant may very well be open late but Mr. Boone has testified about the hours, the dusk and the 11:00, I mean, we've heard about that so I, I, the inference is being made that the music is going to be played as long as the restaurant is open, which is not what the testimony is, I guess what I'm saying, Ms. Murphy.

CHAIR: I understand.

MR. ZIMMERMAN: That misrepresents my question.

CHAIR: Mr. Zimmerman, what I think is concerned with, the closing of the restaurant, that, that, but, again, we are not here to talk about whether or not he can operate a restaurant.

MR. ZIMMERMAN: The closing of the facility, according to the website, is 1:00 a.m.

CHAIR: Understood.

MR. ZIMMERMAN: There's been some testimony that the whole place is closing earlier than that. The fact that the website says 1:00 a.m., without reference to what goes on, I'm asking this witness, you know, how, what impact, if any, does that have about his concern?

MR. WOLINSKI: Well, it, it does. Staying open later obviously has a, has a huge impact on, on when people leave and get in their cars and drive out and wake us up and that kind of thing. For sure that, that will definitely impact my, my life. You know, and I think I understand what you mean by, you know, the, the restaurant is, you know, going to be staying open later than normal hours as far as one of the criteria for, for does it meet that of a nightclub and I would have to assume that, that yes, that it would stay open later than, then normal hours and meet one of the criteria and that's what happened with Larry. He would stay open and, and, whether he had music playing, whether he stopped the music at 12:00 or, or 11:00, the, the music would stop and then the people would stay around, continue drinking and then, you know, that just, that just made the problem that much worse. You know, if the people, if the restaurant closed out at, at 10:00 and, you know, didn't wake us up, then that would be one thing, but when it, everybody leaves and gets in their cars at 2:00 a.m., yes, it is definitely disturbing to us.

MR. ZIMMERMAN: And just to clarify, you don't object

to there being a restaurant and bar there?

MR. WOLINSKI: Absolutely not. I haven't had one, I haven't made one complaint against Mr. Boone in, in a year and a half.

MR. ZIMMERMAN: And as far as you can tell, based on your, have you been inside the place in the last year?

MR. WOLINSKI: Yes, um hm. I was over in the summer time, I was over once for sure when the Kondylas' owned it, I was over once, when the Kondylas were partners, and I was over, over the summer, somebody was having a birthday party and Matt (inaudible) and I have been there.

MR. ZIMMERMAN: Were the Kondylas there part of the time, at some point (inaudible)?

MR. WOLINSKI: No, no, just right, right at the very beginning. Like they were, right at the very beginning, the Kondylas were part of it and I think I was coming home from a baseball game and, you know, fall, fall baseball game. I think it was right when they, when they first opened opened.

MR. ZIMMERMAN: And based on, even when you're not there, when you're at home, you see the parking lot, based on your observation has the place been relatively well attended?

MR. WOLINSKI: Yeah, I mean, there's, there's cars there for sure.

MR. ZIMMERMAN: And just so I understand your testimony, were you saying that even the inside music can be a

problem because the doors open and then the sound emanates --

MR. WOLINSKI: Yes.

MR. ZIMMERMAN: -- outside and even extends, can extend to your property, based on your experience with the Tanner operation?

MR. WOLINSKI: Absolutely. There's a, Larry Tanner tried to build like a plywood vestibule on the back of the building to try to deflect the noise but in the liquor board things, when the side door is opened, you know, we're on the side of the property so as soon as the doors open, well, that's where all the sound is directed out at, at our homes. So, and that's where, there's an outside bar there as well, so there could be people out there, you know, drinking until 11:00 and whatever and it becomes very, very loud.

MR. ZIMMERMAN: And depending on how loud recorded music could be from time to time, was that ever a problem?

MR. WOLINSKI: Occasionally, with the outside bar speakers, not so much from, from my residence but I know Mr. --

MR. SCHMIDT: Objection then if he, if it's not --

MR. WOLINSKI: Mr., Mr. Metheni will testify.

MR. ZIMMERMAN: Well, could you observe as to where the sound goes? I mean, you're not always at your place, sometimes are you at your neighbor's or, or walking down the street, I mean, are you sometimes at those locations?

MR. WOLINSKI: I am, but it hasn't, it, you know,

when I was there, it wasn't bothersome to me, no.

MR. ZIMMERMAN: The music wasn't playing at those times?

MR. WOLINSKI: Yeah, I'm not sure if it was or wasn't.

MR. ZIMMERMAN: But you'd have to ask them as far as their --

MR. WOLINSKI: Absolutely.

MR. ZIMMERMAN: -- their personal experiences on that. And just to clarify, is, is, I want to get this, is Miller's Island actually an island or is it --

MR. WOLINSKI: No, it's not, it's a peninsula.

MR. ZIMMERMAN: Yeah, and it's beyond Edgemere, basically? You drive through --

MR. WOLINSKI: Yes.

MR. ZIMMERMAN: -- part of Dundalk and then you take --

MR. WOLINSKI: Through Edgemere, go down North Point Road, turn left to go to Miller's Island, straight to go to Fort Howard.

MR. ZIMMERMAN: And it's fair to call it a peninsula?

MR. WOLINSKI: It is very fair to call it a peninsula.

MR. ZIMMERMAN: Okay. Thank you. That's all I have, Madam Chair.

CHAIR: All right.

MR. SCHMIDT: Can I have Petitioner's exhibit number six, please? Which is the aerial.

MR. ZIMMERMAN: I think I left mine up there, which is fine. The Board can take a look at it during the questions.

MR. SCHMIDT: Because I'm going to have him mark, okay. Mr. Wolinski, there's been, on Petitioner's exhibit number six, an X placed where the Dock of the Bay when Mr. Boone testified, is that right?

MR. WOLINSKI: Yes, sir.

MR. SCHMIDT: I'm going to ask you if you'll put DOB next to that X where that's the Dock of the Bay? Okay. Now, I'm next going to ask you, your house is shown on that exhibit, is it not?

MR. WOLINSKI: Um hm.

MR. SCHMIDT: And could you put your initials, CW, there? Okay. Now, a little bit about that, what zone is your house located in? What's the zoning of your property, where your house is?

MR. WOLINSKI: BL.

MR. SCHMIDT: Okay. So, your prop, your house is actually in a business zone, is it not?

MR. WOLINSKI: Yes, sir.

MR. SCHMIDT: Okay. When did you build your house?

MR. WOLINSKI: Let's see, twelve years ago,

(inaudible).

MR. SCHMIDT: Okay. Was it, was it zoned business at the time, if you know?

MR. WOLINSKI: Yes, it was.

MR. SCHMIDT: Okay. The Dock of the Bay was in existence at the time, at that time?

MR. WOLINSKI: Yes.

MR. SCHMIDT: So, you chose to build a house in a business zone next to a restaurant?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. Now, do you have, do you have any idea how close your house is to the Dock of the Bay restaurant, in terms of linear feet?

MR. WOLINSKI: Just, just guessing, my house is probably a hundred and fifty.

MR. SCHMIDT: Okay.

MR. WOLINSKI: Just based on like if you use this kind of thing, you know what I mean?

MR. SCHMIDT: As the crow flies?

MR. WOLINSKI: Yeah, kind of thing.

MR. SCHMIDT: Okay. Rowboat Willy's, I understand that's BM, but that's the property next to Dock of the Bay, correct?

MR. WOLINSKI: Um hm.

MR. SCHMIDT: And can you mark, can you write Rowboat

Willy's where the Rowboat Willy's is? Okay and how far is Rowboat Willy's to, from your house?

MR. WOLINSKI: I would probably say three hundred feet.

MR. SCHMIDT: Okay. So, you think it's twice or three times the distance to the Dock of the Bay --

MR. WOLINSKI: I was just looking at this, this is a fifty-foot lot, fifty, fifty, fifty, that's a hundred and fifty.

MR. SCHMIDT: Well, fifty, fifty, fifty.

MR. WOLINSKI: That's a hundred and fifty and this one here looks like it's probably about the same width as two of these so I would say that's two fifty and then this one lot right here is fifty, so I would say two fifty, three hundred feet.

MR. SCHMIDT: Okay. Okay, all right. So, and Rowboat Willy's is outdoor music?

MR. WOLINSKI: Yes.

MR. SCHMIDT: That doesn't bother you?

MR. WOLINSKI: No, it does not.

MR. SCHMIDT: Okay. But the Dock of the Bay, you're objecting to in, indoor music at the Dock of the Bay?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay.

MR. WOLINSKI: And, and outdoor, don't --

MR. SCHMIDT: Indoor and outdoor at Dock of the Bay?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. The Islander, your testimony is that that doesn't have any music?

MR. WOLINSKI: They don't have live music. To, to my knowledge, I've, twelve --

MR. SCHMIDT: Have you ever been in there?

MR. WOLINSKI: Yes, and I've never seen a band in Islander in my life.

MR. SCHMIDT: Okay. Do they have entertainment, amplified entertainment?

MR. WOLINSKI: They might have a DJ, yeah.

MR. SCHMIDT: So, they have a DJ?

MR. WOLINSKI: Karaoke, that's what they have typically.

MR. SCHMIDT: And karaoke, okay, karaoke --

MR. WOLINSKI: Not so much a DJ, I've seen karaoke.

MR. SCHMIDT: Okay.

MR. WOLINSKI: I haven't seen a DJ there.

MR. SCHMIDT: Okay. That doesn't bother you either?

MR. WOLINSKI: No, that's over here behind other houses.

MR. SCHMIDT: Is it, is their property shown, is their property at the intersection of Fifth?

MR. WOLINSKI: That, that's it right there, yep.

MR. SCHMIDT: Okay.

MR. WOLINSKI: So, there's, it's back here, there's other houses that, that block and --

MR. SCHMIDT: Well, if you can, can you put Islander where the corner of their property is?

MR. WOLINSKI: Yep.

MR. SCHMIDT: Okay. How far are you from the Islander Inn?

MR. WOLINSKI: I would say that I am, one, two, that's about a hundred, I, from the building itself, I'd say two, two fifty.

MR. SCHMIDT: Two hundred and fifty feet?

MR. WOLINSKI: Yeah, because --

MR. SCHMIDT: Okay, okay.

MR. WOLINSKI: Yeah.

MR. SCHMIDT: Okay, that's what your measurement is. (inaudible). So, you've got the Islander Inn two hundred --

MR. WOLINSKI: To, to the building.

MR. SCHMIDT: -- two hundred fifty feet away from you in one direction that has karaoke.

MR. WOLINSKI: Yes.

MR. SCHMIDT: You have Rowboat Willy's, you say is three hundred feet from you, which is all outdoors, which has bands playing?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay and then you have the Dock of the Bay?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. All in business zones?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Now, you mentioned that Rowboat Willy's is allowed but with restrictions?

MR. WOLINSKI: Yes.

MR. SCHMIDT: What are the restrictions that Rowboat Willy's operates under?

MR. WOLINSKI: I'm not sure. That might be something you'd have to ask them.

MR. SCHMIDT: Well, why do you say that they have some kind of restrictions then?

MR. WOLINSKI: Because that's what I was, I heard.

MR. SCHMIDT: From, from who?

MR. WOLINSKI: From other people. Like, I mean, that, I know that when you look at the, when you look at through the, the zoning codes and all that kind of stuff, there's all these different restrictions and I don't know all of them, I just know there was one that said, you know, with restrictions and I know Brad talked about them and --

MR. SCHMIDT: I'm not asking Brad.

MR. WOLINSKI: Okay.

MR. SCHMIDT: I'm asking you. So, you believe that

Rowboat Willy's is operating with some kind of restrictions?

MR. WOLINSKI: No, I'm not. I'd say that they are operating within their legal limit, they're allowed, but if somebody forced the issue, there could be restrictions put on them. That's what I mean.

MR. SCHMIDT: Okay. So, your testimony is Rowboat Willy's is operating in accordance with the County regulations, whatever they might be?

MR. WOLINSKI: Yes, I think.

MR. SCHMIDT: You, you think, well, you don't, okay.

MR. WOLINSKI: Yeah.

MR. SCHMIDT: Okay. I was confused --

MR. WOLINSKI: I don't know, I apologize, I don't know all the Code.

MR. SCHMIDT: -- Mr. Wolinski, because you said they're operating with restrictions. I wrote it down.

MR. WOLINSKI: Oh, okay, well --

MR. SCHMIDT: And I was just trying to figure out what the restrictions were. Okay.

MR. WOLINSKI: Okay.

MR. SCHMIDT: But you don't know if there are any restrictions?

MR. WOLINSKI: No, I, I do not.

MR. SCHMIDT: Okay. You're not a noise expert, you're a science teacher?

MR. WOLINSKI: Nope, not a zoning guy, I just --

MR. SCHMIDT: Not a zoning guy. Okay. You've testified a lot about when Mr. Tanner was there.

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. Did you ever go to Mr. Tanner's restaurant when he was having music played?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. The music was, that was outside, did Mr. Tanner have a, a, a stage kind of area that he would, had for the musical acts?

MR. WOLINSKI: I've never seen a band on a stage there.

MR. SCHMIDT: Well --

MR. WOLINSKI: In fact, I know that (inaudible) testify there was a stage built.

MR. SCHMIDT: Um hm.

MR. WOLINSKI: We stopped going there after, you know, we developed this kind of feud, I guess you would say.

MR. SCHMIDT: Okay. So, you don't know, you don't know whether he had a stage or not?

MR. WOLINSKI: I don't know if he, if he built one after the fact, but I do remember that, you know, they were set up on the pavement when I was there before.

MR. SCHMIDT: Okay and there was, they were not on any kind of elevation or no make shift stage, even --

MR. WOLINSKI: No, no, not when I was there.

MR. SCHMIDT: -- if it was in a formal structure?

MR. WOLINSKI: No.

MR. SCHMIDT: Okay. How many --

MR. WOLINSKI: And not a stage inside.

MR. SCHMIDT: -- how many times were you there at, at Mr. Tanner's place when music was playing, live music was playing?

MR. WOLINSKI: Handful.

MR. SCHMIDT: Okay. All right.

MR. WOLINSKI: Because the steel drum band played there and I went there for that once.

MR. SCHMIDT: Okay. When you were at Mr. Tanner's, were people dancing, were there ever people dancing when you were there?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. Did, how was that accommodated? Did they have a dance floor?

MR. WOLINSKI: No, they kind of just like, just like when they put the, the, the band inside, they would just move the tables kind of out of the way or pull the tables back and that's where people would, that's where they would set up the band and that's where they would, they would technically that's where they would dance.

MR. SCHMIDT: Right, so --

MR. WOLINSKI: It wouldn't be like, like a wedding dance floor, it was just like a few tables pulled back and you would see a few people dancing in that location.

MR. SCHMIDT: You've been over to the Dock of the Bay?

MR. WOLINSKI: Yes.

MR. SCHMIDT: You were there as recently as last week?

MR. WOLINSKI: Yes, sir.

MR. SCHMIDT: All right. I assume for the purpose of being able to fill out the affidavit that you attached to --

MR. WOLINSKI: Well, I was over there in the summer as well, but.

MR. SCHMIDT: Okay. But, answer my question. You went over there so you could say you were there and complete your affidavit, right?

MR. WOLINSKI: Oh, yes.

MR. SCHMIDT: Okay. Did you have anything to eat while you were there?

MR. WOLINSKI: No, we drank a couple beers.

MR. SCHMIDT: Okay. Now, when, when you were there, you've seen the layout of the Dock of the Bay inside?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay and I assume what Mr. Tanner did when the bands start playing, as I understand it, is he would

push those chairs and tables back or in an area so as to create a dance floor, is that right?

MR. ZIMMERMAN: Objection. Actually, the Board of Appeals found there was no dance floor. I mean, this is, this testimony is really irrelevant.

CHAIR: Okay.

MR. SCHMIDT: Mr., Mr. Wolinski has testified as to what he said and as, I'm just trying to clarify that, Mr. Wolinski and what I understand you to say, just correct me if I'm wrong, is that what Mr. Tanner did when he had a band inside is he would push the tables and the chairs in order to get, create a space, it wasn't a permanent dance floor, so people could dance?

MR. ZIMMERMAN: I object because the --

MR. WOLINSKI: I don't think Mr. --

MR. ZIMMERMAN: -- Board has made findings on this.

CHAIR: Okay, okay.

MR. WOLINSKI: I don't think Mr. Tanner --

CHAIR: Wait a minute.

MR. ZIMMERMAN: (inaudible) totally a waste of time (inaudible).

CHAIR: I understand. Overruled. Okay, go ahead.

MR. WOLINSKI: I don't think Mr. Tanner moved the tables. He moved the tables for the band to set up.

MR. SCHMIDT: Okay.

MR. WOLINSKI: And then the patrons would slide the tables back if they wanted to dance. It wasn't like, I guess depending on what type of music was playing and who was there, that would determine whether, you know, like, like if I was there, music was playing, I wouldn't, I don't dance, so I wouldn't move the tables back.

MR. SCHMIDT: Okay. But --

MR. WOLINSKI: But if there were people that were there, they would get up and the patrons would adjust the tables and then they would dance there, yes.

MR. SCHMIDT: Okay and that's all I'm asking, when you were there, you saw people doing that.

MR. WOLINSKI: Yes, sir.

MR. SCHMIDT: You saw tables being moved.

MR. WOLINSKI: Yes.

MR. SCHMIDT: Mr. Tanner or the wait staff or somebody didn't come out and say, hey, stop moving those tables, you can't do that?

MR. WOLINSKI: No, no.

MR. SCHMIDT: He allowed that to happen so that there was a de facto dance area created, correct?

MR. WOLINSKI: Yes, I, yes, probably, um hm.

MR. SCHMIDT: Okay. Okay. Now, he also had a tent outside, did he not?

MR. WOLINSKI: Yes, he did.

MR. SCHMIDT: Okay and did he have music within the tent area?

MR. WOLINSKI: Yes, he did.

MR. SCHMIDT: Okay. Is the tent still there?

MR. WOLINSKI: No, it is not.

MR. SCHMIDT: Okay. Now, the hours that Mr. Tanner played all this music, how late in the night, let's start with weekdays when he had music playing, did the music go? You lived next door --

MR. WOLINSKI: Is Friday a weekday?

MR. ZIMMERMAN: You know, I'm going to object.

MR. SCHMIDT: Let's start with the weekday.

MR. ZIMMERMAN: I object because, you know, basically Mr. Schmidt is trying to retry the 2008 case as to what was going on and the Board of Appeals made findings.

CHAIR: I understand, okay. That's all right. Overruled.

MR. ZIMMERMAN: We shouldn't have to retry the 2008 (inaudible).

MR. WOLINSKI: Is Friday a weekday?

MR. SCHMIDT: No.

MR. WOLINSKI: Okay.

MR. SCHMIDT: Let's say, let's say Sunday night through Thursday.

MR. WOLINSKI: Sunday night, he didn't, Sunday during

the day he did. Friday night he would have typically indoor stuff. On Saturday and Sunday he would typically have outdoor music during the day and then he would break for an hour or so and have like a different music, band or live entertainment inside on Saturday night and sometimes Sunday, depending.

MR. SCHMIDT: Now, how late did that go?

MR. WOLINSKI: The, the outside stuff typically, you know, 6:00, 7:00, 8:00, depending on when they would start, you know, that kind of thing. Sometimes shut down at dark, like Mr. Boone was talking about and it really just depends. Sometimes he'd have two acts, you know, and then on the inside, I, I don't really, not really sure exactly what time. They all kind of stopped at different times, if that makes sense, 11:00, 12:00, 1:00, that kind of thing.

MR. SCHMIDT: Okay. He ever have music till 2:00 in the, in the morning?

MR. WOLINSKI: No.

MR. SCHMIDT: Ever have it till 1:00 in the morning?

MR. WOLINSKI: Yes, I would think.

MR. SCHMIDT: Okay. Now, you object to Mr. Boone having any music, either inside or out, correct?

MR. WOLINSKI: Any live entertainment, yes.

MR. SCHMIDT: Any live entertainment, okay. And you also indicated that you object to people making noise when they slam car doors and leave, is that correct? That's part of the

problem too?

MR. WOLINSKI: No, I, I said that that, that can be bothersome and when the people leave after the, the large crowds leave after the music at night, that can be, that can be bothersome. But no way do I sit here and say that people leaving the restaurant, like I don't want to hear doors closing, that, that's not what I'm saying.

MR. SCHMIDT: Because people can leave the restaurant --

MR. WOLINSKI: Absolutely.

MR. SCHMIDT: -- if there's a party there, whether there's music or not.

MR. WOLINSKI: Yes.

MR. SCHMIDT: And that you would hear that, right?

MR. WOLINSKI: Absolutely right, absolutely right.

MR. SCHMIDT: Since you're right next door in the BL zone. Okay.

MR. WOLINSKI: Yeah, but that, that's, that isn't something that, you know, we're not, we're not here over the occasional nuisance noise of, of a door shutting, you know, that's not why any of us are here.

MR. SCHMIDT: Okay.

MR. WOLINSKI: And no, I would never call Mr. Boone and say somebody closed the door, it's bothering me. I mean, that's.

MR. SCHMIDT: Okay. Let me, let me ask it this way, do you know, do you know Raymond Jones, a neighbor, do you have a neighbor named Raymond Jones?

MR. WOLINSKI: I don't know.

MR. SCHMIDT: You don't know? Okay, that's all right. If he doesn't know, that's fine. You have a neighbor named Christina Ottendorf, do you know her?

MR. WOLINSKI: Yes, I do.

MR. SCHMIDT: Where does she live, if you know?

MR. WOLINSKI: Over on Fifth Street.

MR. SCHMIDT: Fifth Street, and do you know her address?

MR. WOLINSKI: I do not.

MR. SCHMIDT: Okay. Is she closer to the Dock of the Bay than you are or as, or farther away?

MR. WOLINSKI: Further away.

MR. SCHMIDT: How far away, if you know?

MR. WOLINSKI: From my, she's, I mean, there's, there's three lots in between and then thirty and thirty are the roadway, a hundred, two hundred and ten feet.

MR. SCHMIDT: Okay.

MR. WOLINSKI: From my house.

MR. SCHMIDT: From your house. Okay.

MR. WOLINSKI: And that's a, that's an approximation, I mean, you know.

MR. SCHMIDT: Okay. I don't have any other questions of the witness. Thank you.

CHAIR: All right.

MR. BORGERDING: Just quickly in follow-up. Mr. Wolinski, Mr. Schmidt asked you if you are here to protest inside or outside music, correct?

MR. WOLINSKI: Yes.

MR. BORGERDING: And you would, you don't want either?

MR. WOLINSKI: I do not.

MR. BORGERDING: Okay. Is the reason that you don't want inside music is illustrated on Protestant's, I believe, it was ten through twelve, the liquor board readings showing above allowed decibel levels?

MR. WOLINSKI: Correct.

MR. BORGERDING: Right. So, you're concerned about that happening again?

MR. WOLINSKI: Yes, sir.

MR. BORGERDING: Okay. No further questions.

MR. ZIMMERMAN: And just a couple. I know we're getting late here. You know, your residence, a residence is allowed in a business zone when it's adjacent to a (inaudible), right?

MR. WOLINSKI: Yes, sir. Yes.

MR. ZIMMERMAN: So, you had no problem (inaudible)?

MR. WOLINSKI: No, because after that they said it's deemed residential.

MR. ZIMMERMAN: Okay and as far as the Islander goes, they only have indoor music and it's not a problem for you so you didn't feel like com, there's nothing to complain about?

MR. WOLINSKI: Exactly.

MR. ZIMMERMAN: Much less spend another seven years on something.

MR. WOLINSKI: Absolutely right.

MR. ZIMMERMAN: And as far as the Rowboat place, it's BM zone and, and the boats and everything and the distance, mean it's not a problem for you?

MR. WOLINSKI: Exactly. I'm not here to, to complain about things that don't bother me and, and, you know, if, you know, I'm not going to go complain against the, the Islander, it doesn't affect us. They don't have live music, I don't hear them, it's not like I'm picking out Mr. Boone just because, you know, it has a direct impact on my life and my family's life.

MR. ZIMMERMAN: So, as far as you're concerned, all the talk about these other places has nothing to do with (inaudible)?

MR. WOLINSKI: Not really, not to me, no.

MR. ZIMMERMAN: Thank you. That's all I have.

MR. SCHMIDT: Just one follow-up very quickly. Rowboat Willy's is, is next door to Mr. Boone, right?

MR. WOLINSKI: Yes.

MR. SCHMIDT: And that's actually the, the boatyard called, it's an operation called Bill's Boats, right?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay and they have boats on racks, do they not?

MR. WOLINSKI: They do.

MR. SCHMIDT: Okay. Do you own a boat?

MR. WOLINSKI: I do.

MR. SCHMIDT: Do you keep it on a rack?

MR. WOLINSKI: No, I keep it on a lift.

MR. SCHMIDT: Okay. On your property?

MR. WOLINSKI: My parents' lot. My parents live on the water, I just hit the button, it falls in the water.

MR. SCHMIDT: Okay. So, it's a lift out on the water?

MR. WOLINSKI: Yes.

MR. SCHMIDT: Okay. I don't own a boat, Mr. Wolinski. I'm assuming most people keep their boats on the boat racks and the storage at Bill's Boats during the winter time, is that a fair statement?

MR. WOLINSKI: That is fair.

MR. SCHMIDT: Because if you're not, if it's, you're not going to go out cruising on the bay when it's ten degrees like it was last week.

MR. WOLINSKI: Um hm.

MR. SCHMIDT: Okay and during the summer, people would come down and would remove their boats and not have them on the racks, right?

MR. WOLINSKI: Yes and no. Basically, Mike and Rob are fairly quick at pulling the boats.

MR. SCHMIDT: Right.

MR. WOLINSKI: So, they, they need their, you know, and this is just speaking for them from, you know, I don't want it to be hearsay but they need their pier space so when a boat comes in, they, they basically pull it out and put it on a rack as, as fast as they can.

MR. SCHMIDT: Okay. But my, my point is, most people would come down to Bill's Boats and take their boats off the racks typically, I would assume, again, I don't own a boat, when it's a nice day in the summer time, right?

MR. ZIMMERMAN: Objection. It's basically asked and answered. We don't need to go into, to this (inaudible).

CHAIR: I don't think it's been asked and answered but go ahead. If you know.

MR. SCHMIDT: If you know.

MR. WOLINSKI: Yeah, I, no, I mean, any given day --

MR. SCHMIDT: My point is this, Mr. --

MR. WOLINSKI: -- five boats could be missing from the rack.

MR. SCHMIDT: Right.

MR. WOLINSKI: And the next day, five different boats would be back and, you know, it's a rack and they, they take them off, put them in, the people go out for a couple hours, come back in, forklift picks them up, puts them back in the rack.

MR. SCHMIDT: Okay.

MR. WOLINSKI: It's, it's never a time as the, the rack like empty.

MR. SCHMIDT: Okay.

MR. WOLINSKI: Nor is there a time, you know, that, that the pier would be, the, the, if the rack were to empty out, the pier couldn't handle the boats in the water, if that would, meant to say, you know, there's not --

MR. SCHMIDT: And most people take their boat and go sail to St. Michael's or something.

MR. WOLINSKI: Oh, yeah, yeah, absolutely.

MR. SCHMIDT: Right?

MR. WOLINSKI: Yeah, but the boats that are in the racks --

MR. SCHMIDT: I mean, and it, I guess all I'm trying to say, Mr. Wolinski, is this, during the winter time when people aren't taking out the boats, you've got sort of a wall of boats there along that property line because the boats are being stored there during off season, right?

MR. WOLINSKI: Yes, pretty much.

MR. SCHMIDT: And during the summer, and particularly weekends, people are taking the boats out. I don't think you have to be a boater to figure that out.

MR. WOLINSKI: No, no, not at all.

MR. ZIMMERMAN: Objection. Objection. It misrepresents his previous testimony, it's argumentative.

CHAIR: Okay. Overruled. Go ahead.

MR. SCHMIDT: Okay and so, and so my point is, Rowboat Willy's operates in the weekends during the summer, right?

MR. WOLINSKI: Well, they operate all week, but yes.

MR. SCHMIDT: Okay. But that's when they have the, most of the music, weekends in the summer, correct?

MR. WOLINSKI: Yeah, I would say, yes.

MR. SCHMIDT: And that's the time when most of the boats are gone or people are using the boats, right?

MR. ZIMMERMAN: Objection.

MR. WOLINSKI: Well, I don't know how many boats would be missing.

CHAIR: Overruled.

MR. WOLINSKI: I, I don't know.

MR. SCHMIDT: Okay. Okay. My point is made.

CHAIR: Okay, all right.

MR. SCHMIDT: Nothing else.

CHAIR: All right. I think we've conclude this witness. It's ten after three and --

MR. SCHMIDT: Yeah, I think, and I know you, the Board members indicated they were going to conclude at three.

CHAIR: At three.

MR. SCHMIDT: And you've got what, two more witnesses, Mr. Borgerding?

MR. BORGERDING: Correct.

CHAIR: Okay.

MR. WOLINSKI: Just one? I'm sorry.

MR. SCHMIDT: Two.

MR. ZIMMERMAN: Possibly another one will make it next time who couldn't make it today.

MR. WOLINSKI: I mean, their testimony is in the last hearing so.

MR. ZIMMERMAN: Yeah, but that doesn't count. It's got to be this hearing.

MR. WOLINSKI: Oh, okay.

MR. ZIMMERMAN: You may want to bring somebody else. Seriously.

CHAIR: Okay. So, it looks like we're going to need another day, I guess.

MR. SCHMIDT: I mean, you indicated, I think, Ms. Hanley and you both indicated conflicts as well, correct? I mean, correct?

CHAIR: Right, correct, that's right. And you had your conflict as well.

MR. SCHMIDT: And I, and I said I was going to, right.

CHAIR: Okay, all right. So, we'll have to schedule another day so we'll just, you'll have to, I'm sure Sunny will be contacting each of you.

MR. SCHMIDT: Okay.

CHAIR: Okay.

VOICE: Approximately when?

CHAIR: As soon as everybody is available.

MR. ZIMMERMAN: Thank you, all.

CHAIR: It's --

MR. BORGERDING: Excuse me. They're, they're indicating to me they only need like five minutes each, if we could just (inaudible).

CHAIR: Well, they need five minutes, but then there's cross examination and there's cross examination.

MR. SCHMIDT: Well, I'm, okay.

MR. ZIMMERMAN: Yeah, I don't know how long I'm going to take, it could be a while.

CHAIR: There's your answer right there. You may be fast, but Mr. Zimmerman's going to, I'm kidding, Mr. Zimmerman, you know that. Okay.

(EVERYONE TALKING AT ONCE)

CHAIR: Well, it's not five minutes because he has to cross examine and he has to cross examine.

MR. ZIMMERMAN: That's fine. No, I'll, I'll try to be short, I'll try to be, go ahead.

MR. BORGERDING: Call Matt (inaudible) to the stand.

CHAIR: Yeah, I mean, Mr., Mr. Schmidt has to be somewhere at 3:30 and, in twenty minutes.

MR. SCHMIDT: I, yeah, I'll push that back, I mean, if you, I'll leave it up to you. If you all want to --

MR. ZIMMERMAN: Can we get at least the one quick one in?

CHAIR: Well, well, that doesn't make sense. If we're going to come back another day, if we're going to come back another day, then we need to bring everybody back.

VOICE: (inaudible).

(EVERYONE TALKING AT ONCE)

MR. SCHMIDT: Whatever the Board's pleasure is so, we going to come back or what do you think --

CHAIR: Well, we're going to need to because we want to hear from everyone, I mean, we don't want to cut everyone off short, we can't get into cross examination, you can see like this one witness took however long it took, we were back here at 1:30 and we're just finishing with that one. Now, these other witnesses may not be as long but when you cross examine, you cross examine, you re-direct and you re-direct,

and you re-cross, that's my only concern. We want to be able to hear from everybody, I don't want to cut anyone off short. So, and if there's other witnesses that need to come, then they need to come next time.

MR. ZIMMERMAN: This gentleman may not be able to come back.

MR. WOLINSKI: (inaudible) his brother is going in the hospice, he has to, like this is the last day he can be here.

CHAIR: All right. Okay, but the problem is that, the problem is it's going to be until 3:30 then and Mr. Schmidt is not going to be able to cross examine him.

MR. SCHMIDT: And you've got, okay.

CHAIR: The next time. So, we can clear it with you the next time and tell you (inaudible).

MR. SCHMIDT: I am happy to work with Mr. Borgerding, Mr. Zimmerman and your office to sche, re-schedule this as promptly or as convenient for everybody as we can.

CHAIR: Okay.

MR. SCHMIDT: That's how, what I will pledge to do. Believe me, we want this over with.

CHAIR: Right. Okay.

MR. SCHMIDT: And I'll hand you up this exhibit.

CHAIR: Okay.

MR. BORGERDING: Thank you, Your Honor.

CHAIR: Thank you.

(OFF THE RECORD - 03:10:19 PM)

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I hereby certify that the hearing in the matter of Boone Kondylas, LLC, case number 16-003-SPH, heard before the Board of Appeals of Baltimore County, February 17, 2016 were recorded by means of audiotape.

I further certify that, to the best of my knowledge and belief, page numbers 1 through 215 constitute a complete and accurate transcript of the proceedings as transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of this case.

In witness thereof, I have affixed my signature this 15th day of November, 2016.

Christine R. Leary

Christine R. Leary

Transcriber

IN THE MATTER OF:

BOONE KONDYLAS, LLC
CASE NUMBER: 16-003-SPH0

Hearing Date: April 28, 2016

Pursuant to Notice, the above-entitled hearing was held before the Board of Appeals for Baltimore County at the Jefferson Building, Second Floor, Suite 203, 105 West Chesapeake Avenue, Towson, Maryland 21204, commencing at 10:00 AM.

PANEL PRESIDING:

MAUREEN E. MURPHY, CHAIRMAN

BENFRED B. ALSTON, BOARD

JANE M. HANLEY, BOARD

PRESENT ON BEHALF OF THE PARTIES:

LAWRENCE E. SCHMIDT, ESQUIRE

FRANCIS X. BORGERDING, ESQUIRE

PETER M. ZIMMERMAN, ESQUIRE

Christine R. Leary
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(ON RECORD - 10:00:25 AM)

CHAIR: Okay. All right. Good morning, everyone. We are here in the matter of Boone Kondylas, Kondylas, Kondylas, LLC, case number 16-003-SPH. This is day two of a Petition for Special Hearing to amend previous restrictions in another case or two other cases to permit future use of the property as a restaurant with limited accessory music and we had counsel, we had a whole day of testimony. Why don't we have counsel for the record?

MR. SCHMIDT: Thank you, Chairwoman Murphy and members of the Board, I'm Lawrence E. Schmidt of Smith, Gildea & Schmidt, with offices in Towson at 600 Washington Avenue, here again this morning on behalf of the Petitioner, property owner and Ken Boone, who is the managing member of the LLC is here with me.

CHAIR: Thank you.

MR. BORGERDING: Good morning, Your Honors. Francis X. Borgerding, I'm here on behalf of the Protestants.

MR. ZIMMERMAN: And Peter Max Zimmerman, People's Counsel for Baltimore County, Towson.

CHAIR: All right. And last I remember, we were in your case, Mr. Borgerding. Am I right about that? Check my notes.

MR. BORGERDING: You are correct.

CHAIR: All right and do you still have witnesses to

put on?

MR. BORGERDING: Yes, I sure do.

CHAIR: And I know we were last time, we were leaving, and someone needed to testify. If, so if there are, you know, priority witnesses, we just, we're going to rely on counsel, you know, both sides to tell us if someone needs to leave sooner rather than later, you organize your, your witnesses the way you need to. We don't want to exclude people and, and all that.

MR. BORGERDING: Understand, understand.

CHAIR: So, we'll try to rely on you.

MR. ZIMMERMAN: All right. I have an attendance sheet for today. If you want (inaudible).

CHAIR: Okay.

MR. ZIMMERMAN: To circulate an attendance sheet for --

CHAIR: Is that an exhibit?

MR. ZIMMERMAN: Well, the last one was made People's Counsel Exhibit 5 from, the sign in sheet from the first day.

CHAIR: Thanks for reminding me.

MR. ZIMMERMAN: So, if I'm correct, I think --

CHAIR: People's Counsel --

BOARD: Exhibit 6.

CHAIR: -- six.

MR. ZIMMERMAN: -- you can verify that, so the number

of citizens are in the audience who are in the opposition. Obviously, there were some citizens who testified in support last time.

MR. SCHMIDT: Chairwoman Murphy, just one sort of preliminary scheduling thing. I have an issue over at Circuit Court at 2:00 today.

CHAIR: Okay.

MR. SCHMIDT: Probably take me about ten or fifteen minutes and I, we may very well be done by then but or, if we could move a later lunch hour, it will not take me long, but it's something that I've got to attend to.

CHAIR: Right, that's fine, that's fine. We do need to leave by probably 3:15-ish.

MR. SCHMIDT: No, 2:00 is when it --

CHAIR: I mean, but we probably have to leave by like --

MR. SCHMIDT: Okay. I mean, I'll be ten minutes with that, I just have to go over --

CHAIR: That's fine. Do you think you're going to be that long, Mr. Borgerding? How, what, what do you think?

MR. BORGERDING: I really don't know. I, it's quite possible we'll be done.

CHAIR: Okay. It's one of those, you know, it's a twenty-minute case right in District Court when they say, everyone says twenty minutes, so they can go first, right?

That's it.

MR. BORGERDING: Pretty much it.

MR. SCHMIDT: That's the whole trick.

CHAIR: That's it, that's.

MR. ZIMMERMAN: Before Mr. Borgerding starts with witnesses, I told him I have some maps that I thought might be helpful to reference (inaudible) witness' testify so if I could briefly put some documents in now, that might facilitate --

CHAIR: Any objection to that --

MR. SCHMIDT: I don't know what they are, but if they're just off the County website.

CHAIR: Maybe you want to show Mr. Schmidt.

MR. ZIMMERMAN: Well, they're, I showed already, what would be People's Counsel Exhibit 7, an aerial, GIS aerial photo produced customarily by the GIS section of Office of Information and Technology, which shows substantial parts of the area around the Dock of the Bay restaurant. It also shows the zoning specifications, the roads and identifies each property on there. So, it is different from another map that, coincidentally, apparently Mr. Borgerding's client have, have assembled.

MR. SCHMIDT: No objection.

CHAIR: All right, no objection.

MR. ZIMMERMAN: So, should we put this on the, it should be marked --

CHAIR: If it, if it helps Mr. Borgerding. Do you want it, Mr. Borgerding? It's your case.

BOARD: Yeah, you want to mark it as your Exhibit 7?

MR. ZIMMERMAN: See, if I can --

CHAIR: Mr. Zimmerman, let me see if Mr. Borgerding wants that up there.

MR. BORGERDING: Yeah, I was kind of thinking that visually that might help but maybe what he can do is just enter into evidence.

MR. ZIMMERMAN: All right.

CHAIR: All right.

MR. ZIMMERMAN: (inaudible).

CHAIR: It appears to be helping you. So, --

MR. SCHMIDT: Just put it below it, if you want.

CHAIR: Yeah, that's fine.

MR. ZIMMERMAN: I think the biggest difference is it, it does show the, the property ownership of each property on (inaudible).

MR. SCHMIDT: It also shows the zoning, does it not?

MR. ZIMMERMAN: Yeah, it shows the zoning classifications. It also identifies clearly the different streets and roads.

CHAIR: Well, then let's do this, let's just put it underneath as Mr. Schmidt suggested, underneath of that, you know, pinned up, would be great, maybe because you'll maybe

cross examine them.

MR. ZIMMERMAN: Let's see what, all right, do the best we can here. Can I have some help?

MR. SCHMIDT: Sure.

MR. ZIMMERMAN: Does this look good for the Board?

CHAIR: Sure.

MR. ZIMMERMAN: Can I be heard, I always worry about these microphones.

CHAIR: You do have to worry about them because, because we always have an inaudible problem but you always remind us about that, which is helpful, because so many transcripts lately we were reading and they, and the witness just says inaudible.

MR. ZIMMERMAN: Right, and this may be helpful, I, I guess I'm a geography person, where (inaudible)?

VOICE: Right here.

MR. ZIMMERMAN: All right. So, I have in the package of three documents, which I'm suggesting would be 8-A, B and C. The ADC aerial road map excerpt, which shows the Miller's Island area, admittedly, the copies do not show as clearly the outside, the actual waterfront boundary but the original shows it a little better. I'm going to show that to Mr. Schmidt. We can, well, it's just a standard ADC road map and then the second, what would be 8-B is another, is really a smaller version of, although not the identical geography, but a smaller

version of what's on the large aerial photo.

BOARD: Just, just for, just for housekeeping, you're calling that eight. Now, one of those maps is seven, is the other eight?

MR. ZIMMERMAN: The other has not been, the other is Mr. Borgerding's map.

BOARD: Oh, that's (inaudible).

MR. ZIMMERMAN: And that hasn't been identified.

BOARD: Okay. So, the bottom map is yours?

MR. ZIMMERMAN: Right.

BOARD: Okay.

MR. ZIMMERMAN: Mr. Borgerding will handle his map, which by the way, is upside down. Okay?

MR. BORGERDING: Oh, is it?

MR. ZIMMERMAN: Okay? So, he'll straighten that out later. The, if you look at the, it identifies the various properties in general terms, like Islander Inn, Seventh Street Park, Hinton Avenue, fortunately I can read things upside down but I think he'll, I would suggest that it probably would make more sense to have it right side up.

MR. SCHMIDT: This is 8-A, B and C, Mr. Alston?

MR. ZIMMERMAN: My, yeah, 8-A, 8-A --

MR. SCHMIDT: I've got no objection.

BOARD: When I see them.

MR. SCHMIDT: Okay.

MR. ZIMMERMAN: Yeah, 8-A is the ADC map, 8-B is a, a, kind of an eight and a half by eleven-inch aerial, again, with property owners identified and, and 8-C is a little bit closer of, of this aerial which makes it easier to read the names of the property owners and I have copy of that for every Board member. Did I give the originals, okay, so I have an 8-B color photo is the actual exhibit for the Board, the rest are in black and white and then --

BOARD: This is 8-A?

MR. ZIMMERMAN: 8-A, B, C.

BOARD: 8-A, B, C. Okay.

MR. ZIMMERMAN: That's my suggestion, 8-A, B, C.

BOARD: Okay.

MR. ZIMMERMAN: And I have a copy for --

CHAIR: Okay.

MR. ZIMMERMAN: To the extent it may be helpful, we often get official copies of the zoning map. Show this to Mr. Schmidt.

MR. SCHMIDT: Sure.

MR. ZIMMERMAN: So, this, this would be People's Counsel's Exhibit 9, the official 2012 comprehensive zoning map of the area. So, I'll, I'll mark it and then provide it to the Board.

MR. SCHMIDT: Mr. Alston, I'm just trying to follow along. Six is the sign in sheet today?

BOARD: Yes.

MR. SCHMIDT: Seven is the large aerial, A, B and C are the three?

BOARD: Yes.

MR. SCHMIDT: And then nine is the zoning map?

BOARD: Yes.

MR. SCHMIDT: Thank you, sir.

CHAIR: Any objection?

MR. SCHMIDT: None.

CHAIR: All right.

MR. ZIMMERMAN: And, while I may have some more exhibits, I think at this stage that that's, that would be sufficient.

CHAIR: And you could put them in in your case.

MR. ZIMMERMAN: Right, to get things going.

CHAIR: Yeah, I understand.

MR. ZIMMERMAN: I thought these, I always think these maps are helpful for reference.

MR. BORGERDING: Your Honor, I just had one housekeeping matter and that is that the previous Court of Special Appeals decision entered in this case, is that in evidence? If it is not, I want to enter a copy.

MR. SCHMIDT: It is.

MR. BORGERDING: Okay.

BOARD: Was that, was that your exhibit?

MR. SCHMIDT: Well, it's in as Petitioner's exhibit number four.

BOARD: Okay.

MR. SCHMIDT: And I think it's also possibly in, well, I put it in as number four, I have Mr. Alston.

BOARD: Yes, that would be number eighteen, September term?

MR. SCHMIDT: Yes, sir.

BOARD: July of 2009?

MR. SCHMIDT: Yeah, the, the --

BOARD: It's an unreported opinion.

MR. SCHMIDT: Right. Circuit Court opinion in the prior case is number three, the unreported opinion is four and then there's a contempt opinion from the Circuit Court, which is number five, at least according to what I have.

BOARD: Yes.

MR. SCHMIDT: Okay.

MR. BORGERDING: Thank you.

CHAIR: All right. Okay.

MR. BORGERDING: Then I call Mr. Matt Ciarpella.

BOARD: Raise your right hand, please.

MR. CIARPELLA: Yes.

BOARD: Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. CIARPELLA: Yes.

BOARD: Can you please state your name and address for the record?

MR. CIARPELLA: My name is Matthew Ciarpella, I live at 2716 Sixth Street, Miller's Island 21219.

BOARD: Could you spell your last name for the record?

MR. CIARPELLA: Yes, C-I-A-R-P-E-L-L-A.

BOARD: Okay. You can have a seat.

MR. BORGERDING: Now, Mr. Ciarpella, how long have you lived at that address?

MR. CIARPELLA: I've lived there for eleven years.

MR. BORGERDING: Okay. So, you were a resident when Mr. Tanner owned Dock of the Bay?

MR. CIARPELLA: Yes.

MR. BORGERDING: Okay and you're familiar with everything that happened during that time?

MR. CIARPELLA: Sure.

MR. BORGERDING: Okay. You are here in opposition, correct?

MR. CIARPELLA: Yes, I am.

MR. BORGERDING: Can you explain to the Board why you are in opposition to Mr. Boone's present request?

MR. CIARPELLA: The short of it is the outdoor music is, it's, it's, it, it just doesn't, doesn't go well with, with

the proximity to where I live and, and a lot of the other people that you're going to hear testify today. The, you know, a couple things that I'd like to say, if, if we could go back just to recap, so far what we've seen from Mr. Schmidt is testimony and, and exhibits that he submitted, all of which I feel are completely irrelevant to the --

MR. SCHMIDT: Objection.

MR. CIARPELLA: -- five to seven years of litigation and, and with that, are examples --

BOARD: There's an objection --

CHAIR: I know.

MR. CIARPELLA: -- he has submitted pictures --

CHAIR: Wait a minute. I thought he was going to finish, okay. Hold on. I was letting you finish so I wouldn't interrupt but.

MR. BORGERDING: I mean, I don't want him testifying about what everyone (inaudible) --

MR. CIARPELLA: Well, I just want to bring it up so we're --

CHAIR: Wait a minute --

MR. SCHMIDT: Sir, you have to be quiet while I'm talking. Okay? With all due respect.

CHAIR: (inaudible) only because of the transcript. What happens is if you talk and Mr. Schmidt talks, the person, if you eventually get it transcribed, then the transcriptionist

can't figure out who said what and then it just becomes a big mess, so we all have to (inaudible), go ahead.

