

IN THE MATTER OF
BOONE KONDYLAS, LLC - Petitioner
9025 Cuckold Point Road
Sparrow's Point, MD 21219

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

* BEFORE THE
* BOARD OF APPEALS
* OF
* 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

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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.”

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.

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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 Thamer, 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

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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.,

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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.*).

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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.**

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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 Oktoberfest. (T, p. 58). Mr. Boone hired a disc jockey on New Year’s Eve. (T. p. 51).

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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

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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

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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

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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.

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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

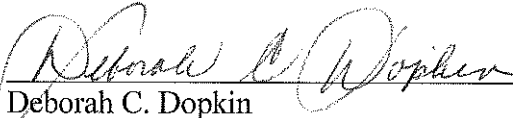
THEREFORE, IT IS THIS 22nd day of August, 2019, by the Board of Appeals of Baltimore County,

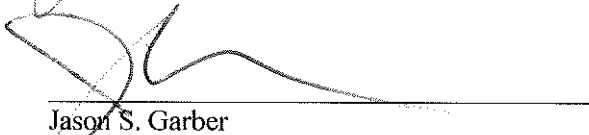
ORDERED that the Petition for Special Hearing to amend previous restrictions imposed in Case Nos. 07-144-SPH, CBA 06-044 and CBA 07-134 so as to permit future use of the property as a restaurant with limited accessory music be and the same is hereby **DENIED**.

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
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