

BOARD OF APPEALS

June 11, 2025

County Administration Building, 100 W. Washington St., Meeting Room 2000, Hagerstown, at 6:00 p.m.

AGENDA

AP2025-011: An appeal for charging administrator error of the Zoning Administrator's determination of Section 4.3d for the legal non-conforming use of a bar & grill on vacate lot owned by the appellant, Kehoe Realty LLC and located at 1221 & 1225 Security Road, Hagerstown, Zoned Residential Suburban. - **APPELLANT IS ALLOWED TO CONTINUE THE NON-CONFORMING USE ON THE PROPERTY.**

Pursuant to the Maryland Open Meetings Law, notice is hereby given that the deliberations of the Board of Zoning Appeals are open to the public. Furthermore, the Board, at its discretion, may render a decision as to some or all of the cases at the hearing described above or at a subsequent hearing, the date and time of which will be announced prior to the conclusion of the public hearing. Individuals requiring special accommodations are requested to contact Katie Rathvon at 240-313-2464 Voice, 240-313-2130 Voice/TDD no later than June 2, 2025. Any person desiring a stenographic transcript shall be responsible for supplying a competent stenographer.

The Board of Appeals reserves the right to vary the order in which the cases are called. Please take note of the Amended Rules of Procedure (Adopted July 5, 2006), Public Hearing, Section 4(d) which states:

Applicants shall have ten (10) minutes in which to present their request and may, upon request to and permission of the Board, receive an additional twenty (20) minutes for their presentation. Following the Applicant's case in chief, other individuals may receive three (3) minutes to testify, except in the circumstance where an individual is representing a group, in which case said individual shall be given eight (8) minutes to testify.

Those Applicants requesting the additional twenty (20) minutes shall have their case automatically moved to the end of the docket.

For extraordinary cause, the Board may extend any time period set forth herein, or otherwise modify or suspend these Rules, to uphold the spirit of the Ordinance and to do substantial justice.

Tracie Felker, Chairman

Board of Zoning Appeals



WASHINGTON COUNTY BOARD OF ZONING APPEALS

747 Northern Avenue | Hagerstown, MD 21742-2723 | P:240.313.2430 | F:240.313.2431 | Hearing Impaired: 7-1-1

ZONING APPEAL

Property Owner: Kehoe Realty LLC
6390 Riding Horse Drive
Mt. Airy MD 21771

Appellant: Kehoe Realty LLC
6390 Riding Horse Drive
Mt. Airy MD 21771

Property Location: 1221 & 1225 Security Road
Hagerstown, MD 21742

Description Of Appeal: Charging Administrator Error of the Zoning Administrator's determination of Section 4.3d for the legal non-conforming use of a bar & grill on vacant lot.

Docket No: AP2025-011
Tax ID No: 18016613
Zoning: RS
RB Overlay: No
Zoning Overlay:
Filed Date: 05/07/2025
Hearing Date: 06/11/2025

Appellant's Legal Interest In Above Property:

Owner:	Yes	Contract to Rent/Lease:	No
Lessee:	No	Contract to Purchase:	No
Other:			

Previous Petition/Appeal Docket No(s):

Applicable Ordinance Sections: Washington County Zoning Ordinance Section 4.3 d

Reason For Hardship:

If Appeal of Ruling, Date Of Ruling: 04/14/2025

Ruling Official/Agency: Zoning Administrator

Existing Use: **Proposed Use:**

Previous Use Ceased For At Least 6 Months: **Date Ceased:**

Area Devoted To Non-Conforming Use -

Existing:
Proposed:

I hearby affirm that all of the statements and information contained in or filed with this appeal are true and correct.

Appellant Signature

State Of Maryland, Washington County to-wit:

Sworn and subscribed before me this May day of 25, 2025.

My Commission Expires
Kathryn B Rathvon
NOTARY PUBLIC
WASHINGTON COUNTY
MARYLAND
MY COMMISSION EXPIRES NOVEMBER 07, 2025

Notary Public



WASHINGTON COUNTY BOARD OF ZONING APPEALS

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BOARD OF ZONING APPEALS

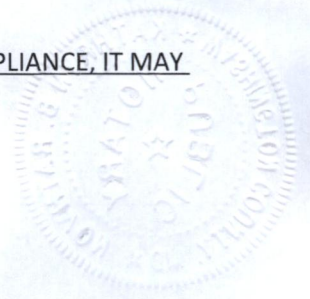
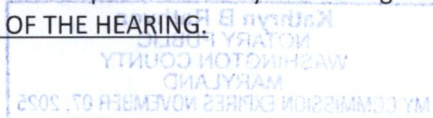
ATTENTION!