MR. SCHMIDT: Obviously, he's a neighbor and can testify about he's opposed and all that, but when he starts off by criticizing my taste and whatever I'm doing, I just find that objectionable, I mean.

CHAIR: I understand.

MR. SCHMIDT: Just, maybe you can instruct him how to testify.

CHAIR: I understand. Yeah, we, the Board is going to rule on whether something has relevance or not --

MR. CIARPELLA: Sure.

CHAIR: -- based on the law and the facts.

MR. CIARPELLA: Okay.

CHAIR: So, you don't have to, you know, worry about whether it's relevant. But, I understand, you're just, but you're, give us your, your take, is what you're trying to do.

MR. CIARPELLA: Yeah, exactly and I'll be brief.

CHAIR: Oh, that's fine, that's fine.

MR. CIARPELLA: Pictures of Bill's Boats, boatyard and pictures of Rowboat Willy's and proximity to Bill's Boats to Dock of the Bay and it has nothing to do with seven years of litigation that we've gone through, paid for and fought and gone, and gone through. Testimony from, from people who are either employees of Dock of the Bay or names are on the liquor

license at Dock of the Bay, okay? Testimony which even contradicts what they're saying in that they want to have different music than what Larry had. Signatures from people who don't live anywhere near Dock of the Bay or have any affiliation or even affected by whether or not Dock of the Bay has outdoor music, okay? So, with that, I don't find any relevance to it. So, the only thing that is relevant, that I feel is, he wants outdoor music for his client and it has been ruled that it affects the neighborhood negatively and you know, let's see. One of the bands that played for, at Dock of the Bay, for Mr. Tanner was a guy by the name of Mark Allen, okay? You're going to hear his name brought up probably a couple more times. So, Mark Allen was here at the last hearing, I don't think you know that, but he was actually, I guess, prepared to testify but he was sitting on the side of, of Mr. Schmidt, which says to me that they were going to, they want Mark Allen to play. Well, that's the exact same music and the exact same person that played there that we had to fight over when Larry Tanner owned, owned Dock of the Bay. So, you know, you have to be careful when they say different music. You know, you have to be careful when they submit pictures of Rowboat Willy's and say it's outdoor music. Here I have a picture of the building that is Rowboat Willy's, the building, okay? This is a building, this, this is closed off, it's a wall here. This is what faces our houses here, okay? Does that appear like it's

outdoor? It doesn't, because I built this. It has a cathedral roof with sound insulation and everything else. Now, there are, a portion of this is open on the other side but that's not the side that faces our homes and this is about three hundred and fifty or more, closer to four hundred feet away from my house.

CHAIR: Are you submitting that as an exhibit?

MR. CIARPELLA: If, if Mr. Schmidt were to allow it.

MR. BORGERDING: Yes, I, it would be Protestant's number --

MR. CIARPELLA: You know, so, you know, you have to be careful with what you're hearing --

CHAIR: Well, one second, one second, one second. Protestant's number?

BOARD: Twelve.

MR. BORGERDING: I don't know, I'm asking (inaudible).

BOARD: It would be Protestant's number twelve.

MR. BORGERDING: Okay.

BOARD: But it --

MR. BORGERDING: I would ask to enter it as Protestant's number twelve.

BOARD: Well, are there copies for everybody to see? Has Mr. Schmidt seen that photograph?

MR. CIARPELLA: I can post it up here.

CHAIR: Let Mr. Schmidt see it first. Mr. Borgerding, if you could hand that to him, he can take a look at it first.

MR. SCHMIDT: Okay. Just if we could ask, maybe the witness to authenticate it or if he took it or when he took it and --

MR. CIARPELLA: I did, I, I took it yesterday evening.

MR. SCHMIDT: Okay.

MR. BORGERDING: I would ask to enter (inaudible).

CHAIR: Okay. So, this --

MR. ZIMMERMAN: Could, could we, could everyone keep their voices up? I'm, even I'm having trouble hearing some of the --

MR. SCHMIDT: So, Mr. Ciarpella, that, that's a photograph that you took yesterday?

MR. CIARPELLA: Yesterday evening, yes.

MR. SCHMIDT: Okay and that's the building on the Bill's Boats property which is known as Rowboat Willy's?

MR. CIARPELLA: Yes, yes, um hm.

MR. SCHMIDT: Okay and obviously, that's what it looks like as of yesterday, so it's a current photo?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And I, I would just ask, is that, since it's, is Rowboat Willy's open this time of the year?

CHAIR: Wait a minute. Why don't we do that after Mr., one second, because we're in the middle of cross --

MR. CIARPELLA: Yeah, I don't believe so.

CHAIR: -- it'll be confusing on the record, but those are good questions, so.

MR. SCHMIDT: Okay, okay.

CHAIR: Why don't we just let Mr. Borgerding --

MR. SCHMIDT: If he took it yesterday, it's an administrative hearing, I have no objection.

CHAIR: I understand. Understand, thank you. Go ahead, Mr. Borgerding or --

MR. BORGERDING: Can you continue, Mr. --

MR. CIARPELLA: Sure, sure. Just a couple issues. Before, I, I realize this is a zoning hearing, this is a zoning issue. Prior to that, back when Mr. Tanner had the establishment, the issue started as a liquor board hear, issue and we went to many hearings with the liquor board and the, the bulk of that basically came down to the outdoor music, the decibel level, the noise level, the microphones, the speakers and all of which, you know, essentially, in my opinion, is going to be the same if, if a microphone is used, if a speaker is plugged in, it's not acoustic and you, you cannot not affect the neighborhood, not, not the immediate neighbors, not fifty feet away. Fifty feet is too close. It's too close. You know, what, what, what a person purchases as a restaurant is

one thing, but once you introduce a band, what it operates as is another and with that, you know, we're just against the outdoor live music, you know? End of story. You know, it's going to be, I don't see how this is really any different than what we've done and been through and the testimony we're hearing from people who, you know, it's the same thing that we went through to get the ruling that we got from the, the State Board of Appeals and I just don't really see a whole lot of difference there. I mean, other than, you know, who, who regulates this music, this accessory music? We did. We had to regulate it, you know, when it got too loud because they said they'd keep it low, we had to make calls, we had to call the police, we had to do this. You know, we shouldn't have to, you know? You know, and then, and then assuming Mr. Boone keeps the place, that's great. What if he sells and someone else comes in and then they're playing bands and then we have to, you know, and here we are, spending more money in attorney fees to keep, you know, what should be peace and tranquility in our neighborhood, you know? You know, I, I know one thing. I met with Mr. Boone and I like Mr. Boone, my father likes Mr. Boone, his test, you know, all of his testimony has, they, states that Mr. Boone is a nice guy and I believe that he is and he's, he's told me personally that he wants to level the playing field, he wants what all other restaurants are afforded. He wants those privileges and, you know, it, you know, it, it's summed up like

this. All BL zone restaurants are afforded the same regulations regarding noise and noise issues. They are, they are afforded that. All restaurants are afforded the same violation if outdoor music affects its neighbors and they are, and because it's complaint driven, that is, you know, that's the issue. You know, so the way I see it is, is, they, they, they, he is afforded the same, the, the playing field is level and, unfortunately, it has been established that the, the proximity of this building in relation to the residents around it is just a not, it's just not a good place to have outdoor music and it went all the way to the State Court of Appeals and they decided that, so, you know.

CHAIR: Okay.

MR. BORGERDING: Mr. Ciarpella, could you go up to the board and show where you live in proximity to Dock of the Bay?

MR. CIARPELLA: Let's see here. Okay, well, here, here's Dock of the Bay obviously. This is their parking lot. This is my residence here.

MR. BORGERDING: And how many feet is that?

MR. CIARPELLA: From, well, I, I will say that from, from this point, which is the road on Sixth Street, to my backyard is a hundred and fifty feet total, so I believe someone has drawn a line here at a hundred and fifteen from building to building, corner of Dock of the Bay to corner of my

building. So, the proximity from the yard to yard is probably somewhere in the fifty to seventy-five-foot range.

BOARD: Excuse me, if I could just, yeah, if I could interrupt you. That, that needs to be admitted as an exhibit.

MR. BORGERDING: Okay.

BOARD: Because we won't know what he's talking about looking at this, listening to this tape later, so.

CHAIR: Are you putting it in through this witness?

BOARD: Are you going to admit that?

MR. BORGERDING: Yeah, number one, I would ask that it be marked as thirteen, be entered (inaudible).

BOARD: Okay. What, what is it pre, what is it a depiction of?

MR. BORGERDING: The general area, aerial of the general area.

MR. ZIMMERMAN: We're talking Protestant's thirteen now?

BOARD: Yes.

MR. BORGERDING: Correct.

MR. ZIMMERMAN: Not just any thirteen.

CHAIR: Is, is an aerial view of the Dock of the Bay and the surrounding community?

MR. BORGERDING: Correct, with measurements.

CHAIR: Okay.

MR. ZIMMERMAN: May I suggest that the witness not

say this because the record is not going to have any idea what this is.

CHAIR: Mr. Borgerding --

MR. ZIMMERMAN: If the witness could be more descriptive.

BOARD: Right, well, actually his lawyer is going to --

CHAIR: Yes, you have to direct your witness to make sure, because otherwise the transcript is this, that and the other and nobody knows what that means and nobody can tell later on. You have to describe things in terms of relation and think about the person who is not sitting here watching what you're doing, so.

MR. BORGERDING: Right.

CHAIR: We'll let Mr. Borgerding direct his witness. 3-And then secondly, I have a smaller version of the same thing. I'd ask that it be entered as Protestant's number fourteen and I apologize --

CHAIR: This is a duplicate?

MR. BORGERDING: -- I --

BOARD: This is a duplicate of that?

MR. BORGERDING: Yeah, but it's, it's small and I apologize, I didn't show that to Mr. Schmidt.

MR. ZIMMERMAN: I still can't hear a lot of the speaking. I still cannot hear a lot of the speaking. I don't

think the microphone is going to get half of this.

MR. SCHMIDT: Okay. Just, just so the record is clear, and I don't have an objection, but the, thirteen and fourteen, is, is that taken, Mr. Borgerding, from the County website or is, or is that taken from some, somewhere else?

MR. BORGERDING: Google Earth.

MR. SCHMIDT: It's a Google Earth photograph and I see that all the trees are in bloom so do we have, does it say, I don't know, I haven't looked at it, when it was taken, just how old it is?

VOICE: No.

MR. SCHMIDT: Okay. So, all right.

CHAIR: So, this, is this witness going to authenticate this doc, this, this exhibit on the board or, or are you --

MR. BORGERDING: He did not take that photograph.

VOICE: (inaudible).

MR. BORGERDING: Okay. Another wit, the next witness coming up is going to --

CHAIR: Authenticate it, okay.

MR. BORGERDING: Right.

CHAIR: Okay. So, but this witness was up there describing, you know, his house and is he familiar with this exhibit?

MR. BORGERDING: Mr. Ciarpella, does this look, look

accurate to you?

MR. CIARPELLA: Yes, it does. Both do, both do. I'm on this program a lot here, so.

CHAIR: Well, then, when you say --

MR. CIARPELLA: I, the, the lower exhibit showing the zoning and the property owner, that, that, I'm very familiar with that exhibit which is --

MR. ZIMMERMAN: People's Counsel Exhibit 7.

CHAIR: Thank you.

MR. CIARPELLA: Exhibit 7.

CHAIR: I was going to ask you.

MR. SCHMIDT: Just for the record, Ms. Murphy, the large aerial photograph, which I think is Protestant's exhibit number thirteen.

CHAIR: Okay.

MR. SCHMIDT: Says in the lower right hand corner, for the record, imagery 2016 Google map data 2, 20, and then it's cut off. So, apparently, the photograph was taken some time in this century, don't know when because it just says 2-0 and then it's cut off. I have no objection to it.

MR. ZIMMERMAN: People's Counsel seven shows 2014 imagery, which is the standard GIS at the moment.

CHAIR: Okay. But Mr. Schmidt has no objection right now to Protestant's --

MR. SCHMIDT: I have no objection.

CHAIR: -- exhibit number thirteen. So, sir, you were in the middle then of describing your house. Could you go back up to the board then and tell us, again, where is your house, you know, and reference it as if you're talking to somebody who is not here in the courtroom.

MR. CIARPELLA: Sure, I'll try to describe it that way.

CHAIR: That's fine.

MR. CIARPELLA: But, my, my house is from what is Sixth Street here, would be the front of my property to the back of my property is one hundred and fifty feet. From, approximately from the corner of my back, the back of my property to the front courtyard of Dock of the Bay where the area we have seen bands play in the past, is approximately sixty-five feet.

CHAIR: And you say the front courtyard, is that the water side?

MR. CIARPELLA: It is the side, it's not the water side and it's not the parking lot side of the, of the restaurant, it's, it's actually on the side of the building.

CHAIR: Okay.

MR. CIARPELLA: Which faces the residence.

MR. BORGERDING: And Mr. Ciarpella, where the bands played for Mr. Tanner, where you assume they would play for Mr. Boone, if outdoor music is allowed, is that facing neighbors or

on the other side of the building?

MR. CIARPELLA: It's facing the neighbors.

MR. BORGERDING: Okay. Thank you.

CHAIR: And there, you said there's no outside structure in that location right there where you just pointed?

MR. CIARPELLA: Not in the courtyard there is not, no. There's, there's an attached outdoor bar that has a roof, like a lean-to roof that was an add on some years ago that someone had done. But, no, out in the courtyard area and the, just some seating.

CHAIR: And, and do bands or music, is that ever, is that ever played under the covered roof that you just pointed out?

MR. CIARPELLA: I, probably a few times there may have been when Mr. Tanner had it. But obviously, there are no bands now and there, there have, hasn't been but for the most part, it was just in this general area in and outside of this outdoor lean-to. It's, you know, has some like curtain, plastic curtain walls, something you would see on a tent, to sort of wall, wall it off and close it in, so.

MR. BORGERDING: Okay. Is there anything else you'd like to tell the Board?

MR. CIARPELLA: No, I, I don't think there's really much left to say, I mean, try to remember it all, but.

CHAIR: All right.

MR. ZIMMERMAN: Can I go next?

CHAIR: Well, I, would you, would you like, Mr. --

MR. SCHMIDT: Please, Mr. Zimmerman.

MR. ZIMMERMAN: I think Mr., I think it makes sense--

CHAIR: Mr. Zimmerman would like to go next.

MR. SCHMIDT: I'm happy to defer to Mr. Zimmerman.

MR. ZIMMERMAN: Yeah. And Mr. Schmidt can try to deal with whatever comes in. All right. Mr. Ciarpella, are you in the construction business?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Are you in the forty to sixty-year-old age range?

MR. CIARPELLA: I am.

MR. ZIMMERMAN: Do you remember that was the age range that Mr. Boone testified that he views as his target audience?

MR. CIARPELLA: Sure, um hm.

MR. ZIMMERMAN: Okay and you testified in the 2008 case, did you not?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay and you, did I hear you say in response to Mr. Borgerding that, the former owner, Lawrence Tanner, indicated in that case that he was going to play kind of soft music that would not be disturbing?

MR. CIARPELLA: He, he did.

MR. ZIMMERMAN: And did Mr. Tanner indicate he had the support of many residents, customers, employees?

MR. CIARPELLA: He did. He, he --

MR. SCHMIDT: Objection.

MR. CIARPELLA: -- had submitted.

MR. SCHMIDT: Objection.

CHAIR: One second, one second, there's an objection.

MR. SCHMIDT: I just don't know what the relevance is, the Board, the Court has decided, so what's the relevance of what Mr. Tanner represented at any of those hearings to, the Board made certain findings.

MR. ZIMMERMAN: The relevance is, yeah, the relevance, and there are Court of Appeals cases on this, such as *Whittle v. Board of Appeals* (inaudible) that if, if a claim is made by a Petitioner, then it's a different situation from what was in the previous case, then it's relevant to compare the two situations, it's very simple.

MR. SCHMIDT: But the Court, I mean, the Court, actually this Board made certain findings of fact and certain conclusions and then, then it went to the Circuit Court and then it went to the, to the Court of Special Appeals. So, ultimately, that is the decision, not the underlying testimony in the case.

CHAIR: Yeah, I'd have to --

MR. SCHMIDT: I'll leave it to Ms. Murphy.

MR. ZIMMERMAN: I'm asking this witness his citizen's perspective --

MR. SCHMIDT: I don't want to relitigate that prior case.

MR. ZIMMERMAN: -- his citizen's perspective on, on this, either similarities or differences between the two cases. I think they're relevant.

CHAIR: But, well, I understand. I mean, I think it's fair to ask him the, the difference or the similarities but not specifically to what Mr. Tanner testified to because that's a transcript of that, I would imagine, and we could always refer to that.

MR. ZIMMERMAN: Well, it's not --

CHAIR: And you could always attach that to your brief, a transcript of those things, so having this witness reiterate what some, a gentleman who previously owned the bar testified to would, isn't really going to help. I mean, he, this, you know, then you're asking him what his memory, the witness' memory of this transcribed sworn testimony was so that's what your two questions went to, but I don't, I don't disagree --

MR. ZIMMERMAN: No, no, I'm not, I'm not asking simply about testimony, I'm asking in general what Mr. Tanner's pitch was based on his recollection.

MR. SCHMIDT: But that's, I mean --

CHAIR: But, but again, it's different, it's a different owner. I mean, then you're saying that, that this gentleman is going to, I mean, in other words, to assume that. I understand your argument, but, but --

MR. ZIMMERMAN: Well, they're very sim, do I have to make a prof, I mean, I could make a proffer.

CHAIR: All right. Well, make a proffer on this one point because I think it's, it's, just beyond what we need to hear.

MR. ZIMMERMAN: All right. Mr. Ciarpella was proffered that just as in the present case, the former owner of Dock of the Bay in the 2008 situation, not just in testimony, but in general, in interaction with the citizens, indicated that he had the support of many residents, customers and employees, that Mr. Tanner similarly complained that he was being singled out or that other, other places have live music that are also restaurants, so he complained about that being unfair. He also asked the Board of Appeals to tell him exactly what kind of music he could play and that may be implicitly what the Petitioner is asking for in this case. So, Mr. Ciarpella would be able to state in detail, not just the testimony of Lawrence Tanner, but the overall context of the 2006 to 2010 litigation, that there's no significant difference.

CHAIR: Understand. Okay, thanks for that proffer.

MR. ZIMMERMAN: Okay.

CHAIR: I actually think this gentleman already did that well. He actually was very clear on his own and, and actually gave us that (inaudible) already.

MR. ZIMMERMAN: All right.

CHAIR: So, we heard that.

MR. ZIMMERMAN: Just, just for the record, Mr. Ciarpella, you, you agree with me, I haven't stated anything false about what you would be saying, right?

MR. CIARPELLA: No, I concur.

MR. ZIMMERMAN: Okay. Okay. All right. As far as just, while we're on this, the age range of forty to sixty, so the, if my arithmetic is good and you have either a high school or college degree?

MR. CIARPELLA: High school degree, yes.

MR. ZIMMERMAN: And after that you went into a trade?

MR. CIARPELLA: I did some college and then into the trades.

MR. ZIMMERMAN: Okay and in your trade you have to be pretty good at math, calculating things?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: So, forty to sixty years old, that means, correct me if I'm wrong, to speed this up, born between 1955 and 1975?

MR. CIARPELLA: Right, yes.

MR. ZIMMERMAN: So, that end of baby boomer generation, beginning of Gen X, Generation X, is that fair?

MR. CIARPELLA: Um hm, yes.

MR. ZIMMERMAN: What, what, what is, do you know, being in that generation, you know, the type of music that generally attracts that generation?

MR. SCHMIDT: Objection.

MR. CIARPELLA: It's, it's tough to say --

CHAIR: Wait a minute, one second, one second, there's an objection.

MR. SCHMIDT: What could possibly be the relevance of asking this, this witness that question?

MR. ZIMMERMAN: Except, except that it was, it was raised on direct and I think when Mr. Boone testified that he only wants music that's directed to this age range, which I'm not, you know, which could be --

MR. CIARPELLA: It --

CHAIR: -- wait a minute, sir. Could be a bunch of things, could be a different, wide range --

MR. ZIMMERMAN: Yeah, that was his pitch that --

CHAIR: Wait a minute. Wide range of music, so we'll just allow it because it was sort of raised on direct.

MR. SCHMIDT: Okay.

CHAIR: We'll allow Mr. Zimmerman to cross examine. Go ahead, sir.

MR. SCHMIDT: Okay.

MR. ZIMMERMAN: Yeah. Do you remember, correct me, what is your understanding is the pitch that Mr. Boone made as to the forty to sixty-year-old generation?

MR. CIARPELLA: Yes, I, I, I would probably go back to Mr. Russell McClellan's testimony, given on behalf of Mr. Schmidt and his client, that they want to have reggae, which is the likes of Mark Allen, which is exactly who Larry Tanner had and he had reggae bands. Mr. Schmidt has made claim that Larry had rock and roll bands and, and his own, his own test, testimony from his representative has stated that he, if you, if you go back and read it, he specifically said that Mr. Tanner had reggae bands. So, the, you know, it's, it's, it's gotten convoluted.

MR. ZIMMERMAN: Well --

MR. CIARPELLA: But that, that is a fact that it was reggae bands that were played there and it is reggae bands that are, wished to be played there.

MR. ZIMMERMAN: Well, did Mr. Boone ever mention anything about reggae? I don't recall that.

MR. CIARPELLA: Mr. Boone did not. Mr. Boone had said something about someone who played an accordion which --

MR. ZIMMERMAN: Okay. Well, let me ask you this. In the forty to sixty-year-old generation, is reggae the only kind of music that's popular with that generation?

MR. CIARPELLA: No, it, it it, it could be a wide range, I mean, it's wide open. The country music, rock, rock, you know, people, I, I know people that listen to classic rock, you know.

MR. ZIMMERMAN: Alternative, new wave (inaudible) --

MR. CIARPELLA: Alternative, new wave would probably not so much but, you never know. I mean, --

MR. ZIMMERMAN: Hip hop, rap?

MR. CIARPELLA: I don't know about that. I don't think there'd be any rap but.

MR. ZIMMERMAN: Okay. Okay. All right. Let me ask you something. In addition, well, just to, just so, just so we can see, we can verify. On People's Counsel Exhibit 7, it shows a scale of one inch to thirty feet. Can, can you precisely verify the corner of, well, (inaudible) your property is shown as 2716 Sixth Street on People's Counsel's seven, correct?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: All right and it, to get, to get this through a little bit quickly, it immediately borders the Dock of the Bay, correct?

MR. CIARPELLA: Yes, yes.

MR. ZIMMERMAN: And is it, does it immed, the, and how wide is your property?

MR. CIARPELLA: My property is 55.23 feet. The

adjacent property, working our way towards the courtyard is exactly fifty feet.

MR. ZIMMERMAN: So, do you border the courtyard where the parking lot of Dock of the Bay --

MR. CIARPELLA: I, I border the parking lot, I'm adjacent to the parking lot but catty corner by fifty feet plus a few more feet, ten or twelve feet, to the courtyard.

MR. ZIMMERMAN: Is the courtyard where they play the music?

MR. CIARPELLA: That's where it has been played in the past, yes.

MR. ZIMMERMAN: Outside, so I, I want to make sure we're doing this right. I've got a ruler here. Can you show on the ruler how many inches you're talking about so there's no confusion?

MR. CIARPELLA: From the property to the courtyard is two --

MR. ZIMMERMAN: Two inches?

MR. CIARPELLA: Well, that's, that wouldn't be fair to say, that, that's the playground, I will say two and a half inches.

MR. ZIMMERMAN: All right. So, that would be seventy, excuse me, seventy-five feet according --

MR. CIARPELLA: Okay, seventy-five feet.

MR. ZIMMERMAN: Okay and while we're, while we're

doing that, Bradley and Bonita Metheny, who are here today and will probably testify, where's their property in relation to the courtyard?

MR. SCHMIDT: Why don't we let them testify then, Mr. Zimmerman?

MR. ZIMMERMAN: Because I asked the question, that's why.

MR. SCHMIDT: Okay.

CHAIR: See if the witness can answer.

MR. CIARPELLA: Well, their, they, they have a few properties and one of which is adjacent to the courtyard and backs up to the courtyard and they have another one as well, so they have two properties that are in direct contact and adjacent to the courtyard.

MR. ZIMMERMAN: So, they're even closer than you are?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay and the Waldmans are here today, do you know where they are?

MR. CIARPELLA: They are across the street and catty corner to the parking lot.

MR. ZIMMERMAN: Okay.

CHAIR: Across what street?

MR. CIARPELLA: I'm sorry, across the main road, Cuckold Point Road.

MR. ZIMMERMAN: 9014 and 9016 Cuckold Point Road,

correct?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay. So, they're diagonally across from the parking lot on the other side of Cuckold Point Road?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay. Okay. All right. I got a few more questions, you can sit down. Now, you've talked about issues of loud music, correct?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: What, if anything, in relation to late night loud music do you find about noise produced by crowds, in addition to the music itself?

MR. CIARPELLA: Well, generally, the tendency has been with a live band, which what you get is when someone does a rendition of, of a song that is popular, you'll get a lot of cheering, clapping and whistling and hooting and hollering afterwards. Normally, when that, when that same song is played on the radio, it's just enjoyed and people go about their conversation and enjoy their meal or whatever but it, in past, there, there was a lot of that going on. You, you would have thought you were at the --

MR. ZIMMERMAN: And what, if anything, would you say about late night noise in the parking lot that's over and above what you would normally --

MR. CIARPELLA: Yeah, the, the only thing I can

testify to that, obviously, there, there is traffic that comes in and out of the parking lot as a restaurant. There, but there is a difference. When you have a band and a crowd that, you know, follows that band and you have different, different bands have followers, so to speak and, you know, they have like their little, little group that kind of goes from restaurant to bar or wherever they're playing and sort of follows them so you bring in a group of people that aren't necessarily from the neighborhood and, and it can be loud and, you know, after, after the show, so to speak. It's a different noise. It's different than what is normal of restaurant traffic. People seem to be, you know, more civil and, you know.

MR. ZIMMERMAN: And when we say late night, what are we talking about, 11:00 p.m., 12:00 midnight, 1:00 a.m., what, what are we talking about?

MR. CIARPELLA: In the past, it had, it had gone to that because Mr. Tanner had indoor music as well in the winter time and, and such so it, it, when the weather wasn't, wouldn't allow for outdoor music, he would have indoor events, bands, you know, and it, yeah, 11:00 would not be uncommon, 11:00 to midnight, you would, you would see people in and out of the parking lot hooting and hollering and --

MR. ZIMMERMAN: And what about when the outdoor music and the good weather was playing, up to midnight, 1:00 a.m.? Tell, tell the Board.

MR. CIARPELLA: Well, he did not have it that late, no. He, he had it till about, I'd say about 9:30 was probably about the latest that he had outdoor music and that was, that was pretty late. On a Sunday evening with school, it, it, it was pretty irritating.

MR. ZIMMERMAN: But even then it was a problem at that hour?

MR. CIARPELLA: Yes, absolutely.

MR. ZIMMERMAN: Okay.

MR. CIARPELLA: It, you know, it was a problem at 6:00, 7:00 p.m. If I wanted, if we were having company over and we wanted to hear our little radio in our yard and have a cookout, you know, it --

MR. ZIMMERMAN: Yeah.

MR. CIARPELLA: -- you know, it --

MR. ZIMMERMAN: And if you were indoors, would --

MR. CIARPELLA: -- it was intrusive.

MR. ZIMMERMAN: -- would you have to close your windows at times?

MR. CIARPELLA: Regardless of that, I mean, with, with the outdoor music, when the sound hits the glass it becomes like its own speaker that's then transmits the bass into the house. So, yeah, I mean, it, it comes up and, and we, we all have to, we're all built up on an elevated foundation because of flood, flood restrictions and I'm not a sound expert

but I can guarantee you one thing, I don't know how I can do that because I'm not an expert, but sound travels up.

MR. SCHMIDT: Objection.

MR. CIARPELLA: I was waiting on that.

CHAIR: Overruled. I don't think he meant it the way it came out.

MR. CIARPELLA: Yeah, yeah.

MR. SCHMIDT: Okay.

MR. CIARPELLA: Sound travels up and the higher you are, the, the more the sound comes to you. Where, I guess, if you're low and you have obstructions around you, the sound doesn't quite reach you, you know? Like it, it does when you're elevated, which we are, we all, we all are. So, it, it comes into the house because even if you close the windows it, the sound, I don't know how it does it, but it makes the windows move and comes into the house.

MR. ZIMMERMAN: Do you have a two-story house?

MR. CIARPELLA: Three story, yes.

MR. ZIMMERMAN: Three story house.

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Do, are there other two and, two or three houses on Sixth Street?

MR. CIARPELLA: Yes. The, the, the majority of houses, I'd say just about all the houses.

MR. ZIMMERMAN: Okay and are there any big walls in

between your house and Dock of the Bay that, that --

MR. CIARPELLA: No, there's no big walls. I mean, I have a privacy fence with some Leland cypresses along the back and there's a garage on the property next to me and --

MR. ZIMMERMAN: How high is your fence?

MR. CIARPELLA: Six feet.

MR. ZIMMERMAN: Okay and what concern, if any, do you have that the impact on your property value of, of (inaudible)?

MR. CIARPELLA: Quite a bit, quite a bit. I mean, you know, if, if we're going to talk property value, that's, that's one of the main reasons I'm here. I mean, I've got to defend the value, you know, I mean, if, if the property is valued at X and there's outdoor live bands next door and I have to go to market with the house, the property, and I can't make a sale because of outdoor music, you know, that, that wouldn't be well, that wouldn't be good, you know?

MR. ZIMMERMAN: All right. I want to shift for a moment to, there's been a lot of discussion of a single musician, namely, Mark Allen, correct?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: And if I remembered Mr. Wolinski's testimony, Mr. Mark Allen uses an amplifier, according to Mr. Wolinski. Do you know anything about that?

MR. CIARPELLA: Yes, he does.

MR. ZIMMERMAN: Okay. Have you ever heard Mark Allen

play?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Yeah, okay. I have People's Counsel Exhibit 10?

BOARD: Ten.

MR. ZIMMERMAN: This is a, this is a two-page excerpt from the Mark Allen website. Okay. I have a cop, may I use my copy to question Mr. Ciarpella?

BOARD: Sure.

MR. ZIMMERMAN: So, does this exhibit show, there's a photograph. Is that, does that look like the Mark Allen you know?

MR. CIARPELLA: That's him.

MR. ZIMMERMAN: Okay. Now, on, on the next page, and this is an excerpt, there's more, many more pages to the website but under gear, it says, I, quote, I use Boise sound system, Shore mikes and Crafter guitars, unquote.

CHAIR: Wait a minute. He hasn't identified that.

MR. ZIMMERMAN: All right.

CHAIR: As knowing it, as, as a copy of, of the website.

MR. ZIMMERMAN: All right.

CHAIR: I mean, this, you're trying to get that document in through this witness and all you're doing is reading what it says and he's saying uh huh, uh huh.

MR. ZIMMERMAN: All right.

CHAIR: So, that doesn't, that doesn't work.

MR. ZIMMERMAN: Well, let me ask you. Have you ever seen the kind of sound systems Mark Allen uses?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Assuming for the sake of argument that his website indicates a Boise sound system --

MR. SCHMIDT: Objection. That's spec, that's all speculative. I mean --

CHAIR: Yeah, do, do you know whether his, his sound system includes a Bose, Bose, B-O-S, sound system?

MR. ZIMMERMAN: B-O-S-E.

CHAIR: Do you have any knowl, personal knowledge of that?

MR. CIARPELLA: I, I have personal knowledge that he has an amplifier.

CHAIR: Right, you said that.

MR. CIARPELLA: And a guitar that plugs in.

CHAIR: Right.

MR. CIARPELLA: Now, it might be an acoustic body guitar but it, it is electrically amplified.

CHAIR: Okay.

MR. CIARPELLA: And a microphone that is amplified and sound is projected via speakers, so I do know that first hand.

MR. ZIMMERMAN: Okay. You ever, have you ever heard of the company named, called Bose, B-O-S-E?

MR. CIARPELLA: I have. It's a high end, high end speaker amplifier system.

MR. ZIMMERMAN: Okay and what about the Sh, the company Shure that makes microphones --

MR. CIARPELLA: Shure microphones as well.

MR. ZIMMERMAN: S-H-U-R-E.

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Very famous?

MR. CIARPELLA: Yes, they are.

MR. ZIMMERMAN: Okay. So, this being an administrative hearing, I think that it's admissible to have the website, the excerpts?

CHAIR: Any objection?

MR. SCHMIDT: Yes.

CHAIR: What's your objection?

MR. SCHMIDT: My objection is, I mean, I've got a Bose radio at home and I'm sure Earth, Wind & Fire might have Bose equipment so, I mean, there's, my understand is Bose has all different kinds of equipment. I, the, the witness testified that he knows Mark Allen has a guitar, which plugs into an amplifier and he sings into a microphone and I think that's fair, because that's what he knows. The rest of this, so what? He uses Bose equipment, that, what does that mean? I

mean, is that supposed to prove that this is, Mark Allen has already been crucified, the poor man is not even here, but in any event, I don't see the relevance.

MR. ZIMMERMAN: Nobody, nobody is crucifying Mark Allen. I'm not, that's not, that's not what's going on here. Just, in context, this is just part of the, an entire picture to kind of flesh out the amplification picture that he's got, the high-end equipment.

MR. SCHMIDT: How do we know it's high end?

MR. ZIMMERMAN: I think it's a reasonable inference, that's my opinion.

CHAIR: Okay and Mr. Borgerding, anything, anything on that issue?

MR. BORGERDING: I have nothing to add.

CHAIR: You have nothing on that. We, we won't admit that into evidence because this witness can't authenticate the website pages. He's already indicated and he testified very well and he actually does well on his own --

MR. ZIMMERMAN: All right. I --

CHAIR: -- without your assistance. Hold on. Testifying that he, as Mr. Schmidt indicated, the man has an electric micro, he's got a microphone hooked up to the amplifier, he's got the guitar hooked up, whether it's Bose or something else, it really, I mean, he already said --

MR. ZIMMERMAN: I'm not, I'm not --

CHAIR: -- hold on. He, he, he, I'm, just because of the transcript, you know, you're the stickler with the transcript.

MR. ZIMMERMAN: Right.

CHAIR: This witness also indicated he understood what Bose was so, I mean, we, we don't need any more than that. We, it's just duplicative anyway of what he just said so I think he's got personal knowledge of that.

MR. ZIMMERMAN: Right. So, I have it in as i.d.?

CHAIR: It's marked for i.d. Maybe Mr. Allen will be here and he can authenticate it.

MR. ZIMMERMAN: Well, okay.

CHAIR: Do you really need those two pages in? Okay.

MR. ZIMMERMAN: I tried.

CHAIR: We're going to mark for i.d. I know you did.

MR. SCHMIDT: It's number ten, Mr. Alston?

BOARD: Yes, um hm.

CHAIR: Well, it's marked for i.d. only.

MR. SCHMIDT: Yes.

CHAIR: Okay.

MR. ZIMMERMAN: And Mr. Ciarpella, do you know whether or not Mark Allen plays music other than reggae?

MR. CIARPELLA: He does.

MR. ZIMMERMAN: What types of music?

MR. CIARPELLA: He plays everything from oldies to

classic rock to reggae, very, very diverse.

MR. ZIMMERMAN: And do you have any knowledge of whether his performances at Rowboat Willy's have generated sound that was heard all the way down on Bay Drive?

MR. CIARPELLA: I do not. I, I, I do not. I know it's been loud, I have heard him over there and he has been loud at times, depending on which way the wind blows affects, if it's a northerly wind, it makes a difference.

MR. ZIMMERMAN: So, the wind can affect this, this sound?

MR. CIARPELLA: Absolutely, carries the sound, yes.

MR. ZIMMERMAN: So, when the wind is blowing in the direction of your place from Dock of the Bay, the sound is even louder, is (inaudible)?

MR. CIARPELLA: Yes, yes.

MR. ZIMMERMAN: Okay. Well, we spent a lot of time, of course, on Mark Allen because Mr. Boone mentioned Mark Allen but what other bands frequently play Miller's Island or the east side, Dundalk, Edgemere?

MR. CIARPELLA: I couldn't, I couldn't answer that because I'm not familiar with all of the bands. But it's, it's a medley, it's not any one type of band. My guess, which, you, you, if you had the same band over and over and over again, probably wouldn't do well, wouldn't go well.

MR. ZIMMERMAN: So, what concern do you have that

actually Mark Allen is, would not be the only performer at Dock of the Bay --

MR. CIARPELLA: Absolutely --

MR. ZIMMERMAN: -- that there, there could or would be other performers?

MR. CIARPELLA: Sure, absolutely. I, I believe that in order for, if the idea is to bring, to increase the, the revenue at the establishment by use of, of live music, I believe that the only way to achieve that would be to diversify and have different types of entertainment and not the same one over and over again.

MR. ZIMMERMAN: Yeah. What about karaoke?

MR. CIARPELLA: Karaoke is even worse.

MR. ZIMMERMAN: Why is that?

MR. CIARPELLA: It's, because it's bad version of, of, of the real thing. It's, it's, it's, it's micro, if it's done on, with the use of a microphone and what it is is you, it's an attempt by people who, in my opinion, have poor singing abilities then go ahead and mic, microphone that and crank it out and hoot and holler and laugh about it and give their renditions of their favorite songs.

MR. ZIMMERMAN: And was that one of the issues or one of the elements in the previous case when Lawrence Tanner owned Dock of the Bay?

MR. CIARPELLA: I don't recall. He may have had, he

may have had it and it was probably more of an indoor thing, like one of his wintertime, you know, ploys to bring people into the restaurant. I, I don't recall that ever being outdoors. Mainly he, he had what, he had scheduled bands for entertainment, to entertain the crowd, not for the crowd to sort of entertain itself.

MR. ZIMMERMAN: So, (inaudible) obviously if it becomes a problem, especially if it were done outdoors?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay.

MR. CIARPELLA: Absolutely.

MR. ZIMMERMAN: Okay. Now, ask an interesting question I was wondering about. According to People's Counsel Exhibit 7, I think Mr., well, we may get more details on this. But if you look on, well, Sixth Street takes a little bit of a jog, or I don't know if we'd call it a dog leg, if your, your part of Sixth, did you give your address, by the way?

MR. CIARPELLA: 2716, yes.

MR. ZIMMERMAN: Yeah, so, and your part of Sixth Street dead ends at the water, correct?

MR. CIARPELLA: It does.

MR. ZIMMERMAN: Okay and then there's a slight --

MR. CIARPELLA: Offset.

MR. ZIMMERMAN: Cuckold Point Road goes a little bit then back towards Edgemere and then Sixth Street continues on

to the opposite waterfront, maybe, maybe twenty or thirty feet from, from where your section intersects Cuckold Point Road, correct?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: So, we see on that part of Sixth Street that's on the other side of Cuckold Point Road, there are several properties owned by George Kondylas or G&D, LLC, okay? Do you know whether or not George Kondylas may be the Kondylas that's named in Boone Kondylas, LLC?

MR. CIARPELLA: It is not. I do know.

MR. ZIMMERMAN: So, who, who would be the Kondylas in Boone Kondylas, LLC?

MR. CIARPELLA: That would be Mike and Donna Kondylas.

MR. ZIMMERMAN: Okay. Do they live anywhere in this neighborhood?

MR. CIARPELLA: They do, yes. It's not on the map, it's not on either map.

MR. ZIMMERMAN: Okay.

MR. CIARPELLA: But it's further up Cuckold Point Road towards Edgemere and, but it is on, they do reside on Millers Island.

MR. ZIMMERMAN: All right. Okay and do you know whether or not they live there or had any active activity in relation to the litigation when, when the litigation with Mr.

Tanner was going on?

MR. SCHMIDT: Objection. Just relevance.

CHAIR: What is the relevance?

MR. ZIMMERMAN: Well, the relevance is to show the awareness of the Boone Kondylas corporation precisely what happened with the 2008 to 2010, 2006 to 2010 litigation.

CHAIR: Okay. Well, you're --

MR. ZIMMERMAN: But I understand, I'm told Mr. Kondylas, Michael Kondylas is here so maybe we can wait till Mr. Borgerding --

CHAIR: Why, why don't we wait to see it? If you're, are you going to call him as a witness?

MR. ZIMMERMAN: No, Mr. Borgerding (inaudible).

CHAIR: Okay. Well, why, let's just wait for that question.

MR. ZIMMERMAN: So, all right, that's fine. Okay. I don't have too much more. Mr. Ciarpella, you made some mention of the liquor license, did you not, in your testimony?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay. Do you know who is on the liquor license?

MR. CIARPELLA: I, I know who I believe is on the liquor license.

MR. ZIMMERMAN: Okay. Let me, okay, well, let me have a couple of exhibits here. So, it's, the first one is,

well, I suggest we make this, are we up to eleven?

BOARD: Yes.

MR. ZIMMERMAN: I suggest we make this first exhibit 11-A, because (inaudible) to the next exhibit. Whoops, wait a minute. That's not, I'm sorry, that's the wrong exhibit. Excuse me. Okay. Okay. So, I have the November 3rd, 2014 Baltimore County website liquor license here in the document that I'm going to suggest is People's Counsel 11-A. And you can take a look at it, but on the last page of this excerpt, because we go to the 7th Council District, I didn't include 2nd, 3rd, 4th Districts, to keep it, the pages less. You see, the applicant Donna Lee Kondylas, is it Michael --

MR. CIARPELLA: It says, it's spelled Michelle, I believe it's probably supposed to be Michael.

MR. ZIMMERMAN: Okay and that shows the transfer from Lawrence Tanner, Jr. of Tanner Enterprises, t/a Dock of the Bay?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: As of November 3rd, 2014, okay. Is that consistent with your understanding of --

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: -- at that point?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Okay.

BOARD: You're going to admit this? Any objection?

MR. ZIMMERMAN: Yes, 11-A, yes, I would like to.

BOARD: Any objections?

MR. SCHMIDT: Yeah, I will object. I don't know what the relevance of it is and I'm not sure that the witness, I mean, other than giving him a document which apparently, he's never seen before and ask him to read it and read it, there's no authentication or anything to it, so.

CHAIR: That's the same problem we had with the other exhibit. I mean, he's not, we're not here on the, this is not a liquor board hearing and, and so how is this witness --

MR. ZIMMERMAN: This is going to connect --

CHAIR: -- the, all you're doing is handing him a document and saying, is this what it says and he says yes, this is what it says and I think it should have said this, this is a typo. But he didn't draft that.

MR. ZIMMERMAN: All right.

CHAIR: He didn't write that.

MR. ZIMMERMAN: All right, well, okay.

CHAIR: So, how, how can he really identify it? I mean, --

MR. ZIMMERMAN: It's an administrative hearing, if the Petitioner thinks that it's inaccurate, you know, he can question it or find some other evidence. But it also will connect up, especially with 11-B, which shows the additional transfer to the current license holders.

CHAIR: But, but it's not even an issue, we're not here on the liquor board so.

MR. SCHMIDT: So what?

MR. ZIMMERMAN: Well, it's, if I, once you see the document, I think you'll see the explanation or I'll --

CHAIR: But not through this witness, I don't think this witness is not the witness, obviously, to identify those documents that you have.

MR. ZIMMERMAN: Well, no, the sec, the second document is important also because it shows and I'll put it in as i.d.

CHAIR: But, but you're --

MR. ZIMMERMAN: Let me put it in as i.d. and --

CHAIR: Well, just mark it as i.d. and don't, don't give the witness indication of what it is or what you think it should say or --

MR. ZIMMERMAN: Okay, because 11-B is the March 2nd, 2015 --

MR. SCHMIDT: Can I have a copy of that, Mr. Zimmerman?

MR. ZIMMERMAN: I thought I gave it to you.

MR. SCHMIDT: No, you gave me 11-A.

MR. ZIMMERMAN: Okay. 11-B is the November, excuse me, March 2nd, 2015 Baltimore County Liquor Board website record showing on the very last page the transfer from, again, I'm

sure Michael Kondylas will be testifying, misspelled Michelle Kondylas to Russell McClelland and Dorothy Riley and also it, it refers to these people as the Kondylas' having transferred, refers to them as corporate officers. So, I think, I will argue later perhaps, just to keep this thing moving, that the, this is definitely relevant on a number of scores. It also, among other things, shows the interest of Mr. McClellan and Ms. Riley, who I, if my memory is correct, previously testified in the Petitioner's case.

CHAIR: Okay. We'll mark them for i.d. at this point.

MR. ZIMMERMAN: Right. Thank you. Thank you, Madam Chair. I think I can rest at this point with this witness.

CHAIR: All right. Any cross?

MR. SCHMIDT: Thank you. I'll try to be brief. Sir, you were referring to some documents before. Can I see those, please?

MR. CIARPELLA: Documents?

MR. SCHMIDT: That you were looking at.

MR. CIARPELLA: Oh, okay.

MR. SCHMIDT: You were looking at.

MR. CIARPELLA: Oh, okay.

MR. SCHMIDT: I guess --

MR. CIARPELLA: These, these are my notes here.

MR. SCHMIDT: Okay.

MR. CIARPELLA: And then I have, also have some here that I had been compiling from the last, from the last --

MR. SCHMIDT: Okay. These were just notes that you took to help you prepare for testimony?

MR. CIARPELLA: This is just, you know, yeah, just kind of keeping my thoughts together.

MR. SCHMIDT: Okay, that's fine.

MR. CIARPELLA: And then, you know, I've got some, you know --

MR. SCHMIDT: I just saw you looking down and I didn't know what you were looking at.

MR. CIARPELLA: No, it wasn't, it wasn't anything to submit or anything like that.

MR. SCHMIDT: It was any other document, okay. Thank you, sir. Okay. Just a couple questions. Mr. Ciarpella, you, you, you referenced your father at one point in time. He is a regular at, at Dock of the Bay, is he, is he not?

MR. CIARPELLA: Yes, he is. Yes, he is.

MR. SCHMIDT: Okay and in addition to that, do you have any family members who are employed at the Dock of the Bay?

MR. CIARPELLA: My daughter, I believe, is to be hired here soon. She hasn't worked there yet, but she was interested in, in doing some waitressing or whatever.

MR. SCHMIDT: Okay, okay.

MR. CIARPELLA: Cleaning tables or whatever they have available.

MR. SCHMIDT: All right. I tried, I tried to write this down. You said your objection in this case was, quote, you're against outdoor live music, correct?

MR. CIARPELLA: Yes.

MR. SCHMIDT: All right. Okay and I think you also indicated that when Mr. Tanner was here, he had outdoor live music in what's called the courtyard area?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. So, that's, that's really your objection, is the outdoor live music in the courtyard area?

MR. CIARPELLA: That's a big, big part of it, yes.

MR. SCHMIDT: Okay. Okay. Now, you've lived next door to the Dock of the Bay for eleven years, right?

