

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

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**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 22<sup>nd</sup> 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.

JEB:sln

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Signed \_\_\_\_\_  
JOHN E. BEVERUNGEN  
Administrative Law Judge  
for Baltimore County