MR. CIARPELLA: Yes, I have.

MR. SCHMIDT: Okay and when you moved in, did you build your house or was it an existing house?

MR. CIARPELLA: No, I built it.

MR. SCHMIDT: Okay and the Dock of the Bay business was there eleven years ago when you bought the property?

MR. CIARPELLA: Yes, yes, it was.

MR. SCHMIDT: Was it operating --

MR. ZIMMERMAN: Objection. Objection.

CHAIR: What's the objection?

MR. ZIMMERMAN: What difference is it, it's irrelevant?

MR. CIARPELLA: It was, it was operating --

CHAIR: Okay. One second, one second, there's an objection on the table. No, actually, overruled. Go ahead. The Board is interested.

MR. CIARPELLA: It was, it was operated and owned at the time I purchased my property by the Trumbero's. It was a family restaurant.

MR. SCHMIDT: Okay. Did it have music at the time?

MR. CIARPELLA: They did not, no.

MR. SCHMIDT: No music at all?

MR. CIARPELLA: No.

MR. SCHMIDT: Okay and what year was that?

MR. CIARPELLA: That was, see, four or five, it would have been 2004 to 2005, it was in the winter of that period there. So, it could have been either four or five.

MR. SCHMIDT: Okay and, and when, so you bought, bought the property first and --

MR. CIARPELLA: No, wait a minute, 2003. I'm sorry, 2003.

MR. SCHMIDT: Okay. Was that after Isabel or before?

MR. CIARPELLA: That was before Isabel.

MR. SCHMIDT: Okay and the Trumbero's owned it and I assume you bought your property first as what, an unimproved

lot?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And then you built a house?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And then at some point in time you moved in?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And do you know when you moved in?

MR. CIARPELLA: It was right around two months after my son's birthday, so that would have been, June, July, it would have been August of 2004.

MR. SCHMIDT: Okay. Now, at the time you acquired your property and built your house, what was your property zoned, if you know?

MR. CIARPELLA: It was zoned business local.

MR. SCHMIDT: Okay and what is it zoned today?

MR. CIARPELLA: It is, I believe still business local.

MR. SCHMIDT: So, as far as you know, sir, I assume that your property has been a business local zoned property --

MR. CIARPELLA: Yes.

MR. SCHMIDT: -- throughout the period of your ownership?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And it was zoned business local when

you acquired it?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. Now, you indicated that, and Mr. Zimmerman asked you to do some measurements and your property is shown on here, I believe, sir, Matthew and --

MR. CIARPELLA: Nancy.

MR. SCHMIDT: -- Nancy and is that, is Nancy your wife?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay, because it's just, she has a different, does she have a different last name?

MR. CIARPELLA: No, she has the same name as me but when we purchased the property, we were not married when we made the purchase.

MR. SCHMIDT: At the time.

MR. CIARPELLA: At the time.

MR. SCHMIDT: Right. The reason I, I ask is that Protestant's seven indicates Matthew J. Ciar, Ciarpella.

MR. CIARPELLA: Ciarpella.

MR. SCHMIDT: Ciarpella and Nancy Stivaletto?

MR. CIARPELLA: Stivaletto, yes.

MR. SCHMIDT: Did I pronounce that correctly? Okay and now she's Nancy --

MR. CIARPELLA: Ciarpella.

MR. SCHMIDT: -- Ciarpella, okay. Just so the Board

is clear if they were to look at this. Okay. Your property abuts the Dock of the Bay parking lot, your backyard, right?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. Now, as you go towards, I guess, the top of this page or I would assume this is north, southeast and west sort of north east direction, the closest improvement of the Dock of the Bay restaurant to your property is what, the closest thing where there's any kind of construction, other than a parking lot?

MR. CIARPELLA: It would be the playground area, which is adjacent to the courtyard.

MR. SCHMIDT: Okay. Right, so --

MR. CIARPELLA: Opposite of the building.

MR. SCHMIDT: Right, so you first go, as, if you were walking, for example, from your backyard, you'd walk across the Dock of the Bay parking lot.

MR. CIARPELLA: Yes.

MR. SCHMIDT: And then you'd come to the, and there are some photographs that were introduced, of the pirate ship playground, correct?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And then an open area, correct?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And that's the courtyard where Mr. Tanner used to have his bands?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay and then there is a building shown on Protestant's exhibit number seven with sort of a silver roof and do you know what that is?

MR. CIARPELLA: It was at one point when the Trumbero's owned the restaurant, they had done a canvas canopy over top of the deck area that, patio area just outside of the building.

MR. SCHMIDT: Okay.

MR. CIARPELLA: When Mr., well, of course, the flood, the tornado, or the, the hurricane, the flood, it tore things up pretty good. Mr. Tanner purchased the property and put a wood roof on the metal truss system, existing metal truss system.

MR. SCHMIDT: And it, is that what it is today?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay and does that sit over top of tables, chairs, bar, if you know?

MR. CIARPELLA: A combination of, of all, yes.

MR. SCHMIDT: Okay. So, and that's, so that's an, it's got a roof on it but no walls?

MR. CIARPELLA: Has no walls.

MR. SCHMIDT: Okay. So, again, just so we're clear, from your property you have the Dock of the Bay parking lot, then the pirate ship playground area and moving in sort of a

northeast direction, then the outdoor courtyard that's uncovered, open, open air.

MR. CIARPELLA: Yes.

MR. SCHMIDT: Then a bar, table, chairs area that has a roof but no walls to it, correct?

MR. CIARPELLA: Yes.

MR. SCHMIDT: And then the actual Dock of the Bay building?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. Have you taken any measurements or do you know how far it is from your house to the Dock of the Bay building? Not, not the property, not the playground, not the parking lot, not the courtyard, not the bar, but the actual building?

MR. CIARPELLA: I have not taken measurements, no.

MR. SCHMIDT: Okay. So, you don't know how far that is?

MR. CIARPELLA: No.

MR. SCHMIDT: Okay. Now, the Rowboat Willy's, and you showed us a picture of that, that building, you constructed it?

MR. CIARPELLA: Yes, I did.

MR. SCHMIDT: How big is it, square footage?

MR. CIARPELLA: Square footage wise, let's see, about a thousand square feet.

MR. SCHMIDT: Okay. It's a thousand square feet. Does it have any tables and chairs or patron seating in it?

MR. CIARPELLA: They do, yes. It's an elevated deck.

MR. SCHMIDT: Okay.

MR. CIARPELLA: And it has a, a small kitchen area on the backside, which faces Dock of the Bay parking lot, my house, Mr. Wolinski's house, all, all of the residents on the other side. You have, Dock of the Bay sort of sits in the middle between what is Bill's Boats and Boatyard on one side to the north and all of us to the south.

MR. SCHMIDT: Okay. I understand that but the, the Rowboat Willy's pavilion --

MR. CIARPELLA: Yes.

MR. SCHMIDT: -- if that's a fair description of what that building is.

MR. CIARPELLA: Right.

MR. SCHMIDT: Okay. Is that a fully enclosed building?

MR. CIARPELLA: It is not fully enclosed, no.

MR. SCHMIDT: Okay. So, it's open on --

MR. CIARPELLA: Open on the north side.

MR. SCHMIDT: -- on the north side. Okay and there is seating in there for people to eat?

MR. CIARPELLA: They do, yes.

MR. SCHMIDT: Okay. Do you know how many, if you

know, do you know how much seating is in there?

MR. CIARPELLA: I would say twelve tables.

MR. SCHMIDT: Okay. Fairly small --

MR. CIARPELLA: With four, four seats, right.

MR. SCHMIDT: Okay. Fairly small?

MR. CIARPELLA: Fairly small, fairly small.

MR. SCHMIDT: When the bands play at Rowboat Willy's, are they in the pavilion or outside?

MR. CIARPELLA: They're in the pavilion.

MR. ZIMMERMAN: Objection. Rowboat Willy's is zoned business major so what --

THE CHAIR: Okay. Well, that's not, but that's not an object, that's not a proper objection, that's an argument.

MR. ZIMMERMAN: All right.

THE CHAIR: Go ahead, sir.

MR. SCHMIDT: Okay and they actually play inside?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. Does Rowboat Willy's ever have any outside music?

MR. CIARPELLA: Outside? As far as I know, all of the bands that I have seen there.

MR. SCHMIDT: Um hm.

MR. CIARPELLA: Have been up inside, under this roof structure that is cathedraled with a clear story up above.

MR. SCHMIDT: Okay. Within the thous, within the

area of the thousand square feet of interior place that contains a kitchen and seating and they fit a band in there?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. Now --

MR. CIARPELLA: Well, wait, wait, wait. I have to clarify that. The structure, the roof structure that you see, is about a thousand, so it's about thirty by thirty, thirty-two by thirty or so.

MR. SCHMIDT: Okay.

MR. CIARPELLA: Okay, square. To the backside of that, is an, is an additional twenty, what, I think it was about, maybe sixteen by twenty-four, and that is where the kitchen area is.

MR. SCHMIDT: Is that shown in your photograph?

MR. CIARPELLA: It is. That's actually what you see. That wall that you see is the kitchen area.

MR. SCHMIDT: Okay.

MR. CIARPELLA: And, and that, that, that's what encloses that whole south, south east side of the building.

MR. SCHMIDT: Okay. So, as far as you know, there's no outdoor music at Rowboat Willy's?

MR. CIARPELLA: No.

MR. SCHMIDT: But, however, it is an open structure, at least on one side?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Now, in addition to Rowboat Willy's, you identified the other property, the BL property, which I'm going to refer to on Protestant's exhibit number seven as being located at the intersection of Sixth Street and Cuckold Point Road, owned by G&D LLC?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay. What business is there?

MR. CIARPELLA: That is called the Islander Inn.

MR. SCHMIDT: Okay. How long has that been there, all, all --

MR. CIARPELLA: That's been there as long as I can remember.

MR. SCHMIDT: They play music at the Islander Inn?

MR. CIARPELLA: They, I don't recall them having bands, but I do know that they have, inside they have a DJ by the name of Don on occasion.

MR. SCHMIDT: Okay.

MR. CIARPELLA: And they may do karaoke, I'm not sure. I don't, I don't frequent the establishment.

MR. SCHMIDT: You don't, you don't go there?

MR. CIARPELLA: So, honestly, I don't know.

MR. SCHMIDT: You ever been in there?

MR. CIARPELLA: I have, yes.

MR. SCHMIDT: Okay. How often do they have either karaoke or their DJ?

MR. CIARPELLA: Honestly, --

MR. SCHMIDT: Nightly?

MR. CIARPELLA: No, not nightly.

MR. SCHMIDT: Okay. Every, on weekends?

MR. ZIMMERMAN: Objection. He said he didn't know about karaoke.

MR. SCHMIDT: He doesn't know.

MR. CIARPELLA: I, I would say --

MR. SCHMIDT: You don't know.

MR. CIARPELLA: -- probably.

MR. SCHMIDT: Probably on the weekends?

MR. CIARPELLA: Right.

MR. SCHMIDT: Okay. Any outdoor music there?

MR. CIARPELLA: No.

MR. SCHMIDT: You hear that from your house?

MR. CIARPELLA: No.

MR. SCHMIDT: You cannot? So, can't hear the bad voices when they sing karaoke?

MR. CIARPELLA: No.

MR. SCHMIDT: That's good.

MR. ZIMMERMAN: I would object. The witness testified he didn't know if there was karaoke there and then Mr. Schmidt picked it up as if he had said yes.

THE CHAIR: He actually corrected himself and he, he actually testified clearly.

MR. SCHMIDT: Now, Mr. Zimmerman asked you a bunch of questions about what Mr. Tanner testified and what he was saying at the prior hearing. And I understood you to say that Mr. Tanner said he had the support of a lot of the neighbors, correct?

MR. CIARPELLA: Yes.

MR. ZIMMERMAN: Objection. My questions were general, not just what he testified at the hearing.

THE CHAIR: Now, we, we actually sustained that earlier objection.

MR. SCHMIDT: You didn't, you allowed it.

THE CHAIR: We sustained it and then he proffered the reason why he wanted it, is what I remember.

MR. ZIMMERMAN: Yeah, I suppose I should be objecting to Mr. Schmidt asking (inaudible) --

MR. SCHMIDT: Okay. If you sustained the objection, he made a proffer, then I'm not going to follow that.

THE CHAIR: Maybe you want to --

MR. SCHMIDT: I apologize. I thought I was overruled. I'm usually overruled, Ms. Murphy.

THE CHAIR: I think we did sustain it because he did make a proffer because we, the question did go directly to what Mr. Tanner was testifying about.

VOICE: Right.

THE CHAIR: Then I indicated there was this sworn,

you know, transcript and all that.

MR. ZIMMERMAN: Okay.

MR. SCHMIDT: But in terms of participating in that case, Mr. Ciarpella, there was a fair amount of opposition to Mr. Tanner's operation from the neighbors, is that a fair statement?

MR. CIARPELLA: Yes, it is.

MR. SCHMIDT: Okay and it's also a fair statement that no matter what he represented, he had outdoor live music, did he not?

MR. CIARPELLA: He did.

MR. SCHMIDT: Um hm. Okay and if you know, just to clarify, did Mr. Kondylas, George, who apparently owns the Village, I'm sorry, the Islander restaurant property, do you know if he's related to the Kondylas' who were, not the same individual involved in (inaudible) --

MR. CIARPELLA: Not the same individual but I believe he's a relative, yes.

MR. SCHMIDT: You believe he's a relative. All right. Okay. I don't have any other questions. Thank you.

THE CHAIR: All right. Mr. Borgerding, any re-direct?

MR. BORGERDING: Mr. Ciarpella, you had said that primarily you were bothered by outdoor music, correct?

MR. CIARPELLA: Yes.

MR. BORGERDING: When Mr. Tanner operated the structure, were you ever bothered by the indoor music?

MR. CIARPELLA: Depending on the, depending on who it was and the crowd that followed, yes.

MR. BORGERDING: Okay. Can you explain that?

MR. CIARPELLA: Couple things, all right? If, it was someone that was turned up and loud, he had actually had bands, so there were drums, it wasn't just a plugged in microphone with the guitar. He had a medley, he had the likes of just Mark Allen but also had, he, he obviously did not have the same person every week. So, with that, he brought in a variety of, of entertainment bands. When patrons would leave and come out and do their cigarette smoking in and out of the building, you would get a blast of music each time the door would open.

MR. BORGERDING: Okay.

MR. CIARPELLA: And depending on how popular the, the band was, would depend on the, the size of the crowd that would follow them and sort of lead with them late in the evenings. So, indoor, indoor wise, it was usually a later event. It went on beyond, you know, the 11:00 p.m. hour into the midnight hour and with that, you had late, loud exiting of the restaurant. But when the band was inside, you didn't hear it unless the doors were being open and people were coming and going. You would get blasts of the music coming in and out.

MR. BORGERDING: All right. Okay. No further

questions.

MR. ZIMMERMAN: Just a couple --

THE CHAIR: Okay. Anything on that, on that re-direct? Anything on that question?

MR. ZIMMERMAN: Well, yes, but I also have one or two other questions.

THE CHAIR: Well, we weren't going to re-open up, we already had ques --

MR. ZIMMERMAN: Well, based on what Mr. Schmidt had--

THE CHAIR: But then we're going to go back and re-direct, re-cross and --

MR. ZIMMERMAN: Well, no --

MR. SCHMIDT: I'm trying, Ms. Murphy.

THE CHAIR: No, I know, I understand, but.

MR. ZIMMERMAN: I wanted to, well, first of all, based on what Mr. Borgerding asked, I wanted to ask whether, in terms of the, the later night issues that you just described, some of the noise would also extend into the parking lot, close, even closer to your house then the courtyard.

MR. CIARPELLA: Well, I don't understand the question.

MR. ZIMMERMAN: Well, would, would you, would there--

MR. SCHMIDT: Join the club.

MR. ZIMMERMAN: -- be a fair amount of noise in the parking lot as well as right where the music was being

(inaudible) --

MR. CIARPELLA: Yeah, no, not from the music itself.

MR. ZIMMERMAN: Right.

MR. CIARPELLA: Yes, yes. That, the noise that is generated by the exiting of the, of the, of the restaurant late night, can be much louder than the music that you would hear inside the building as it blasts out at that hour.

MR. ZIMMERMAN: Okay and that would be even closer to your house?

MR. CIARPELLA: Yes, exactly, exactly.

MR. ZIMMERMAN: (inaudible). I did want to try to pin down the precise distance between Mr. Ciarpella's building and the, the building of Dock of the Bay but if the Board feels that's beyond the scope, I will respect the --

THE CHAIR: He actually said he didn't know. I think the witness said --

THE CHAIR: Well, yeah, we can, we can measure it, I guess we can --

MR. SCHMIDT: And the Board can measure it.

THE CHAIR: We can measure it.

MR. ZIMMERMAN: Okay, the Board can measure it.

MR. SCHMIDT: You'll have an exhibit.

THE CHAIR: There's a scale on that.

MR. ZIMMERMAN: Okay. The only other, I wanted to clarify the so called Rowboat Willy's is actually a smaller

part of Bill's Boatyard where the main use is the boatyard, so I wanted --

MR. SCHMIDT: Stipulated. Agreed.

THE CHAIR: It already, I think that came out in different witness' testimony.

MR. ZIMMERMAN: Okay, all right. Then that, that's all I have. Thank you.

THE CHAIR: Okay.

MR. SCHMIDT: So, just so I'm clear, re-direct, I'm going to keep it, okay, Mr. Borgerding dragged out of you that indoor music was occasionally a problem with Mr. Tanner?

MR. CIARPELLA: Yes.

MR. SCHMIDT: Okay and I think you said that it really depended on the music, whether there were bigger group drums, I think you mentioned. So, I guess depending on what the act was that was inside, or --

MR. CIARPELLA: Yeah, the crowd that would follow, see, the later, with, with the music being played in the building.

MR. SCHMIDT: Right.

MR. CIARPELLA: Okay? The music is obviously in the building.

MR. SCHMIDT: Right.

MR. CIARPELLA: So, you know, we don't hear it.

MR. SCHMIDT: In the building, sure.

MR. CIARPELLA: Like you would, okay? Now, however, when the doors are opened with people coming and going and depending on how popular the group is.

MR. SCHMIDT: Right.

MR. CIARPELLA: So, you, you could get a group that is very unpopular and people come in and sit there and nobody cheers when the, when the song is over.

MR. SCHMIDT: And you don't hear a thing.

MR. CIARPELLA: And you don't hear a thing.

MR. SCHMIDT: Or you could get a very popular group where people are screaming and yelling?

MR. CIARPELLA: Right, right and that's, and with, with that, in order to generate revenue, to increase the revenue of, of an establishment, the, the better bands are what you're going to want to have.

MR. SCHMIDT: All right and depending on the type of the music as well, would impact that, right?

MR. CIARPELLA: Well, I think we pretty much covered the variety of music that was played.

MR. SCHMIDT: Right.

MR. CIARPELLA: In the past.

MR. SCHMIDT: Right.

MR. CIARPELLA: It was, it was --

MR. SCHMIDT: Thank you, sir. No other questions.

THE CHAIR: Okay. Are we finished with this witness?

MR. BORGERDING: No questions.

THE CHAIR: All right, sir. Thank you.

MR. CIARPELLA: Thank you.

THE CHAIR: Okay.

MR. BORGERDING: With that, I'd call Brad Metheny to the stand.

THE CHAIR: Okay. Do you think we'll be able to finish this witness? Is he going to be relative short, what do you think time wise?

MR. BORGERDING: How, how long?

MR. SCHMIDT: I think you're asking the wrong person, Ms. Murphy. You might want to direct it further down, towards the other end of the room.

THE CHAIR: Maybe ask Mr. Zimmerman, that's probably, that's probably true. His cross is longer. He means it in a good way.

MR. ZIMMERMAN: Sometimes it takes a little while to get this approved.

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. METHENY: Yes.

BOARD: Can you please state your name and address for the record?

MR. METHENY: Yes. My name is Bradley Metheny, I live at 2704 Sixth Street, Miller's Island.

BOARD: Can you spell your last name for the record?

MR. METHENY: Yes, it's M-E-T-H-E-N-Y.

BOARD: Thank you. You can be seated.

MR. METHENY: Um hm.

MR. BORGERDING: Mr. Metheny, you are also here in opposition?

MR. METHENY: Absolutely.

MR. BORGERDING: Okay. Can you explain to the Board the basis of your opposition to Mr. Boone's --

MR. METHENY: Well, the basis of it comes from, started for us in 2006 up until they finally stopped, you know, that he was forced to stop having the music. Just everything that the, the commotion and the, you know, that it caused in the neighborhood and close proximity to our houses. This was every weekend, it was outside, it was inside, the people in the parking lot, the people in the piers partying, you know, bringing their boats up, standing out there partying. Saturdays and Sundays was outdoor music. Two thousand six, we moved there in 2005, 2006 we started getting involved with the liquor board, with complaint wise, you know, it started off not so bad in the very beginning and it got progressively worse. Longer hours for the music, louder bands, more often. Then they were, he started having bands, Tanner started having bands

also on the inside so on a Friday night or Saturday night, his outside music could stop at 7:00 or 8:00 and 9:30 be inside bands would start and that went till 1:30 in the morning.

MR. BORGERDING: And did you hear the inside bands? Did (inaudible) --

MR. METHENY: I heard the inside bands in our house, with our doors and windows closed. We could hear them over top of our television.

MR. BORGERDING: Okay and can you point from the exhibit where your house is in proximity to the Dock of the Bay?

MR. METHENY: Okay.

MR. ZIMMERMAN: Which exhibit are we talking about?

MR. BORGERDING: What is that, Protestant's twelve?

MR. SCHMIDT: Mr., I could, Mr. Metheny, I think your name is on the one on the bottom, it might be easier to find.

MR. ZIMMERMAN: People's Counsel seven --

MR. SCHMIDT: Protestant's number seven.

MR. METHENY: Yes, this, this is us right here, this is my wife and I.

MR. BORGERDING: And approximately how far is that from the Dock of the Bay?

MR. METHENY: Can I use this one or do you want me to use, does it matter?

BOARD: Well, you have to let us know which one.

MR. METHENY: From here, from my property to the Dock of the Bay, the outside area, is probably rough, roughly a hundred and eighty feet.

THE CHAIR: Okay. The witness is using Protestant's exhibit number.

MR. BORGERDING: Twelve.

THE CHAIR: Twelve. He's pointing to that and he indicated the feet was --

BOARD: Well, actually it's thirteen.

MR. ZIMMERMAN: I think he's pointing to his building, I, I don't think --

THE CHAIR: Hold on. You're going to use Protestant's exhibit number thirteen, you said, how, how far did you say?

MR. METHENY: I said, I'm guessing a hundred and eighty feet.

THE CHAIR: You're guessing a hundred and eighty feet, okay.

MR. METHENY: From here, from this area to their courtyard. It could be a hundred and ninety feet.

MR. BORGERDING: Okay. You can resume (inaudible).

MR. METHENY: Yes.

MR. BORGERDING: Okay. Can you tell the Board why else you're opposed to this?

MR. METHENY: Well, basically, when, when this stuff,

excuse me, when this stuff started in 2007, you know, we had the music, the, the, the activity out on the pier, which is actually closer to my house. Their, the pier from the Dock of the Bay is probably within a hundred feet of my property, it's actually closer. You know, Larry started out, you know, with, with the bands, as I said, they started out, you know, low enough, you know, not, not very loud and everything. But it was just more and more and more. There was no control. It got to that point. We fought it for years, you know, with liquor board hearings, with zoning hearings, you know, starting for us in 2006 up until it was finally ruled that he was not to have music of any kind, you know, but it, it, it was, it's been a constant battle, a constant disruption, a lot of money.

MR. BORGERDING: So, why are you opposed presently to Mr. Boone's requested music?

MR. METHENY: Basically, it's, it's, just opens the door for the same thing, you know? What happened is, is we, we dealt with Larry. We've heard that, well, Larry intends to do this, Larry intends to have a, you know, a music that's quieter and wants to play to a certain crowd. We've went to all the hearings with, you know, with his patrons, with his employees testifying, you know, on behalf of, you know, what a great place it is and this, that and the other and the previous owner is terrible. We, we're actually, this is the same thing to me. It's like we're just repeating everything all over again.

We've done seven years of this. It's went through hearing after hearing after appeal after appeal, it's been upheld all the way through the system, to the Special Court of Appeals and we're starting over again. And it, it basically created hell for us being, being that close. When we moved there, Larry was the one that brought his business outside. There were tables outside for people to eat at the Dock of the Bay. When the Trumberos had it, when it was Fisherman's Inn, there was tables outside, prior to that, for people to eat. After Larry got it, probably 2004, 2005, when we moved into the neighborhood, he started putting the bands outside. Two thousand seven, in the spring, he constructed a bar outside, underneath of the canopy that's, you know, in these photographs. They're, he put an outside bar and actually that fall, started stocking the bar and serving people. So, in addition to the outside music, plus around the same time, I think the State of Maryland invoked, you know, you couldn't smoke inside anymore, so you have a lot of the smokers now outside, you know? So, they're outside drinking and smoking, so it's not just people, you know, dining any longer, you know? The, the, the dining down there was never a problem. It's not a problem now, honestly. You bring the music into it, I believe Mr. Boone or one of the witnesses stated that that outside area capacity could hold a hundred and fifty people. You got a hundred and fifty people out there drinking, you got music, people out, you know, on the pier on

their boats, that's a whole different dynamic. It, you know, it's no longer a bar and restaurant.

MR. BORGERDING: Okay. Mr. Metheny, is there anything else you'd like to tell the Court?

MR. METHENY: First of all, with regards to repeating this, we've had, Larry Tanner brought witnesses to testify to him. Mr. Boone, as a matter of fact, one of the witnesses that testified for Larry Tanner also testified at a, at the last, first part of this hearing for Mr. Boone.

MR. BORGERDING: And who is that?

MR. METHENY: If you would like to, that would be Russell McClellin.

MR. BORGERDING: Okay.

MR. METHENY: Who, by the way, his name also, is also on the liquor license, listed on the liquor license.

MR. BORGERDING: Have you looked, is Mr. Tanner's name, or is Mr., I'm sorry, Boone's name on the liquor license?

MR. METHENY: No, it's not.

MR. BORGERDING: Okay.

MR. METHENY: As a matter of fact, I was in touch with the liquor board yesterday, I, I called them, they told me who was on the liquor license, there, it's a D license and who was on there and they gave me access to their website that I was able to go on and print that out, which I also have a copy. I printed that out yesterday also.

MR. BORGERDING: You can give me that. I'll show it to Mr. (inaudible).

MR. METHENY: That would be (inaudible) right there.

MR. BORGERDING: And this is a liquor license for the present establishment?

MR. METHENY: Yes.

MR. BORGERDING: Okay.

MR. ZIMMERMAN: Am I allowed to see it?

MR. BORGERDING: Yes, after Larry.

MR. SCHMIDT: I guess, I mean, I just don't know what the relevance it is of this, I mean, we admit we have a liquor license. I'm not quite sure how that applies to the question presented as to whether we ought to be able to have music.

MR. BORGERDING: I think, Mr. Metheny, your issue was that Mr. Boone is not on the liquor license?

MR. METHENY: Well, yeah, that definitely is a concern of mind.

MR. SCHMIDT: Well, is that something that this Board can do anything about or is that an issue for the liquor board? I mean, assuming it's even a liquor, assuming it's the case even to begin with.

MR. BORGERDING: Mr. Metheny, can you explain why that, you feel that's relevant?

MR. METHENY: Well, when I brought that, I wanted to show just, the basis, one part was to demonstrate that the two

people that testified on behalf of Ken Boone and the Dock of the Bay were also on the liquor license, you know, not just in, patrons, they're not just --

MR. BORGERDING: Okay.

MR. METHENY: -- you know, interested people. Number two, with him not being on the liquor license, there's really no requirement for him to be on the property. He's asking for reconsideration and music and, you know, I can do this and do that, but he could also move to Florida and be an absentee owner. There, there's nothing to keep him at the property.

MR. SCHMIDT: He could do that whether he's on the liquor license or not.

THE CHAIR: Okay.

MR. METHENY: Is he, is he not required to spend so much time on the property as the liquor license owner?

BOARD: Is there an objection to this document?

THE CHAIR: Any objection?

MR. SCHMIDT: There is. I, well, yeah, I will, for the record, I'll object.

THE CHAIR: Okay. Same objection and, and is this the same document, Mr. Zimmerman, that you were going to put in?

MR. ZIMMERMAN: Well, I think it's slightly different in format but I think that it's the similar substance of People's Counsel Exhibit 11-B. I would just suggest that Mr.

Metheny has excellently explained some of the reasons why there's, the document certainly has some relevance and there's no reason to exclude it.

THE CHAIR: Okay. Well, he, he explained his reasons for the relevance. I --

MR. ZIMMERMAN: Well, I think they were in addition to my reasons and I think they were excellent.

THE CHAIR: Okay. I just wanted to know whether it was the same document. I didn't want, I didn't want to hear your argument --

MR. ZIMMERMAN: It's, no, no, it's not, it's not ident, it's not an identical piece of paper.

THE CHAIR: I understand.

MR. ZIMMERMAN: But it shows the same substance I think of, of People's Counsel Exhibit 11.

THE CHAIR: So, so, this witness apparently, you know, printed this from the website, he authenticated it as the documents he printed. The relevance, I mean, the, I guess, significance of it, he indicated why he thought it was significant, now the Court can then, the Board will then, at some point, decide whether that is significant to the ultimate issue but for the purposes of the hearing, we'll admit that as Protestant's exhibit --

MR. BORGERDING: Exhibit 15? I think it's fifteen.

THE CHAIR: You tell us. Fifteen, probably is.

BOARD: Fifteen.

MR. BORGERDING: That gentleman would be the one to tell us.

THE CHAIR: All right. All right. Any other questions?

MR. BORGERDING: Okay. Any, anything else you'd like to tell the Board?

MR. METHENY: Basically, that, that this, it's created a lot of problems down there for us, this whole situation with the music. We do not want to relive it. There's, there's no controls set in place. We come in here and say we're going to have, you know, this type of band with two guitars, well, then they bring amplification in, there's no control on the volume, there's no control on the frequency, how long they play, how late they play, you know, I mean, this, this is our house, you know? We, we live there, we, we live within a couple hundred feet. All we can do in season when this starts with the bar activity over there is close our houses up, turn the air conditioner on. But, beyond that, there's nothing else that we can do. We, there's no place for, else for us to go, you know? That didn't start out, everybody says oh, it's always been a bar, it's always been this and that. I'm sorry, Mr. Tanner moved all that outside. That bar was enclosed behind walls, aside from the dining. This is something he did. He did it after Charlie built his house, he

did it after Matt built his house. Our house was certainly there prior to him even owning it, prior even to the Trumberos owning it, you know? This, this is something he wanted to do. He wanted to take that and turn it into a dock bar, no longer a bar and restaurant. It's, his zoning is not compatible for what he wants to do.

MR. BORGERDING: Thank you, Mr. Metheny.

THE CHAIR: All right. Cross, Mr. Zimmerman?

MR. ZIMMERMAN: Yes. Mr. Metheny, what, are you in that forty to six-year-old age range as well?

MR. METHENY: Yes.

MR. ZIMMERMAN: And what is your occupation, may I ask?

MR. METHENY: I am a millwright for a CP crane power generating station in Bowley's Quarters.

MR. ZIMMERMAN: And, okay, I want to look at People's Counsel Exhibit 7, are you at 2714 Sixth Street?

MR. METHENY: No, I'm at 2704 Sixth Street. If I may? Right here.

MR. ZIMMERMAN: Okay.

MR. SCHMIDT: Can you show me that? I couldn't see, Mr. Metheny.

MR. METHENY: Yes.

MR. ZIMMERMAN: Okay. This is on People Counsel Exhibit 7.

MR. METHENY: 2704.

MR. ZIMMERMAN: And the Board can see, because there's a, separately there's a, there, there are two addresses of Bradley Metheny and Bonita Metheny.

MR. METHENY: Yes.

MR. ZIMMERMAN: Are they any relation to you?

MR. METHENY: That's us, we own that property also.

MR. ZIMMERMAN: All right. So, just to clarify --

MR. SCHMIDT: I'm sorry, go ahead.

MR. ZIMMERMAN: Okay. So, so there's no confusion, you live at 2704 Sixth Street, correct?

MR. METHENY: Yes.

MR. ZIMMERMAN: And you bought that house approximately 2003?

MR. METHENY: We didn't buy that house.

MR. ZIMMERMAN: Okay.

MR. METHENY: That house was in the family.

MR. ZIMMERMAN: Oh, it was in the, okay. You moved in around 2003?

MR. METHENY: We moved in in 2005, May of 2005.

MR. ZIMMERMAN: Five, sorry.

MR. METHENY: Yes.

MR. ZIMMERMAN: Okay. Is that a two story, three story, what is that?

MR. METHENY: It's a raised two story.

MR. ZIMMERMAN: Right on the water?

MR. METHENY: Yes.

MR. ZIMMERMAN: You have a pier?

MR. METHENY: Yes.

MR. ZIMMERMAN: And a boat?

MR. METHENY: Um hm.

MR. ZIMMERMAN: Okay. So, this is, the scale is one inch to thirty feet on this, so could, could you measure from the corner of your property, or your pier, to the courtyard area where the outdoor --

MR. METHENY: Okay. Well, this is the corner of my property so we're --

MR. ZIMMERMAN: The corner that's closest to their property, to, to the Dock of the Bay.

MR. METHENY: Of, of our resident, okay. So, that would be from here to here?

MR. ZIMMERMAN: From, I'm pointing, from right here on --

MR. METHENY: That's fine.

MR. ZIMMERMAN: Wait a minute. Wait, wait a minute. I'm sorry.

MR. METHENY: I'm sorry, here's our house.

VOICE: (inaudible).

MR. ZIMMERMAN: Okay. Okay, yeah, from --

MR. METHENY: Right there.

MR. ZIMMERMAN: -- from right here, which is the edge of your property corner closest to the Dock of the Bay courtyard.

THE CHAIR: Don't forget, the transcript probably isn't picking any of this up, here and there and here and there.

MR. METHENY: About four and a quarter inches.

THE CHAIR: Everybody's talking at the Board.

MR. ZIMMERMAN: Excuse me?

MR. METHENY: Four and a quarter inches.

MR. ZIMMERMAN: Four and a quarter inches, that would be about a hundred and twenty-seven feet. Is my math right? Four times thirty is a hundred and twenty.

MR. METHENY: A hundred and twenty plus, yes.

MR. ZIMMERMAN: All right. So, about forty yards, a little, a little over forty yards, less than half a football field. Okay. Okay and basically, it's entirely water between the corner of your property and the Dock of the Bay?

MR. METHENY: Yeah, there's no obstructions.

MR. ZIMMERMAN: Yeah.

MR. METHENY: Absolutely none.

MR. ZIMMERMAN: And I, did I ask you how many stories your house is?

MR. METHENY: Yes, it's a raised two story.

MR. ZIMMERMAN: What does raised two story mean?

MR. METHENY: The foundation part of it is approximately nine foot off the ground level and then it's the first and second floor.

MR. ZIMMERMAN: So, the --

MR. METHENY: It's, it's a flood zone.

THE CHAIR: -- second floor is almost like a third, equivalent to a third story?

MR. METHENY: Yeah, yeah.

MR. ZIMMERMAN: Okay and just so, while we're here, you own 2712 and 2714, correct?

MR. METHENY: Yes.

MR. ZIMMERMAN: And do you use those or do you lease them, what's going on with those properties?

MR. METHENY: Right, right now we have tenants in 2712, 2714 is an empty lot.

MR. ZIMMERMAN: Okay. Well, that's right next to the --

MR. METHENY: Yes.

MR. ZIMMERMAN: Those two are right next to the Dock of the Bay courtyard.

MR. METHENY: Yes.

MR. ZIMMERMAN: So, you have some concern for your tenants as well?

MR. METHENY: Absolutely.

MR. ZIMMERMAN: You'd like to have your, your tenants

have a good experience.

MR. METHENY: Absolutely.

MR. ZIMMERMAN: Okay and your wife is here today?

MR. METHENY: Yes.

MR. ZIMMERMAN: Bonita, it's Bonnie?

MR. METHENY: Bonnie.

MR. ZIMMERMAN: Okay and just following up on the question of your concern about, not just your enjoyment of your life but your property values, what, what concern do you have about that?

MR. METHENY: Oh, God, I certainly have a concern about my property value. As a matter of fact, probably back in, around the time we moved down there, I know Larry Tanner had asked if I tried to, wanting to buy the house we live in. He also wanted to purchase my mother-in-law's property from her, which would have been 2712 and 2714. So, that was a concern for me, especially the way he was operating that with the music and the stuff that was going on, you know? I, I didn't know if, if, you know, what he was up to. Was he trying to create a public nuisance and then try to buy the property cheap, you know, thinking that he was going to run us out or anything. That was a thought that, that crossed our minds at the time. We had no idea.

MR. ZIMMERMAN: When you say, are you say he was offering a very cheap price?

MR. METHENY: No, he, he, he offered to buy, inquire as to the fact of whether the property was for sale and, and expressed an interest that, you know, he would like to have it.

MR. ZIMMERMAN: You never got into any detailed negotiations?

MR. METHENY: Absolutely not. No, it wasn't for sale.

MR. ZIMMERMAN: And when you say your mother-in-law's property, that's the, the property that, that you now own with Bonnie?

MR. METHENY: Twen, no, 2712, the one that borders that, was my mother-in-law's, that was built, she built that house for herself when she retired.

MR. ZIMMERMAN: Okay. That, I'm sorry, but is that now, that's, that's --

MR. METHENY: That's the rental.

MR. ZIMMERMAN: That's shown here.

MR. METHENY: Yes.

MR. ZIMMERMAN: But that's now, that's now in the name of your, of you and your wife?

MR. METHENY: Yes, yes.

MR. ZIMMERMAN: Yeah.

MR. METHENY: Yes, she passed away in 2009.

MR. ZIMMERMAN: Is that a two-story house as well?

MR. METHENY: No, it's a raised rancher.

MR. ZIMMERMAN: Raised rancher.

MR. METHENY: Yes.

MR. ZIMMERMAN: All right. Okay, not, and just to preface my question, I'm in no way criticizing Mark Allen at all, but in terms of the discussion of the kind of sound he generates, do you have anything to add about any observations? Have you listened to Mark Allen, heard Mark Allen?

MR. METHENY: I've, I've heard Mark Allen play, yes and it's very loud. I've heard him from Rowboat Willy's. The only complaints that we've ever had with Rowboat Willy's was basically over Mark Allen.

MR. ZIMMERMAN: And of course, Mark, Rowboat Willy's is the, is the property, that's actually one further then, then Dock of the Bay.

MR. METHENY: Yeah, they, they're, they're, they border, they're on the other side of the Dock of the Bay.

MR. ZIMMERMAN: Yeah.

MR. METHENY: But probably an additional couple hundred feet, I don't know.

MR. ZIMMERMAN: Yeah.

MR. METHENY: On the other side.

MR. ZIMMERMAN: Do you have any knowledge about people all the way down on Bay, Bay Drive being --

MR. METHENY: Yeah, we have friends down there that could hear him when he played down there, yes. Said they could

hear him that far down.

MR. ZIMMERMAN: And that's about a third of a mile away, Bay Drive? It's right at the end of the peninsula, right?

MR. METHENY: It's, it's at least five blocks.

MR. ZIMMERMAN: Yeah.

MR. METHENY: Down there.

MR. ZIMMERMAN: That's the last street at the end of the peninsula, Bay Drive?

MR. METHENY: Yes, it is.

MR. ZIMMERMAN: Thank you. I think that's all I have, Madam Chair.

CHAIR: Okay. Cross, Mr. Schmidt?

MR. SCHMIDT: Mr. Metheny, just a couple questions.

MR. METHENY: Sure.

MR. SCHMIDT: And because we're recording this, a lot of times when you're referring to photographs, it's not clear on the tape what you're actually talking about. So, I just want to make sure that the tape is clear. Okay, you and your wife, your wife is Bonita Josephine Metheny, correct?

MR. METHENY: Yes.

MR. SCHMIDT: And she goes by Bonnie?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and you and she are married, correct?

MR. METHENY: Yes.

MR. SCHMIDT: How long have you been married?

MR. METHENY: Thirty-one years.

MR. SCHMIDT: Okay and you presently own two different properties on Sixth Street on Miller's Island?

MR. METHENY: Three.

MR. SCHMIDT: Three properties, okay. All right and so, okay, let's, let's start to address all three of them. The first one is known as 2718 Sixth Street, is that correct? No, I'm sorry, strike that. The first one is known as 2714 Sixth Street?

MR. METHENY: Yes.

MR. SCHMIDT: Is that correct?

MR. METHENY: Yes.

MR. SCHMIDT: Okay. As I'm pointing to that, 2714 Sixth Street is immediately adjacent to the Dock of the Bay property?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and as shown on Protestant's exhibit number seven, is it a vacant lot?

MR. METHENY: Yes, it is.

MR. SCHMIDT: Okay. So, there's obviously no house or anything on that right now?

MR. METHENY: No.

MR. SCHMIDT: Okay and that property is shown on

Protestant's exhibit number, I'm sorry, People's Counsel exhibit number seven, People's Counsel seven, is zoned BL, is it not?

MR. METHENY: Yes, it is.

MR. SCHMIDT: Okay. The second property that you own is a lot that you and your wife own, is a lot that's right next door to that, is that correct?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and that is known and shown on Protestant's, People's Counsel seven as 2712 Sixth Street?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and that is also zoned BL, is it not?

MR. METHENY: Yes, it is.

MR. SCHMIDT: Okay and you do not live there?

MR. METHENY: No, no. That's a rental.

MR. SCHMIDT: Okay and even though that's a business local zoning, it's rented for residential purposes?

MR. METHENY: Used as a residence, yes.

MR. SCHMIDT: Okay. So, not, it's not used as business purposes?

MR. METHENY: No, not at all.

MR. SCHMIDT: Okay and that house, or that building on 2712, that was occupied by your mother-in-law at one point in time?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and she built that house?

MR. METHENY: She had it built in '99, moved in in 2000, yes.

MR. SCHMIDT: Okay and you indicated, I think, she built that when she retired?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and then she lived there until she passed away?

MR. METHENY: Two thousand nine, yes.

MR. SCHMIDT: Okay and then since, you and your wife inherited that and then started to lease it?

MR. METHENY: Well, actually, my son and daughter-in-law and my grand, granddaughter lived there until approximately a year ago.

MR. SCHMIDT: Okay and then they moved somewhere and then you started to lease it?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and obviously when your mother-in-law built that house, the Dock of the Bay was next door at that time?

MR. METHENY: Yes, yes.

MR. SCHMIDT: Okay. All right and then the third property that you own is further down Sixth Street towards the water, shown on People's Counsel exhibit number seven as to the

south east and that is known as 2704 Sixth Street, correct?

MR. METHENY: Yes.

MR. SCHMIDT: And that's where you live?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and that's where Mr. Zimmerman actually had you measure from the very corner of the property, and I'm pointing to it, but the very corner of the property on the water.

MR. METHENY: Yes.

MR. SCHMIDT: Towards the Dock of the Bay. Obviously, your house is not right on the water, correct? I mean, not immediately on the water, there's a part of your yard from the, from the bulkhead or the shore line back to your house, correct?

MR. METHENY: Well, from here, you're looking at about forty-five feet.

MR. SCHMIDT: Okay. So, when you said before a hundred and eighty, a hundred and ninety feet, you were going from your house to the Dock of the Bay property?

MR. METHENY: Yeah.

MR. SCHMIDT: As opposed to going to the very corner of your property on the water?

MR. METHENY: Yes.

MR. SCHMIDT: Okay. That's the hundred and twenty-seven or whatever Mr. Zimmerman tried to get you to say.

MR. METHENY: Yes.

MR. SCHMIDT: Okay.

MR. ZIMMERMAN: One twenty-seven plus forty is one sixty-seven.

CHAIR: Don't testify, Mr. Zimmerman.

MR. SCHMIDT: Okay. Okay. Now, in that house, how long have you owned that, as, was that also inherited from the --

MR. METHENY: Yes.

MR. SCHMIDT: -- from your wife's family?

MR. METHENY: Two thousand and five.

MR. SCHMIDT: Okay and when was that house built, if you know?

MR. METHENY: Nineteen ninety-seven or '98, one of those two years.

MR. SCHMIDT: Okay and obviously, your mother-in-law was living at the other place, so who was living there before you and your wife moved in?

MR. METHENY: My wife's brother.

MR. SCHMIDT: Okay and then, okay. Now, your wife, what's her maiden name?

MR. METHENY: Heronica (phonetic).

MR. SCHMIDT: Heronica. Okay and were the, was the Heronica family ever, did the Heronica family ever have any connection with the Dock of the Bay property?

MR. METHENY: My mother-in-law owned it.

MR. SCHMIDT: Okay. So, your mother-in-law owned the Dock of the Bay property?

MR. METHENY: Yes.

MR. SCHMIDT: How long did your mother-in-law own the Dock of the Bay property?

MR. METHENY: Late forties, early fifties.

MR. SCHMIDT: Until she sold it to who?

MR. METHENY: Nineteen, she sold it to two brothers, their names Trumbrero and that would be in '98, if I'm not mistaken. I'm, I'm not a hundred percent certain on the date, but it's --

MR. SCHMIDT: Okay. Around that time?

MR. METHENY: Yes.

MR. SCHMIDT: Okay. So, your mother-in-law owned the property for fifty years almost?

MR. METHENY: Yes.

MR. SCHMIDT: There's been testimony in this case that before the business on the subject property was called the Dock of the Bay, that it used to be called the Fisherman's Inn?

MR. METHENY: Yes.

MR. SCHMIDT: And when this operated as the Fisherman's Inn, is that when your mother-in-law owned the property?

MR. METHENY: It was Fisherman's Inn the whole time

(inaudible).

MR. SCHMIDT: The whole time she owned it, for the fifty years she had it?

MR. METHENY: Yes.

MR. SCHMIDT: So, it was, do you know when she bought it in the, I think you said late forties, or in the forties?

MR. METHENY: To be honest with you, what it is, the building was a house. It was right here. That was the house. The dining room was added on to it later, but, but it started out as a house and the basement was a bar.

MR. SCHMIDT: Okay. When she, when she bought it --

MR. METHENY: And that was in the late forties.

MR. SCHMIDT: In the late forties.

MR. METHENY: Early fifties.

MR. SCHMIDT: And she converted it into a full-time no longer house, but a full-time Fisherman's Inn restaurant?

MR. METHENY: Right, took the basement, made it into a bar and then at a later date, my wife's father added the dining room.

MR. SCHMIDT: Okay.

MR. METHENY: Then made it into a restaurant.

MR. SCHMIDT: When your in-laws owned it as the Fisherman's Inn, did they, did they ever have a time where they had outdoor seating?

MR. METHENY: My brother-in-law had outdoor seating

the last three, four, five, six years. He didn't have as many tables as Ken Boone or the Trumbreros had because the parking lot went all the way up to the water. So, he only had tables on the concrete bulkhead.

MR. SCHMIDT: Okay. But there was some outdoor seating there?

MR. METHENY: There was some outdoor seating.

MR. SCHMIDT: What about entertainment? Was there ever entertainment at the Fisherman's Inn?

MR. METHENY: Oh, the, in the early eighties, my brother-in-law was managing it, and he had, he had, well, he tried having rock bands there for, for a few years.

MR. SCHMIDT: Okay. Inside or outside or both?

MR. METHENY: That was inside, it was inside.

MR. SCHMIDT: Okay. So, when it was Fisherman's Inn, at least for a period of time, although more limited, there was, limited then today, there was outdoor seating, correct?

MR. METHENY: That would have been in the nineties.

MR. SCHMIDT: Okay and then --

MR. METHENY: Probably nineties, (inaudible) --

MR. SCHMIDT: And that was before Mr. Tanner got involved after Isabel?

MR. METHENY: That was before the Trumbreros even, it was still --

MR. SCHMIDT: Even the Trumbreros.

MR. METHENY: -- it was still Fisherman's Inn.

MR. SCHMIDT: Still Fisherman's Inn. Okay. In addition to the outdoor dining area and the, and the music that was at the Fisherman's Inn, any other activity associated with the business that was outside? Did you have the pirate ship playground?

MR. ZIMMERMAN: I would object, (inaudible) the Fisherman's Inn has nothing to do with this case.

CHAIR: Overruled. Since your, your case is built upon the fact that the Tanners' operation has everything to do with the case.

MR. SCHMIDT: Right.

CHAIR: And the Fisherman's Inn, if we're going to go there, then we have to hear the testimony of the Fisherman's Inn.

MR. ZIMMERMAN: But the Fisherman's Inn was not the problem obviously, it was mainly essentially a restaurant.

CHAIR: It's, we're going through the history of the, of this establishment and the music that's been there.

MR. SCHMIDT: Or what I'm asking, Mr. Metheny, to get to it, my understanding there was a skate park?

MR. METHENY: Yes. My, my, now that was my wife's brother.

MR. SCHMIDT: Okay.

MR. METHENY: He owned and operated, he put in two

skateboard ramps and he had, you know, I think they called it Chesapeake Skateboard or, it's on Facebook.

MR. SCHMIDT: Okay and that was actually, what that, that, the skateboard activity was where the outdoor seating area is now?

MR. METHENY: No.

MR. ZIMMERMAN: Objection.

MR. SCHMIDT: If you know.

CHAIR: Well, --

MR. ZIMMERMAN: Absolutely nothing to do with the current case.

CHAIR: Okay. Overruled. Go ahead. Go ahead.

MR. SCHMIDT: Go ahead, sir.

MR. METHENY: Okay. This area here where the garage is, this is the Dock of the Bay, this is the main building, this is the dining room, this is the outside area.

MR. SCHMIDT: Okay and he's pointing to Protestant's exhibit number --

BOARD: Thirteen.

MR. SCHMIDT: -- thirteen, which is the aerial photograph and you've indicated the area of the Dock of the Bay buildings, where you can see the roofs --

MR. METHENY: Exactly.

MR. SCHMIDT: -- was the restaurant as it was then?

MR. METHENY: The two ramps were right here.

MR. SCHMIDT: So, the ramps were actually --

MR. METHENY: On lots that wasn't part of the Dock of the Bay. There's, there's three lots that run this way, three lots that run this way.

MR. SCHMIDT: Okay.

MR. METHENY: Then these lots run this way, the, the two ramps were where that garage is now.

MR. SCHMIDT: Okay.

MR. METHENY: Right in this area right here.

MR. SCHMIDT: Okay and so --

MR. METHENY: This house wasn't there.

MR. SCHMIDT: Okay. So, the tape is clear, the skateboard ramps, you indicated that, I think, your mother, when she re, I'm sorry, your mother-in-law, when she retired, she built the house which is now owned, now occupied by your tenants.

MR. METHENY: Tenants, yes.

MR. SCHMIDT: At 2712 Sixth Street.

MR. METHENY: Yes.

MR. SCHMIDT: You also indicated that next to that property is a, unimproved lot known as 2714 Sixth Street?

MR. METHENY: Yes.

MR. SCHMIDT: Okay and is, do I understand it that the skateboard ramps, an operation that your brother-in-law ran, was on that unimproved lot, is that where it was?

MR. METHENY: It, it might even, it might have even been on both lots.

MR. SCHMIDT: Both the Dock of the Bay property and--

MR. METHENY: This was all, this was all their property.

MR. SCHMIDT: Okay. So --

MR. METHENY: Except for this, this right here was all their property.

MR. SCHMIDT: Okay.

MR. ZIMMERMAN: You don't, we're not even going to understand what --

MR. METHENY: So, right in this area.

MR. SCHMIDT: And the witness is indicating, for the record, on, on People's Counsel exhibit number seventeen, that the Dock of the Bay property, which is outlined in yellow, was owned by your in-laws.

MR. METHENY: The Heronicas.

MR. SCHMIDT: They also owned 2714, I'm going to go south to north, 2712, which is where your tenants live.

MR. METHENY: Yep.

MR. SCHMIDT: 2714, which is the vacant lot.

MR. METHENY: Yes.

MR. SCHMIDT: 2718, which is owned by Miller's Island Land Company.

MR. METHENY: Yeah.

MR. SCHMIDT: You know who that is?

MR. METHENY: No.

MR. SCHMIDT: Is it a, is it a, is that a, is that a residence there?

MR. METHENY: No, it's a garage.

MR. SCHMIDT: It's a --

MR. METHENY: It's an empty lot with a garage on it and my knowledge is that it has just been sold.

MR. SCHMIDT: Okay.

MR. METHENY: So, but I, I don't, I don't know anything about it.

MR. SCHMIDT: Not, and then next to that is 2716, which is Mr. Ciarpella's property.

MR. METHENY: Matt Ciarpella's, yes.

MR. ZIMMERMAN: I'll maintain my objection to what happened in the twentieth century. That's another century.

CHAIR: Okay. Overruled.

MR. ZIMMERMAN: It's not this case.

CHAIR: Overruled.

MR. SCHMIDT: Thank you. And you also indicated that your in-laws, in addition to the properties that I've just described, also owned what is now the Wolinski property at 9109 Cuckold Point Road?

MR. METHENY: (inaudible).

MR. SCHMIDT: Yes. Okay, which are both (inaudible)

the Wolinskis, okay. And obviously in those days, a lot, those houses weren't built because Mr. Wolinski bought, built his house when he moved in as did Mr. Ciarpella, so when your in-laws owned it, that was no residences were there, correct?

MR. METHENY: Oh, no, no, not at all.

MR. SCHMIDT: Okay.

MR. METHENY: The only residence was there would be this, I don't know who lived there, but there's a, a house right here on the corner.

MR. SCHMIDT: Corner of what?

MR. METHENY: I'm sorry, the corner of Cuckold Point and Sixth.

MR. ZIMMERMAN: Yeah, I object.

MR. SCHMIDT: Very well.

MR. ZIMMERMAN: The timing, you know, the timing of, on the residence (inaudible) Fisherman's Inn was there, is irrelevant to this case.

CHAIR: Okay.

MR. ZIMMERMAN: The same thing was true back in the 2008 case, the residents were built when they were built, the Fisherman's Inn had been there when it was. The problem is the late night music, the nightclub use, that's the problem. The Fisherman's Inn is not the problem. People are entitled to build their houses and live there in peace and quiet enjoyment.

CHAIR: Overruled. Okay.

MR. SCHMIDT: Thank you, Chair. I have no other questions, thank you.

CHAIR: Okay. Any re-direct?

MR. BORGERDING: No re-direct.

CHAIR: No re-direct? Anything based on Mr. --

MR. BORGERDING: Oh, I'm sorry, I have one question. My client just --

CHAIR: Mr. Borgerding does have a question.

MR. BORGERDING: Did your son live near the subject property?

MR. METHENY: My son, Steve?

MR. BORGERDING: Your son, did he used to live there?

MR. METHENY: Yes, he lived at 2712.

MR. BORGERDING: When, how close is that (inaudible)?

MR. METHENY: Okay. Again, going to 2712.

MR. BORGERDING: For the record, you're referring to, is that Protestant's seven?

BOARD: It's People's Counsel seven.

MR. BORGERDING: I'm sorry, People's Counsel seven, my bad.

MR. METHENY: The house that, that we, is a rental for us now.

MR. BORGERDING: Okay. So, did he move out, he and his family? He lived there with his family?

MR. METHENY: Yes, yes.

MR. BORGERDING: He and his family moved out?

MR. METHENY: Yes, they did.

MR. BORGERDING: When did they move out?

MR. METHENY: Not too long after they put up a sign that they were having live music at the Dock of the Bay.

MR. BORGERDING: Why did he decide to move out?

MR. METHENY: He wasn't going through that. I got a four-year-old at that time, a four-year-old granddaughter and he, he just wasn't living that mess. They started looking for a house, they found one in Bel Air and moved to Bel Air.

MR. BORGERDING: Okay. No further questions.

CHAIR: Okay.

MR. ZIMMERMAN: Yeah, just a follow-up. Did the people who live at, your tenants at 2712, do they also use 2714 for recreation or gardening or anything like that?

MR. METHENY: No, I mean, they can, you know, but, but, no, they don't.

MR. ZIMMERMAN: Any plans for 2714?

MR. METHENY: Nothing right at this point. Maybe put a house there, don't know yet.

MR. ZIMMERMAN: And if you did put a house there, you'd be worried about --

MR. SCHMIDT: Objection.

MR. ZIMMERMAN: -- the live music?

MR. SCHMIDT: Objection.

CHAIR: That would be testimony.

MR. SCHMIDT: So speculative. He just said he didn't have any plans.

CHAIR: He has no plans but if they did have plans, maybe someday we might (inaudible) --

MR. ZIMMERMAN: Well, you're entitled to do something with that property, aren't you?

CHAIR: Well, everybody is entitled to do something with their property. This gentleman is very honest, I mean, I appreciate your honesty, sir.

MR. ZIMMERMAN: Yeah.

CHAIR: I mean, you didn't, you know, you have no plans yet. Let's leave it at that.

MR. ZIMMERMAN: All right.

CHAIR: How about that?

MR. ZIMMERMAN: All right. Thank you, Madam Chair.

CHAIR: Okay.

MR. SCHMIDT: Just, just one follow-up and it does relate, what's your son's name?

MR. METHENY: Steven.

MR. SCHMIDT: What's he do for a living?

MR. METHENY: He is a senior network engineer for Johns Hopkins.

MR. SCHMIDT: Does he do any disc jockeying on the side?

MR. METHENY: No.

MR. SCHMIDT: He does, did he ever?

MR. METHENY: No.

MR. SCHMIDT: Okay. Do you have a son that's a disc jockey?

MR. ZIMMERMAN: Objection. Now, we're, --

MR. SCHMIDT: I thought maybe this was his son.

MR. ZIMMERMAN: Yeah, it has nothing to do with this case whether his son was a disc jockey or not. It's ridiculous.

CHAIR: Okay.

MR. SCHMIDT: Okay.

CHAIR: He said no, I think he said no, so, I'm not sure.

MR. SCHMIDT: Well, that's, Steven is not a disc jockey. Do you have any other children, do you have another son who is a disc jockey?

MR. ZIMMERMAN: Objection.

CHAIR: Well, that, but that's going to go beyond the scope and, and --

MR. SCHMIDT: Okay. Okay. No problem.

CHAIR: All right.

MR. SCHMIDT: It's not a big deal.

CHAIR: Okay. Thank you, sir.

MR. METHENY: All right.

CHAIR: It's 12:00. Mr. Borgerding, how many more witnesses do you have?

MR. BORGERDING: Three. I've got three.

CHAIR: You have three more witnesses?

MR. BORGERDING: I, I, I would imag, I don't know what the, when the Court would think about taking a lunch --

CHAIR: We were going to do it now and we could, we could take a half an hour short.

MR. SCHMIDT: That's fine.

CHAIR: Everybody could take a half, which is kind of rushes everyone.

MR. BORGERDING: Or, or what I'm thinking, Your Honor, is I could probably be done by 1:00.

MR. SCHMIDT: Done everything?

CHAIR: Done everything?

(EVERYONE TALKING AT ONE TIME)

MR. BORGERDING: I don't know how much rebuttal Mr. Schmidt has.

CHAIR: Yeah, Mr. Zimmerman --

MR. SCHMIDT: Is Mr. Zimmerman leaving?

CHAIR: Mr. Zimmerman is going to be here, he's going to, you might be done at 1:00 --

MR. ZIMMERMAN: Unless the, unless the witness, you know, has to, has to, Mr. Kondylas needs to testify now, let's do it, but otherwise I wouldn't mind a lunch break.

MR. BORGERDING: Well, just my thought was, due to Mr. Schmidt's engagement at 2:00, we could maybe plow through and get done.

CHAIR: Well, I was just thinking and we could take, you know, if we took maybe a half an hour, then it would be 12:30, you know, an hour and a half before he, you actually have to leave before 2:00?

MR. SCHMIDT: Just, all I have to do is run across the street.

CHAIR: Oh, yeah, yeah, yeah, but you need to be there at 2:00?

MR. SCHMIDT: Yes, and, and I've asked, I've, I've got to be there but I'm going to have one of my associates go there and tell them I'm on my way so.

CHAIR: I understand. All right.

MR. SCHMIDT: Yeah.

CHAIR: Well, hopefully you're defending some case that we, we've (inaudible).

MR. ZIMMERMAN: I'm just saying is, if we need to have, if a witness --

MR. SCHMIDT: Defending the Board.

MR. ZIMMERMAN: -- if a witness needs to be on the stand now because he's got to go, let's do that. But otherwise, let's --

CHAIR: Well, that's not what he, I don't think

that's what he indicated but I don't know if we're going to get all done by 1:00. We could at least take, does everybody agree --

MR. BORGERDING: My thought would be we should try to plow through.

CHAIR: Okay. Well, let's just take at least a ten-minute break then.

MR. BORGERDING: Okay.

CHAIR: Let's just take a ten-minute break until, you know, 12:15.

MR. BORGERDING: Okay.

CHAIR: Give us ten minutes and then we'll come right back and then we'll start with that gentleman.

MR. SCHMIDT: Very well.

CHAIR: How's that sound?

MR. BORGERDING: Thank you, Your Honor.

MR. SCHMIDT: Thank you, all.

CHAIR: Because I'm going to eat something.

(RECORD PAUSED - 12:03:01 PM)

(ON RECORD - 12:18:17 PM)

CHAIR: Okay. We're back on the record after just taken a little break. Mr. Borgerding, you had a witness? Who is ready?

MR. BORGERDING: Yeah, with that, I'd call Mr. Kondylas.

CHAIR: Mr.?

MR. BORGERDING: Kondylas.

CHAIR: Kondylas.

MR. BORGERDING: From Boone Kondylas. If I could see Protestant's one and 1-A or one and two.

MR. ZIMMERMAN: Again, may I remind people to speak up because I can't even here half, half the voices.

CHAIR: You might want to keep your voice up, Mr. Borgerding.

MR. BORGERDING: Okay, I apologize.

CHAIR: Oh, no worries.

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. KONDYLAS: Yeah. Yes.

BOARD: Can you state your name and your address for the record, please?

MR. KONDYLAS: Yeah, Mike Kondylas, my address 8909 Miller's Island Boulevard.

BOARD: And spell your last name, please.

MR. KONDYLAS: K-O-N-D-Y-L-A-S.

BOARD: Thank you. You can be seated.

MR. BORGERDING: Mr. Kondylas, were you Mr. Boone's former partner in the establishment for which we're here today?

MR. KONDYLAS: Yes.

MR. BORGERDING: And when were you partners, from when and what time did you exit the business?

MR. KONDYLAS: Well, when we bought the place, it took six, eight months to renovate.

MR. BORGERDING: Do you know what time that was, when that was?

MR. KONDYLAS: I got out in '14, November of '14, so that was the summer of --

MR. BORGERDING: Of '14?

MR. KONDYLAS: -- '14.

MR. ZIMMERMAN: Two thousand fourteen, not 1914?

MR. KONDYLAS: Right, 2014.

MR. BORGERDING: During that summer, do you recall getting a letter from me in reference to Mr. Tanner's use of the property?

MR. KONDYLAS: Yes.

MR. BORGERDING: Okay. I'm going to show you a copy of a letter --

MR. SCHMIDT: This is, this is already in evidence, I think.

MR. BORGERDING: I can still ask about it, can't I?

BOARD: Sure.

MR. SCHMIDT: Sure. Okay.

CHAIR: Is it an exhibit all --

BOARD: It, it was. I mean, did you take my exhibit out of there?

MR. SCHMIDT: It's, it's exhibit number one.

BOARD: Yes.

MR. SCHMIDT: Okay. I, I've seen it, I got a copy of it.

CHAIR: Why don't you just, let's identify then if there's an exhibit already in evidence, do you want to use that, Mr. --

BOARD: He just took (inaudible).

CHAIR: Oh.

MR. BORGERDING: I took it, I have it.

CHAIR: You know, I (inaudible), you are one step ahead of me.

MR. BORGERDING: I'm one step ahead of you.

CHAIR: I apologize. (inaudible).

MR. BORGERDING: Can you identify what you're looking at?

MR. KONDYLAS: Yeah, this is the letter we got, received in the mail, stating, reminding us that a restrictions for the music on the property.

MR. BORGERDING: Okay. So, there's a letter attached to that, which purports to be from Baltimore County. That is not on Baltimore County's letterhead, but is that, in fact, the letter that was attached?

MR. KONDYLAS: Yes.

MR. BORGERDING: Okay. I'd ask that 1-A or was it two, I'm not sure --

MR. ZIMMERMAN: My record shows it's People's, Protestant's Exhibit 1, letter --

BOARD: Right, it's a letter dated 9/24.

MR. ZIMMERMAN: -- 9/24/14, Borgerding to Kondylas, to letter dated 9/12/2004 previously for i.d. only.

BOARD: Okay.

MR. BORGERDING: I'd ask that Protestant's number two, which was previously admitted for i.d., be entered into evidence.

MR. SCHMIDT: Objection.

MR. ZIMMERMAN: Is that Rosenblatt to --

MR. BORGERDING: Correct.

MR. ZIMMERMAN: -- to whom? It's 9/12/2014, Rosenblatt to?

CHAIR: Wait a minute, Mr. Zimmerman.

MR. ZIMMERMAN: I'm sorry.

CHAIR: You keep interjecting in the middle of, of Mr. Borgerding's --

MR. ZIMMERMAN: All right.

CHAIR: -- direct examination and he's talking about two exhibits, one of which was --

BOARD: Right, this is, this is, this exhibit, which

is supposedly for Protestant exhibit number two, was not admitted.

MR. BORGERDING: It was marked for i.d. and I'm asking now, after he has referred to it --

BOARD: Properly authenticated it, is that what you're saying? He's identified it and authenticated it.

MR. BORGERDING: Yes, I am asking that it now be entered into evidence.

CHAIR: Do you have any objection to Exhibit 2?

MR. SCHMIDT: I do.

CHAIR: Okay.

MR. SCHMIDT: I think what happened before, Ms. Murphy, as I recall and I listened to the tape, is that Mr. Borgerding submitted into evidence over my objection exhibit number one, which is a letter that he wrote to Mr. and Mrs. Kondylas and he then attempted to offer exhibit number two into evidence, which I objected to because I said it's not signed, it's not on County stationary and there's no indication that it's actually a County authenticated letter. This gentleman, the only thing he has testified to today, is that he got it, it was received by him in a letter attached to Mr. Borgerding's letter. That doesn't change the fact that it's still not signed, it's still not on County letterhead, it's still not authenticated as a document produced by Baltimore County. The mere fact that this man got it from Mr. Borgerding, I mean,

arguably, if he got it directly from the County, then there would be a stronger argument but he just testified he got this from Borgerding in a letter, with Exhibit 1. I believe it's still not properly authenticated and I would object to it.

MR. ZIMMERMAN: May I comment before a ruling is made, may I comment after, either before or after Mr. Borgerding?

CHAIR: Okay. I was going to ask Mr. Borgerding, but why don't you say what you need to say, Mr. Zimmerman?

MR. ZIMMERMAN: Yes. I think Mr., Mr. Schmidt's argument is a red herring. Whether or not this particular exhibit is signed or not, it's relevant for the purpose of notice. It's an additional, I mean, the, Exhibit 1 itself is a notice to Mr. Kondylas of the attached letter is further detail as to notice. It so happens that what's in that letter is consistent with everything else in this record anyway, in the public record. But the point is, it's relevant to notice. Doesn't matter whether it was signed, doesn't matter, the authentication is, as to the County is not even the issue. The issue is, this is more information which Mr. Kondylas probably knew already, but we'll get into that later. It's, it's fine to be admitted into evidence. It's what, it's the extent of notice that Mr. Borgerding provided.

CHAIR: Mr. Borgerding?

MR. BORGERDING: Yeah, I, I guess a couple of points

I'd make. Number one, this is an administrative hearing, so I would ask the Board to keep that in mind. Number two, I agree, this, this correspondence was dealing with notice issues and so the fact it is not on County stationary or signed, it still provided the notice and that's what my further questioning is going to be about.

MR. SCHMIDT: Ms. Murphy, if Mr. Borgerding is done, can I be heard very briefly?

CHAIR: Yes.

MR. SCHMIDT: First of all, my, my particular objection to the document is that surely the, the Board is an administrative body and the Board has more latitude than a Court of law would and I think we all understand that. Nonetheless, I think the Board does have to operate within the precepts of fundamental fairness and due process and I just don't see this unsigned letter, which is on a blank sheet of paper and not on County letterhead as being reliable enough to, to, on its own face. But let me get beyond that. I have thought about this issue and listened to the tape recording of the hearing before and this may go to this gentleman's entire testimony. As I understand it, and Mr. Zimmerman said this at the first hearing, there is apparently a dispute or an allegation as to what Mr. Boone knew or didn't know or should have known or whatever, as it related to the prior proceedings involving Mr. Tanner and I guess I'm going to say right now and

I will note an objection depending on your ruling, I'll not it continuing, I think that's irrelevant. Certainly, in the context of a zoning variance case, the concept of self-imposed hardship is a, a factor which this Board can decide when it's considering a variance, as to whether the variance should be granted and whether the circumstances giving rise to the variance were self-created. This is not a variance case. The concept of, I guess they're arguing a self-imposed special hearing or, or whatever it is. This is a special hearing case. We're not asking for a variance. I looked at the cases involving this issue and the one that jumps out at me is the, and Mr. Zimmerman cited this, is the *Seminary Galleria* case, which involved the property up near Heaver Plaza, up at Seminary Avenue and in that case, which Mr. Zimmerman cited it when his initial Motion, the owners of that property attempted to obtain relief for their parking. They were denied, then they came back in a separate filing and attempted to retain, obtain relief and the relief was denied again on the grounds of res judicata. And I don't know if that's where they're going with this argument, but if one reads that decision, the, the second case wasn't denied because there was a self-created hardship or an earlier case, it was denied because of res judicata. My, my point is, is that self-created hardship, if that's what they're arguing, is a variance issue, but not in the context of the relief here, either in the res judicata

argument or in the underlying special hearing which was filed. And so, I would just say, who cares what Mr. Boone knew? Whether he knew about Tanner, whether he didn't, it doesn't matter. There's no relevant to it and I haven't, I'm unaware of any case law that supports a proposition otherwise. So, I think that's, I, I objected to this before. The questions I objected to of the cross examination of Mr. Boone about what he knew and when he, and all the rest of that stuff, I don't think it's got anything to do with whether he can make this request and whether the Board should grant it now. I'll shut up.

CHAIR: Okay.

MR. ZIMMERMAN: I think Mr. Borgerding goes next.

MR. BORGERDING: Yeah. Your Honors, I'll proffer exactly what I'm getting at with this witness and what he's going to testify to. Mr. Boone testified on the stand that he had no knowledge of the zoning issues with Mr. Tanner, nor the Court's ruling. When my clients, after all they had been through, caught wind that Mr. Kondylas and Mr. Boone were thinking of buying the property, Mr. Wolinski called me and said, you need to write them a letter, notify them because he also, my, my client also heard that there were spreading amongst Miller's Island, which is a small community, the attitude that we can buy this and do whatever we want. We're not bound by the previous decisions. That is the reason I sent that letter to Mr. Kondylas. Mr. Kondylas is going to, we'll

have him, he'll testify to what he's going to testify, but he is going to testify that he gave that letter to Mr. Boone. Mr. Boone testified under oath that he had no knowledge of this. So, I think it is absolutely relevant to his credibility. It has nothing to do with res judicata or any other issue, his credibility. He testified, I didn't know about this and this gentleman is going to testify, yes, he did know about it.

CHAIR: Okay.

MR. BORGERDING: So, I think that's relevant.

MR. ZIMMERMAN: Yeah. Well, as this sometimes happens, Ms., I don't think Mr. Schmidt has accurately described what my position is or what may be my position is in this case. It's not a variance case, okay? Every case has its legal dimension and then at administrative hearings, there's the sympathy or extraneous dimensions. When it comes to res judicata, even if Mr. Boone subjectively had no idea that there was ever a case before, okay? That wouldn't excuse him from the res judicata impact. All right? Even if he had come from Mars and not read any of the public records, not talked to anyone at all. Res judicata would still apply. However, as a sympathy dimension in this case, building on, consistent with what, what Mr. Borgerding said, I, I can't state word for word what Mr. Boone testified, but the gist of it was that he, he knew there was a problem but he thought he could overcome it. He didn't realize the depth of the decisions that had been

made, that Kondylas didn't show him the letter, his partners weren't clear with him or Tanner wasn't clear. I think the Board may remember it as well as I. Petitioner, as often happens in these cases, in addition to whatever legal argument they may have, they make a play for sympathy, okay? So, the Petitioner in, as often happens, even though it's really not, doesn't really justify legally their case, they make a play for sympathy for some, some degree of ignorance, okay? You know, Petitioner's case is, Tanner's a bad guy, Tanner didn't tell them everything, current Petitioner is a good guy, don't, don't equate him with Tanner. So, when Mr. Borgerding legitimately points out that he sent information directly to one of the partners, apparent partners, we don't have, we don't have a partnership agreement, but we know it's Boone Kondylas LLC, when Mr. Borgerding points out that not only was there a problem of public record, but Mr. Borgerding made a special effort on behalf of his clients to remind them that there was this problem, then that, that's legitimate in the context of the way the Petitioner presented their case. And there can't be a double standard in these cases. Like Petitioner can do, put in and do whatever they want and they, they open it up, Madam Chair, and --

CHAIR: Okay.

MR. ZIMMERMAN: -- even though it's irrelevant, right? There's no sympathy argument that should be made, the

Petitioner has opened up this sympathy position to try to, again, differentiate the current owners from the, the evil Mr. Tanner, who was the subject of the previous case. Well, that good and evil argument is, frankly, irrelevant. But they opened it up and Mr. Borgerding is legitimately pointing out that the knowledge of Boone Kondylas, which is the Petitioner, Kondylas being one of the principals, that the knowledge was greater. Now, whether or not Mr. Kondylas told Mr. Boone, maybe Mr. Borgerding is going to get into that questioning, that's a detail and it frankly doesn't change the outcome of the case. But the Pet, one of the Petitioner's big pitches is, gee, I didn't know or I didn't know the degree or I wasn't told this, I wasn't, you know, that was, that was part of their case and, yeah, we could say none of it really matters. And, of course, my view is the case should have been dismissed before we even had this trial but, but once these things start to open up, the Petitioners make these kind of equitable, sympathetic, try to, try to look good and guess what? The Petitioner, Boone Kondylas, was on full notice, should have been on, with notice anyway, but, but, but the citizens made the effort, the extra effort, which they didn't have to make, but they made the extra effort to say, wait a minute. We had all this problem all these years and now you're going to start up again? Come on. So, I think it's outrageous for Mr. Schmidt to object.

CHAIR: Okay. Anything else?

MR. SCHMIDT: Just very briefly. Mr. Borgerding says that the, the neighbors sent this letter so that Kondylas, or so that Boone just wouldn't think the prior restrictions were not applicable to him. Obviously, we know the restrictions are, are applicable to us, that's why we filed the Petition. I mean, that doesn't make any sense. And if we want to talk about sympathy, Mr. Zimmerman, I've heard nothing but pity party from the neighbors about the hell they endured for seven years of Larry Tanner. I, I wrote down --

CHAIR: I object to that, I object to that, you know, additional red herring.

MR. SCHMIDT: I wrote down exactly what Mr., what Mr. Boone said. Mr., and this was on cross examination and I objected to it, but the Board allowed it and Mr. Boone testified, quote, this is a hurdle that could be navigated. That was his understanding, that's what he said. And then he said, either Mr. Tanner or Mr. Kondylas told me that there was a music restriction related to the liquor license and that it would go away when the liquor license was transferred. And that's what his testimony was. So, he was aware of some problem but my point is, he's aware of it, he's now filed this Petition to address it and what's all the rest of this got to do with anything? I, I still can't get there.

CHAIR: All right. Can you pause that for one second?

(RECORD PAUSED - 12:37:11 PM)

(ON RECORD - 12:37:54 PM)

CHAIR: All right. The objection was to exhibit number two, that's when we started with this fifteen minutes ago, which is why we're never going to finish by 1:00. It's okay, but just calling Mr. Borgerding.

MR. BORGERDING: Oh, well.

CHAIR: So, --

MR. BORGERDING: I'm being overly optimistic.

CHAIR: -- Prot, Protestant's exhibit number one was the letter from Mr. Borgerding, which is already in evidence, to Kondylas. Protestant's number two is, as was indicated, is an unsigned letter from, it appears to be Adam Rosenblatt. It's not on County letterhead, it's not signed. The Protestants are arguing that their issue is notice and Mr. Zimmerman was arguing notice. The notice was provided in Protestant's exhibit number one, September 24th letter. We don't need exhibit number two necessarily. The only person actually who could identify Protestant's exhibit number two is Mr. Borgerding, if he wants to be a witness. But, normally we have these, always, not normally, always in these cases, we always have County letterhead, it's always signed and it's just not hard to get a copy of that. Now, before today's hearing, before the last time's hearing, easy to do. So, Protestant's exhibit number two will not be admitted, but Protestant's

exhibit number one already gives you the information and certainly, you know, this gentleman can testify as to what he told Mr. Boone. I mean, if, that's really what the issue is and his testimony is also evidence. So, this doesn't, the admission of this doesn't make or break anything, it's just, it doesn't come in because it doesn't have a sign and it's not, and Mr. Borgerding is not going to be a witness, so. All right. So, we're going to mark that for i.d. still. Go ahead.

MR. BORGERDING: So, Mr. Kondylas, going back to the time that you received that letter, you received it September of 2014? Did you at that time --

CHAIR: Wait a minute, wait a minute.

BOARD: Which letter are we talking about?

CHAIR: Hold on one second. Yes, you have to identify which letter and also, sir, you have to actually speak up because there's a transcript --

MR. KONDYLAS: Oh.

CHAIR: -- there's a microphone.

MR. KONDYLAS: I'm sorry.

CHAIR: That's okay. It's, it's awkward but there's a microphone and, and so when these gentlemen go to print the transcript, they'll just go, it won't even have anything that you said, so you have to actually speak up. Which document are you speaking about?

MR. BORGERDING: Mr. Kondylas, your testimony is

you've received both letters, correct?

MR. KONDYLAS: Yes.

MR. BORGERDING: Okay and did you show both letters to Mr. Boone at the time?

MR. KONDYLAS: Yeah, I just gave him the whole envelope, handed it to him and he went upstairs to the office.

MR. BORGERDING: Thank you. No further questions.

CHAIR: Okay.

MR. ZIMMERMAN: Mr. Kondylas, just to show, you live at Miller's Island Boulevard and Tenth Street, correct?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: And just to show the Board where you live, may I see Petitioner's Exhibit 7? It's an aerial photo of the whole peninsula.

MR. KONDYLAS: It's five blocks away.

CHAIR: One second, let Mr. Zimmerman ask you a question.

MR. KONDYLAS: Oh.

CHAIR: Because --

MR. ZIMMERMAN: No, I don't, I don't think, in fairness, ten, the aerial photos that are in evidence don't go down to Tenth Street, so I just want to --

BOARD: Petitioner's exhibits.

MR. ZIMMERMAN: Petitioner's seven. Okay. I have Petitioner's seven, Exhibit 7, and this, this does show

Miller's Island Road, then Miller's Island Boulevard shoots off to a wider part of the peninsula, correct?

MR. KONDYLAS: To the right, yes.

MR. ZIMMERMAN: And then Tenth Street is, I guess Tenth Street becomes Miller's Island --

MR. KONDYLAS: No, this is Tenth.

MR. ZIMMERMAN: Okay.

MR. KONDYLAS: Going to the left, going north and Miller's Island Boulevard is the same street but it, from Cuckold Point it goes south.

MR. ZIMMERMAN: Okay and your house is about --

MR. KONDYLAS: The second one in.

MR. ZIMMERMAN: -- the second one towards, on the Miller's Island Boulevard side?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: Which happens to be in a, in a modest area zoned BL, correct?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: And you're near the corner, you're, you're a house or two away from the corner of Miller's Island--

MR. KONDYLAS: One house away from the corner.

MR. ZIMMERMAN: Of Miller Island Boulevard and Tenth Street.

MR. KONDYLAS: Right.

MR. ZIMMERMAN: And if I show the, I'm going to show

the Board the area to which, to which he's pointed. Just so, so there's no confusion, there's Tenth Street, Miller Island Boulevard and that's where Mr. Kondylas lives. Okay. I just wanted to clarify that.

BOARD: What's his home address (inaudible)?

MR. ZIMMERMAN: Your home address?

MR. KONDYLAS: 8909 Miller's Island Boulevard.

MR. ZIMMERMAN: Okay. Okay and Mr. Kondylas, how long have you lived in the area?

MR. KONDYLAS: I've been at that address since 2000.

MR. ZIMMERMAN: And at some point, you became partners, were you partners with Mr. Boone in Boone Kondylas, LLC?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: And were you familiar with the previous litigation?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: Involving Mr. Tanner? Okay. What relationship, if any, did you have with Mr. Tanner?

MR. KONDYLAS: In the very beginning, we were trying to, to (inaudible), but then when things got too intense back and forth, we just, you know, as a friend of Tanner's, I just backed off.

MR. ZIMMERMAN: You were friends with Mr. Tanner?

MR. KONDYLAS: Oh, I'm friends with Mr. Tanner, I'm

neighbors, you know, with everybody else and I wasn't going to get caught in the middle.

MR. ZIMMERMAN: So, anyway, by the time, at some point, you made an agreement or entered into some sort, was it a partnership or a small corporation, an LLC --

MR. KONDYLAS: An LLC.

MR. ZIMMERMAN: Okay and you knew the whole history of the, the Tanner litigation, correct?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: So, so did you inform Mr. Boone about what had happened?

MR. SCHMIDT: Objection. Asked and answered. He said he got the letter, he gave it to him, he took it upstairs.

CHAIR: Right, okay.

MR. ZIMMERMAN: But did he have conversations with Mr. Boone --

MR. KONDYLAS: Yes, we did.

MR. ZIMMERMAN: -- that there was this litigation. Okay and at one point, you, the corporation acquired the property, Boone Kondylas, in, sometime in 2014 or 2015?

MR. KONDYLAS: In '14, 2014.

MR. ZIMMERMAN: Okay and you were still, would you call yourself a partners with Mr. Boone or what's, what's, what's the correct --

MR. KONDYLAS: The partnership was Boone Kondylas,

was me, my wife, Kenny and his wife.

MR. ZIMMERMAN: Okay.

MR. KONDYLAS: The Dock of the Bay, LLC, the license, was put in my wife's and my daughter's name.

MR. ZIMMERMAN: Ah. So, when it said Michelle Kondylas --

MR. KONDYLAS: That's my daughter.

MR. ZIMMERMAN: -- on the liquor license, that's, that was correct?

MR. KONDYLAS: Yes.

MR. ZIMMERMAN: Okay and, and then, and that was what we showed as People's Counsel Exhibit 11-A, the, just so --

MR. KONDYLAS: Yeah, the liquor license.

BOARD: (inaudible).

MR. ZIMMERMAN: 11-A is still in for i.d.?

BOARD: Yeah, and 11-B as well.

MR. ZIMMERMAN: So, let me show to this witness and maybe he can verify that.

MR. SCHMIDT: Objection. That's going to be the same objection. What does he know? He's going to be showing a document --

MR. ZIMMERMAN: He knows.

MR. SCHMIDT: What's the possible relevance of any of this?

MR. ZIMMERMAN: It's a thousand times more relevant

then (inaudible).

CHAIR: All right. Well, Mr., Mr. Borger --

MR. ZIMMERMAN: All right. So, I'm going to show you 11-A for I, i.d.

MR. SCHMIDT: All right. For the record, I think this is Mr. Borgerding's witness and I will object that this is beyond the scope of direct examination as well.

CHAIR: All right and you're actually cross examining him.

MR. SCHMIDT: Yes.

MR. ZIMMERMAN: Well, I'll call him as my witness now then, or, or later (inaudible), would you like --

CHAIR: On day three.

MR. ZIMMERMAN: Whenever, unless we can get through it quickly now.

CHAIR: On day three. The, the exhibits that you have, I mean, Mr. Borgerding already had one, I thought he had (inaudible) liquor license, I thought.

MR. SCHMIDT: The, the witness just testified who owned the liquor license. What else do you want to know, Mr. Zimmerman?

MR. ZIMMERMAN: I want to verify to, excuse me, because there was some confusion before, we thought that perhaps Michelle was a mis, misprint, so, I think I have the copy of 11-A. This is the November 3rd, 2014 record of the

liquor board and it, applicant's, do you recognize these names, Donna Lee Kondylas, who is that?

MR. KONDYLAS: That's my wife.

CHAIR: Okay. But, Mr. Zimmerman, we're back to the same thing before, you wrote, you turned the paper over and you said this is a 2014 liquor license and you're handing it to the witness and you're, and you're reading the same thing and he's saying, and you're asking him, does this mean, say what it says?

MR. ZIMMERMAN: All right. If, all right, let me ask you this. Is this --

CHAIR: He already testified she's on the liquor license.

MR. ZIMMERMAN: Right.

MR. SCHMIDT: And the daughter.

MR. ZIMMERMAN: So, is this document consistent with your familiarity that your wife and daughter were transferred the liquor license in November of 2014?

MR. KONDYLAS: Yes.

CHAIR: No, because he can't identify the document. He can't identify the document is the problem. He can't, that's not his document. He can't identify it.

MR. ZIMMERMAN: Doesn't matter.

CHAIR: He can't identify the document. He's already said that my daughter's name is on the license. (inaudible)

trying to go around about the question by handing him that document and saying, well, is this consistent with what you just said? Of course he's going to say yes. Mr. Zimmerman, I just --

MR. ZIMMERMAN: Well, it's rele, it is, it is relevant, it corroborates what he has said and gives you --

CHAIR: Well, it corroborates because you're handing it to him and saying it says what it says. (inaudible).

MR. ZIMMERMAN: All right. I think, I think it's admissible.

CHAIR: It's marked for i.d. right now.

MR. ZIMMERMAN: All right. It's --

CHAIR: But this gentleman, thank you, sir, you did testify that your daughter's name was on the liquor license, that's what we heard five minutes ago. But, okay, let's, (inaudible) question.

MR. ZIMMERMAN: Let me get my, let me get my documents back. Okay and then, just, in March 2nd, 2015, however, can you state whether or not the liquor license got transferred from your wife and daughter to Russell McClelland and Dorothy O'Reilly? (inaudible)?

CHAIR: I'm sorry, you have to say, sir --

MR. KONDYLAS: Oh, yeah. Yes. You know, the wife and the daughter, you know, we came to an agreement. They signed off and transferred it over.

MR. ZIMMERMAN: Was that around the time that in some fashion, you no longer became active in Boone Kondylas, LLC?

MR. KONDYLAS: That's, you know, when all the final paperwork came through and we were done with Boone Kondylas and Dock of the Bay, LLC.

MR. ZIMMERMAN: Okay, thank you. I have no further questions.

MR. SCHMIDT: No questions.

CHAIR: Thank you. Thank you, Mr. Schmidt. Mr. Borgerding? Sorry, sir, any re --

MR. BORGERDING: No further questions.

CHAIR: All right. Thank you, sir. Anymore witnesses?

MR. BORGERDING: Yep, I sure do. (inaudible).

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MS. METHENY: That's correct.

BOARD: Please state your name and address for the record.

MS. METHENY: My name is Bonita, or Bonnie, Metheny. I live at 2704 Sixth Street, Miller's Island.

BOARD: Thank you. Please be seated.

MR. BORGERDING: Ms. Metheny, you've been here this

morning, so you've heard all the testimony?

MS. METHENY: Yes, I have.

MR. BORGERDING: And you are here in opposition?

MS. METHENY: I most certainly am.

MR. BORGERDING: Can you explain to the Board why?

MS. METHENY: I am here in opposition of live entertainment inside and out. The reason being is because we've been through this before for seven years, as we all have heard. I don't want to go through that again. The only thing that is different is that we have a new owner of the Dock of the Bay and a new Board. All these people in here are the same people who have been involved before with the whole litigation for the Dock of the Bay.

MR. SCHMIDT: Not me.

MS. METHENY: Well, sorry. But you were Rowboat Willy's lawyer, weren't you? Okay. Well, that makes you a little different. Let's see, Mr. Boone had, his, his history, I think he is the president of American Direct and you have two companies, correct?

MR. SCHMIDT: Don't answer, don't answer.

CHAIR: No, he can't, you can't ask him questions.

MS. METHENY: Oh.

CHAIR: You just need to testify to us.

MS. METHENY: Okay. I am pretty certain that Mr. Boone is the president of two companies and I would think that

as a man of that stature, that he would have did due diligence with the Dock of the Bay, with spending hundreds of thousands of dollars on property, that was one of my points. This has already been decided, as I said, earlier. The hearing results of all the hearings from the lowest court to the highest court still are in place, but we're just back here again arguing the same questions and as far as accessory music, let's really call it what it is, it's not accessory music, it is entertainment, whether it's indoor or outdoor. Mr. Boone testified that he would like to have a Sinatra impersonator. Sinatra only plays nightclubs and casinos. And facebook. Mr. Boone, (inaudible) we'll get into that later. This is something that I would like to submit into the Court. This is a certification of records by Sergeant Gwendolyn Parrish. What this is, is the incident--

MR. SCHMIDT: Objection. Could we have counsel go through the appropriate process of asking that his witness --

CHAIR: That would be a better idea.

MR. SCHMIDT: -- authenticate and offer --

MR. ZIMMERMAN: I don't think counsel should interrupt testimony.

BOARD: It's appropriate.

CHAIR: It is appropriate and, and, and I think, Mr. Zimmerman, in all fairness, pretty much you interrupt testimony on a regular basis and you know I mean that in the best of ways.

MR. ZIMMERMAN: Only to try to clarify.

CHAIR: (inaudible) not only to clarify, it makes it clear to me.

MR. BORGERDING: This marked as Protestant's number sixteen.

CHAIR: Okay.

VOICE: Can you explain to us what this is?

MS. METHENY: Of course.

CHAIR: Well, why don't we have Mr. Borgerding --

BOARD: Yeah, I want the attorney to explain to me what this is.

CHAIR: What is it?

MR. BORGERDING: To my understanding, it's a list of when the police were called to Mr. Tanner's establishment.

MR. SCHMIDT: Mr. Tanner's establishment?

MR. BORGERDING: Yes, yes.

MS. METHENY: And all the calls. What I don't want to do is, I don't want to have to live that over again because of somebody else coming in and saying oh, yes, well, we'd like to have music because I can't make it without music or, it's just, I don't want to live it again. I don't, I don't want my quality of life to go down there. I have to work all week and then I come home and next door they're having a party out, or your waitresses or, not his, but the waitresses are swimming, going swimming at 2:00 in the morning. That should be in there

as a call. There's duplicate calls in there where more than one person have called about what had, what had happened or what had transpired. That's the data source and that's the graphing.

BOARD: What was presented to you? You, you have a certification here that this was a record --

MS. METHENY: This is certifying that all that --

BOARD: Yeah, but what was, were the, was the data source presented to you? Was this presented to you?

MS. METHENY: The data source was presented to me. The graphing is what I did with the data.

BOARD: Oh, you did the graphics yourself?

MS. METHENY: Yes.

BOARD: Let me show this to Mr. Schmidt.

MR. SCHMIDT: I haven't seen it, yes.

CHAIR: Yeah. Let, let, and, and we're going to need to know what came with the certification from the actual government authority as opposed to what you drafted.

MS. METHENY: Oh, the data base, data source on the back, the Excel spreadsheet, that came from Sergeant, what was her name, Gwendolyn?

CHAIR: Okay.

MS. METHENY: Certifying that this information --

BOARD: But the pie charts are something you did yourself?

MS. METHENY: Yes.

CHAIR: Okay. We have two separate documents --

MS. METHENY: It's more of a visual. I don't want to go through that again.

CHAIR: Okay. One second. (inaudible) Mr. Schmidt is looking at the document.

MR. SCHMIDT: Okay. So, just so I, just so that I understand it, the Sergeant Parrish of the police department has sent, I don't know, sent a chart of a bunch of, of a bunch of calls from 2004 to 2008. Some of which were called in by Mr. Tanner and, and the Dock of the Bay and then you made a pie chart of all this, right?

MS. METHENY: Yes, I took that information and made (inaudible).

MR. SCHMIDT: Okay. I would just object. I don't know what relevance it could possibly have to the current issue.

CHAIR: Well, we have two, two issues. One is the only thing that goes with the certification is this chart.

MS. METHENY: Okay.

MR. SCHMIDT: I guess that's a government record of some type.

CHAIR: So, that's a government record and it consists of one, well, maybe they're on the bottom here, two, it looks like, it looks like there's going to be nine pages.

It starts with page two and goes to page ten. So, the only thing that actually goes with the certification are those government records and then, of course, you know, that would come in as, because they're apparently business records, really, they're, they're government records.

MR. SCHMIDT: Right.

CHAIR: They did a business certification on the front of it.

MR. SCHMIDT: Although it says, it says at the bottom to Elaine Foltz from Kay McCubin, do you know who any of these people are?

MS. METHENY: Let me, let me, I'll have to check what that is. That was what she gave me. What it is, they're footers. Apparently one of the people sent it to the other.

MR. SCHMIDT: Chairwoman Murphy, I'll leave it to your wisdom.

CHAIR: Okay. Well, this, you know, this document will come into evidence because it is certified by a government agency and you've testified to that and you've told us what pages actually come with it. We're not going to include the pie charts with this document. This is Protestant's exhibit number --

MS. METHENY: Okay.

BOARD: Sixteen.

CHAIR: Sixteen.

MR. SCHMIDT: Sixteen is the police records, is that correct, Mr. Alston?

BOARD: Yes.

CHAIR: Okay and then you indicated there were other charts that you, that you drafted.

MR. BORGERDING: Okay. I'll show you now what'll be marked as Protestant's number seventeen. Can you identify that?

MS. METHENY: Yes. These are the summaries of calls. There's a total of eighty-six calls and this is, the incident was adjusted, I assume that was a police matter, there was twenty-six percent of these calls were report writ, written, unverified, unfounded, handled by another agency or incidents unverified.

MR. BORGERDING: Okay and what is the second page?

MS. METHENY: This is 911 service call types. Out of, let's say, a hundred percent, noise was at twenty-two percent. Then we had disturbance was at twenty percent. These are the higher percentages of, let's say, a hundred percent of the 911 service type calls. Parking and traffic, which was on the parking lot, thirteen. Duplicate calls, eight percent. That means, more than one person called to report the same incident.

MR. BORGERDING: And the third page?

MS. METHENY: These were reports written. The

highest one for, was assault, was twenty-two percent, lost or stolen property, fourteen percent, disturbance, fourteen percent, destruction of property, thirteen percent.

MR. BORGERDING: And fourth page?

MS. METHENY: No report written. Police were called, no report written, twenty percent disturbance, twenty percent duplicate call, parking and traffic complaints, seventeen percent, noise, highest, twenty-two percent. So, in other words, there was noise, the police were called, no report was written but it was documented down on that spreadsheet from Lieutenant Parrish, Gwendolyn Parrish, is it?

MR. BORGERDING: With that, I would ask that Protestant's 17-A through D be entered into evidence.

CHAIR: Any objection?

BOARD: Any objection to this?

MR. SCHMIDT: No ob, no objection. She explained how she put it in.

CHAIR: Okay and they'll come into evidence. That's correct and their summary of, of her case and, and the rules of evidence allow for summaries by witnesses and we can certainly go through and verify whether we agree to, Mr. Schmidt can cross examine on those. Okay. Mr. Borgerding?

MR. BORGERDING: Okay. Ms. Metheny, what else, why are you objecting?

MS. METHENY: Well, this whole issue has divided the

neighbors. It pits neighbors against neighbor. You'll have a neighbor, Sixth Street, okay, I don't want any music over there whatsoever. Neighbor on Second Street, oh, yeah, well, I want music. So, now somebody that I've been friends with for fifteen years, we're on opposite sides, we don't talk anymore. It pits neighbor against neighbor, but it was already decided and the whole thing settled down. Everybody was working together. Now, you have neighbor against neighbor. Also, on his facebook page, thank you for cleaning it up but there are people on there who had actually, I have it down here, from let's see, this is December 2015. I have some things highlighted. One of the, let's say, commenters, this was about going to the Dock of the Bay hearing, or what had happened the first time at the Dock of the Bay, this hearing. And the comments that the people had made. Oh, you have some unreasonable neighbors who need find homes near a convent or something. Or hey, let's use a Tony Soprano effect. Place a boat out on the water with loud speakers and stop playing music. The one that really, really upsets me was from a man named Larry Holt, who lives in Columbia. Maybe you should publish the names of the complainants. Cockroaches tend to scurry when you shine a light on them. That was in February. In February also here are the neighborhood suspects that are harassing the last owner. Probably a good chance they are the same ones that are using taxpayer money to get free legal wage,

the current, to, to wage the current campaign of harassment too. It has Charlie's name and number, our name and number, a person who doesn't live there anymore and the president of the Miller's Island Association. This is put out in public. Now these people who go by on their boats and give us hand gestures, now they know where we live, whose our names, they know who they are. They come out on the pier, they take pictures of the house. Because I am trying, we are trying to put actually implore from this Board that they uphold the results that already went through for seven years. All that litigation, the results were that the Dock of the Bay, by being zoned in BL, by having live music makes him a nightclub which he is not zoned for.

CHAIR: Anything else, sir?

MR. BORGERDING: Anything else, Ms. Metheny?

MR. BORGERDING: You can ask a question instead of just giving speeches. I think he's asked anything else like three times.

CHAIR: That you haven't already said.

MR. BORGERDING: Yeah.

MS. METHENY: Okay.

MR. BORGERDING: And you don't have to say anything. You can --

MS. METHENY: Well, I just wanted to give you my personal past history with the Dock of the Bay. The documents

that I had, our information being out on facebook, which made me very, very, very uncomfortable. And it's still out there. It was out there last night. Being a responsible business owner, I would have thought that, hey, I don't want to go through this. But now he has, you know, he can have his patrons point, oh, yeah, okay, here they are, this is where they live and this is their name. Well, you want it, I got it right here. I printed it out yesterday.

CHAIR: Wait a minute, one second. One second (inaudible). Any more questions, Mr. Borgerding?

MR. BORGERDING: I'd just like to enter that into evidence.

MS. METHENY: Wait a minute, let me find --

CHAIR: (inaudible).

MR. SCHMIDT: The facebook thing?

CHAIR: The facebook page with the --

MR. SCHMIDT: I don't know. I'm trying to decide if Mr. Alston would like to read that or not. I'm sure he --

MS. METHENY: Okay. This is, there's that.

MR. SCHMIDT: I really don't see the relevance of it, but I'll leave it up to the Board.

MS. METHENY: And, and, and this is where, this is where, this (inaudible) let's put, let's publish the names out there. And I think this is just, I mean, there's other times where we were mentioned, you know, it's the neighbors, it's the

neighbors, it's the neighbors. Who are the Wolinskis, are they wealthy, are they lawyers, are, are they rich and have a free lawyer? Here, I'll give you all this. And here's two post, there's two printouts. One was from early February and then the other, down the bottom you should see the date on the footer where it was printed out yesterday, where our addresses and our names are still out there.

MR. ZIMMERMAN: Could we get the numbers and descriptions of these various documents?

CHAIR: You want to take a look at them?

MR. ZIMMERMAN: Just to keep this thing moving, I'll let Mr. Borgerding --

MR. SCHMIDT: I, I just cannot imagine what the possible relevance of this would be.

MR. ZIMMERMAN: -- I just want to make sure the numbers --

MR. SCHMIDT: So, I'll, I'll object. But, oh, is this part of it too?

MR. BORGERDING: Yep.

MR. SCHMIDT: Okay. I'll object for the record. Just to try to keep, I've got to do my job to keep the record straight.

CHAIR: You don't want to see them, Mr. Zimmerman?

MR. ZIMMERMAN: I think I generally know the idea of it so just so, because I'm trying to be cooperative and get

this case continuing to move, let Mr. Borgerding, you know, describe what they are --

MR. BORGERDING: So, this would be Protestant's eighteen through twenty-two.

CHAIR: Okay. He --

MR. ZIMMERMAN: Yeah, but, but each one has to be identified. What's eighteen, what's nineteen? I've got to know what it is.

CHAIR: Well, then, Mr. Borgerding needs to do that. Here you go. They're his exhibits through his witness.

MR. BORGERDING: I'll show you what is now Protestant's number eighteen. Can you identify it?

MS. METHENY: Wait a minute, here. They're in order.

MR. ZIMMERMAN: And the dates of each ones, please.

MS. METHENY: Okay.

MR. ZIMMERMAN: And what, and whose facebook page it is, if there's any facebook page.

MS. METHENY: Okay.

MR. SCHMIDT: This is all facebook stuff, right?

MR. ZIMMERMAN: Yeah, but whose facebook? Is it your facebook, is it (inaudible)?

MS. METHENY: It's the website for the Dock of the Bay.

MR. SCHMIDT: Okay.

MS. METHENY: One, two, three, four, okay? And I do

have to say that some comments were either removed, people went in and took them off or maybe you cleaned it up, I'm not sure. This is December 1st at 2:51, this is the first one.

MR. ZIMMERMAN: In 2015?

MS. METHENY: December 2015.

MR. ZIMMERMAN: Okay. You said 2:51, I'm sorry, I'm just --

MS. METHENY: Oh, at 2:51 p.m.

MR. ZIMMERMAN: Oh.

MR. BORGERDING: Okay. So, these are facebook.

MS. METHENY: These are facebook.

MR. BORGERDING: Entries from the Dock of the Bay from that date.

MS. METHENY: December 1st, yes.

MR. BORGERDING: Okay, thank you. With that, I'm going (inaudible).

CHAIR: Well, let's, first of all --

MR. BORGERDING: That's eighteen.

CHAIR: Protestant's eighteen, just identify them first.

MR. BORGERDING: Can you identify Protestant's number nineteen?

MS. METHENY: Okay. This is on February 17th at the Dock of the Bay and other, let's say comments, that I guess supporters or only even, even some of my neighbors --

MR. BORGERDING: Well, suffice it to say, what's the date of this?

MS. METHENY: That is February 17th.

MR. BORGERDING: Additional facebook comments on Dock of the Bay website, correct?

MR. ZIMMERMAN: What year? What year?

MS. METHENY: Twenty fifteen.

CHAIR: I was just about to say, Mr. Zimmerman, if you could just --

MS. METHENY: No, that's 2016.

CHAIR: Okay. Okay.

MR. ZIMMERMAN: Sorry, I'm --

CHAIR: Everybody deep breath, because this transcript is going to be a mess. I'm just telling you. It's going to be a mess and then you're all going to say why is it such a mess? But, February, thank you, ma'am, February 17th 2016 was the facebook page, right?

MS. METHENY: Yes.

CHAIR: Of Dock of the Bay, perfect. Thank you.

MR. BORGERDING: And can you identify, is it nineteen or twenty? It's twenty.

MR. SCHMIDT: Twenty.

MR. BORGERDING: Twenty.

MS. METHENY: Okay.

CHAIR: We have nineteen and twenty so far, right?

MR. SCHMIDT: No, eighteen. I'm sorry. Eighteen and nineteen, I believe.

MS. METHENY: This is February 17th, 20, 2016 at 4:52 p.m.

MR. BORGERDING: Okay.

MR. SCHMIDT: What's the date of that again?

MR. BORGERDING: That's twenty.

MR. SCHMIDT: March 20, February 20th?

MS. METHENY: February 17th.

BOARD: Exhibit 19 is dated 2/21/16.

MR. BORGERDING: Shall I go on to the (inaudible)?

CHAIR: Go ahead, I'm sorry.

MR. BORGERDING: Okay. Can you identify exhibit number twenty-one?

MS. METHENY: Yes. This was just pulled yesterday.

MR. BORGERDING: Okay. What is it? Just identify it, please.

MS. METHENY: Okay. Dock of the Bay facebook page as of December 1st. There is a difference between what was on there yesterday and what was on there at, in February.

MR. BORGERDING: Okay. I don't think we need (inaudible). Okay. Twenty-two, please. Identify twenty-two, please.

MR. ZIMMERMAN: May (inaudible).

CHAIR: May 2nd?

MR. ZIMMERMAN: I'm sorry, what, what's the, I'm sorry, today's April 27th, yesterday was April 27th, 2016. For Protestant's exhibit.

MS. METHENY: This is from February 17th, yesterday.

MR. BORGERDING: Okay. Again, Dock of the Bay facebook posting?

MS. METHENY: There are difference, there are differences from February 17th to February 17th, where statements were taken off or deleted.

MR. BORGERDING: Ms. Metheny, is that it?

MS. METHENY: Yes.

MR. BORGERDING: Okay. Thank you. With that, I would ask to enter those into evidence.

MR. SCHMIDT: Mr. Alston, do I understand that collectively the facebook exhibits are eighteen through twenty-two?

BOARD: Yes. Yes, (inaudible).

MR. SCHMIDT: Okay. So, it's eighteen through twenty-two. Okay.

CHAIR: Okay. The question is whether these documents are admissible. The, one of the problems is, there are multiple pages, they contain hearsay statements of people who are not here testifying. We have a witness on the stand who is saying all this and how it impacts her. The, these witnesses are not being cross examined on this or perhaps if

there was someone who did testify they could have been cross examined on that, but they were not. Potentially, there are, at least one the, I have one document in front of me, which is Protestant's twenty-one, has a first page date December 1st, 2015. It's actually, it appears to be a letter from Ken Boone, on, I guess it is on the facebook page so, so, you know, the first page of this Protestant's twenty-one could be admitted for the purposes of, you know, I mean, we'll certainly weigh it as we deem it to be worth but the rest of the exhibit, having all this hearsay, we can't admit these hearsay statements.

MR. ZIMMERMAN: May, may I make one observation?

CHAIR: No. And, let me, let me have another one. Now, this says twenty-one, this says twenty-one, the same thing?

MS. METHENY: That page doesn't go, go with anything.

CHAIR: Oh. So, that means that's twenty-two? Okay. This is a page that says Techopedia Doxing. Is that --

BOARD: No, this, this came from this.

CHAIR: I took it out.

BOARD: Oh, you took it off.

CHAIR: Sorry.

BOARD: Okay.

CHAIR: What is this, ma'am?

MS. METHENY: That is just, it's a term for when people post your names and addresses.

CHAIR: Okay. We, we don't need that piece of paper. All right. So, so we would, I'm just going to un-staple this by taking it apart so exhibit number twenty would be the December 1st letter which, again, she's testified she pulled it off of the Dock of the Bay website. It's written from Mr. Boone, he posted it, this (inaudible) for whatever it indicates. We're not going to read it right now but (inaudible) I can look at it later but the rest of the pages, two, three, four of twenty-one, two, three, four and five are hearsay statements so these, these will not be admitted (inaudible).

VOICE: Could I see the one that was admitted?

CHAIR: Don't, don't take it.

VOICE: I'm not, just leave it right here.

CHAIR: Okay. Again, we have on, let me just go backwards then. Sorry to get this out of order. Protestant's Exhibit 18 has the first page appears to be a December 1st letter from Mr. Boone which, again, the witness has indicated she pulled off of the, the website page of Dock of the Bay so this would be an admission for the extent, you know, for, that certainly the Board would weigh the merits of it but the rest of the pages two, three, four and five are hearsay statements of other people who are not here so we would remove those documents. I'm just going to paperclip these together. So, we would admit Protestant's Exhibit 18, page one. Twenty, exhibit

number twenty, exhibit number twenty appears to be a February 17th --

MS. METHENY: There was different, let's say, links, or different spaces. Sorry.

CHAIR: Okay. Protestant's exhibit number twenty-three is a February 17th letter, which the witness indicated it was February of 2016, it appears to have Mr., something from Mr. Boone. Unfortunately, it has comments at the bottom of the page, three different comments of, of, of other people who are not here containing hearsay statements.

MS. METHENY: Okay.

CHAIR: Which are similar to pages two, three and four stapled to the exhibit. I'm not sure how, I mean, we certainly could take the first half of the page if there was some way that you could splice this and Xerox it or something but we don't want to admit this document certainly for the other indications because it has hearsay on that page so --

MR. ZIMMERMAN: May I make, I didn't, I'm interrupting, sorry.

CHAIR: Do you want to sit up here? No.

MR. ZIMMERMAN: I just want to make some observations.

CHAIR: He want to sit up here. We're going to get you a chair. He wants to make observations. Mr. Borgerding, sir, you know, I don't know how you want to handle that. I

mean, since we have this, I mean, it's not a separate, the other ones had separate pages, so how do you want to handle that? Should we just not admit it or would you like to admit that and then somehow come back with a better copy or? I'm trying to help the --

MR. ZIMMERMAN: At a break we could, we could --

MR. BORGERDING: Yeah, just don't admit it.

CHAIR: Just don't admit it?

MR. BORGERDING: Yeah.

CHAIR: Okay. We're going to, we're not going to admit twenty-three.

MR. ZIMMERMAN: But it's i.d.?

CHAIR: I.d. only for twenty-three. Protestant's exhibit number twenty-one, the printing was good, so you have the letter on the front, that makes it easy for us. Okay. We have a letter from Mr. Boone. The witness indicated she pulled this from the website, February 17th, 2016. The first page, we certainly could (inaudible) pages two, well, they're not numbered, but the other three pages attached are all comments of hearsay, people that are not here, hearsay statements. Do you want me to clip these?

BOARD: Yeah.

CHAIR: Sorry. Okay. And now we have the final one, Protestant's exhibit number nineteen, two pages of statements from people who are not here so we don't have a letter with

that from Mr. Boone so we would not admit Protestant's exhibit number nineteen because of the hearsay issues. Okay. So, we went through those. You were finished, sir. Mr. Borgerding, were you finished with your questions? I don't want to rush you.

MR. BORGERDING: I think so.

CHAIR: Mr. Zimmerman, you have questions?

MR. ZIMMERMAN: I do.

CHAIR: Okay.

MR. ZIMMERMAN: May I briefly see these?

BOARD: Sure.

MR. ZIMMERMAN: I'm not going to read them in detail, I just want to, just --

BOARD: See the ones that are admitted or the ones --

MR. ZIMMERMAN: All of them.

BOARD: Here you go.

MR. ZIMMERMAN: Okay. Okay and these are, whether for i.d. or admitted, these are Protestant's Exhibits 18 to 23, am I correct?

BOARD: Correct.

MR. ZIMMERMAN: Okay. Do, do these exhibits show the date you visited the sites, the websites?

MS. METHENY: The one I pulled, the one I pulled yesterday does, yes. It would be down at the bottom.

BOARD: Yeah, there are three of them in here --

MR. ZIMMERMAN: Okay. So, if there's a, if there's a date at the bottom, for example, Protestant twenty, just as an illustration, it says 4/27/2016, 4:57 p.m.

MS. METHENY: That's correct.

MR. ZIMMERMAN: That's when you visited the website.

MS. METHENY: Um hm, um hm, um hm.

MR. ZIMMERMAN: But then at the top of the page, it would show when a posting was made?

MS. METHENY: Um hm.

MR. ZIMMERMAN: Okay. Just so we understand that. So, do you know who operates or manages the Dock of the Bay website or facebook?

MS. METHENY: No, I do not.

MR. ZIMMERMAN: Okay. Would there be a reasonable inference that the Dock of the Bay website is owned or managed or controlled by the owners of the Dock of the Bay?

MR. SCHMIDT: Objection.

CHAIR: Sustained, yeah.

MR. SCHMIDT: Asked and answered.

CHAIR: Sustained. I mean, she doesn't know.

MR. SCHMIDT: She doesn't know.

CHAIR: You can't ask it another way. She doesn't know.

MR. ZIMMERMAN: Well, I'm asking a reasonable inference. Do you have any knowledge that anyone other than

the owners of the Dock --

MR. SCHMIDT: Objection.

MR. ZIMMERMAN: Let me finish my question.

MR. SCHMIDT: Objection.

CHAIR: Go ahead, finish the question.

MR. ZIMMERMAN: Do you have any information to indicate that anyone other than the owners of the Dock of the Bay facilities control or manage the Dock of the Bay website?

MR. SCHMIDT: Objection.

CHAIR: Sustained. It's the same question. She doesn't know. She just said, she's very honest, very honest, she says she doesn't know, we appreciate that.

MS. METHENY: I mean, I think, would imagine that it would be Mr. Boone. Do I know one hundred percent?

MR. ZIMMERMAN: Is the fact that some of the facebook documents, including some that are introduced in evidence, have postings by Mr. Boone suggested Mr. Boone has some management of the Dock of the Bay website?

MR. SCHMIDT: Objection.

MS. METHENY: I would think --

MR. SCHMIDT: Objection.

CHAIR: Wait a minute, ma'am.

MR. SCHMIDT: Objection. I mean, if this was a courtroom, I would ask you to hold Mr. Zimmerman in contempt. This is absolutely ridiculous.

CHAIR: It's the same question, fourth time, the same question so we're going to sustain the objection. The document speaks for itself and she indicates she pulled them off and had Mr. Boone's name on it. So, that's all we need to know. We don't need to know who manages --

MR. ZIMMERMAN: Well, I think it's good to pin these things down at times. Anyway, I'll move on. So, it's my, correct me if I'm wrong, but in your direct testimony, tell me whether or not your collection and submission of the facebook documents were not for the purpose of indicating the truth of every statement that was made in there but just to, to reflect this kind of civil war that's going on --

MS. METHENY: That's correct.

MR. ZIMMERMAN: -- and also how uncomfortable you were made by the posting of your name and address in the, in a negative context on the facebook page.

MS. METHENY: That's --

CHAIR: Is that, is that a question?

MS. METHENY: That's correct.

MR. ZIMMERMAN: I'm asking.

CHAIR: Wait a minute, hold on a second.

MR. ZIMMERMAN: I'm asking. I'm asking.

CHAIR: But that's what she already testified to, it's already been clear. She's very honest and testified about the neighbors against pitted against neighbors but we don't

need to rehash it.

MR. ZIMMERMAN: Hearsay is inadmissible for the truth. She, she's offering these documents not for the truth of everything that's in there. She's offering it as, to reflect this major problem and --

CHAIR: We understand that.

MR. ZIMMERMAN: Okay. All right.

CHAIR: We already know.

MR. ZIMMERMAN: Oh, okay. She's way ahead of me, I'm sorry. All right. I want to try to speed this up. As I understand your concerns, let me ask you whether this, what you can say as to whether this is an accurate reflection based on your experience, based on your concerns. Have you ever heard of the story in Greek mythology about Pandora's Jar or Box?

MR. SCHMIDT: Objection.

CHAIR: Mr. Zimmerman, we would love to be here all day, but --

MR. ZIMMERMAN: It would be a lot quicker if we didn't --

CHAIR: You didn't even want to hear the history before 1950, but you're going back to Greek mythology.

MR. ZIMMERMAN: No, no. Well --

CHAIR: It's always interesting but --

MR. ZIMMERMAN: Have you heard of Pandora's Box?

MR. SCHMIDT: Objection.

CHAIR: Ma'am, I'll let you answer it. Do you know what it, do you?

MS. METHENY: Yes.

CHAIR: Okay.

MR. ZIMMERMAN: And what did, what would you say as to whether your concern is that if --

MR. SCHMIDT: Oh, my goodness.

MR. ZIMMERMAN: -- if this Board were to allow live music in any way, shape or form at the Dock of the Bay it would be equivalent to Pandora opening that box and setting forth all the problems of the world?

MR. SCHMIDT: Objection. Can we, can we please ask Mr. Zimmerman not to testify but to ask the witness a question and not just spoon feed, I mean, this, Mr. Zimmerman is a capable attorney. He has got to know that this is totally inappropriate, even in an administrative setting and it's, quite frankly, embarrassing to, to the lawyers in the room that we have to hear this. So, I'm going to object.

CHAIR: Yeah, I agree. Sustained. We're not going to go there and you, you need to ask open ended questions of the witness that were not already asked before by Mr. Borgerding.

MR. ZIMMERMAN: Ms. Metheny, put it, put it, encapsulate, put it in your own words without my characterizing it, your --

MR. SCHMIDT: She's testified. She's said what she said.

MR. ZIMMERMAN: I'm allowed to, I'm allowed to ask questions too. You're not the only one, okay? Encapsulate, you know, if, if you were asked, and you were given, you know, thirty seconds or sixty seconds, a sound bite, a sound bite, to encapsulate the most important of your concerns about the prospect of what would happen if any live music is allowed?

MR. SCHMIDT: Objection. Asked and answered.

CHAIR: Yes. Ma'am, I only want you to answer that question if there's something in addition that you haven't already said. Mr. Borgerding asked you as Mr., I think Mr. Zimmerman said several, somebody said several times, you know, was there anything else, was there anything else, and you were very clear about all the reasons that you gave. If there's something else that you haven't already talked about, don't re-talk about everything, okay? We don't need to hear it all again. Anything in addition?

MS. METHENY: That if the Dock of the Bay were allowed music and what would happen afterwards?

CHAIR: And how, well, what are your, yeah, concerns, other than what you've already given us, because you already gave us your list.

MS. METHENY: Okay. I will go with, we pay high taxes, property values. I don't, we don't plan on selling or

going anywhere forever. I would say I don't like that we are pitted against each other, neighbors against neighbors.

CHAIR: Okay.

MS. METHENY: You know.

CHAIR: You said that, right, okay. All right.

MR. ZIMMERMAN: All right. I'm done. Thank you.

CHAIR: You're finished?

MR. SCHMIDT: Ms. Metheny, very quickly. You're the wife of the gentleman who testified before?

MS. METHENY: Um hm.

MR. SCHMIDT: You heard his testimony?

MS. METHENY: Um hm.

CHAIR: You want to say yes or no.

MS. METHENY: Oh, yes.

MR. SCHMIDT: Okay and you, you were here this morning and you heard his testimony?

MS. METHENY: That's, yes.

MR. SCHMIDT: And he described, I, that I guess it was your family, your mother and your --

MS. METHENY: Yes.

MR. SCHMIDT: -- brother who previously operated the Fisherman's Inn here.

MS. METHENY: Correct.

MR. ZIMMERMAN: Objection. It's beyond the scope of direct.

MR. SCHMIDT: His testimony, his testimony was accurate as to that history?

MR. ZIMMERMAN: Objection.

MS. METHENY: Yes.

MR. SCHMIDT: Yes? Okay. No other questions. Thank you.

CHAIR: Okay. All right. Thank you, ma'am. Mr. Borgerding, sir? Hello?

MR. BORGERDING: One final witness.

CHAIR: One final witness. It's 1:30. What time do you have to leave, Mr. Schmidt?

MR. SCHMIDT: Literally, five of two is good.

CHAIR: Five of two, you can run in the rain.

MR. SCHMIDT: I can run over, yeah.

CHAIR: In the rain.

MR. SCHMIDT: I can, I, that's fine. But I'll go through the tunnel.

MR. ZIMMERMAN: I have a document but no witnesses, I don't have any witnesses.

BOARD: Raise your right hand, please. Do you swear and affirm under the penalties of perjury that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MR. WALDMAN: Yes.

BOARD: Please state your name and address for the

record.

MR. WALDMAN: Wayne Edward Waltman, Jr., 9014 Cuckold Point Road, Baltimore, Maryland 21219.

BOARD: Okay. Thank you. Speak into the microphone.

MR. SCHMIDT: Sir, what's your last name again, I'm sorry?

MR. WALDMAN: Waldman.

MR. SCHMIDT: Waldman?

MR. WALDMAN: Yes.

MR. BORGERDING: Mr. Waldman, you are also here in opposition to the request for relief?

MR. WALDMAN: Yes.

MR. BORGERDING: Can you explain to the Board why?

MR. WALDMAN: Without being repetitive, I've lived there my whole life and I guess it's very peaceful right now. We don't, there is no outdoor music from Dock of the Bay. But, when it starts again, we still have to look forward to a more crowded area, people that aren't from the neighborhood coming in. The music generally draws people from as far away as York Road area, you know, Dulaney Valley, places in Baltimore City, you know, places where people don't usually come down but the music does bring people down and there's more trash on the roads, there's more, the parking lot has an asphalt strip in the middle but the outsides are millings and dirt. So, there's more traffic so you wash your cars and your house and then

there's just more dust all over everything. So, it's the larger crowds and it's, above, no matter what kind of music you play, it doesn't matter if it's Lawrence Welk or a rock band, one of the biggest things is is, again, when it, each song is over and you hear the uproar of the crowd. That's something that no matter what amplification you use or don't have, you still hear that all the time and that's annoying. I mean, I don't know what else there is to say. It's just all repetitive at this state. And one other thing, you mentioned about a pity party for the neighbors. It is kind of pitiful, you know, that we have to come here and do this. It's already been done, we went through all this and when the next owner comes in, are we going to have to do this all over again because it's been opened back up again? And, if Mr. Boone does sell and the doors open, we're back to the same place we are right now. Not only that, in Maryland now there is no decibel limit on music and if you call the police and ask them to come down because the music is too loud, they don't know what to do. They just look at you and say okay, you know, what are we going to do? So, we're really at their mercy to contain the music and, basically, they could do whatever they wanted to do. You know, that's about all I got to say.

MR. BORGERDING: Now, Mr. Waldman, you lived through the years with Mr. Tanner?

MR. WALDMAN: Yes.

MR. BORGERDING: Operating the Dock of the Bay. Do you feel that that affected your health?

MR. WALDMAN: Well, embarrassingly, for me anyway, I've always been in good health. In '06, and I went through this a thousand times in my head, but I had a perfect job, no stress at all in my job, I was an equipment manager, could come and go as I pleased and, as long as I did what I was supposed to do. But, in '06, I had a heart attack when I was forty-two and I had three stints put in and I always tell my wife that I never had a heart attack but I did but the thing is, it was stress, it was the stress of the daily grind of putting up with that music. Not just the music, the crowds, the whole thing, and I think it's weak because you should always have control. I don't drink, I've never used any drugs because I've always wanted to be in control of my life, my family and that stress that it created and I had to go to a psychiatrist because they wanted to know why did this happen, why did, you know, you, you had a heart attack and it was, unfortunately, it was the stress and it took a long time for me to accept that. But that was one of the things that, you know, that happened. So, that's it.

MR. BORGERDING: Is there anything else you'd like to tell the Court?

MR. WALDMAN: Just that we've been through so much of this, our time, our money and to open this back up again, it's

just unbelievable. I can't believe that we're here again but, you know, that's all.

MR. BORGERDING: Thanks. No further questions.

CHAIR: Mr. Zimmerman?

MR. ZIMMERMAN: Yeah. Now, how long have you lived on Cuckold Point Road?

MR. WALDMAN: My whole life, fifty-two years.

MR. ZIMMERMAN: I mean, (inaudible) where you're living now? People's Counsel Exhibit 7 we actually have your--

MR. WALDMAN: I started out living here.

MR. ZIMMERMAN: Well, wait a minute. Now, we're at Protestant's thirteen, is it?

MR. WALDMAN: Um hm.

MR. ZIMMERMAN: Okay. The corner of Cuckold Point Road and Sixth Street, which is now what, Poleski?

MR. WALDMAN: Poleskis, yeah.

MR. ZIMMERMAN: Yeah.

MR. WALDMAN: Then I moved to this little house, which is --

MR. ZIMMERMAN: Across Cuckold Point Road.

MR. WALDMAN: Was my grandmother and grandfather's.

MR. ZIMMERMAN: Across from Dock of the Bay?

MR. WALDMAN: Um hm. My mom and dad built this house. They sold it, we built this house and we currently reside in these houses, my (inaudible).

MR. ZIMMERMAN: All those houses you just mentioned are on the, across Cuckold Point Road --

MR. WALDMAN: Across.

MR. ZIMMERMAN: -- from either Dock of the Bay or right next, but right now, People's Counsel thirteen shows your, you have two lots?

MR. WALDMAN: Yes.

CHAIR: People's Counsel seven.

MR. ZIMMERMAN: People's Counsel seven, thank you, Madam Chair. 9014 and 9016 Cuckold Point Road and what's on there? Do you have a house, you have a couple structures?

MR. WALDMAN: There's a house.

MR. ZIMMERMAN: What's on 9016?

MR. WALDMAN: That's a house also.

MR. ZIMMERMAN: You have two, are there two houses?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: Do you live in both or?

MR. WALDMAN: Yes. This is my primary residence, this is the house that we live in. This is a back lot that my mom and dad own.

MR. ZIMMERMAN: Oh.

MR. WALDMAN: There's nothing on that lot.

MR. ZIMMERMAN: Okay and how long have you lived at your current location?

MR. WALDMAN: Probably about fifteen years maybe.

MR. ZIMMERMAN: Okay. So, that's where you've been living throughout the Tanner years?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: If we can call them that. Okay. Are you still an equipment manager or what, do you have --

MR. WALDMAN: No, I'm a mechanic.

MR. ZIMMERMAN: Mechanic, okay. Okay and now being across Cuckold Point Road, you are not right next to the courtyard?

MR. WALDMAN: No.

MR. ZIMMERMAN: And even so, the music and the associated activities, noises, created a major problem for you in the Tanner years, is that correct?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: Okay and how is it that the noise, did some of the music noise also travel to your, where you live?

MR. WALDMAN: Yes. It's hard to believe. I built that house, it's got two by six walls and it's got R-19 insulation in it but I think like Mr. Ciarpella said, the music somehow, even with the doors closed, the window on and the TV on, I mean, the air conditioner on and the TV on, you can still hear the music and the clapping through that. That's hard to believe, especially when there's a north wind blowing, you know, you can really hear it then.

MR. ZIMMERMAN: And just to be clear, the corner of 9016, where you live, is diagonally across or, or across from one of the corners of the Dock of the Day property, the parking lot, correct?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: Okay. The dis, the distance to the courtyard where it's been said that music is sometimes, or was played outside in the Tanner era, you can, looks approximately ten inches or you can tell me?

MR. WALDMAN: Oh, yeah, approximately ten inches.

MR. ZIMMERMAN: So, that would be about three hundred feet.

MR. WALDMAN: Yep.

MR. ZIMMERMAN: A football field length, a hundred yards, and even with a hundred yards, you had a problem?

MR. WALDMAN: Oh, yes.

MR. ZIMMERMAN: And then, of course, the parking lot would be a lot closer.

MR. WALDMAN: Um hm.

MR. ZIMMERMAN: To your property.

MR. WALDMAN: Yes.

MR. ZIMMERMAN: Okay. So, you were at the mercy of Mr. Tanner until the Board of Appeals and the Circuit Court and the Court of Special Appeals closed them down?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: Which took a contempt proceeding, by the way, right?

MR. WALDMAN: Um hm, yes.

MR. ZIMMERMAN: Okay and you don't want to be at the mercy of Mr. Boone?

MR. WALDMAN: Nor anyone.

MR. ZIMMERMAN: Nor anyone. As far as depreciation of property values, do you have anything, any observation on how, how this not only affected you personally but also your property values?

MR. WALDMAN: I mean, anyone in that area would have a hard time selling their house if they had to put it on the market for some reason. If there was live music next door, who would really want to live next to that. Not knowing what could come next.

MR. ZIMMERMAN: Okay. Do you have kids, by the way?

MR. WALDMAN: Yes, and that is one other thing, is that it's just us here, but, you know, we were, I have grandkids and my kids and, you know, it effects more than just the people here. It affects our families.

MR. ZIMMERMAN: And since you grew up in the area, assuming, whether or not it's relevant, you were aware of the Fisherman's Inn?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: What problems, if any, did the

Fisherman's Inn operations cause you?

MR. WALDMAN: I mean, I was young then, so I never had a problem. If there was music, it never bothered me at the time.

MR. ZIMMERMAN: You don't really recall?

MR. WALDMAN: No, I mean, it's --

MR. ZIMMERMAN: Any significant music coming from there?

MR. WALDMAN: No.

MR. SCHMIDT: Objection. That's not what he said, Mr. Zimmerman. He said he was young and it didn't bother him then.

CHAIR: Yeah, he said --

MR. SCHMIDT: That's what he said.

MR. WALDMAN: The music was inside.

MR. SCHMIDT: He didn't say there wasn't much music.

CHAIR: Okay. Wait a minute. The witness said the music was inside.

MR. WALDMAN: The music was inside then.

CHAIR: Okay.

MR. WALDMAN: The only time you heard anything was when they opened the doors up.

MR. ZIMMERMAN: And was that, there was some testimony by, was it Mr. Metheny, that it was (inaudible) a few years, it wasn't --

MR. WALDMAN: It was only a couple years, yes.

MR. ZIMMERMAN: And it didn't give rise to any complaints as far as you know, that went to the zoning authority?

MR. WALDMAN: There was no houses around then, not at that time, no.

MR. ZIMMERMAN: Oh, so it was a different, many of the houses were built after the Fisherman Inn was --

MR. WALDMAN: Yes.

MR. ZIMMERMAN: -- was closed up or, or at about that time. I don't want to put words in your mouth.

MR. WALDMAN: There was, there was few houses there then.

MR. ZIMMERMAN: So, it's within the last ten or fifteen years that you've had more houses built on Sixth Street and in that area?

MR. WALDMAN: Yes.

MR. ZIMMERMAN: So, as far as you know, is this zoning, this unfortunate zoning case, the, the only forum where you see that you can maintain relief that you want in the battles with Mr. Tanner?

MR. WALDMAN: Yes, I mean --

MR. SCHMIDT: Objection. I mean, I don't even know what that question is.

CHAIR: Yeah, I'm going to sustain --

MR. ZIMMERMAN: I think the witness knows.

CHAIR: Sustain the objection.

MR. SCHMIDT: Thank you.

MR. ZIMMERMAN: Is this the one place where you can assert your rights?

MR. SCHMIDT: Objection.

CHAIR: Sustained. Same question.

MR. ZIMMERMAN: Anything else you want to tell the Board about your situation?

MR. SCHMIDT: Objection.

MR. WALDMAN: No, that's it.

CHAIR: Well, wait a minute. This is not your witness. Wait a minute.

MR. SCHMIDT: Asked, not his witness, asked and answered.

CHAIR: This is not your witness. Mr. Borgerding covered that very well.

MR. ZIMMERMAN: All right. I am duly admonished by the chair. That's all.

CHAIR: You're not.

MR. ZIMMERMAN: That's all I can, that's all I have.

CHAIR: Thank you, Mr. Zimmerman.

MR. SCHMIDT: Mr. Waldman, just real quickly, the People's Counsel exhibit number seven, which is on the board, that's the aerial photograph and I'm looking at, you indicate

you have two houses that you own that are, I guess, basically on the same property, essentially?

MR. WALDMAN: Yes.

MR. SCHMIDT: Is that right?

MR. WALDMAN: Yes.

MR. SCHMIDT: Okay and I know Dock of the Bay is across the street from you so the property, but are you closer to the Islander Restaurant in terms of the building or closer, what's, what's closest to you?

MR. WALDMAN: The Islander.

MR. SCHMIDT: You're closer to the Islander then you are to Dock of the Bay restaurant building?

MR. WALDMAN: Yes, yes.

MR. SCHMIDT: How about Rowboat Willy's, are you closer to that or Dock of the Bay?

MR. WALDMAN: Probably about the same.

MR. SCHMIDT: About the same? Okay. Okay. You ever had a situation where the, where sporting events are televised at any of these restaurants?

MR. ZIMMERMAN: Objection.

MR. SCHMIDT: Are you aware of that?

MR. WALDMAN: I'm sure there are.

MR. ZIMMERMAN: Objection.

MR. WALDMAN: I don't frequent, so I don't know.

CHAIR: What's, what's the objection?

MR. ZIMMERMAN: Because what happens at other restaurants has nothing to do with the present case.

MR. SCHMIDT: Okay. How about at the Dock of the Bay, they have the Oriole game or Raven game on in there?

MR. WALDMAN: I have no idea.

MR. SCHMIDT: Okay. You ever heard people cheering when something happens at a sporting event that might be televised at any of these?

MR. ZIMMERMAN: Objection.

MR. SCHMIDT: Similar to what people cheering at the end of a song?

CHAIR: Wait a minute. Overruled. Go ahead.

MR. WALDMAN: Not, it's inside, so I wouldn't hear it.

MR. SCHMIDT: Okay. So, if they're cheering inside for, if somebody scores a touchdown, hits a homerun or plays a song, you wouldn't hear that?

MR. WALDMAN: Only if the door was opened.

MR. SCHMIDT: Okay. Very well. No other questions.

CHAIR: All right. Anything, sir? Re-direct, Mr. Borgerding?

MR. BORGERDING: (inaudible).

CHAIR: Okay.

MR. ZIMMERMAN: I have a document.

CHAIR: You okay, I think we're finished, sir.

MR. WALDMAN: Thank you.

CHAIR: All right. Thank you.

MR. ZIMMERMAN: Yeah. Denise Hoss (phonetic), the president of the Miller's Island Community Association could not be here today. She had --

CHAIR: No, wait a minute, wait a minute.

MR. ZIMMERMAN: Oh, sorry.

CHAIR: Mr. Borgerding, still in your case, sir. He jumped up.

MR. BORGERDING: I rest, so.

CHAIR: Okay. You're resting your case. The Protestants rest. Mr. Zimmerman, the floor is yours.

MR. ZIMMERMAN: I'm sorry. Denise Hoss, who actually was present last time is the president of the Miller's Island Community Association. She was in touch with me, told me she could not be here today. She composed a letter which she asked me to provide to the Board. It's, I have it, I think she gave it to one of the citizens to give to me and it's dated April 25th, 2016. I'll give Mr. Schmidt a copy. I would, I would ask that it be, since the Board does accept letters routinely, and has accepted letters in the Petitioner's case, I believe, (inaudible), this would be People's Counsel's --

BOARD: Twelve.

MR. ZIMMERMAN: -- twelve, twelve? I presume there's no double standard since the --

CHAIR: Well, let me, let me ask Mr. Schmidt. I don't, I don't recall specifically on all the exhibits you had whether we admitted letters that, sometimes we do and sometimes we --

MR. SCHMIDT: Okay. Well, I'll tell you, under the well known case of goose versus gander, I will, I mean, that's okay, but I will say this, I, and just to be fair to Mr. Zimmerman, because I have two documents similar and we can put them all in or none of them in.

CHAIR: I see, okay.

MR. SCHMIDT: I'll leave it up to the Board.

CHAIR: Okay.

MR. SCHMIDT: And that's what my rebuttal would be. So, I have a, you might remember my exhibit, which you did accept indeed, Chairwoman Murphy, Petitioner's exhibit number 11-A and 11-B were two Petitions which had been signed by people and you might remember that one was from residents and one was from non-residents and I'll give a copy of these to Mr. Zimmerman and Mr. Borgerding. So, I would offer those as well and I have, I mean, if we're just going to put, if all this stuff is going to come in, then you all can --

MR. ZIMMERMAN: I thought some of it already came in but.

MR. SCHMIDT: Well, that's, that's another page that was signed since the first hearing.

MR. ZIMMERMAN: Okay and for the record, my exhibit--

CHAIR: Well, wait a minute.

MR. ZIMMERMAN: Okay.

CHAIR: What, let's, let's --

BOARD: Let's deal with this exhibit first.

CHAIR: Let's deal with first.

BOARD: Before you, here, this is twelve.

CHAIR: Mr. Zimmerman, People's Counsel twelve is the letter from --

MR. ZIMMERMAN: With an attachment, with an attachment.

MR. SCHMIDT: Oh, what's the attachment?

BOARD: But the attachment is somebody named Lisa (inaudible).

MR. ZIMMERMAN: Well, she, it's referred to in the letter

BOARD: Okay.

MR. ZIMMERMAN: You can take it for what it's worth. I mean, we, we're providing this partly as a courtesy to the Miller's Island Community Association.

CHAIR: I understand, I know you are.

MR. ZIMMERMAN: And actually the overall position of the association is neutral as stated in the letter, but Ms. Hoss provides her own perspectives on some aspects of the case. And this was, she, Ms. Hoss prepared this herself. This is

not, this is not something where it's, other than her own independent letters.

CHAIR: Okay. You know, page, page one is a letter dated April 25th, 2016 from Denise Hoss, President of the Miller's Island Community Association, it is addressed to us. We haven't really gone through the contents of it. We'll certainly read the letter but the page attached to it has to do with somebody else's comments about something or another.

MR. ZIMMERMAN: It looks like facebook postings. Sorry, I'll go in the corner.

CHAIR: You're in the time out chair. So, yeah, it looks like some other facebook comments again, and we're going to use that same, you know, principal that we applied in, in Mr. Borgerding's case and we'll admit the first page but not the second page so People's Counsel number --

BOARD: Twelve.

CHAIR: -- twelve would be the first page and Mr. Zimmerman, you can have this page back with the, the facebook comments. But then Mr. Schmidt, you now have another document.

MR. SCHMIDT: If Mr. Zimmer, if that's Mr. Zimmerman's, if that's all he has, I think he said a sole document, sole document.

CHAIR: He, that was it, right, Mr. Zimmerman?

MR. ZIMMERMAN: That's all, that's it.

CHAIR: And that's your case?

MR. ZIMMERMAN: Yeah, that's the conclusion.

CHAIR: Here's your, here's, if you want the paper back.

MR. SCHMIDT: Okay. Then, then --

MR. ZIMMERMAN: Can't this be for i.d., the attachment?

CHAIR: No, no, we're, I mean, no, because we're not, we're not --

MR. ZIMMERMAN: Isn't --

MR. SCHMIDT: Okay. Then I am, then if it's my turn, Chairwoman Murphy?

CHAIR: It is, Mr. Schmidt.

MR. SCHMIDT: I would offer 12-A and 12-B, which are basically supplements to 11-A and 11-B.

CHAIR: Okay.

MR. SCHMIDT: It was a Petition that was signed at the restaurant at the first hearing in February, it was, signatures were obtained up to that date. These are some additional signatures. They've had this Petition at the restaurant, people come in and sign it so it's one page, 12-A and 12-B.

CHAIR: All right. Mr. Borgerding, you have a copy?

MR. BORGERDING: Yeah.

CHAIR: Okay. No objection?

MR. SCHMIDT: Okay and, and then as exhibit number

thirteen, and I will give it to counsel, is I similarly, just like Ms. Hoff, was given a letter to deliver to the Board of Appeals, except this is from that scoundrel, Mark Allen, and it is a notarized letter that, and I would submit it and the Board can receive it and give it what weight it deems appropriate. Just like Ms. Hoss' letter.

MR. BORGERDING: He will not have his reputation be besmirched.

CHAIR: Okay. All right.

MR. SCHMIDT: And with that being said, did anyone else want to say anything? Did you want to say something? You have about five minutes. Is there something you wanted to say? One of these ladies came up to me during the break, is there something that you wanted to say, ma'am?

VOICE: I was talking to you about the --

CHAIR: Wait a minute, let, wait, talk to him, talk to him. Don't tell us.

VOICE: (inaudible).

MR. SCHMIDT: Okay. Do you want to just say that? Do you think that's important?

VOICE: I mean, I think so, I think so.

MR. SCHMIDT: Okay. Okay.

CHAIR: Do you have enough time, Mr. Schmidt, do get over (inaudible)?

MR. SCHMIDT: Yeah, she's going to ask, I'm going to

ask her one question.

CHAIR: But then you know what happens?

MR. SCHMIDT: Well, I think she's just going to say, go, go ahead, ma'am.

BOARD: Raise your right hand. Do you swear and affirm under the penalties of perjury, that the testimony you are about to give is true and correct to the best of your knowledge and belief?

MS. GOWERS: Yes, I do.

BOARD: State your name and address for the record, please.

MS. GOWERS: Cheryl Gowers, 2812 Bay Drive, Miller's Island 21219.

BOARD: Okay. Be seated.

MR. SCHMIDT: Okay. Ms. Gowers, I think you wanted to testify just about Rowboat Willy's, is that correct?

MS. GOWERS: Yes.

MR. SCHMIDT: And you had heard that there was testimony that there was seating inside of Rowboat Willy's?

MS. GOWERS: Yes.

MR. SCHMIDT: And do you believe that to be the case?

MS. GOWERS: No, I do not.

MR. SCHMIDT: The seating is outside?

MS. GOWERS: The seating is outside, everything is like on a deck and it's, has like an overhang with like the

ceiling that kind of goes up but it's all open and their music is played on the deck, which is outside.

MR. SCHMIDT: Okay, okay. Very well. And you just wanted to offer that in, because someone had said that the, that the seating was inside.

MS. GOWERS: They had inside, right.

MR. SCHMIDT: Very well.

CHAIR: And you worked there, as I remember, is that right? Didn't you work there?

MS. GOWERS: I, no, my son worked there.

CHAIR: Somebody worked there, okay. You worked at the Islander?

MS. GOWERS: I worked at the Islander, the White Swan and the Dock of the Bay.

CHAIR: I remember now.

MR. SCHMIDT: Right, right. Okay.

CHAIR: Okay. Any cross? Any cross examination of this witness? Mr. Borgerding?

MR. BORGERDING: No, no, Your Honors.

CHAIR: Okay.

MR. ZIMMERMAN: No, thank you.

CHAIR: No, Mr. Zimmerman.

MR. SCHMIDT: Thank you, ma'am.

CHAIR: Thank you. I, so that, is that your rebuttal case, Mr. Schmidt?

MR. SCHMIDT: That's, just one moment.

CHAIR: Yes.

MR. SCHMIDT: That would be our case.

CHAIR: Okay, all right. So, we made it out in time. Mr. Borgerding was kind of right, almost right. A few minutes late.

MR. BORGERDING: Yes.

CHAIR: We need memos?

MR. SCHMIDT: I, I don't believe we do but I'm going to, I, I would just ask this. Mr. Boone would like somewhat of a prompt resolution. Obviously, whatever this Board does, if, if we have the warm summer season going and that, that is obviously a concern and he is a businessman so --

CHAIR: I understand.

MR. SCHMIDT: -- if the Board wants memos, I would be happy to get something in in a week's time or very quickly. I would note that we both filed memos beforehand --

MR. ZIMMERMAN: I don't think I did file --

MR. SCHMIDT: -- with, with Motion, with Motions. I, I think I did and I--

MR. BORGERDING: Relating to the res judicata issue.

MR. SCHMIDT: Res, so that you have that already but.

CHAIR: Oh.

MR. SCHMIDT: But if you want to give us a week, that, I mean, or so, I just would ask that it be very quickly.

MR. ZIMMERMAN: I need thirty days.

MR. SCHMIDT: We'd object to the thir, I mean, I just want to get something filed quickly.

CHAIR: And, and we normally are really accommodating to everyone. (inaudible) forty-five or sixty days, whatever it is, we have an issue with the Board where we actually have to have these in, and I could actually, if the three of you wanted to step back there for a second, I could tell you, but they actually do have to be in sooner. So, but I don't know if you have time for it right now. Do you have time?

MR. SCHMIDT: To, I've got, I've got --

MR. ZIMMERMAN: I mean, I can probably do it in twenty days.

CHAIR: Okay.

MR. SCHMIDT: Well, when do you need them by?

MR. ZIMMERMAN: (inaudible) whatever, whatever memos that were filed earlier were filed at the ALJ level.

MR. SCHMIDT: No, they were filed here.

MR. ZIMMERMAN: Mr., Mr. Schmidt filed a trial memo. I don't think I filed a memo, am I right? I don't think I did.

CHAIR: You tell me, I don't know.

MR. SCHMIDT: I think he did. Somebody did, either you or Mr. Borgerding.

MR. ZIMMERMAN: I, I checked the record, I didn't see, I thought maybe I had but we checked --

MR. SCHMIDT: You filed a Motion, you filed People's Counsel's Motion and I think it was a written Motion.

MR. ZIMMERMAN: We checked the record the other day, I thought I filed a Motion but we, we've checked, we couldn't find it in the record. We couldn't find it. Am I, did we miss something?

CHAIR: I don't know. I, I recall a letter from you, at least a letter, with a bunch of cases list, you do have to go. We, we can do twenty days, we just need to, and if you wanted to step back here for two minutes, I'll tell you.

MR. SCHMIDT: Okay.

CHAIR: Why don't we just go off the record and --

MR. ZIMMERMAN: But this post-trial, I'm sorry.

CHAIR: The hearing is adjourned for right now, we'll just grab a date real quick with the post --

MR. BORGERDING: Your Honor, just to clarify. Since we already briefed the res judicata issue, these memos won't concern that or should they?

CHAIR: That's, that's fine if you feel like those covered it. If you feel like it's covered, just one second. We'll --

MR. SCHMIDT: You, you want to see counsel?

CHAIR: Yeah, just real, like I know you need to leave, so.

MR. ZIMMERMAN: No, I definitely will --

(OFF THE RECORD - 01:51:40 PM)

CERTIFICATE OF TRANSCRIBER

I hereby certify that the hearing in the matter of Boone Kondylas, LLC, case number 16-003-SPH, heard before the Board of Appeals of Baltimore County, April 28, 2016 were recorded by means of audiotape.

I further certify that, to the best of my knowledge and belief, page numbers 1 through 196 constitute a complete and accurate transcript of the proceedings as transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of this case.

In witness thereof, I have affixed my signature this 5th day of December, 2016.

Christine R. Leary

Transcriber

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY, MARYLAND

IN THE MATTER OF: *
*
*
BOONE KONDYLAS, LLC *
* **Case No. 03-C-16-010551**
*
* * * * * * * * * * * * * *



ORIGINAL

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

(JUDICIAL REVIEW)

June 1, 2017

BEFORE:

THE HONORABLE H. PATRICK STRINGER, JR.

APPEARANCES:

LAWRENCE SCHMIDT, ESQ.

On behalf of the Petitioner

FRANCIS BORGERDING, JR., ESQ.

On behalf of the Protestants

PETER ZIMMERMAN, ESQ.

On behalf of Baltimore County

TRANSCRIBED BY:

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P R O C E E D I N G S

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THE COURT: I'm calling first the matter of Boone Kondylas, LLC; case number 03-C-16-010551. Counsel, when you're ready, please identify yourselves for the record?

MR. SCHMIDT: Thank you. Good morning, your Honor. Lawrence E. Schmidt with Smith, Gildea & Schmidt here on behalf of the Petitioner under this petition for judicial review.

MR. BORGERDING: Good morning, your Honor. Francis Borgerding, Jr. representing a number of the protestants.

MR. ZIMMERMAN: Peter Max Zimmerman, Respondent, People's Counsel for Baltimore County, Towson, Maryland.

THE COURT: I'm sorry, but I should've asked you this, spell your names for the record as well.

MR. SCHMIDT: Sure, Lawrence E. Schmidt; that's S-c-h-m-i-d-t.

MR. BORGERDING: Frank Borgerding; B-o-r-g-e-r-d-i-n-g.

MR. ZIMMERMAN: Peter Max; M-a-x middle name, Zimmerman; Z-i-m-m-e-r-m-a-n.

THE COURT: All right. This is in on the petition for judicial review filed by Boone Kondylas LLC. Mr. Scchmidt, I will hear from you.

MR. SCHMIDT: Thank you, your Honor. Your Honor, preliminarily based our on brief conversation in chambers --

THE COURT: Yeah, actually before you start, I'm sorry, I wanted to do that too on the record.

MR. SCHMIDT: Yes, sir.

THE COURT: I did ask counsel to come into chambers this morning, and I advised them just ironically a couple weeks ago I had lunch at the Dock of the Bay on a Sunday afternoon. It was of no particular consequence, doesn't affect my ability to be fair and impartial, but I advised counsel. Actually I had adjudicated Larry Tanner's divorce, I don't know how many years ago now. It's been a while, but none of that effects my ability to be fair and impartial, but if anybody has any objection to my hearing the case, I'll hear from you. Mr. Schmidt, any objection to my hearing the case?

MR. SCHMIDT: No, certainly on behalf of the Petitioner we have no objection. I just point out that I client purchased the property from Mr. Tanner, but he's not a party to this suit and has no interest in the property or the business any longer.

THE COURT: Mr. Borgerding, do you have any objection to my hearing the case.

MR. BORGERDING: No, no objection your Honor.

THE COURT: Mr. Zimmerman?

MR. ZIMMERMAN: Our office has no objection, your Honor.

THE COURT: All right. Mr. Schmidt, I will hear from you.

MR. SCHMIDT: Thank you, Judge Stringer. Your Honor, with that being said, did look through my file when I got out here, and I do have a copy, if the Court would like it, of the transcript of the proceedings before the Board. I know these were transmitted by the Board of Appeals to the Clerk of the Circuit Court.

THE COURT: Okay. I advised counsel that I had read the file, I read their memos and the Court of Appeals opinion in this case, but there was no transcript in the file. So, I couldn't have read the transcript. Well, let's see if it's necessary.

MR. SCHMIDT: If you're happy to have it, I've got an extra copy, it's just that -- certainly, I'll leave it to your discretion. Obviously and since you have read the file and read the memorandums, I don't want to be repetitive, but I do represent Boone Kondylas, LLC. The Boone and Kondylas are the last names of the individuals who formed that LLC for the purpose of acquiring this property. Mr. Boone, who is seated in the front row, is my client, and he has since bought out his partner and is the sole owner through the LLC of this business.

As you indicated, this is is petition for judicial review of the decision of the County Board of Appeals which dismissed this case not on the merits, per se, but based on the principles and the doctrine of res judicata. When I was thinking of my remarks this morning, it occurred to me that I think every time I come into this court on a zoning case, typically on a petition for judicial review from a Board of Appeals decision or a zoning commissioner's decision, we're talking about zoning variances and special exceptions and whether a particular use should be allowed or whether a building should be allowed or permitted.

This case is really unusual to the extent that that's all my client wants. He wants a chance to have his day in court or have his day before the Board of Appeals for a determination of whether he had operate his business as he would like to do it, and the Board of Appeals said no because of the Board's prior decision as affirmed by the Court of Special Appeals --

THE COURT: Well, he must have had an evidentiary hearing before the zoning commissioner, I take it.

MR. SCHMIDT: Yeah, he filed a petition for a special hearing, which is akin to a declaratory judgment; that the courts have said a special hearing in the zoning context is a zoning petition you file with Baltimore County.

It went before the zoning commissioner or Administrative Law Judge John Beverungen, and there it was dismissed based on res judicata grounds.

THE COURT: So, they never had an evidentiary hearing?

MR. SCHMIDT: Well, then it was appealed to the Board of Appeals --

THE COURT: Well, was there an evidentiary hearing before the Zoning Commission?

MR. SCHMIDT: There was a hearing before the Zoning Commission --

THE COURT: Was it an evidentiary hearing? You argued -- your whole memo is arguing facts.

MR. SCHMIDT: Yes.

THE COURT: Were those facts presented to the zoning commissioner?

MR. SCHMIDT: Yes.

THE COURT: Okay. So you had an evidentiary hearing?

MR. SCHMIDT: Yes, then it was appealed to the Board of Appeals, then there was a de novo hearing.

THE COURT: There was a de novo hearing?

MR. SCHMIDT: Two days of hearings before the Board.

THE COURT: So these transcripts that you have now, were they both before the zoning commissioner and the Board of Appeals --

MR. SCHMIDT: Yeah, Board of Appeals.

THE COURT: -- or just Board of Appeals?

MR. SCHMIDT: Yes. The zoning commissioner's case, in essence, because it's de novo to the Board of Appeals.

THE COURT: I saw the zoning commissioner was an ALJ, wasn't he?

MR. SCHMIDT: Yes, but the zoning commissioner's decision, I mean, essentially because of the de novo nature of the appeal to the Board, the Board does a do-over and doesn't look at the testimony --

THE COURT: Okay.

MR. SCHMIDT: -- or the evidence submitted to the Commissioner.

THE COURT: They've had two evidentiary hearings?

MR. SCHMIDT: Yes.

THE COURT: I'm distinguishing an evidentiary hearing from just a legal argument.

MR. SCHMIDT: Yes, there was testimony by witnesses and evidence that was presented to the Board of Appeals.

THE COURT: Okay.

MR. SCHMIDT: The evidence was really, if I can characterize it -- again, I can give you the transcripts and the Court can take a look at them -- but there was evidence and argument, but there was evidence and testimony given about what I would call the historic operation of the Dock of the Bay, what happened when it was owned going back as far as the 1950's to them when it was owned by Mr. Tanner in his operation earlier in the first decade of the 2000's, as well as Mr. Boone's current operation in the several years that he's owned it, that's what the testimony was about.

As noted in the Board's decision, which I'm sure you reviewed the Board's decision, again, they never got to what I would call the merits of the case, the substance of the case, which is can there be music at the Dock of the Bay? That's the question that we have asked in our petition for special hearing. Are we allowed to have music at the Dock of the Bay, and if so, under what circumstances? Is there a prohibition on the hours when the music can be played? Can it be played inside the restaurant or outside? Because there's outside seating as you probably know if you were there. Is there going to be a sound level --

THE COURT: If it makes any difference, that is where we sat on a Sunday afternoon, we were outside.

MR. SCHMIDT: The Board never got to that, never addressed that, never answered that ultimate question, what the Board of Appeals said is, "Larry, during the prior proceedings when Mr. Tanner owned the business that this issue was litigated" -- this is the Board's judgment and the Board's wording -- "therefore, it's resolved and it's done, and Mr. Boone's present case, this case, is barred by res judicata." That's what the Board said.

So, again, I think what's unusual about this case is a lot of times I may be here arguing that the Board was wrong in permitting a building to be built or not allowing a building or allowing a certain use or not allowing a certain use, but that's the sum and substance of what zoning cases are all about, land use control; but here we never got to that.

We never had an opportunity for Mr. Boone to have his day in court or at the Board of Appeals for determination of under what circumstances music may or may not be allowed because they said, "You are bound, Mr. Boone, by the decision of the Board in the prior case as it related to Larry Tanner's operation. Now, obviously they decided that based on the principles of res judicata --

THE COURT: Well, do you have the opinions in front of you?

MR. SCHMIDT: Which ones, your Honor?

THE COURT: Both --

MR. SCHMIDT: I do have them.

THE COURT: -- Mr. Beverungen's and the Board.

MR. SCHMIDT: Yeah, I have the Board's opinion right here.

THE COURT: We'll go with that then.

MR. SCHMIDT: I certainly can -- I'm sure I brought Beverungen's as well.

THE COURT: See, although there's this talk of res judicata -- actually, I don't know that they did use that term, did they?

MR. SCHMIDT: Yes, they did.

THE COURT: Board of Appeals?

MR. SCHMIDT: Sure, they start on -- their decision starts on page 9 of the Board of Appeals' decision.

THE COURT: The pages aren't numbered, but I'm on the part that's headed, "Decision."

MR. SCHMIDT: Yes, sir. The Petitioner is before the Board requesting that the restriction against playing lot or recorded entertainment be amended so as to permit live music.

THE COURT: Right. So --

MR. SCHMIDT: Then on the next page they start with their discussion of Inseminary Galleria versus Delaney Valley Improvement Association --

THE COURT: Wait a minute, I don't see that.

MR. SCHMIDT: It's the page -- I've got numbered pages, that's page 10.

THE COURT: You do?

MR. SCHMIDT: But it's the page after the Board's decision.

THE COURT: My pages aren't numbered.

MR. SCHMIDT: I just want to make sure we're looking at the same --

MR. ZIMMERMAN: The top of the page -- excuse me, the top of the page has the numbers.

MR. SCHMIDT: On the right-hand side.

THE COURT: Page 9?

MR. SCHMIDT: Yes, sir.

THE COURT: You know what? The opinion that I'm reading, I couldn't see those numbers. It's actually missing a couple pages. This is what was attached to somebody's memo.

MR. BORGERDING: Mine, mine your Honor.

MR. ZIMMERMAN: That's Mr. Borgerding's. People's counsel, we attached all the decision and the previous --

THE COURT: Well, you missed a few pages.

MR. ZIMMERMAN: In ours?

MR. SCHMIDT: I have a copy of the Board's decision, and I've got notes on it.

THE COURT: I've got it. All right. Wait a minute, I've got another one. I've got it here.

MR. SCHMIDT: Let me see if I another --

THE COURT: I have it.

MR. SCHMIDT: -- copy.

THE COURT: I have it. I have another one.

MR. ZIMMERMAN: I think we've got all the pages in our attachment.

THE COURT: I've got it.

MR. ZIMMERMAN: It's two pages to a sheet of paper attached to our memo. That is People's Counsel's.

THE COURT: So in the decision they're referring to their prior decision.

MR. SCHMIDT: That's also interesting that they -- I'm on page 9 where it says the word "Decision," underlined. Is that where you are, your Honor?

THE COURT: Well, I'm onto page 10 now.

MR. SCHMIDT: Okay. On page 9 they incorporate their prior findings of facts and opinions.

THE COURT: Right, that's what I was gonna start with you.

MR. SCHMIDT: -- which is, I think, ridicu -- well, pardon my language. I don't understand how they could incorporate a prior findings of fact in a prior case.

THE COURT: All right. Hold on one second.

MR. SCHMIDT: Sure.

THE COURT: Let me finish reading these pages that I hadn't seen.

(WHEREUPON, a pause had in the proceedings.)

THE COURT: Okay. Go ahead, Mr. Schmidt. I think I've read the complete decision now.

MR. SCHMIDT: Okay. Just based on the Court's questions, Judge Stringer, yeah, the way we certainly read the Board of Appeals' decision in this case is that the Board after hearing the case decided that they could not decide the merits of the case, the substance of the case, the question of the case, which is whether there should be music at the Dock of the Bay and under what circumstances, because they were barred from considering that under the principles of res judicata and because under Mr. Tanner's operation several years prior, the Board, the Circuit Court and the Court of Special Appeals in affirming in that prior litigation that under Tanner's operation there could be no music. What was the upshot and the holding of that prior case is that Tanner's operation, Tanner's Dock of the Bay was a nightclub, and a nightclub is not permitted in the zoning classification on this property, which is BL or business local.

Since that determination was made in the prior case, that was, therefore, binding on Mr. Boone, and Mr. Boone, as I say, doesn't even have a chance to have his day in court. The reason that I say that is if you start looking at the Board's decision on page 9 going back there, the second paragraph under the decision, they talk about the prior decision of 2008 being affirmed by both the Circuit Court and the Court of Special Appeals, then they incorporate that opinion. I don't know how they do that, quite honestly, Judge, incorporate a prior opinion of a prior Board in a prior case.

THE COURT: It seems like an unusual statement, but to me it means the facts are pretty much the same.

MR. SCHMIDT: Yes, that's apparently what they've concluded.

THE COURT: That is what they concluded, so they did make a factual determination in your case.

MR. SCHMIDT: Well --

THE COURT: They say they did.

MR. SCHMIDT: They say that they did --

THE COURT: They say it there. That's a different way of saying it, but it said, "We made many findings of fact."

MR. SCHMIDT: In the prior case.

THE COURT: -- "prior case. We incorporate that opinion in here" --

MR. SCHMIDT: Right.

THE COURT: Then they refer the facts and holdings and the Court of Special Appeals' opinion. So, in other words, they're saying the facts haven't changed much. Then they go on --

MR. SCHMIDT: To describe them.

THE COURT: Then even say later on at page 12, "We find there has been no substantial change in the facts as proposed than was previously litigated in the code enforcement hearings" --

MR. SCHMIDT: Yes.

THE COURT: -- "before the zoning commissioner, blah, blah, blah, blah."

MR. SCHMIDT: Right, and then --

THE COURT: Restaurant operations are substantially the same, they go on with analysis. Then, again, on page 13 they say, "We've previously determined that this restaurant operated a nightclub because it met the definition in the zoning regs, the facts presented by the Petitioner here have not changed that determination."

MR. SCHMIDT: Right.

THE COURT: So, the way I read this opinion, they are making a factual determination in the present case.

MR. SCHMIDT: Yes, I don't --

THE COURT: They're saying it didn't change.

MR. SCHMIDT: -- disagree with that.

THE COURT: I really don't know that res judicata would be the determinative issue. It could be under its analysis because they don't find changed circumstance; but number two, given their finding that the facts haven't changed and that they say this is a nightclub.

MR. SCHMIDT: But they do that, I believe, your Honor --

THE COURT: The nightclub isn't --

MR. SCHMIDT: -- in the context of res judicata, because they then say, again, on page 13, and think site to this Belvedere Baptist Church of Baltimore, the third full paragraph. In that case we applied the doctrine of res judicata and found that there was no substantial change in circumstances or facts.

THE COURT: Yeah, they're using that as an element of res judicata, whether there's a different in the facts. They had to make a factual finding in the first place to determine whether the facts have changed. Since the facts haven't changed, according to them --

MR. SCHMIDT: Yes.

THE COURT: -- the Board of Appeals, then res judicata applies.

MR. SCHMIDT: Yes, I think that's what --

THE COURT: But they made a factual determination that the facts haven't changed. So, if the facts haven't changed, and it's a proposed music and entertainment proposed by your client is a nightclub, then it's still prohibited under the zoning regs, isn't it?

MR. SCHMIDT: Yes.

THE COURT: So they could have just gone that route.

MR. SCHMIDT: Well, they could have, but they didn't --

THE COURT: Yeah, but they --

MR. SCHMIDT: An applied res judicata.

THE COURT: Yeah, but they made the factual determination that you wanted.

MR. SCHMIDT: Well, they made a factual determination, but what I would say to that, your Honor, and how I would reply to that is that the facts that they determined as being the same, and the facts that Mr. Zimmerman and Mr. Borgerding cite in their memo as being the same are not the operative facts. If I can, I'll explain that. If.

THE COURT: Go ahead.

MR. SCHMIDT: The Board says the building is the same --

THE COURT: I gotcha.

MR. SCHMIDT: -- the neighborhood still the same, the zoning is still the same.

THE COURT: The same neighbors are complaining.

MR. SCHMIDT: The same neighbors are still --

THE COURT: I got it.

MR. SCHMIDT: -- complaining. That's not the point. In our view, that is not the point. The reason that we believe it's not the point, and my memo discusses this and cites to the transcript and also cites to the previous decision to the Court of Special Appeals in the prior cases is this, the County in it's zoning regulations -- let me step back. Clearly in the business local zone, in the BL zone, which is the zone for this property, a restaurant is permitted land use. A businessman can operate a restaurant in the BL zone, and just as clearly a nightclub cannot be operated in the BL zone.

Now, the regulations go onto define in Section 101 of the regulations and certainly, I think, it's cited to in my memo and you have it, but there are definitions that the zoning regulations provide as to what a nightclub is and what a restaurant is, and paraphrasing those definitions if you read them, a restaurant is a place where the primary purpose of people going to a restaurant is to eat or drink. A nightclub, on the other hand, is a business where the primary purpose is people are gonna be entertained.

Now, obviously they are similar businesses. You can go to a restaurant, I would dare say we've all been to restaurants where there's music playing either DJ or a band or whatever, but they are still a restaurant. There are restaurants all around Towson, Timonium, that have music playing. There are nightclubs where you can get something to eat and drink. The question is, what's the primary focus of the business, are people going there to get entertained, or are they going there to eat something and have something to drink? The zoning of the property, the character of the neighborhood, the fact that the building is the same, that doesn't have anything to do with the ultimate question of whether you are a restaurant or whether are you a nightclub.

When also look at the definition of a nightclub in the County zoning regulations, it drills down further and refers to you the International Building Code. The International Building Code is a building code adopted all over the United States including across Maryland and in Baltimore County. The building code -- and I've attached it to my memorandum -- talks about a number of factors in the classification of businesses and when you build, businesses where there are high levels of people, a lot of people in a small place, a place where alcohol is being served and those type of businesses which include nightclubs and include restaurants.

The building code goes further. Again, that's attached to my memorandum, and it talks about what I've identified and what's in the building code of eight relevant considerations which distinguish a nightclub from a restaurant. They're listed on page 3-6 of the building code, which I attached to my memorandum.

We submit that it is the consideration of those facts, those are the operative facts which go to the question of whether a particular business is a nightclub or a restaurant. Again, whether the zoning is the same, the building is the same, the neighbors are the same, that doesn't matter. The Board of Appeals focused on the wrong inquiry. What is significant is the facts which distinguish these very closely related businesses of nightclub or restaurant are the same.

I went through in my memorandum, your Honor, and pointed out the differences between the previous operation under Mr. Tanner and the current operation on Mr. Boone. For example, one of the criteria in the building code is -- talks about the interior lighting, and do they turn down the lights in the business when a band is playing. If you think of it, when you go to a nightclub when a band is playing, usually the audience sit somewhat in the dark and the band or performer is spotlighted and is on stage.

For example, in the Tanner case, the Board found in it's June 4, 2008 opinion -- this is the Board in 2008 -- "When the band is playing, Mr. Tanner admitted that the lights were turned down." That's on page 11 of the Board's prior decision. Mr. Boone testified in this case that there is no change in the lighting if there is any entertainment. That's on page 58 of the transcript.

The second consideration or another consideration, is there a stage? This is, again, coming right out of the building code. In the prior case in the Board's decision on page 11, the Board said, "There's a small stage for bands to play outside." In Mr. Boone's case he testified on page 59 that he had removed the stage and there was no stage.

These other factors about sound levels, the hours of operation of the business, whether there's a dance floor. There is no dance floor now, there was a dance floor in Mr. Tanner's operation. What the building code calls a high occupant low density the amount of people the size of the crowds, those are the operative facts under the building code which distinguishes a restaurant from a nightclub.

Those facts are different, they are all different, and the testimony and the evidence when you compare what the testimony was at the hearing before the Board in this case, in the Boone case -- the Boone Kondylas case versus the findings of the Board in it's prior case.

Those are to us the operative facts which are different which makes it so res judicata does not apply. I cited in my case the Seminary Galleria reported decision out of the Court of Special Appeals. There's another case which I didn't cite but the Court can certainly look at called Anne Arundel County versus Norville, it's at 390 Md 93, it's a 2005 Court of Appeals case that talks about res judicata.

In the decision the Court of Appeals talk about how in the re statement of judgment the elements of res judicata that the parties have to be the same or in privity, that there has to be a final judgment in the first case, and third one which is really the key one here is whether the "transaction is still the same," and the Court says on page 1 09 of it's decision, "Under the transactional approach, if the two claims are based upon the same set of facts, then they would be barred by res judicata," as it goes on and it cites a number of decisions.

The present case, our case, Mr. Boone's case, is not based on the same operative facts as the old case. Again, it's not the broad facts of the property and so on as I've said, but it is the specific elements that are cited in the definition of these terms in the zoning regulations, and the fact that when you drill down, look at the definitions, go to the building code and look at how restaurants and nightclubs are distinguished, then the facts are different.

Now, it's an interesting question that the Court posed, because I know there's deference given under the substantial evidence rule to the Board's findings of fact, but the question of res judicata is, I would submit -- and the law is fairly clear, and I put this in my memorandum as well -- that the question of the application of res judicata, which the Board clearly did in this case, I mean, the decision is somewhat difficult to decipher, I believe, as you've read it this morning and I've read it.

The question of res judicata is a matter of law, and this Court owes no deference to the Board's determination that res judicata applies in this case. It's a legal question. So to that extent -- although the Board made certain findings of fact, this case as I read the Board's decision was based on res judicata.

They say,we're applying the same rational that we did in the prior Belvedere Church case. We found, "There's no substantial change to the property" and, therefore, we can't rehear the case is essentially what they say, "We find the facts of this case fit squarely within the Belvedere Baptist case. There has been no change to the property, the restaurant, the neighborhood, the neighbors or the zoning which would lead to a different result." That's the bottom of page 13.

Again, it's not the property, the restaurant, the neighborhood, the neighbors or the zoning which is the issue, it's the operation of the business which continues there. So, for those reasons we believe that the Board of Appeals got this wrong. We believe the proper resolve here, your Honor, would be for the Court to reverse on the res judicata issue and remand it for the Board to make find I think so of fact in this case, and then make a determination as to the ultimate issue, which is should music be allowed in the Dock of the Bay, and under what circumstances? That is all we want. We just want to know what we should be allowed to do.

I can't fundamentally get my arms around the concept that in a zoning context because the Board of Appeals said in 2008 that Larry Tanner was running a night-club business because his business had morphed into a nightclub, because the focus was no longer serving people food and drink, but to provide entertainment, that that means that thereafter perpetually from now until dooms day there could never been a business at the Dock of the Bay in which music can be played as a restaurant. It just doesn't make -- I think that the Board got it wrong, and that their application of res judicata was wrong.

(WHEREUPON, a pause had in the proceedings.)

I would say one final thing, and I pointed this out in my memorandum as well. Clearly zoning regulations allow what are called accessory uses. This whole concept the Board didn't address at all, which I think is also very important. You have in any given situation a primary use of a particular property. For example, a church.

A church may occupy a particular property, according to designing authorities in Baltimore County the use of the property is a church, obviously enough. That church may have a day school there, it may have a daycare center there. That does not make the use of that property a school, or it doesn't make it a daycare center, which are separate identified land uses in the Baltimore County Zoning Regulations. Those are accessory, subservient components of the principal use, which is a church. It's not a day-care center and a church and a school, it's a church with a component ministry of a daycare center, perhaps, or whatever.

Similarly in this context, it's the same thing. Mr. Boone might do catering, he might have a birthday party and say I want the Dock of the Bay to deliver three dozen crab cakes to my house for my birthday celebration. That doesn't make him a catering hall which is another defined use in the zoning regulations. He's not Martin's West, he is still a restaurant.

The same principle and the same approach applies here. He might have music in his restaurant, but it doesn't automatically make it a nightclub, it makes it a restaurant with an accessory component, and the Board's task and what they should've done is determine under what circumstances a restaurant can have a component music part of it.

Again, Tanner's morphed into a nightclub. It became the primary focus. Mr. Boone's got no interest and no intention of doing that, but the Board will never get to that issue because they said the facts didn't change. Well, they have changed against all the factors that I've highlighted here. So, for all those reasonings, we believe that the Board of Appeals really got this wrong, and that a remand to determine the circumstances of music would be appropriate. Thank you, Judge.

THE COURT: All right. Thank you, Mr. Schmidt. Mr. Borgerding?

MR. BORGERDING: Your Honor, a couple things I would say. First off, my argument is going to parallel what I put in my brief, and I would just say that, you know, based upon Mr. Schmidt's comments, though he makes a good argument, he writes a good brief, but I ask you to focus on a couple things. If your Honor did the divorce case for Mr. Tanner, your Honor has a flavor for what Mr. Tanner was all about.

Suffice it to say, he was a bull in a china shop, and my client's going through seven years of hell litigating with him. He would waive the red flag and have loud rock bands and disturb the neighbors, and that went on for seven years all the way up to the Court of Special Appeals. So that's what they're leery of going back to.

They're afraid if music is allowed again, any type of music, indoor or outdoor, with the proximity of the homes there, it's gonna be disturbing, then they're gonna have to go back to Baltimore County Zoning, which is a complaint-driven system, and play the cat-and-mouse game of trying to get an inspector down there to document this. They don't want to go back to that. They went through seven years of hell, they don't want to go back to it. That's what they're leery of.

The Board of Appeals noted in its opinion that even if Mr. Boone had the best of intentions, it's not to say that there won't be disturbance to the neighbors, number one. Number two, if he sold the property, it doesn't mean that the next owner won't be Mr. Tanner. Mr. Tanner was a unique individual, and I'm sure presiding over his divorce case you got a flavor for that.

THE COURT: I think that argument plays into Mr. Schmidt's argument, though.

MR. BORGERDING: Why?

THE COURT: To say that Mr. Tanner is a unique individual, and I'm not gonna comment on that, I'm not getting into the divorce again, but to say that he is unique and that this owner is different, that's Mr. Schmidt's whole point, this is different, and the Board of Appeals didn't treat it that way.

MR. BORGERDING: I don't think it is different, your Honor.

THE COURT: It doesn't matter -- I don't think it matters what Mr. Tanner put these neighbors through. There is a new owner who's has a different plan for the restaurant.

MR. BORGERDING: He says he has a different plan, but in actuality if you put live music --

THE COURT: You'll get it a turn, Mr. Zimmerman --

MR. ZIMMERMAN: I know.

THE COURT: -- just sit still, please.

MR. ZIMMERMAN: All right. Thanks, sorry.

MR. BORGERDING: If you add the actuality of putting music back there, you'd probably have the same issues.

THE COURT: There are different kinds of music. There are different levels of the noise, for one thing, not to mention the different types of music.

MR. BORGERDING: With the proximity of the homes, you ate on the outdoor deck.

THE COURT: I think that also goes to Mr. Schmidt's point that that's what Board of Appeals did. They said, Mr. Tanner did this, and his kind of music was loud and rock bands and the neighbors didn't like it, therefore nobody can do anything different, because it might more of back into what the Dock of the Bay was under Mr. Tanner.

MR. SCHMIDT: Right.

THE COURT: That's Mr. Schmidt's whole point, this is different and it requires an analysis of the facts presented by the current owner.

MR. BORGERDING: Well, I would say a couple --

THE COURT: I think the Board did exactly what you're saying.

MR. BORGERDING: I think you ought to affirm the Board's decision based on three factors: One is res judicata, the second is what Mr. Schmidt is asking is for an amendment of the conditions of the prior ruling, which was affirmed by the Court of Special Appeals. As the zoning commissioner noted, he doesn't have the authority to over-rule a Court of Special Appeals opinion.

THE COURT: That's not what Mr. Schmidt is asking. It was such a factual oriented case, even about of Court of Special Appeals. The question was whether those facts presented in that case constituted a nightclub? That was the issue, wasn't it?

MR. BORGERDING: (No response)

THE COURT: Everybody agreed if it was a night-club, you couldn't have it in a BL zone.

MR. BORGERDING: It was the issue. The zoning office does not allow music in a BL zone. It does allow music in a BM zone which --

THE COURT: Now, you just said something that I also think is Mr. Schmidt's argument, and you can correct me or advise me. You just said it doesn't allow music in a BL zone. My understanding is it doesn't allow a nightclub in a BL zone. Correct me if I'm wrong.

MR. BORGERDING: The policy is no --

THE COURT: Correct me if I'm wrong. The zoning reg says you can't have a nightclub in a BL zone, it doesn't say you can't have music in a BL zone.

MR. BORGERDING: I think their policy -- they have policies over there, and I think their policy is no live music in a BL zone, in a BM zone you can have it.

THE COURT: Well, they can't make up a policy. What does the zoning reg say?

MR. BORGERDING: I'm sorry?

THE COURT: What does the zoning reg say, no nightclubs in a BL zone or no music in a BL zone.

MR. BORGERDING: To be honest with you, I don't know.

THE COURT: Mr. Schmidt, what do you say?

MR. SCHMIDT: It says no nightclubs in a BL zone. The way the regulations -- I don't mean to digress, your Honor, but the way the regulations are written, they're written in what's called the inclusive, which means the regulations say only the following uses are allowed, then it lists it, and restaurants are allowed.

THE COURT: Right.

MR. SCHMIDT: Then if you go into other zones, nightclubs are allowed elsewhere. So, you're exactly right, there is no mention of the word, "music," in the zoning regulations.

THE COURT: That's what the Board seems to say here.

MR. SCHMIDT: Yes.

THE COURT: They use the word, "live music," interchangeably with, "nightclub."

MR. BORGERDING: Your Honor, indicated that you read the Court of Special Appeals opinion.

THE COURT: I did.

MR. BORGERDING: It does not -- it says, "no live music," okay?

THE COURT: The way I read that decision, the whole question was whether it was a nightclub, and they went through the factors, this affirmed the Board, but they had gone through those different factors --

MR. BORGERDING: But one of --

THE COURT: -- which this board did not do in this case.

MR. BORGERDING: It affirmed the restrictions --

THE COURT: The criteria applied by the Board of Appeals.

MR. BORGERDING: -- one of which was no live music.

THE COURT: Well, that's one, I guess --

MR. BORGERDING: So to now for the administrative law judge on appeal, this Court to overturn the restriction is overturning the prior ruling of the Court of Special Appeals. So I would argue that this Court respectfully does not have the authority to do that.

THE COURT: Okay. Well, I would agree with you I can't overrule a Court of Special Appeals decision, and I --

MR. BORGERDING: Correct.

THE COURT: -- wouldn't want to, I wouldn't do so.

MR. BORGERDING: Correct.

THE COURT: But it seems to me there can be some factual distinctions.

MR. BORGERDING: So I'd say even if you got past the res judicata issue, you have that issue to contend with, and under that scenario this Court respectfully does not have the authority to overrule the Court of Special Appeals.

Your Honor, I would say that Mr. Schmidt made these same arguments to the administrative law judge at the evidentiary hearing, and he made the same arguments to the Board of Appeals which conducted an evidentiary hearing, and they determined that res judicata does apply.

THE COURT: Yeah, well, I know. That's why he's appealing.

MR. BORGERDING: Uh-huh.

THE COURT: They didn't buy his argument, there is no question about that apparently.

MR. SCHMIDT: Right. So --

THE COURT: Here's the issue. I'm reading the Court of Special Appeals opinion. The whole question was whether the Dock of the Bay is a "nightclub or simply a restaurant where ancillary entertainment is provided." They looked at the definition of nightclub in the Zoning Code. That was the issue in the case. That had been the issue all along.

That was the complaint about the Dock of the Bay. That was the zoning commissioner's decision, and that was the Board of Appeals decision that it was a nightclub, and that was the issue before the Court of Special Appeals. They reviewed those factors and said under the facts of this case they agreed it was a nightclub, and a nightclub is prohibited by the zoning.

So commissioner ruled that, the Dock of the Bay is a "nightclub," under the Zoning Code and ordered that the playing of outdoor music either by way of an outside speaker system, live or recorded entertainment must be discontinued. There's another distinction right there, outdoor music played over a speaker system. I mean, the facts matter. Okay. Anyway. Anything else, Mr. Borgerding?

MR. BORGERDING: Yeah, so again, for three reasons I think you ought to turn down the Petitioner's request, which is res judicata. Again, I don't think this Court respectfully has the authority to overturn a condition on a prior ruling, and one of the conditions was no live music. Then thirdly, if one looks at the testimony which I've outlined in my brief, I think the testimony is clear from --

THE COURT: What page of your memo?

MR. BORGERDING: I'm sorry?

THE COURT: What page of your memo?

MR. BORGERDING: Starting at page 9; so testifying on behalf of the protestants were Charlie Wolenski, Brad McKeeney, Brian McKeeney, Matt Charpella, Wayne Walman, and Mike Kondealis. I wasn't going to go through the testimony, but just as a sample I'll indicate what Mr. Charlie Wolenski's testimony was --

THE COURT: Okay. I'll read it, I got it right in front of me.

MR. BORGERDING: Okay. So, your Honor can read through that and see, get a flavor for what my clients went through.

THE COURT: I believe it. They won the case against the prior renters with whatever was going on there. If that's the same situation that this owner wants to do, I would agree, if it's the same facts then it should be the same result. The whole question is whether these are different facts? It, at least, can end up with a different result. The current owner doesn't want to operate or convert it to a nightclub, he wants a restaurant.

MR. BORGERDING: Your Honor, once you introduce the live music, I would suffice it to say if you look through the history of the litigation of this matter, I would say it's very well apt to cause a lot of the same problems. If your Honor ate on the outside deck, your Honor knows the proximity of the residents. So, I mean --

THE COURT: I agree with you, but I don't know whether -- what was the proposal, was it outdoor music?

MR. BORGERDING: He wants indoor and outdoor music.

THE COURT: He wants indoor and outdoor -- well, I mean, I get -- okay. All right. Anything else, Mr. Borgerding?

MR. BORGERDING: No, thank you, your Honor.

THE COURT: Mr. Zimmerman?

MR. ZIMMERMAN: Thank you, Judge. I'm feeling a bit frustrated because my perspective on this case is --

THE COURT: Did you file a memo, by the way?

MR. ZIMMERMAN: Absolutely. I hope it's in the file.

THE COURT: I didn't see in there.

MR. ZIMMERMAN: It was a very long memo. It's got to be in the file.

THE COURT: It seems like all memos these days are long, but I didn't see it in the file.

MR. ZIMMERMAN: It was stamped by the Circuit Court. May I show it to you?

THE COURT: No, I believe you. Go ahead, I'm listening.

MR. ZIMMERMAN: All right. Well, Mr. Schmidt tries to differentiate res judicata from the merits as if there's some hard line distinction. By way of background, in cases going back to 1936, and we cited cases in our memo, the Whittle versus County Board of Appeals, the Woodlawn Citizens, the Seminary Galleria was our case from the Court of Special Appeals in 1910. When you're dealing with res judicata in the context of zoning in a successor case, there's a factual question, is there a substantial change in circumstances?

So, the merits which we recognized is was there a substantial change in circumstances from the previous situation. It's not whether the citizens are worried, okay?

THE COURT: Okay, I agree with you.

MR. ZIMMERMAN: It has nothing to do with Mr. Tanner being unique.

THE COURT: I agree with you.

MR. ZIMMERMAN: So, I'm listening to Mr. Borgerding, and I'm saying, wait a minute, that's not my perspective here.

THE COURT: Okay.

MR. ZIMMERMAN: So, let's go back. We attached to our memorandum all the prior decisions, as well as the current decision.

THE COURT: All right. I've read those.

MR. ZIMMERMAN: Mr. Tanner claim that he was gonna have a steel band very light, light music. He went through the argument about accessory. There was nothing unique in a sense about him in the previous case. He made all the same points. He wanted a restaurant with a little bit of accessory music. The Board's decision, the majority opinion, went through all the criteria --

THE COURT: You're talking about the Larry Tanner case now?

MR. ZIMMERMAN: Right. You're right, restaurants can have music, but you have all these criteria, at what point does it become a nightclub?

THE COURT: Okay, right.

MR. ZIMMERMAN: You know, have you loud music --

THE COURT: They did that analysis in Larry Tanner's case --

MR. ZIMMERMAN: Right.

THE COURT: Where is that analysis done in this case.

MR. ZIMMERMAN: I'm gonna -- okay.

THE COURT: That's all I want to know, where is that analysis done in this case.

MR. ZIMMERMAN: Here's what I would say. First of all, from pages 2 through 9 the Board goes through all the facts. Remember, we have a two day Board of Appeals hearing where Mr. Boone testified to what he wanted to do. Beginning on page 2, the Board discusses the testimony relating to the current situation.

They went through basically every witness, and there were multiple exhibits filed, including relating to the current operation. How late it was gonna stay open, until 1:00 a.m.; some documentation relating to the liquor license, they can be open until 2:00 a.m., they got a liquor license.

Mr. Boone testified extensively as to what kind of music he would want to play. He claimed there would be -- his first guy would be a guy named Mark Allen, acoustic guitar, but then there was evidence that Mark Allen plays with an amplifier, and then there's evidence that other bands that play. Let me just before I answer your question more directly, let me point out that in the Board's -- and we call it the Tanner case, the earlier case, there was an reconsideration request which is identical to what Mr. Schmidt is asking for now. The request was to the board, what kind of music can we play, how loud, when and so on, and that's attached to our memorandum. It's called ruling on motion for reconsideration and clarification. It's a three page decision, September 12, 2008.

THE COURT: 2008?

MR. ZIMMERMAN: September 12, 2008, it's an attached memorandum. Can I show it to you?

THE COURT: Yeah, can you show it to me if you want, just hand it to the clerk.

MR. ZIMMERMAN: It follows the original Board majority descenting opinion, and then -- so my point is we know that in the earlier case the same arguments were made about accessory, it's just music accessory to a restaurant, it's not loud, it's gonna be steel band. I mean, here they said acoustic.

Mr. Tanner's presentation was a very attractive, you know, kind of promotional presentation, it was gonna be a restaurant with a little bit of music. The Board found in 2008, no, based on the facts. As I said, he said what kind of music can I play, and the Board said based on the facts here we're not gonna give an advisory opinion. Basically the Board found it was a nightclub, okay? You've read Judge Eyers Court of Special Appeals opinion, it was extensive on all the arguments. Okay.

So, now let's fast forward to the current situation. There was an evidentiary hearing before the Administrative Law Judge Beverungen, and his view was that basically based on the Court of Special Appeals' decision, it wasn't a question of whether the new music would be like Frank Sinatra. The proposal in the earlier case was soft music as well, and he found it was still a nightclub.

Let's get to the Board of Appeals, which is de novo. As you pointed out on major 12 -- first of all the Board had the earlier decision which went through all the criteria, and I was going to bring it up, but then you brought it up. Beginning on page 12 -- and I don't have it in front of me anymore because you've got my memo -- they say, hey --

THE COURT: I'm handing your memo back. Your memo is in the file.

MR. ZIMMERMAN: Oh, okay. I'm not gonna read everything -- I mean, you've read it. They said there's not been a substantial change in fact and circumstances.

THE COURT: That's what they said. The more you and Mr. Borgerding talk, the more I'm convinced that this is a change. You keep trashing Larry Tanner and what he day and how he morphed, and you're not giving this man a chance.

MR. ZIMMERMAN: No, what I'm saying -- I'm not trashing Larry Tanner. I'm saying that Larry Tanner also made the same type of argument that he had steel band music. The argument here is oh, we're gonna have acoustic music. The Board listened to the testimony of Mr. Boone. It was a two-day trial. They listened to the testimony of the --

THE COURT: Okay, I hope so.

MR. ZIMMERMAN: -- citizens relating to the kind of music. There was testimony, for example, that the --

THE COURT: Okay. Here's what I'm asking. I'm gonna ask the same question I've asked before. Where in this opinion do they analyze the testimony about whether this is a nightclub? That's the question I think is before me. Even under your statement about what res judicata is, it's an analysis of the facts to see if they are the same or whether there's been a change in circumstances. Where is that analysis in the Board of Appeals decision?

MR. ZIMMERMAN: I actually --

THE COURT: I agree they make a statement, "There's been no substantial change in the facts," but where is the analysis?

MR. ZIMMERMAN: I think the Court of Appeals in a number of cases --

THE COURT: No, I'm asking you where is the Board of Appeals analysis. Point to it in the opinion, if you would?

MR. ZIMMERMAN: I think among other things on page 10 they talk about first original case, and then on page 12, last paragraph, the restaurant operations are substantially the same other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers, but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with neighboring restaurants --

THE COURT: All right.

MR. ZIMMERMAN: -- and so on.

THE COURT: All right. I think --

MR. ZIMMERMAN: It may not be encyclopedic, but --

THE COURT: "Other than a lack of a stage, the proposal for life music is the same." Was it the same? You all are telling me that Larry Tanner had loud rock bands outside with speakers --

MR. ZIMMERMAN: He proposed steel band music ultimately. It's a question of also credibility and factual evaluation.

THE COURT: Proposed performers.

MR. ZIMMERMAN: They felt that it was not a substantial change from the type of music, that's a factual finding. It may not be encyclopedic, it may not be, you know, the length that you would have liked to see, but that paragraph, they're making a finding it's not a substantial change. If you wanna take one word out of context and say, well, they weren't taking into account sufficiently that Mr. Boone said he was gonna have acoustic whereas Mr. Tanner had said it was gonna be a steel band.

On this record the Board was entitled to find that there was not a substantial change. Whether you could take one word out of context and say, well, Mr. Boone, you know, it's not gonna be identical performers, okay. They're not denying this based on the fact that there's music period, they're denying it based on the fact that they don't view this as a substantial change, and they heard evidence for two days. I think under the Court of Appeals decision, that's a sufficient finding. The Court also has said in a number of cases, there's one called Chesapeake versus Moreland, you can look at the findings also in relations to the description of the facts.

I think if you put together page 12, and then you look at the extensive review of the facts, the Board is credited with their evaluation of the facts, and their finding is in the context of how they described Mr. Boone's testimony, which begins on, I believe, page 3. There's a description of Mr. Boone's testimony, and then you have also it goes on and on to the testimony from the citizens. For example, on page 6, Mr. Wolenski is also familiar with Mr. Boone's operation, and Mr. Allen, Mark Allen was the first musician to be hired. Mr. Allen's guitar is connected to an amplifier --

THE COURT: Where are you now, page 6?

MR. ZIMMERMAN: Page 6.

THE COURT: All right. Hold on.

MR. ZIMMERMAN: -- which Mr. Wolenski described so loud. So, I mean, there's a mix in the citizen's testimony of not only the past operation, but there was a mix relating to the current proposal.

THE COURT: I'm sorry?

MR. ZIMMERMAN: What I'm trying to say is that the citizen's testimony spanned both their observations on the previous operation, as well as the current operation and proposal, and the Board had all of that which they described.

THE COURT: Well, I think that's a problem.

MR. ZIMMERMAN: I think the Board --

THE COURT: Here's the crux of part of what you and Mr. Borgerding are arguing and what the Board of Appeals says, the neighbors are concerned that the same problems will reoccur.

MR. ZIMMERMAN: That's part of it, and I agree with you if that's all there was. I agree if that's all there was, that would not by itself be enough, but there was much more than the neighbors' concern.

THE COURT: It's not enough. It's not even --

MR. ZIMMERMAN: That's not all there was in this decision. They had Mr. Boone's testimony before them in its entirety --

THE COURT: I understand that. I got that early on, there's a two-day evidentiary hearing.

MR. ZIMMERMAN: They didn't view his proposal and his description as being substantially different from the previous case. Given the description of the criteria of the Board in the previous case, I don't think they had to go through the criteria once again, one, two -- you know, the eight criteria.

THE COURT: It would have been helpful, I can tell you. All this focus on the prior owner and years ago is really not helpful to your case.

MR. ZIMMERMAN: You know, what's the expression? Let's not with the perfect be the enemy of the good or the adequate. Yes, they could have been more detailed, but I don't think that's enough for a reversal or a remand. I think the appellate courts these days, the scope of review is such that they're not requiring that kind of perfection, and I think that the evaluation here based on the two-day evidentiary hearing, that the Board finds no substantial change in circumstances, and they evaluated all the facts. They went through them. Yes, you could pick out a sentence here or there and say, well, you know, that would not be relevant.

Mr. Tanner's unique personality is not the point, I get that. The fact that the neighbors are worried is not the point, I absolutely get that, but I think there's much more here, and I don't think -- obviously I don't think Mr. Schmidt's argument is crediting what the Board did, in fact, do after two days of testimony after an extensive description of the facts, and their page 12 paragraph does include some findings. Could it have been more perfect --

THE COURT: Okay.

MR. ZIMMERMAN: -- and could it have been more extensive? Sure.

THE COURT: All right.

MR. ZIMMERMAN: I think you --

THE COURT: You're going around the same bush Mr. Zimmerman.

MR. ZIMMERMAN: Let's just see if I have a few more points that I can make. Based on all of the Court of Appeals cases that I've cited, which I won't get into detail, but it begins on page 14 of my memo, there were all sorts of changes and circumstances that the Court of Appeals had said were not substantial. It's not substantial enough to overcome the previous case.

There are arguments about -- if I could get back to my notes -- arguments about population changes, arguments about need, arguments about new development in the area. For example, the Seminary Galleria had arguments about a different business situation with the Galleria up on York Road --

THE COURT: Where are these factors listed? You listed those in your memo, didn't you, Mr. --

MR. BORGERDING: Yes, your Honor.

THE COURT: What page, please?

MR. BORGERDING: They start in my memo on page 18.

THE COURT: Those are out of the International Building Code?

MR. BORGERDING: Yes, sir.

(WHEREUPON, a pause had in the proceedings.)

THE COURT: Okay. Mr. Zimmerman, anything further?

MR. ZIMMERMAN: Just briefly, we did go through some of the Petitioner's arguments also beginning on page 21 of our memorandum, but what I wanted to say is based on all of the Court of Appeals case, I don't think a promotional -- an allegation or statement that the management style is gonna change. It's the kind of change that the Court of Appeals indicated would be a so called substantial change in circumstances regarding the property.

THE COURT: I don't think that's the argument that it's the management's style.

MR. ZIMMERMAN: Well, that the music is not gonna be as loud. That's basically what it's coming down to, that's the main thing.

THE COURT: I would think that's the main complaint of the neighbors is the music is too loud.

MR. ZIMMERMAN: What I'm saying is I think the Board of Appeals found based on all the evidence that they did not view Mr. -- they did not view Mr. Boone's testimony as convincing or credible. They made a factual finding based on the factual inferences, which the Court of Appeals has said the judiciary must defer to the factual inferences.

THE COURT: You know what? I would agree with that statement that you just made, but Board of Appeals didn't make it. That's not what they said.

If they had made that statement that they didn't find Mr. Boone credible and they thought that the music was gonna be too loud, I would defer to that factual finding. I don't see that factual finding in here.

MR. ZIMMERMAN: That is the way I --

THE COURT: They just said Mr. Tanner did what he wanted to do and they're afraid it's gonna happen again.

MR. ZIMMERMAN: No, I think they're saying much more than that.

THE COURT: They don't say a whole lot more than that.

MR. ZIMMERMAN: No, but I disagree, because it's differently in context from the way --

THE COURT: Okay.

MR. ZIMMERMAN: I think, frankly, I would respectfully suggest that while the decision may not be perfect, I think your approach may be too strict. If you really feel the Board did not do enough in explaining it's decision, then I suppose the remedy would be a remand to have them explain it further, but I don't think it's an absolute situation for absolute reversal.

THE COURT: Okay. All right. Thank you, Mr. Zimmerman.

(WHEREUPON, a pause had in the proceedings.)

THE COURT: All right. I know Mr. Borgerding and Mr. Zimmerman want me to follow the Court of Special Appeals opinion and not overrule it, and I agree with that. That is what I should do, but the issue in the Court of Special Appeals was whether the Dock of the Bay was operating as a nightclub. That had been an original complaint.

This, again, we're going back years now, however many years whether Mr. Tanner owned it, the complaint was that the Dock of the Bay was operating as a nightclub in a BL zone, which is not permitted use in a BL zone. The issue in the special hearing before the zoning commissioner was to determine if the Dock of the Bay is a nightclub or simply a restaurant under the Zoning Code.

The commissioner ruled that the Dock of the Bay is a nightclub under the Zoning Code and the facts in this case and ordered that the outdoor music be discontinued. This is the facts now that are recited in the Court of Special Appeals' opinion.

Then the case was appealed to the Board of Appeals, which concluded that the Dock of the Bay was operating as a nightclub under the definition of a nightclub in the Zoning Code, and the Board of Appeals had considered the characteristics of this Subgroup 82 -- that's in the IBC, right?

MR. ZIMMERMAN: Yes, sir.

THE COURT: And they considered those characteristics and whether they applied to the Dock of the Bay, and the analysis was, I think there were six of the eight criteria that applied, therefore, they concluded under facts and the analysis that the Dock of the Bay was operated as a nightclub. So then that was appealed to the Court of Special Appeals. The whole analysis by the Court of Special Appeals was whether the Dock of the Bay met the definition of a nightclub. The Court of Special Appeals noted that the criteria applied by the Board of Appeals to determine whether the Dock of the Bay is a nightclub was relevant. Those criteria were relevant of whether the Dock of the Bay was a nightclub, and the Court of Special Appeals found there was substantial evidence in the record to support the findings, the factual findings, that six of these eight criteria were met.

Again, the issue was whether the Dock of the Bay under the facts that existed at that time was a nightclub, and if it was, it was not permitted in a BL zone. In order for res judicata applied, it seems to me that same analysis has to be done to see and determine whether the proposed use with the current owner would constitute a nightclub. If the facts were the same, then maybe res judicata would apply at that time, I would even -- if it did, but the analysis just was not done in this case.

I agree with Mr. Schmidt that there was a whole lot of extraneous material written about the prior owners and the fear of the neighbors that the current owner would morph into the same type of problems that they had with Mr. Tanner, and I understand that. I understand the fear and the concerns of the neighbors and it's a very nice area, Miller's Island, and they don't want a nightclub in the neighborhood next to their homes, but this Court doesn't know that's what was proposed or what was decided by Board of Appeals based on this opinion.

The Board of Appeals, I mean, I have no quibble with the recitation of the law that applies, and they cite Whittle versus Board of Zoning Appeals, and the question was whether there was a change in circumstances. The Board of Appeals says -- and this is page 12 of its decision -- applying the reasoning of Whittle here, "We find there has been no substantial change in the facts as proposed than was previously litigated in the code enforcement hearings." I think they're referring to Mr. Tanner here, because then he said, "The same neighbors who incurred attorney's fees and endured the Tanner era ownership are still protesting both indoor and outdoor music." It's not an analysis of the criteria to determine whether this is a nightclub. Then the next paragraph, I agree with Mr. Zimmerman, it constitutes the analysis.

"The restaurant operations are substantially the same." I'm not sure which operations, but that would be okay, the restaurant operations, but then it says, "Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers, but the hours for performance." It seems to be different from what I'm reading of the manner in which the music will be played. That's really it, and it goes on with other stuff about it's not really an analysis of whether it a nightclub.

"The owner expressed the desire for live music to boost revenue and compete with neighboring restaurants. There has been no change to the physical layout of the restaurant or additions or improvements such as sound-proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that in order to be successful in this request, the changes needed under Whittle, there must be more than a change in the restaurant's ownership or management style of the new owner." Okay. I would agree with that, but there seem to be other changes that they're not considering.

"It says we are mindful the fact that if the Petitioner has the best of intentions operates a family-oriented restaurant and as indicated it be sensitive to the neighbor's concern, there is no regulational policing of the restaurant other than complaints filed by the protestants.

Well, you need to be cognizant that the restaurant could subsequently be sold and the same problems could result. You could say that about any business. Now, they do say, "We previously determined that this restaurant operated a "nightclub" because it met the definition of BCZR Section 101. The facts presented by the Petitioner here have not changed that determination.

They make the conclusion, Mr. Zimmerman, I agree with you, but they don't really say how they got there, and I think we should follow the Court of Special Appeals decision. The Court of Special Appeals decision was very factually oriented, and again, the Court of Special Appeals said that those criteria, those eight criteria in the building code are relevant to a factual finding to determine whether the Dock of the Bay is a nightclub. So all I'm saying is that analysis should be done in this case. I don't know what the answer is, I'm not saying that the board is wrong. So, I don't know if this technically is not a reversal, but I am going to remand it for a determination under the facts of this case as to whether the Dock of the Bay is a nightclub, and I believe they should look at the Court of Special Appeals opinion and see what the Court of Special Appeals in the prior case said was were relevant criteria to that determines, and that Court of Special Appeals opinion should be followed.

MR. ZIMMERMAN: That would not require a new evidentiary hearing.

THE COURT: No, it does not require an evidentiary hearing. I determined that with Mr. Schmidt right at the get go. He had his two days of evidence he presented. Whether they have a hearing or not would be up to the Board of Appeals. I'm not even going to say they should have another hearing, it's up to them whether should have any type of argument or take additional testimony, they could, but I believe the case should be remanded for an analysis.

I will say under the Court of Special Appeals' opinion in the prior case, Case Number 810, September Term 2009, decided by Judge Deborah Eyler, and I believe that requires an analysis of those eight criteria in the International Building Code that the board of special appeals say were relevant. Okay, so the case is remanded for the determination of whether the proposed use would constitute a nightclub.

MR. SCHMIDT: Thank you, your Honor.

THE COURT: Now, as far as an order, I believe that's all it needs to say, right? Remanded for determines of whether the proposed use would constitute a nightclub.

MR. SCHMIDT: We certainly would have access to the transcript and your remarks herein open court as well, your Honor.

THE COURT: Okay. I'll say a determining whether the proposed use would constitute a nightclub under the analysis used by the Court of Special Appeals in that prior case. Would that do it?

MR. SCHMIDT: You could reference the international building codes specifically, your Honor.

THE COURT: I'll let the Court of Special Appeals opinion speak.

MR. SCHMIDT: Yes, sir.

THE COURT: Okay. Would that be clear enough for every one?

MR. SCHMIDT: Yes, sir.

MR. BORGERDING: Yes.

MR. ZIMMERMAN: Yes, your Honor.

THE COURT: All right. I'll sign that order and it's up to you to contact the Board of Appeals and --

MR. SCHMIDT: Once we get your order.

THE COURT: -- see how they want to proceed.

MR. SCHMIDT: Yes, sir.

MR. ZIMMERMAN: You'll be preparing the order?

THE COURT: I'll do the order.

MR. ZIMMERMAN: Great, thank you.

THE COURT: All right. Thank you all very much for your memos and your arguments.

MR. BORGERDING: Thank you, your Honor.

MR. ZIMMERMAN: Thanks, Judge.

MR. SCHMIDT: Thank you, your Honor.

THE COURT: It was interesting. Okay.

MR. SCHMIDT: Thank you.

(WHEREUPON, proceedings concluded 10:55 a.m.)

* * *

REPORTER'S CERTIFICATE

I, CONSTANCE A. STACKER-WILSON, an Official Registered Professional Reporter within and for the State of Maryland, Baltimore County, do hereby certify that the foregoing proceedings were recorded using the CourtSmart Digital Recording System and was thereafter reduced to the herein typewritten form to the best of my ability.

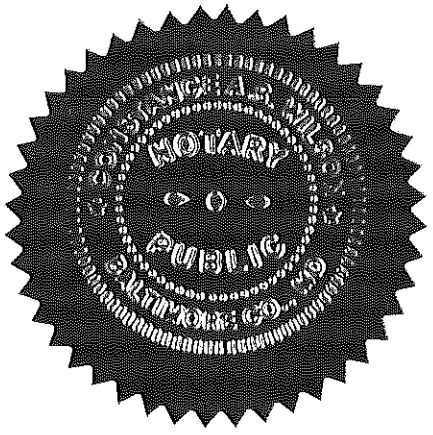
I also certify that the foregoing transcript of proceedings is a true, correct, and complete transmission of the CourtSmart recording so taken, consisting of pages 1 through 58 inclusive.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action of which these proceedings were taken, nor am I financially or otherwise interested in the outcome of this case.

Subscribed and sworn to by me this **28th** day of **August, 2017.**

Constance A S Wilson, RPR

CONSTANCE A. S. WILSON
Notary Public
Baltimore County, Maryland
My Commission Expires March 22, 2020



IN THE MATTER OF BOONE KONDYLAS, LLC - Petitioner 9025 Cuckold Point Road Sparrow's Point, MD 21219	*	BEFORE THE
	*	BOARD OF APPEALS
	*	OF
RE: Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music	*	BALTIMORE COUNTY
	*	Case No. 16-003-SPH

* * * * * * * * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge (the "ALJ") in which the ALJ denied a Petition for Special Hearing to amend previous restrictions imposed in Cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music.

A public hearing was held *de novo* on February 17, 2016 and April 28, 2016. The Petitioner, Boone Kondylas, LLC (the "Petitioner") was represented by Lawrence E. Schmidt, Esquire of Smith, Gildea and Schmidt, L.L.C. The Protestants, Charles Wolinski, Brad and Bonnie Metheny, Matt Ciarpella and Tammy Waldmann (collectively, the "Protestants") were represented by Francis X. Borgerding, Esquire. People's Counsel also participated in the hearing. A public deliberation was held on June 14, 2016.

Factual Background

The subject property is water front property located in the Millers' Island community of eastern Baltimore County (the "Property"). The Property is 1.27 acres +/- and is zoned B.L. (business-local). That zoning designation allows for restaurants to operate by right. The business located on the Property is a restaurant with associated parking known as "The Dock of the Bay" (the "Restaurant"). The Restaurant is open seven (7) days a week and has a total seating capacity of approximately 225 persons (125 persons inside and 100 persons outside). The Property is also

improved with boat slips for patrons to dock their boats and access the Restaurant via the Chesapeake Bay. A restaurant has been operating on the Property since the 1950s and was originally known as the "Fisherman's Inn."

In or about 2004, the Restaurant came under the ownership of Fifth Street, LLC and its member, Lawrence Thanner ("Mr. Thanner"). During Mr. Thanner's operation, music was played inside and outside the Restaurant as well as on a barge in the water. This caused some of the Protestants in this case to file code enforcement actions beginning in April of 2006. After numerous citations were issued, on August 23, 2006, Mr. Thanner's Restaurant was found to be in violation for operating a "nightclub."

Mr. Thanner filed a Petition for Special Hearing to request a determination that the Restaurant with its associated live music did not constitute a 'nightclub.' In our June 4, 2008 Opinion, this Board held that Mr. Thanner's operation of the Restaurant along with music played met the definition of "nightclub" in §101 of the Baltimore County Zoning Regulations ("BCZR"). We also affirmed the code violations. Because a 'nightclub' was not permitted in a BL zone, this Board ruled that "the playing of music by way of speaker system, live or recorded entertainment must be discontinued." (Board Opinion 6/4/08, p. 14). Both the Circuit Court for Baltimore County and the Court of Special Appeals affirmed our decision. On July 9, 2010, in an unreported opinion, the Court of Special Appeals held that the record supported a finding that Mr. Thanner's operation was both a restaurant and a nightclub. Thereafter, the Restaurant closed.

In or about August of 2014, the Petitioner purchased the Property. In or about October of 2014, the Petitioner reopened the Restaurant under the previous name – Dock of the Bay. At the hearing, Kenneth Boone, owner of Boone Kondylas, LLC, the Petitioner, testified before this Board that his ownership and operation of the Restaurant is one of three businesses he owns. The Restaurant has both a business license and a liquor license. The food menu varies from seafood to sandwiches, hamburgers and pasta.

The Petitioner described the minimal improvements that have been made to the Restaurant since August of 2014. These have included pouring a concrete pad where the customers can eat steamed crabs, expanding the kitchen, and removing the outside stage installed by Mr. Thanner where the musicians formerly played.

In April of 2015, the Petitioner hired Mark Allen, a guitar player, to perform at the Restaurant. Mr. Allen was also a regular performer at the Restaurant during the period that Mr. Thanner owned it. When signs advertising Mr. Allen's performance were put up at the Restaurant, a Baltimore County inspector instructed the Petitioner that the Restaurant would be closed down if music was permitted to play.

Mr. Boone mentioned that 'Row Boat Willie's', a restaurant located next to the Property is permitted to have live music. Row Boat Willie's is located in a BM (Business-major) zone which permits 'nightclubs' to operate. The Petitioner is competing with 8 other restaurants, including the 'The New White Swan' located at 8821 Millers Island Blvd. and 'The Islander' located at 9008 Cuckold Point Rd., on or near the waterfront and all of them have some type of live music. Mr. Boone was certain that the Restaurant would not be able to survive financially without live music.

While not excluding any specific age of customers, the plan is to hire musical performers who cater to a 50 year-old audience, who want to hear music while enjoying lunch or dinner. The Petitioner does not want to cater to a younger crowd as he anticipated the potential problems that might arise with a younger audience. In the summer months, boaters from all over Baltimore County patronize the Restaurant. The types of musical acts envisioned by the Petitioner would range from solo acoustic or electric guitar players to Frank Sinatra and Oompa bands.

The proposed hours for the musical groups would be Friday and Saturday nights from 6:00 p.m. to 10:00 p.m., with the last call at midnight, in hopes that the customers might leave by 12:30

a.m. On Sundays, in the summer, music would be played outdoors from 5:00 p.m. to 8:30 p.m. Also, there would not be a dance floor or stage area.

The Petitioner is amenable to a decibel level restriction for the sound stemming from the music. However, Mr. Boone has not personally operated any type of device to monitor decibel levels at the Restaurant.

On cross examination, the Petitioner conceded that the Restaurant hours of operation are in fact stated on the website. The hours of operation stated in the website are Monday to Thursday 11:00 a.m. to 11:00 p.m.; Friday and Saturday 11:00 a.m. to 1:00 a.m.; and Sunday from 9:00 a.m. to 8:00 p.m. Mr. Boone then changed his testimony on the time period during which musical acts would perform and indicated that the music would end at Friday and Saturday nights at 11:00 p.m., on Sundays at 7:00 p.m.; and, at dusk for outdoor performances in the summer months which would end as late as 9:00 p.m.

The Petitioner acknowledged that it did not want to be restricted to certain types of music but would entertain other types of music such as jazz quartet bands or Reggae bands. The Petitioner was uncertain about normal sound levels or how the proposed music might be regulated.

In support of the Petitioner's proposed business, several Miller's Island residents testified. Cheryl Gowers of 2812 Bay Drive has lived at that address since 1993. At the previous hearing, Ms. Gowers testified against Mr. Thanner's operation. She was familiar with the problems that resulted from Mr. Thanner's operation of the business which, she said permitted very loud music including heavy metal music and played until midnight or 1:00 a.m. on most weekends. Presently, Ms. Gowers works as a waitress in the Restaurant for the Petitioner. Having worked at both The New White Swan and The Islander, she corroborated that live music is played at those establishments.

Russell McClelland, 9011 Miller's Island Blvd. testified that he lives 400 yds. from the Property. Mr. McClelland was familiar with the complaints from neighbors and the level of sound

coming from Mr. Thanner's restaurant. He described music at Mr. Thanner's restaurant as being played from speakers mounted to a stage outside the Restaurant. The music was amplified over the water and would occur all days of the week until midnight. He recalled that Reggae music was played.

Mr. McClelland is in support of the Petitioner's request here because he believes, like Ms. Gowers, that Mr. Boone will not permit the type of problems associated with Mr. Thanner's operation. Mr. McClelland works for the Petitioner by cutting the grass and policing both the parking lots and boat slips. If this request is granted, he is willing to monitor the sound level.

Charles Boland and Jerri Boland, his wife, 2414 Eugene Avenue, Edgemere, MD live 1 ½ miles from the Restaurant. Mr. Boland is a retired Baltimore County police officer whose son is employed by the Petitioner. Mr. Boland frequents the Restaurant 4-5 times per week and testified that the Petitioner's operation is family-oriented. The Bolands have no objection to live music at the Restaurant.

Dorothy Reilly, 2809 3rd Street, Miller's Island, is located 2 blocks from the Restaurant. Ms. Reilly has observed loud music coming from The White Swann and The Islander. She reiterated that the Petitioner's restaurant is family oriented. She does not like loud music but would like to hear softer music while there.

In the Protestants' case in chief, Charles Wolinski, 9019 Cockhold Point Rd. testified that his home is adjacent to the Restaurant. Mr. Wolinski is a high school biology teacher at Sparrow's Point High School. He can see the Restaurant from his house. He has 4 children, ranging in age from 13 yrs. to 3 yrs. Mr. Wolinski described his family's life through the Thanner years as living through a "nightmare." He specifically described the problems with the loud music both indoor and outdoor which occurred every weekend. Disorderly patrons were loud while the music was playing and, after the music ended, the clapping and screaming was just as bad as the music itself.

These patrons would then spillover into the parking lot and would continue with loud, disruptive behavior.

Because of the loud noises made by patrons and the loud music, he can never open the windows in his home in the summer or winter. All the noise from the music and the patrons could still be heard inside the home; even in the shower with the fan running. This situation disrupted his family's sleep and the enjoyment of their home. Due to the configuration of the Restaurant's door leading to the outside, even the music played indoors by a live band can be heard in his home and it is disruptive. He explained that each time the outside door would open, the music and noise from inside the Restaurant would project outdoors. He further stated that the parking would overflow into the neighborhood streets. He described one incident where a Restaurant patron, who was blocked in by another car on the parking lot, drove across Mr. Wolinski's lawn in order to exit the parking lot. That incident forced Mr. Wolinski to incur the cost of erecting a fence. Mr. Wolinski was clear that Mr. Thanner never controlled the crowds that came with playing music at the Restaurant.

Mr. Wolinski is also familiar with Mr. Boone's operation of the Restaurant and explained that the physical layout of the Restaurant has not changed. He is very concerned that the same problems will reoccur whether the music is played inside or outdoors. Mark Allen is the same performer hired by Mr. Thanner. Mr. Allen's guitar is connected to an amplifier which Mr. Wolinski described as so loud that Mr. Allen was no longer permitted to play at Rowboat Willie's. Mr. Wolinski recalled that Mr. Thanner also hired steel drum bands. In his experience and from personal observation, the music from Rowboat Willie's does not impact him or his family. He indicated that The Islander only has karaoke music inside.

Mr. Wolinski stated that the litigation against Mr. Thanner's operation lasted seven (7) years through the various appeals in the Court system and that he and the other Protestants paid

substantial attorney's fees. Toward that end, he was surprised that the new owner could make the identical request for music when that request was previously denied in the various appeals.

Also testifying for the Protestants was Matthew Ciarpella, 2116 6th Street, Miller's Island where he has resided for 11 years. Mr. Ciarpella experienced first-hand Mr. Thanner's operation of the Restaurant and also endured seven (7) years of litigation. He opposes outdoor music at the Restaurant due the proximity of the Restaurant to his house. As such, even if the proposed music ends at 7:00 p.m., rather than 9:00 p.m., it would still be intrusive. His house, similar to others in the neighborhood is built on elevated foundations such that the sound travels upward. When wind blows from the north over the water, the sound travels. He could hear the music and loud patrons while inside his house with the windows closed. Each time the outside door opened, bursts of sound would travel. This problem occurred even with a 6' privacy fence and a wall of Leland Cypress trees.

Mr. Ciarella is convinced that the type of music will not be limited to acoustic or Reggae. He insists that the Petitioner will not repeatedly hire the same musical acts because, economically, the Restaurant will profit from hiring a variety of bands. Moreover, the more popular the band, the more revenue will be generated. Karaoke would not be a better option because a microphone will still be used. He is familiar with Mark Allen's guitar which is connected to an electric amplifier and/or microphone whether he is playing classic rock, 'oldies music' or Reggae.

Mr. Ciarpella added that when the popular rendition of a song was played, he would hear cheering, clapping and hooting for the music to continue. In contrast, this additional noise from cheering and clapping does not occur when a song is being played on a radio. At The Islander, he said that there is a DJ inside and that he cannot hear that from his house.

Mr. Ciarpella was familiar with the layout of Row Boat Willie's as he was involved with constructing the sound proofing of the pavilion where the live music plays. The pavilion consists

of a 32x30 square shape and is opened on north side. The pavilion also has table seating and an elevated deck.

In his view, the proposal presented here is the same one that was previously rejected by this Board and by the courts. He testified that there will be no regulation of decibel levels. During the Thanner years, the neighbors regulated the music levels by filing complaints with Code Enforcement. What he learned through the Thanner litigation is that there is no regulation of noise levels by Baltimore County; rather any nuisance is complaint driven. This puts a burden on the Protestants to seek enforcement against the Restaurant.

He further testified that along with bands comes the followers which he described as a 'different type of crowd' than would normally be expected with music that accompanies dinner. He also stated that the amount of traffic not only increased with the live music but the followers of those bands did not drive civilly.

Mr. Ciarpella anticipates that, if the Petitioner's request is granted, he and his neighbors will endure more litigation monitoring the Petitioner and again when the Restaurant is subsequently sold. Any live music played at this restaurant will negatively affect his property values.

Brad Metheny, 2704 6th Street, Miller's Island, testified that he too lived through the Thanner era. He recalled that the bands would play on Friday and Saturday nights until 1:30 a.m. He also heard all the music and noise while inside his house with the doors and windows closed, with the air conditioning running and the TV playing. He approximated that his home is located 180' from the Restaurant.

Mr. Metheny described the instant hearing as being the same that he heard when Mr. Thanner and his employees previously testified. Granting this request would open the door to the same problems he endured for the last 7 years. Since outside the Restaurant can accommodate 150 people, if outdoor music is combined with alcohol consumption by patrons and boaters who

dock outside the Restaurant, the situation becomes problematic. He does not want to suffer through the same 'constant battle and disruption.' Indeed, Mr. Metheny's son and his family were living at 2712 6th Street which Mr. Metheny also owns. Due to the noise problems, his son was forced to move with his 4 year old granddaughter to Bel Air.

Mr. Metheny's mother-in-law previously owned The Fisherman's Inn in the 1940s and 1950s. Mr. Metheny recalled that when the Restaurant was The Fisherman's Inn there were outdoor dining tables without any problems.

Following Mr. Metheny's testimony was his wife, Bonnie Metheny as well as a neighbor Wayne Waldmann of 9014 Cuckhold Point Road. Both of those neighbors also opposed any type of music at the Restaurant.

Decision

The Petitioner is before the Board requesting that the restriction against playing live or recorded entertainment be amended so as to permit live music at the Restaurant. In short, the Petitioner asks this Board to believe that the same problems will not result if live music is now permitted.

In our decision of June 4, 2008, which decision was affirmed by both the Circuit Court and the Court of Special Appeals, we made many findings of fact. We incorporate that Opinion in its entirety herein. We also refer to the facts and holding as set forth in the Court of Special Appeals Opinion dated July 9, 2010.

Specifically, we previously found that the Restaurant could seat 150-160 patrons inside. Outside of the Restaurant was a patio, two television sets, along with an outside bar, and tables for patrons to use. There were also outside speakers connected to a radio which played music both inside and outside. The Restaurant had 14 boat slips for "transient" boat customers.

The Restaurant opened every day from 11:00 a.m. and closed at 2:00 a.m. In the winter, the Restaurant closed early as customers left. The kitchen closed at 11:00 p.m. but the bar stayed

open until 2:00 a.m. as permitted by the liquor license. The food menu was seafood, steaks and sandwiches. We also found that 70% of sales were from food and 30% were in beverages.

On Friday and Saturday nights, we found that live bands played from 9:00 p.m. to 1:00 a.m. We also found that on Saturday and Sunday afternoons, live music played from 4:00 p.m. to 8:00 p.m. (with the caveat that the music stopped after 8:00 because of the code violation complaints).

The type of music were "mostly duos" or "steel bands." There was no charge for live entertainment and the Restaurant stayed open until 2:00 a.m. when live music was played. We also heard testimony that the Restaurant would close without live music being available. In that case, we also heard the testimony against the live music from Matthew Ciarpella, Charles Wolinski, Brad and Bonnie Metheny and Patricia Waldmann.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." The Court in *Seminary Galleria* confirmed that this Board need not even hear the facts before determining whether the doctrine of *res judicata* applies. *Id* at 995 A.2d 1070. The Court also stated that *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett*, 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency's ruling is entitled to preclusive effect is as follows:

> Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency's decision.

Id. at 995 A.2d 1078.

This Board's Opinion of June 4, 2008 meets this test. (1) The Board was acting in a judicial capacity by conducting a hearing on the Petition for Special Hearing, where evidence was presented, and rulings were made on disputed factual and legal issues; (2) The issue of whether music should be permitted at this location was actually litigated; and (3) the Board's Opinion of June 4, 2008 was necessary for a resolution of the issue.

Under *Deleon v. Slear*, 328 Md. 569 (1992), the Court of Appeals made clear that in determining whether claims are the same for the purposes of *res judicata*, the Court has in the past applied "same evidence test." However, the *Deleon* Court acknowledged that the concept of "claim" is broad and that "claim" is defined as a "group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from the narrow concept of a 'cause of action.'" *Id.* at 589. The *Deleon* Court, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), emphasized that the most recent test for determining when two claims or causes of action are the same for purposes of *res judicata* is the "transaction" test as set forth in §24 of the Restatement (Second) of Judgments.

The Court of Appeals in *Bilbrough*, recited the transaction test as follows:

> The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 497-498; *Deleon* at 589.

Specifically, with respect to whether the claims are the same, the *Deleon* Court reviewed the facts to see whether they "are related in time, space, origin or motivation." *Id.* at 591. As applied to the instant case, the same parties, or their privy, are involved here as were involved in the Thanner litigation which led to our June 4, 2008 Opinion. We further find that, the same piece

of property has been involved as well as the same zoning issue with respect to whether a music should be permitted on the Property.

With regard to amending previous restrictions or conditions where an earlier application has been denied by a zoning board, the Court of Appeals in *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36, 45 (1936) appropriately explained that:

> The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions..... This rule seems to rest not strictly on the doctrine of res judicata, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.
>
> * * * *
>
> The changes in circumstances which the appellees rely upon may be summarized as follows: (1) increased commercialization of the area; (2) increased population of Baltimore County (3) decreased opposition of neighbors and some support by them; and (4) additional conditions attached to the granting of the permit.

Applying the reasoning of *Whittle* here, we find that there has been no substantial change in the facts as proposed than was previously litigated in the Code Enforcement hearings, before the Zoning Commissioner on the Petition for Special Hearing or before this Board after a *de novo* hearing. The same neighbors who incurred attorney fees and endured the Thanner era of ownership are still protesting both indoor and outdoor music.

The Restaurant operations are substantially the same. Other than the lack of a stage, the proposal for live music is the same, including not only the proposed performers but the hours for performances and the manner in which the music will be played. Both owners expressed the desire for live music to boost revenue and compete with the neighboring restaurants. Moreover, there has been no change to the physical layout of the Restaurant, or additions or improvements such as sound proofing or other physical change that might have lessened the impact of music on the neighboring properties. We find that, in order to be successful on this request, the changes needed

under *Whittle* must be more than a change in the Restaurant's ownership or management style of the new owner.

We are also mindful of the fact that even if the Petitioner has the best of intentions, operates a family-oriented restaurant and has indicated that it be sensitive to the neighbors' concerns, there is no regulation or policing of the Restaurant other than complaints filed by the Protestants. In addition, we need to be cognizant that the Restaurant could subsequently be sold and the same problems could result.

The County Council has determined that 'nightclubs' can exist in a BM zone but not in a BL zone. Thus, the comparison by the Petitioner to Row Boat Willie's is without merit because music is permitted in the BM zone. In contrast, this restaurant is located in a BL zone which is not permitted to have live music. We previously determined that this restaurant operated a 'night club' because it met the definition in BCZR, §101. The facts presented by the Petitioner here have not changed that determination.

We also cite our previous holding in *The Belvedere Baptist Church of Baltimore*, Case No. 15-004-SPH, wherein we declined to approve a request to amend a restriction in a previous ALJ Order. In that case, we applied the doctrine of *res judicata* and found that there was no substantial change in circumstances or facts between the first case and the second case to warrant the requested relief. Specifically, we found that: "there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decision." (Board Opinion, p.8).

In the Board's desire to be consistent in its holdings, we find that the facts of this case fit squarely within the relief requested in the *Belevedere Baptist* case. Here, there has been no change in the Property, the Restaurant, the neighborhood, the neighbors or the zoning that might lead to a different result.

For all of the foregoing reasons, the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music should be denied.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

Benfred B. Alston

Jane M. Hanley was on the panel and agreed with the majority opinion. She was not reappointed to the Board and her last day with the Board of Appeals was June 30, 2016.

Board of Appeals of Baltimore County

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September 15, 2016

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RE: In the Matter of: *Boone Kondylas, LLC*
Case No.: 16-003-SPH

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Multiple Original Cover Letters

c: Kenneth Boone/Boone Kondylas, LLC
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN RE: **PETITION FOR SPECIAL HEARING** **(9025 Cuckold Point Road)** 15th Election District 7th Council District	*	BEFORE THE
	*	OFFICE OF
	*	ADMINISTRATIVE HEARINGS
Boone Kondylas, LLC *Legal Owner* Petitioner	*	FOR BALTIMORE COUNTY
	*	**Case No. 2016-0003-SPH**

* * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Boone Kondylas, LLC, legal owner. The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

Ken Boone appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioner. Several neighbors, represented by Francis Borgerding, Esq., attended and opposed the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Bureau of Development Plans Review (DPR). Neither agency opposed the request, but suggested certain conditions be imposed if relief is granted.

The subject property is 1.27 acres and zoned B.L. The property is improved with a restaurant known as "Dock of the Bay." The restaurant has new ownership, which proposes to offer limited music and live entertainment as an "accessory" use to the food and beverage service. This property and business have been the subject of protracted litigation concerning loud music and unruly patrons which disturbed the neighborhood. The operation was found by the court of

ORDER RECEIVED FOR FILING
Date 10/22/15
By Den

special appeals to constitute a "nightclub," a use prohibited in the B.L. zone. Protestants contend the petition is barred by *res judicata,* while Petitioner argues that unlike the former operation the current business is first and foremost a restaurant, with music offered to compliment the dining experience.

Under Maryland law, an agency determination affirmed on appeal is entitled to preclusive effect. Esslinger v. Balto. City, 95 Md. App. 607, 621 (1993). This is the case, and *res judicata* will apply, unless there is a significant change in circumstances between the earlier and subsequent action. *See, e.g.*, Alvey v. Hedin, 243 Md. 334, 340 (1966). In light of this authority I believe the doctrine of *res judicata* mandates that the petition in this case be dismissed.

As an initial matter, I do not believe the OAH has the authority to "amend" restrictions found in previous cases (at least under the circumstances presented here), as Petitioner has requested. The zoning violation and special hearing cases cited in the Petition were appealed to the board of appeals, circuit court and then the court of special appeals. In an unreported opinion (No. 810, September Term, 2009) the appellate court affirmed the agency findings, which necessarily included the conditions and restrictions found in those orders. To amend those restrictions at this juncture would be akin to reversing the appellate court, which an administrative agency cannot do.

I believe the Petition must also be denied based on *res judicata.* As discussed above, *res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard. For example, if the owner of the subject property was now proposing to operate a barbershop or beauty salon at the site, that would constitute a significant change and *res judicata* would not apply. But here, I do not believe there

ORDER RECEIVED FOR FILING
Date 10/22/15
By

have been significant changes; Petitioner is still proposing to operate a restaurant that would offer live and/or recorded music.

The same was true of the prior Dock of the Bay operation, even though the entertainment now proposed would not be as loud or disruptive as the music played during Mr. Thanner's tenure. There is nothing in the opinion of the court of special appeals that would indicate the result would have been different if Dock of the Bay played Frank Sinatra tunes instead of rock music. As noted by the court, the Dock of the Bay is both a restaurant and nightclub, and that finding is equally applicable in this case. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719 (2010).

THEREFORE, IT IS ORDERED this 22nd day of October, 2015 by this Administrative Law Judge, that the Petition for Special Hearing pursuant to B.C.Z.R. § 500.7 to amend previous restrictions imposed in Cases 07-144 SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music, be and is hereby DENIED.

Any appeal of this decision must be filed within thirty (30) days of the date of this Order.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:sln

ORDER RECEIVED FOR FILING
Date 10/22/15
By sln

CBCA

F100D

PETITION FOR ZONING HEARING(S)

To be filed with the Department of Permits, Approvals and Inspections

To the Office of Administrative Law of Baltimore County for the property located at:

address 9025 Cuckold Point Road **which is presently zoned** BL

Deed Reference 35488/00133 10 Digit Tax Account # 1 5 0 8 7 9 0 1 1 0

Property Owner(s) Printed Name(s) Boone Kondylas, LLC

CASE NUMBER 2016-0003-SPH **Filing Date** 7/6/15 **Estimated Posting Date** __/__/_____ **Reviewer** BD

(SELECT THE HEARING(S) BY MARKING X AT THE APPROPRIATE SELECTION AND PRINT OR TYPE THE PETITION REQUEST)

The undersigned legal owner(s) of the property situate in Baltimore County and which is described in the description and plan attached hereto and made a part hereof, hereby petition for:

1. ✓ **a Special Hearing** under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

Please see attached.

2. ____ **a Special Exception** under the Zoning Regulations of Baltimore County to use the herein described property for

3. ____ **a Variance** from Section(s)

of the zoning regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons: **(Indicate below your hardship or practical difficulty or indicate below "To Be Presented At Hearing". If you need additional space, you may add an attachment to this petition)**

TO BE PRESENTED AT HEARING

Property is to be posted and advertised as prescribed by the zoning regulations.
I, or we, agree to pay expenses of above petition(s), advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.
Legal Owner(s) Affirmation: I / we do so solemnly declare and affirm, under the penalties of perjury, that I / We are the legal owner(s) of the property which is the subject of this / these Petition(s).

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Date 10/22/15
By BD

Contract Purchaser/Lessee:

Name- Type or Print

Signature

Mailing Address City State

Zip Code Telephone # Email Address

Legal Owners:

Boone Kondylas, LLC
Ken Boone

Name #1 – Type or Print Name #2 – Type or Print

Signature #1 Signature # 2

9025 Cuckold Point Road, Sparrows Point, MD

Mailing Address City State

21219 kboone@tidalwaterdirect.com

Zip Code Telephone # Email Address

Attorney for Petitioner:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name- Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

Representative to be contacted:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name – Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD

Mailing Address City State

21204 (410) 821-0070 lschmidt@sgs-law.com

Zip Code Telephone # Email Address

REV. 2/23/11

ATTACHMENT TO PETITION FOR ZONING HEARING

9025 Cuckold Point Road
15th Election District
7th Councilmanic District

Special Hearing:

1. To amend previous restrictions imposed in cases 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music; and

2. For such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Item #0003

CENTURY ENGINEERING

10710 Gilroy Road
Hunt Valley, MD 21031

Zoning Description for
9025 Cuckold Point Road*

Beginning at a point on the southeast side of Cuckold Point Road which is 30 feet wide, at the distance of fifteen feet southwest of the centerline of Fifth Street which is 30 feet wide. Being Lots 500 through 505 in the subdivision of Swan Point as recorded in Plat Book L.McL.M. # 9, Folio #5. Containing 1.031 acres of land, more or less. Also known as 9025 Cuckold Point Road and located in the 15th Election District and the 7th Councilmanic District.

STATE OF MARYLAND
BRYAN JASON HAYNIE
No. 21139
PROFESSIONAL LAND SURVEYOR

W:\file\login2\ld\ld06\descriptions\9025 Cuckold Point Road-08-17-06
* Legal Description from Case No. 07-144-SPH

IN 144

Item # 0003

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET AND FINANCE
MISCELLANEOUS CASH RECEIPT

No. 127362

Date: 7/6/15

Fund	Dept	Unit	Sub Unit	Rev Source/ Obj	Sub Rev/ Sub Obj	Dept Obj	BS Acct	Amount
001	806	0000		6150				500 00

Total: 500 00

Rec From:

For: Zoning hearing - case # 2016-0003-SPH

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER GOLD - ACCOUNTING
PLEASE PRESS HARD!!!!

PAID RECEIPT
BUSINESS ACTUAL TIME DRN
7/06/2015 7/06/2015 11:19:28 5
REG WS05 WALKIN RB05 LR0
>>RECEIPT # 802508 7/06/2015 OFLN
Dept 5 520 ZONING VERIFICATION
CR NO. 127362
Recpt Tot $500.00
$500.00 CK $.00 CA
Baltimore County, Maryland

CASHIER'S VALIDATION

Circuit Court for Baltimore City
Case No.: 03-C-16-010551

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 638

September Term, 2017

IN THE MATTER OF BOONE KONDYLAS, LLC

Meredith,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 9, 2018

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Boone Kondylas, LLC ("Boone"), appellee, filed a zoning petition for special hearing in the Baltimore County Office of Administrative Hearings ("OAH"), seeking an amendment to, or rescission of, restrictions previously placed on Boone's waterfront property ("the property"), to permit the use of the property as a restaurant with limited accessory music and entertainment. Following the special hearing, an OAH administrative law judge ("ALJ") denied Boone's zoning petition on the ground that it was barred by *res judicata,* as a result of this Court's 2010 unreported opinion in *Fifth Street, LLC, et al. v. Matthew Ciarpella, et al.*, No. 810, September Term, 2009 (filed July 9, 2010) ("*DOB I*"), wherein we held that the operation by the previous owner comprised a use as both a restaurant and a nightclub, and that use as a nightclub was prohibited by the applicable zoning regulations.

Boone appealed the ALJ's decision to the Board of Appeals of Baltimore County ("Board"), which also denied Boone's petition as barred by *res judicata*. Boone petitioned for judicial review, and the Circuit Court for Baltimore County remanded the matter to the Board for a determination of whether the subject property, under Boone's ownership, currently meets the definition of a nightclub, in light of the factors cited in our opinion in *DOB I.*

Appellants, Charles Wolinski, *et al.* ("Wolinski")—residential neighbors of the property—and People's Counsel of Baltimore County ("People's Counsel"), appealed the decision of the circuit court.

The questions presented, as set forth in Wolinski's brief, are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition?

2. As a matter of law, should the Opinion of the County Board of Appeals in this matter dated September 15, 2016 have been affirmed by the Circuit Court for Baltimore County?

3. Does an administrative agency or on appeal a reviewing Court have the authority to amend the zoning restriction previously granted by the Court of Special Appeals?

The questions as presented by People's Counsel are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition, which alleges essentially a cosmetic change in management style or operation?

2. Is the County Board of Appeals' opinion correct and at least legally sufficient based on the deferential, contextual and interpretive scope of judicial review?

3. Does the Circuit Court remand misapply *res judicata*; exceed the prudential scope of judicial review, fail to exercise judicial self-restraint, and both disrespect and undermine the administrative function[?]

For the reasons that follow, we shall dismiss appellants' appeal as premature.

FACTS AND LEGAL PROCEEDINGS

The waterfront property at the center of the controversy in this matter is located on Cuckold Point Road on Miller's Island in Baltimore County. The 1.27 acre property is improved by a restaurant/bar called Dock of the Bay ("DOB").[1]

In October 2003, shortly after it suffered extensive damage from Hurricane Isabel, Fifth Street, LLC ("FSLLC"), purchased DOB.[2] After a lengthy rebuilding period, FSLLC

[1] A restaurant, under various names and owners, has operated on the property since the 1950s.

[2] For the background of DOB before Boone purchased it, we rely primarily on the factual recitation set forth in *DOB I*.

reopened DOB in March 2004. It was licensed as a restaurant with a capacity of approximately 150-160 patrons and held a Class D liquor license. On an outdoor patio, there was more seating and a bar, along with a children's play area. DOB had an in-house music system to play satellite radio inside and outside, and it offered live entertainment by disc jockeys, bands and karaoke performers.

In 2006, residential neighbors of DOB complained to the Baltimore County Department of Permits and Development Management that the live music was too loud and disruptive and that DOB was operating as a nightclub, which was not permitted in the applicable business zone.[3] DOB was cited three times for: operating a nightclub in a B.L.

[3] DOB is located in a B.L. (Business Local) business zone. Baltimore County Zoning Regulation ("BCZR") §230.1, permits the operation of a "standard restaurant" and a "tavern" in a B.L. zone but does not permit a "nightclub," even by special exception. BCZR §230.3.

BCZR §101.1 defines "standard restaurant" as:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

The same code section defines a "tavern" as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." Finally, "nightclub" is defined by the Code section as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County."

(continued . . .)

zone; erecting a tent without a permit and; failing to cease nightclub operations and to remove the tent.

In August 2006, FSLLC filed a petition for special hearing, seeking a determination of whether DOB was a nightclub in violation of BCZR.[4] The zoning commissioner determined that DOB was a nightclub under BCZR and the International Building Code and ordered DOB to discontinue the playing of music by way of speaker system. On appeal, a majority of the members of the Board affirmed that determination.[5] Upon judicial review, the Circuit Court for Baltimore County also affirmed the determination. In an unreported opinion by a panel of this Court in *DOB I*, we affirmed the circuit court's judgment, concluding that the transcript and record provided substantial evidence to support the Board's finding that DOB was operating as a nightclub. In reaching that

(. . . continued)

The International Building Code, which was adopted as the Building Code of Baltimore County, sets forth advisory characteristics in determining whether an establishment may be characterized as, *e.g.,* a nightclub, dance hall, banquet hall, or cabaret, to include some or all of the following: low lighting levels; entertainment by a live band or recorded music generating above-normal sound levels; no theatrical stage accessories; later than average operating hours; tables and seating arranged or positioned so as to create ill-defined aisles; a specific area designed for dancing; services facilities for alcoholic beverages and food; and high occupant load density.

[4] A "request for special hearing is, in legal effect, a request for a declaratory judgment." *Antwerpen v. Baltimore County*, 163 Md. App. 194, 209 (2005).

[5] One board member dissented, finding that DOB was a restaurant offering some musical entertainment on the side.

conclusion, we analyzed DOB's operation, using the criteria (for determining whether premises are being used as a nightclub) set forth in the International Building Code.

In 2010, Baltimore County filed a petition for contempt alleging that FSLLC continued to operate DOB in violation of the Board's order. At a hearing on the matter, FSLLC argued that DOB was no longer operating as a nightclub because it was not playing music outside the restaurant.

The circuit court, citing the Board's ruling that "the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR," found FSLLC in violation of the Board's order for "continuing to play live and/or recorded entertainment on the premises." The court found FSLLC to be in contempt of court and ordered that FSLLC permanently dismantle any outdoor speaker system at DOB and refrain from allowing "any live band, Disc Jockey, karaoke or any other form of live or recorded entertainment to perform at the Site" for a period of one year beginning November 10, 2010.

DOB closed in 2012. In 2014, Boone purchased the property from FSLLC and reopened DOB. In 2015, Boone filed a petition for special hearing to "amend previous restrictions imposed . . . so as to permit future use of the property as a restaurant with limited accessory music." Before the ALJ, Boone argued that, unlike FSLLC's use of DOB as a nightclub, its business was first and foremost a restaurant, with music to be offered only as a complement to the dining experience.

In his October 22, 2015 written opinion and order, the ALJ concluded that FSLLC's zoning violation and special hearing case had been appealed to the Board, the circuit court, and this Court, all of which had affirmed the agency's finding that DOB was a nightclub, subject to the conditions and restrictions contained in the agency's order. Therefore, the ALJ concluded, "*res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard." In the absence of any evidence of such significant changes by Boone, the ALJ continued, the ruling that DOB was both a restaurant and a nightclub must stand. Boone's petition was therefore denied.

Boone appealed the ALJ's decision to the Board on November 13, 2015. The Board heard argument on the matter on February 17 and April 28, 2016.

At the start of the hearing, People's Counsel argued that the doctrine of *res judicata* permitted the Board to dispose of the matter on a motion to dismiss. Counsel for DOB's residential neighbors agreed and added that amending the zoning restrictions would require a reversal of this Court's 2010 unreported decision, which the Board was not permitted to do. Boone claimed that there had been some significant changes since 2010 that should cause this Board to come to a different conclusion.

Boone's attorney, although acknowledging that FSLLC had operated a nightclub with loud rock music, which was not permitted in the pertinent B.L. zone, argued that Boone was not operating a nightclub, but a restaurant with the occasional "single acoustic guitar player" providing music. With regard to the *res judicata* argument, counsel averred

that *res judicata* did not apply because there had been a significant change in the facts of the case since *DOB I* was decided.

The Board reserved ruling on the *res judicata* issue and heard testimony.

Kenneth Boone ("Mr. Boone") the sole managing member of Boone Kondylas, LLC,[6] testified that DOB is licensed to operate as a restaurant and maintains a Class D liquor license, which Boone purchased from FSLLC. The restaurant averages 80% food / 20% alcohol sales.

Since Mr. Boone's purchase of DOB, his corporation has expanded the restaurant's kitchen to permit the outdoor steaming of crabs and removed the outdoor stage and tent that FSLLC had erected. Indoors, he said, DOB has seating for approximately 125 patrons at dining room tables and the bar, and there is outdoor seating for approximately 100 additional patrons. DOB has no dance floor or stage, and Mr. Boone has no plans to create either one.

DOB is presently open seven days a week, with posted hours of 11:00 a.m. to midnight, but the restaurant generally closes between 9:00 and 10:00 p.m. during winter months when business is slow. The average patron is between 40 and 70 years of age.

Other than a DJ on New Year's Eve 2014, Mr. Boone testified that he had hesitated to book live performers, as he was initially unfamiliar with what the applicable zoning code permitted. His hesitation appears to have been well founded because in 2015, when Mr.

[6] Mike and Donna Kondylas, the "Kondylas" of "Boone Kondylas, LLC" were no longer in partnership with Mr. Boone by the time of the hearing.

Boone scheduled an acoustic guitarist to play on a Saturday night, the neighbors complained about the potential for noise and disruption, and a zoning official threatened to pull DOB's liquor license if the musician played. Mr. Boone cancelled the guitarist, as well as scheduled performances by a Frank Sinatra cover singer and an "oompah" band for Oktoberfest, and he had not scheduled any live music since then.

Boone's petition centered on his desire to "cater to the demographic" and book soloists to play at DOB. Mr. Boone said he was willing to "live within sound restrictions on outside music [and] time restrictions of both indoor and outdoor music" in anticipation of offering live music outdoors on Friday and Saturday nights from 6:00 until 10:00 p.m. (with last call for alcohol at midnight) and on Sunday afternoons from 5:00 until 8:30 p.m.

Several neighborhood residents testified on Boone's behalf, stating that when FSLLC owned DOB, it hired "[v]ery loud, heavy metal" full-sized bands, which played until midnight or 1:00 a.m. on weekends. In contrast, DOB under Boone's ownership has a family atmosphere with an older demographic. The supporters advocated giving Boone a chance to have live music at DOB.

Charles Wolinski, whose house is approximately 200 feet from DOB, testified that he had fought with FSLLC for seven years over the loud music and the disorderly patrons in the parking lot. In his opinion, everything at DOB now that Boone owns it is "exactly the same" as when FSLLC owned it (other than the playing of live music), and the addition of live music would return the establishment to the level of disruption it had created during FSLLC's ownership.

In the opinion of Matthew Ciarpella, who was also a neighborhood protestant in the FSLLC litigation, the playing of any outdoor music at DOB would re-introduce the same noise problems that had been previously litigated. Other neighbors who had heard the loud music played when FSLLC owned DOB also protested the reinstatement of live music outside the restaurant.

The Board issued its written opinion on September 15, 2016. Therein, the Board noted that as the parties, or their privy, and the property had been involved in the previous litigation regarding the same zoning issue of whether live music should be permitted at the DOB, which led to the Board's 2008 opinion, the only manner in which the Board could act upon the new application for special permit previously denied would be if there had been a substantial change in the facts from those previously litigated. The Board found that the restaurant operations and layout and Boone's proposal for live music were substantially the same as when FSLLC owned the premises and litigated the matter. In the Board's view, a change in the restaurant's ownership or management style did not amount to a substantial change. Having previously determined that DOB comprised a nightclub not permitted in a B.L. zone, and having currently determined that no substantial change to the property existed that would support re-litigation of the issue, the Board denied Boone's petition to amend the previous restrictions imposed upon DOB.

Boone filed a petition for judicial review in the circuit court on October 17, 2016. The court heard argument on the petition on June 1, 2017.

Boone initially argued that the Board, in denying his petition on *res judicata* grounds, never decided the merits of the matter, that is, whether DOB can play live music and, if so, under what circumstances. Counsel for Boone said "whether the zoning is the same, the building is the same, the neighbors are the same, that doesn't matter. The Board of Appeals focused on the wrong inquiry" and "got this wrong" in failing to make a determination of the "ultimate issue." Counsel for Boone requested that the court reverse on the *res judicata* issue and remand to the Board for a determination of whether music should be allowed at DOB as an accessory use to the restaurant service and under what circumstances.[7] In the alternative, Boone argued that the court should find that the operative facts had changed since the time of FSLLC's ownership such that *res judicata* should not apply as a bar to the present litigation.

The circuit court observed that the Board had determined that the prior owner played music that was "loud and [performed by] rock bands and the neighbors didn't like it, therefore nobody can do anything different, because it might [move us] back into what the Dock of the Bay was under" the prior owner. The judge went on to say that the panel of this Court, in its *DOB I* decision was "very factually oriented" when it upheld the Board's determination that DOB was a nightclub while owned by FSLLC. In the circuit court's

[7] As the court pointed out, the applicable zoning regulations prohibit a nightclub from operating in a B.L. zone but does not prohibit music from being played. The Board appeared to use "live music" and "nightclub" interchangeably in its ruling.

view, for *res judicata* to apply, "the same analysis has to be done to see and determine whether the proposed use with the current owner would constitute a nightclub." In the court's words, "[i]f the facts were the same, then maybe *res judicata* would apply at this time . . ., but the analysis just was not done in this case."

Although the Board had found no substantial change in the facts as previously litigated, the circuit court observed that the Board did not perform an adequate analysis of the relevant criteria to determine whether DOB is currently a nightclub. Determining that that analysis should be done, the circuit court remanded the matter to the Board for a determination under the facts of this case as to "whether the proposed use would constitute a nightclub under the analysis used by the Court of Special Appeals in that prior case."

The circuit court issued its written order on June 2, 2017. The order remanded the matter to the Board "for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a 'nightclub' as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC)."[8]

[8] *See* footnote 3, *supra*, for the International Business Code criteria.

DISCUSSION

Although not raised by any party, before we may consider appellants' arguments, we must ensure that the appeal has been taken either from a final judgment or from an appealable interlocutory ruling. We shall hold that this appeal is premature.

Pursuant to Maryland Code (2013 Repl. Vol., 2017 Supp.) §12-301 of the Courts and Judicial Proceedings Article ("CJP"), a party may appeal from a final judgment in a civil case. The Court of Appeals has consistently stated that "a judgment or order of a court is final when it determines or concludes the rights of parties or when it denies the parties means of further prosecuting or defending their rights and interests in the subject matter of the proceeding." *Schultz v. Pritts*, 291 Md. 1, 5–6 (1981). We will dismiss an appeal if it is not taken from a final judgment entered in a civil case by a circuit court, or if a non-final judgment does not fit within the statutory exceptions or the collateral order doctrine. *Foy v. Baltimore City Det. Ctr.*, 235 Md. App. 37, 47 (2017), *cert. granted*, 457 Md. 660 (2018).

In general, where, as here, a circuit court orders a remand of the proceeding to an administrative agency, that is an appealable final order because when "a court remands a proceeding to an administrative agency, the matter reverts to the processes of the agency, and there is nothing further for the court to do. Such an order is an appealable final order because it terminates the judicial proceeding and denies the parties means of further prosecuting or defending their rights in the judicial proceeding." *Schultz*, 291 Md. at. 6 (citing *Fred W. Allnutt, Inc. v. Commissioner of Labor and Industry*, 289 Md. 35, 40

(1980)). Nevertheless, a circuit court's remand order in a judicial review action is not always an appealable final judgment. Although a remand after the circuit court has conducted a judicial review of the sole question raised in the administrative action, thereby precluding the parties from further contesting the validity of the agency's decision on the merits of the case, is an appealable final judgment, "a remand that precedes any judicial review is not a final judgment[.]" *Metro Maint. Sys. South, Inc. v. Milburn*, 442 Md. 289, 305, 310 (2015). As we suggested in *Foy*, *supra*, the "lack [of] any discernable conclusions of law or findings of fact" and the circuit court's apparent inability to assess the merits of the Board's decision may render the remand order a non-final judgment. 235 Md. App. at 52-53.

The sole issue before the circuit court in this matter was whether the Board was correct in denying Boone's petition on the ground of *res judicata*, based on the Board's determination that DOB was a nightclub when owned by FSLLC. The circuit court declared itself unable to make a finding on that sole claim because the Board had not determined whether DOB is currently a nightclub, pursuant to the International Business Code factors that were discussed in detail in *DOB I.*

The circuit court did not find any error of law on the part of the Board, nor did it affirm or reverse the Board's decision or decide or conclude the matter in dispute. In other words, the circuit court did not conduct judicial review. As in *Milburn*, the remand was to precede the circuit court's determination of whether there was substantial evidence in the record to support the Board's ruling and whether or not to affirm. 442 Md. at 308. In other

words, although the court did not specifically so state in its order, it deferred its ruling pending the remand, and the matter "contemplates that judicial review awaits the return of the case following the remand." *Id.* at 309. Specifically, once the Board has an opportunity to apply the International Business Code factors to the facts of this case, the circuit court will then determine whether *res judicata* would apply to support the denial of DOB's petition on that basis.

As noted in *Milburn*, 442 Md. at 309, although the parties "have, in a sense, been 'put out of court'. . . there is a strong potential, bordering on certainty, that the issue at hand—the viability of . . . an administrative decision—will be back for determination by the circuit court." The remand order in the subject case does not prevent the parties from continuing to defend or challenge the Board's decision following the remand; once the Board reconsiders its decision, the parties may continue to challenge or defend the Board's decision. All this was made clear in *Milburn*, where the Court said:

> It is true that, on remand, the Board of Appeals retains discretion to reconsider its decision. Finality, however, is not determined by considering what additional proceedings may occur before the agency, but what further proceedings, if any, will occur in the circuit court. *See Brewster* [*v. Woodhaven Bldg. & Dev., Inc.*, 360 Md. 602 (2000)] (proceedings before another forum are irrelevant to finality). Thus, the breadth of the additional proceedings at the agency level do not convert the remand order here into a final, appealable judgment.
>
> After the remand, the parties will have the opportunity to litigate their positions in the circuit court and pursue appellate review of those issues, including any contention that the remand was unlawful or an abuse of discretion. It may be, of course, that the lawfulness of the remand will no longer be at issue and that other issues concerning the validity of the Board's decisions will have become moot as a result of any modifications that the Board makes. In that respect, our holding that a remand that precedes any

> judicial review is not a final judgment is consistent with the purpose of the final judgment rule—to promote judicial efficiency by limiting piecemeal appeals.

Id. at 310-11 (footnotes omitted).

APPEAL DISMISSED; COSTS TO BE PAID BY APPELLANTS.

16-003-SPH

IN THE MATTER OF BOONE KONDYLAS, LLC Petitioner	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-16-010551

* *

ORDER

This matter came before the Court for a hearing on the *Petition for Judicial Review* of the opinion of the Board of Appeals for Baltimore County dated September 15, 206, filed by Petitioner, Boone Kondylas. Upon consideration of the Petitioner's *Memorandum in Support of Petition for Judicial Review*, the *Memorandum of People's Counsel for Baltimore County*, the *Memorandum in Opposition to Petition for Judicial Review* filed by the Protestants, and arguments of counsel, for the reasons stated on the record in open court, it is this 2nd day of June, 2017, by the Circuit Court for Baltimore County, hereby

ORDERED, that this matter is Remanded to the Board of Appeals for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a "nightclub" as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Clarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC).

RECEIVED
JUN 08 2017
BALTIMORE COUNTY
BOARD OF APPEALS

H. Patrick Stringer, Judge

12/15/16
TO WP

RECEIVED
DEC 14 2016
DEPARTMENT OF PERMITS
APPROVALS AND INSPECTIONS

Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

December 14, 2016

VIA HAND-DELIVERY
Civil Clerk
Circuit Court for Baltimore County
401 Bosley Avenue
Towson, Maryland 21204

RE: In the matter of: Boone Kondylas, LLC
Civil Action No.: 03-C-16-010551
Board of Appeals Case No.: 16-003-SPH

Dear Clerk:

Enclosed for filing please find the Proceedings before the Administrative Law Judge and the Board of Appeals for Baltimore County. Additionally, please allow this letter to reflect the filing of one accordion folder containing the entire Board of Appeals case file, exhibits, and transcript pursuant to Maryland Rule 7-206.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Tammy A. McDiarmid
Legal Secretary

Enclosures

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY	*	
PETITION OF: BOONE KONDYLAS, LLC	*	
FOR JUDICIAL REVIEW OF THE OPINION OF THE BOARD OF APPEALS OF BALTIMORE COUNTY JEFFERSON BUILDING – ROOM 203 105 W. CHESAPEAKE AVENUE TOWSON, MARYLAND 21204	*	CIVIL ACTION NO. : 03-C-16-010551
IN THE MATTER OF: BOONE KONDYLAS, LLC FOR PROPERTY LOCATED AT 9025 CUCKOLD POINT ROAD	*	
15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	*	
BOARD OF APPEALS CASE NO.: 16-003-SPH		

* * * * * * * * * * * *

PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes the Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the original papers on file in the Department of Permits, Approvals and Inspections and the Board of Appeals of Baltimore County:

ENTRIES FROM THE DOCKET OF THE BOARD OF APPEALS AND DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS OF BALTIMORE COUNTY

July 6, 2015	Petition for Special Hearing filed by Lawrence E. Schmidt, Esquire on behalf of Boone Kondylas, LLC under Section 500.7 of the Baltimore County Zoning Regulations to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA-06-044 and CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music.

February 17, 2016 Board convened for a Hearing, Day 1.

Exhibits submitted at Motion Hearing before the Board of Appeals:

Protestants' Exhibit No.

1 – Opinion and Order of OAH (Case No. 2016-0003-SPH) dated October 22, 2015

2 – Unreported Opinion of Court of Special Appeals No. 810, Sept. Term 2009, filed July 9, 2010

People's Counsel Exhibit No.

1 – Compilation of BCZR, Opinion of OAH (Case No. 2016-0003-SPH), Trial Memorandum from Appellant (Case No. 2016-0003-SPH), definition of anticipate, Unreported Court of Special Appeals of Maryland (No. 810 Sept. Term 2009, filed July 9, 2010), Majority Opinion of Baltimore County Board of Appeals (Case Nos. CBA-06-044 and CBA-07-134)

2 – Zoning Checklist/PAI

February 19, 2016 E-mails between Board and counsel regarding scheduling and witnesses.

March 8, 2016 Notice of Reassignment issued by the Board.

April 28, 2016 Board convened for a Hearing, Day 2.

Exhibits submitted at Hearings before the Board of Appeals:

Petitioner's Exhibit No.

1 – Site Plan

2A – Majority Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2B – Dissenting Opinion Board of Appeals (Case Nos. 07-144-SPH), CBA-06-044, and CBA-07-134)

2C – Ruling on Motion for Reconsideration and Clarification (Case Nos. 07-144-SPH, CBA-06-044, and CBA-07-134)

3 – Circuit Court Opinion, Final Order, Case No. 03-C-08-009996

4 – Unreported Opinion, Court of Special Appeals, No. 810, Sept. Term, 2009, Filed July 9, 2010

5 – Memorandum Opinion (Exhibit) Contempt-Circuit Court for Baltimore County, Case No. 03-C-08-009996

6 – My Neighborhood Map/aerial photograph of "Dock of the Bay"

10 – Letter dated June 9, 2008, letter measured decibel levels emanating from the Dock of the Bay
11 – Letter dated October 3, 2007 measuring the decibel levels from Dock of the Bay
12 – Photograph of Row Boat Willie's building
13 – Large map of aerial view of Dock of the Bay and area, 2016 Google Imaging
14 – My Neighborhood Map printed 4/27/2016, aerial view of Dock of the Bay and area
15 – 2015 Alcoholic Beverage License for Dock of the Bay
16 – Baltimore County Police Records, Sgt. Parrish
17 – Summary of Calls from Exhibit 16
18 – Facebook posts for Dock of the Bay 2/17/16 Boone Letter
19 – Facebook posts for Dock of the Bay 2/21/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
20 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
21 – Facebook post for Dock of the Bay 4/27/16 Boone Letter
22 – Facebook post from Dock of the Bay 2/22/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
23 – Facebook posts from Dock of the Bay (ID ONLY/NOT ADMITTED/NOT IN FILE)

People's Counsel Exhibit No.

1 – Website photo showing hours of operation
2A – SDAT record showing 9025 Cuckold Point Road, Lot 504
2B – SDAT record showing Cuckold Point Road, Lot 500
2C – SDAT record showing Cuckold Point Road, Lot 502
2D – SDAT record showing Cuckold Point Road, Lot 501
3 – Deed to 9025 Cuckold Point Road dated September 30, 2014
4 – Deed to 9025 Cuckold Point Road dated March 10, 1999
5 – People's Counsel Sign-In Sheet, 2/17/16
6 – People's Counsel Sign-In Sheet, 4/28/16
7 – Map – Property ID and Zoning, 2014 image
8A – Map
8B – Map (color)
8C – Map
9 – Comprehensive Zoning Map
10 – Website page for Mark Alan date 4/26/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)
11A – Baltimore County website showing liquor license for Dock of the Bay transfer 4/27/16 (ID ONLY/NOT ADMITTED/NOT IN FILE)

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.

Tammy A. McDiarmid

Tammy A. McDiarmid, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3180
appealsboard@baltimorecountymd.gov

c: Lawrence E. Schmidt, Esquire
Francis X. Borgerding, Esquire
Kenneth Boone/Boone Kondylas, LLC
Charles Wolinski
Brad and Bonnie Metheny
Matt Ciarpella
Tammy Waldmann
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

CASE NO. 2016-0003-SPH

CHECKLIST

Comment Received	Department	Support/Oppose/ Conditions/ Comments/ No Comment
7/17/15	DEVELOPMENT PLANS REVIEW (if not received, date e-mail sent _____)	C
_____	DEPS (if not received, date e-mail sent _____)	_____
_____	FIRE DEPARTMENT	_____
8/4/15	PLANNING (if not received, date e-mail sent _____)	C
7/14/15	STATE HIGHWAY ADMINISTRATION	no Obj
_____	TRAFFIC ENGINEERING	_____
_____	COMMUNITY ASSOCIATION	_____
_____	ADJACENT PROPERTY OWNERS	_____

ZONING VIOLATION (Case No. _____)

PRIOR ZONING (Case No. 2007-0144-SPH)

NEWSPAPER ADVERTISEMENT Date: 9/8/15

SIGN POSTING Date: 9/6/15 by O'Keefe

PEOPLE'S COUNSEL APPEARANCE Yes ☑ No ☐

PEOPLE'S COUNSEL COMMENT LETTER Yes ☐ No ☐

Comments, if any: _____

Real Property Data Search (w4) Guide to searching the database

Search Result for BALTIMORE COUNTY

View Map View GroundRent Redemption View GroundRent Registration

Account Identifier: District - 15 Account Number - 1508790109

Owner Information

Owner Name:	BOONE KONDYLAS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	9025 CUCKOLD POINT RD BALTIMORE MD 21219-1635	**Deed Reference:**	/35488/ 00133

Location & Structure Information

Premises Address:	9025 CUCKOLD POINT RD 0-0000 Waterfront	**Legal Description:**	9025 CUCKOLD POINT RD SWAN POINT

Map:	Grid:	Parcel:	Sub District:	Subdivision:	Section:	Block:	Lot:	Assessment Year:	Plat No:	
0112	0015	0004		0000			504	2015	Plat Ref:	0009/ 0004

Special Tax Areas: **Town:** NONE
Ad Valorem:
Tax Class:

Primary Structure Built	Above Grade Enclosed Area	Finished Basement Area	Property Land Area	County Use
1993	6530		7,500 SF	30

Stories	Basement	Type	Exterior	Full/Half Bath	Garage	Last Major Renovation
		SERVICE GARAGE				

Value Information

	Base Value	Value As of 01/01/2015	Phase-in Assessments As of 07/01/2015	As of 07/01/2016
Land:	225,000	225,000		
Improvements	379,100	379,200		
Total:	604,100	604,200	604,133	604,167
Preferential Land:	0			0

Transfer Information

Seller: FIFTH STREET LLC	**Date:** 10/21/2014	**Price:** $600,000
Type: ARMS LENGTH MULTIPLE	**Deed1:** /35488/ 00133	**Deed2:**
Seller: HRANICKA EDWARD F	**Date:** 04/08/1999	**Price:** $300,000
Type: ARMS LENGTH MULTIPLE	**Deed1:** /13658/ 00354	**Deed2:**
Seller:	**Date:**	**Price:**
Type:	**Deed1:**	**Deed2:**

Exemption Information

Partial Exempt Assessments:	Class	07/01/2015	07/01/2016
County:	000	0.00	
State:	000	0.00	
Municipal:	000	0.00|0.00	0.00|0.00

Tax Exempt:
Exempt Class:
Special Tax Recapture: NONE

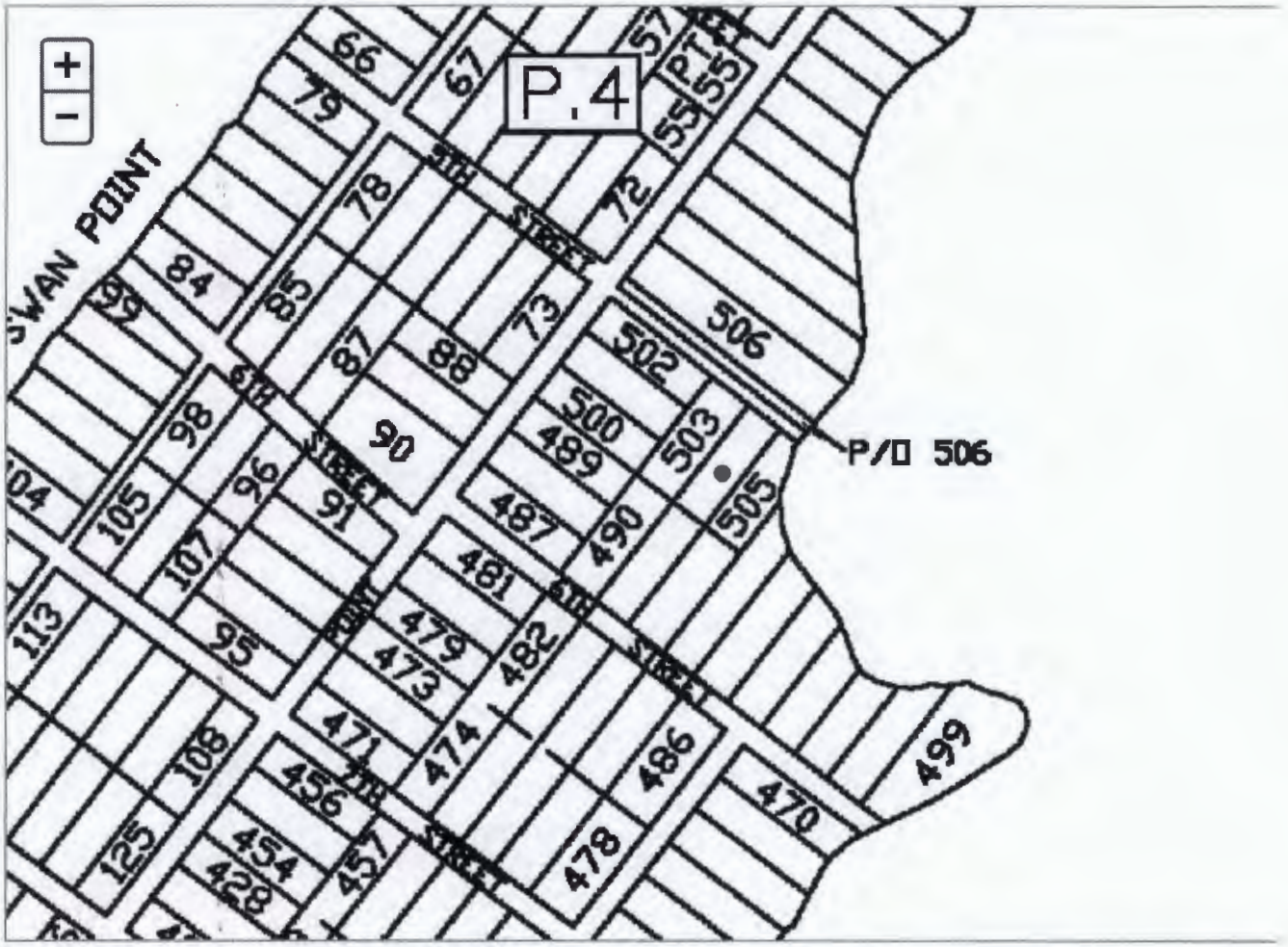
Homestead Application Information

Homestead Application Status: No Application

Baltimore County

New Search (http://sdat.dat.maryland.gov/RealProperty)

District: 15 Account Number: 1508790109



The information shown on this map has been compiled from deed descriptions and plats and is not a property survey. The map should not be used for legal descriptions. Users noting errors are urged to notify the Maryland Department of Planning Mapping, 301 W. Preston Street, Baltimore MD 21201.

If a plat for a property is needed, contact the local Land Records office where the property is located. Plats are also available online through the Maryland State Archives at www.plats.net (http://www.plats.net).

Property maps provided courtesy of the Maryland Department of Planning ©2011.

For more information on electronic mapping applications, visit the Maryland Department of Planning web site at www.mdp.state.md.us/OurProducts/OurProducts.shtml (http://www.mdp.state.md.us/OurProducts/OurProducts.shtml).



(http://imsweb05.mdp.state.md.us/website/mosp/)

Loading... Please Wait. Loading... Please Wait. -->

Larry Hogan, *Governor*
Boyd Rutherford, *Lt. Governor*

SHA State Highway Administration
Maryland Department of Transportation

Pete K. Rahn, *Secretary*
Douglas H. Simmons, *Acting Administrator*

Date: 7/14/15

Ms. Kristen Lewis
Baltimore County Office of
Permits and Development Management
County Office Building, Room 109
Towson, Maryland 21204

RE: Baltimore County
Item No 2016-0003-SPH
Special Hearing
BooneKondylas LLC, Ken Boone.
9025 Cuckold Point Road.

Dear Ms. Lewis:

Thank you for the opportunity to review your referral request on the subject of the above captioned. We have determined that the subject property does not access a State roadway and is not affected by any State Highway Administration projects. Therefore, based upon available information this office has no objection to Baltimore County Zoning Advisory Committee approval of Item No. 2016-0003-SPH

Should you have any questions regarding this matter, please contact Mr. Richard Zeller at 410-229-2332 or 1-866-998-0367 (in Maryland only) extension 2332, or by email at (rzeller@sha.state.md.us).

Sincerely,

David W. Peake
Metropolitan District Engineer
Baltimore & Harford Counties

DWP/RAZ

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon
Deputy Administrative Officer and
Director of Permits, Approvals and Inspections

DATE: August 4, 2015

FROM: Andrea Van Arsdale
Director, Department of Planning

SUBJECT: 9025 Cuckold Point Road

INFORMATION:

Item Number: 16-003

Petitioner: Ken Boone

Zoning: BL

Requested Action: Special Hearing

SUMMARY OF RECOMMENDATIONS:

The Department of Planning has reviewed the Petition for a Special Hearing to determine whether the Administrative Law Judge should approve amendments to previous restrictions imposed in Zoning Cases 07-144-SPH, CBA-06-044, CBA-07-134 so as to permit future use of the property as a restaurant with limited accessory music and other and further relief as may be required.

Testimony in the aforementioned cases established the fact of the prior use of the property as a "nightclub" which is not listed as an allowed use in the zone. Upon a site visit and discussions with the petitioner's counsel, the Department understands the future use of the property will be as a permitted restaurant that will have music, both live and reproduced, as an accessory component.

The Department has no objection to the granting of the petitioned zoning relief conditioned upon the following:

There shall be no dance floor, nor shall the restaurant become a "nightclub" as defined in the BCZR Section 101.1 and the Building Code of Baltimore County.

All accessory music shall be limited to reasonable sound levels so as not to disturb adjacent properties.

All accessory music shall be limited to the following hours or as may be otherwise established by the Administrative Law Judge:

a. No outdoor music after 10:00 p.m. Monday thru Saturday.

b. No indoor music after 12:00 a.m. (midnight) Monday thru Saturday.

c. No music after 8:00 p.m. on Sundays.

For further information concerning the matters stated herein, please contact Bill Skibinski at 410-887-3480.

Division Chief: Kathy Schlabach

AVA/KS

C: Bill Skibinski

TO: PATUXENT PUBLISHING COMPANY
Tuesday, September 8, 2015 Issue - Jeffersonian

Please forward billing to:
Lawrence Schmidt 410-821-0070
Smith, Gildea & Schmidt
600 Washington Avenue, Ste. 200
Towson, MD 21204

NOTICE OF ZONING HEARING

The Administrative Law Judge of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 2016-0003-SPH
9025 Cuckold Point Road
SE/s of Cuckold Point Road, 15 ft. SW of the centerline of 5th Avenue
15th Election District – 7th Councilmanic District
Legal Owners: Boone Kondylas, LLC, Ken Boone

Special Hearing to amend previous restrictions imposed in cases 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music; and for such other and further relief as may be required by the Administrative Law Judge for Baltimore County.

Hearing: Monday, September 28, 2015 at 10:00 a.m. in Room 205, Jefferson Building, 105 West Chesapeake Avenue, Towson 21204

Arnold Jablon
Director of Permits, Approvals and Inspections for Baltimore County

NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ADMINISTRATIVE HEARINGS OFFICE AT 410-887-3868.
(2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT
ZONING REVIEW

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

The Baltimore County Zoning Regulations (BCZR) require that notice be given to the general public/neighboring property owners relative to property which is the subject of an upcoming zoning hearing. For those petitions which require a public hearing, this notice is accomplished by posting a sign on the property (responsibility of the petitioner) and placement of a notice in a newspaper of general circulation in the County, both at least fifteen (15) days before the hearing.

Zoning Review will ensure that the legal requirements for advertising are satisfied. However, the petitioner is responsible for the costs associated with these requirements. The newspaper will bill the person listed below for the advertising. This advertising is due upon receipt and should be remitted directly to the newspaper.

OPINIONS MAY NOT BE ISSUED UNTIL ALL ADVERTISING COSTS ARE PAID.

For Newspaper Advertising:

Item Number or Case Number: 2016-0003-SPH

Petitioner: Boone Kondylas, LLC

Address or Location: 9025 Cuckold Point Road

PLEASE FORWARD ADVERTISING BILL TO:

Name: Lawrence E. Schmidt, Esquire

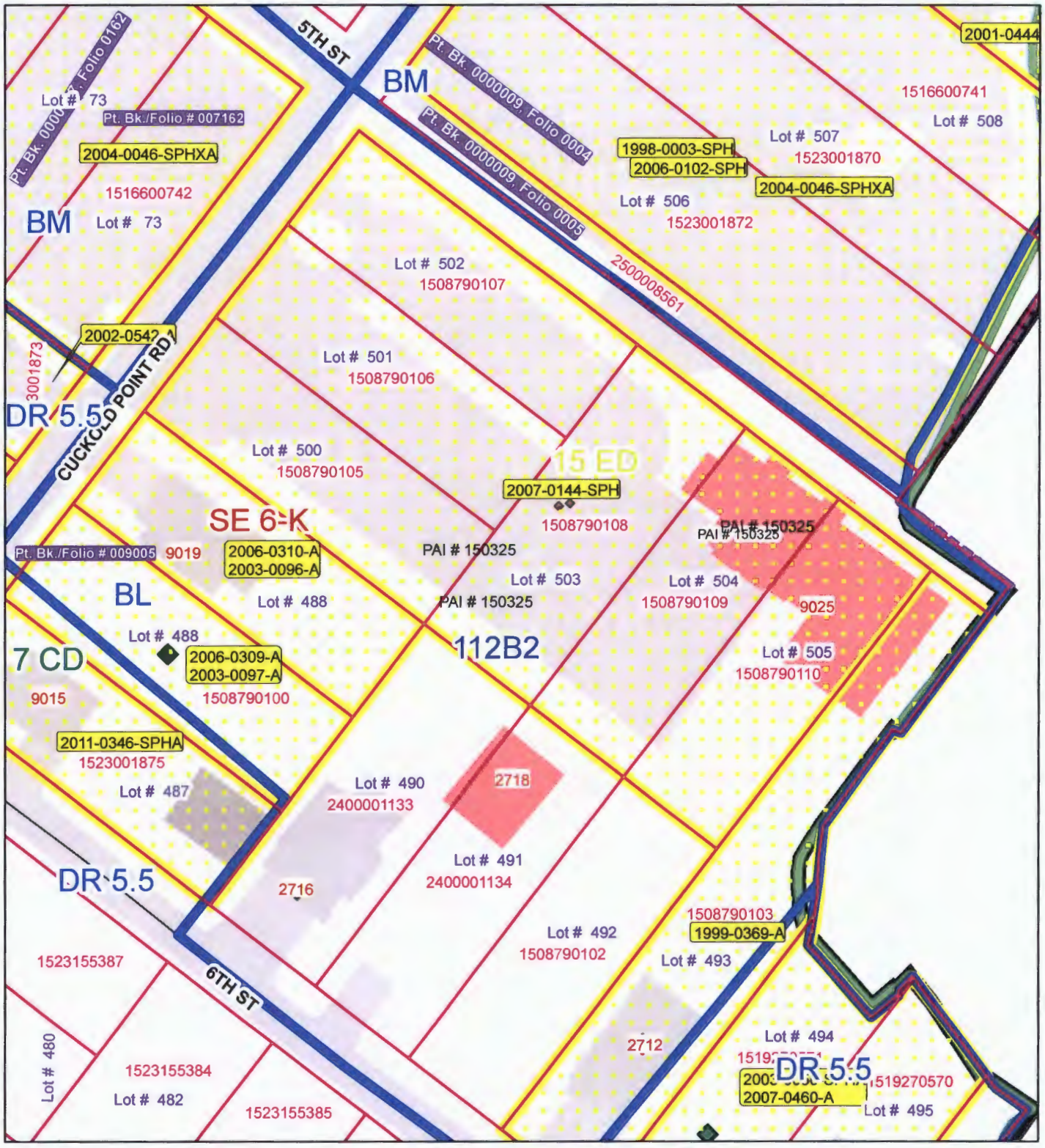
Address: Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

Telephone Number: 410-821-0070

Revised 2/20/98 - SCJ


BM
BM
BL
DR 5.5
290'
170'
160'
115'
130'
58'
80'
58'
225'
9019
9025
9015
2718
2716
2712
2708
2704
2711
CUCKOLD POINT RD
61ST ST
SWAN AVE
103 Feet

9025 Cuckold Point Road



Publication Date: 7/2/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

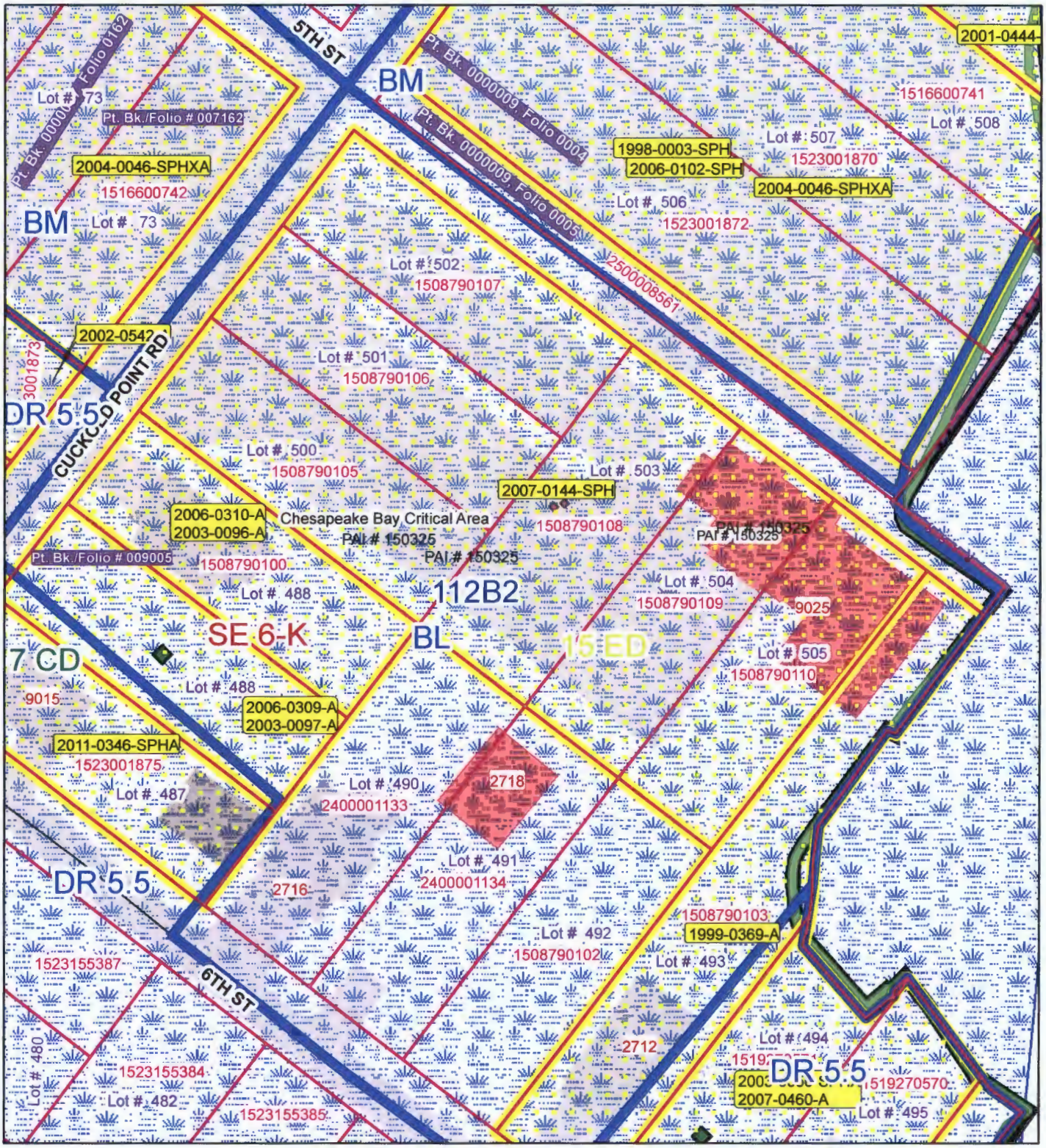
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0 15 30 60 90 120 Feet

1 inch = 60 feet

Item #0003

Chesapeake Bay Critical Area



Publication Date: 7/6/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

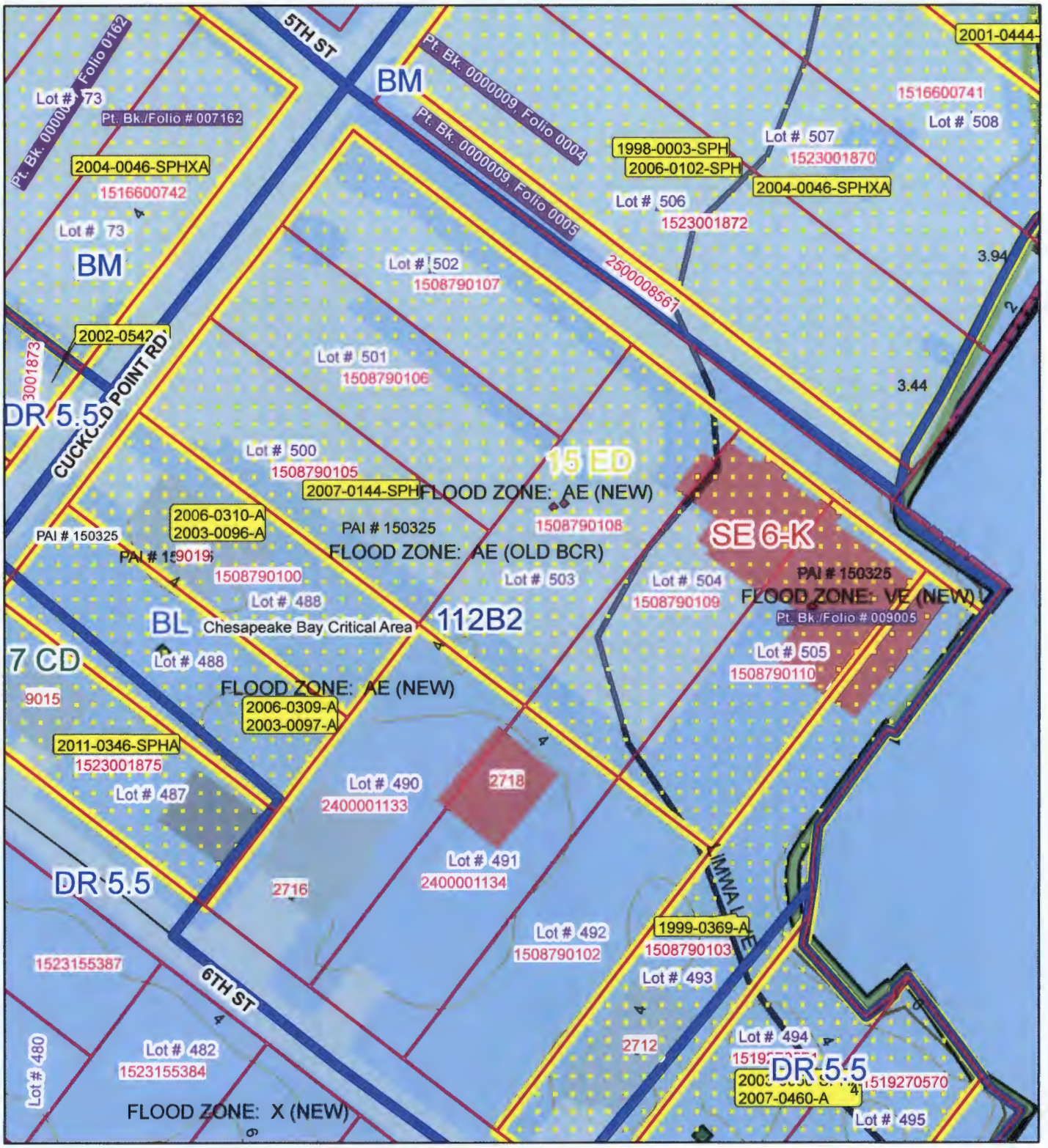
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0 15 30 60 90 120 Feet

1 inch = 60 feet

Item #0003

Elevations and Flood Hazards



Publication Date: 7/6/2015

Publication Agency: Permits, Approvals & Inspections
Projection/Datum: Maryland State Plane,
FIPS 1900, NAD 1983/91 HARN, US Foot

0 15 30 60 90 120 Feet

1 inch = 60 feet

Item #0003