Posting Instructions

The premises MUST be posted in accordance with the following rules:

1. The sign must be posted a minimum of fourteen (14) days prior to the public hearing
Section 25.51(c) Property upon which the application or appeal is concerned shall be posted conspicuously by a zoning notice no less in size than twenty-two (22) inches by twenty-eight (28) inches at least fourteen (14) days before the date of the hearing.
2. The sign must be placed on the property within ten (10) feet of the property line which abuts the most traveled public road.
3. The sign must be posted in a conspicuous manner not over six (6) feet above the ground level, and affixed to a sturdy frame where it will be clearly visible and legible to the public.
4. The sign shall be maintained at all times by the applicant until after the public hearing. If a new sign is needed or required, please contact the Plan Review Department at 240-313-2460.
5. An affidavit certifying the property will be posted for the minimum of fourteen (14) days prior to the public hearing date.

Proper posting of the sign will be spot checked by the Zoning Inspector. IF SIGN IS NOT IN COMPLIANCE, IT MAY RESULT IN RESCHEDULING OF THE HEARING.





WASHINGTON COUNTY BOARD OF ZONING APPEALS

747 Northern Avenue | Hagerstown, MD 21742-2723 | P:240.313.2430 | F:240.313.2431 | Hearing Impaired: 7-1-1

AFFIDAVIT IN COMPLIANCE WITH SECTION 25.51(C)


Docket No: AP2025-011

State of Maryland Washington County, To Wit:

On 5/7/2025, before me the subscriber, a Notary of the public of the State and County aforesaid, personally appeared Jason Divelbiss and made oath in due form of law as follows:

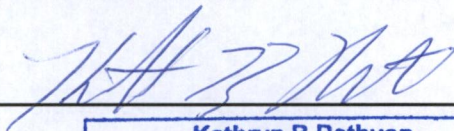
Jason Divelbiss will post the zoning notice sign(s) given to me by the Zoning Administrator in accordance with Section 25.51(c) of the Washington County Zoning Ordinance for the above captioned Board of Appeals case, scheduled for public hearing on 06/11/2025, and that said sign(s) will be erected on the subject property in accordance with the required distances and positioning as set out in the attached posting instructions.

Sign(s) will be posted on 05/27/2025 and will remain until after the above hearing date.



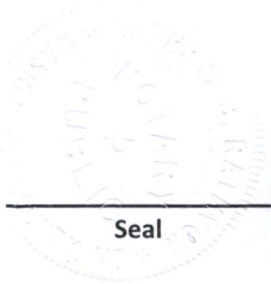
Jason Divelbiss

Sworn and subscribed before me the day and year first above written.



Kathryn B Rathvon
NOTARY PUBLIC
WASHINGTON COUNTY
MARYLAND
MY COMMISSION EXPIRES NOVEMBER 07, 2025

Notary Public



Seal

My Commission Expires



WASHINGTON COUNTY BOARD OF ZONING APPEALS

747 Northern Avenue | Hagerstown, MD 21742-2723 | P: 240.313.2430 | F: 240.313.2431 | Hearing Impaired: 7-1-1

ZONING APPEAL

Property Owner: Kehoe Realty LLC
6390 Riding Horse Drive
Mt. Airy MD 21771

Appellant: Kehoe Realty LLC
6390 Riding Horse Drive
303 MEMORIAL BLVD W
Mt. Airy MD 21771

Property Location: 1221 & 1225 Security Road
Hagerstown, MD 21742

Description Of Appeal: Charging Administrator Error of the Zoning Administrator's determination of Section 4.3d for the legal non-conformation use of a bar & grill on vacant lot.

Docket No: AP2025-011
Tax ID No: 18016613
Zoning: A(R); RS
RB Overlay: No
Zoning Overlay: IM
Filed Date: 05/07/2025
Hearing Date: 05/28/2025

Appellant's Legal Interest In Above Property:

Owner:	Yes	Contract to Rent/Lease:	No
Lessee:	No	Contract to Purchase:	No
Other:			

Previous Petition/Appeal Docket No(s):

Applicable Ordinance Sections: Washington County Zoning Ordinance Section 4.3 d

Reason For Hardship:

If Appeal of Ruling, Date Of Ruling: 04/14/2025


Ruling Official/Agency: Zoning Administrator

Existing Use: **Proposed Use:**

Previous Use Ceased For At Least 6 Months: **Date Ceased:**

Area Devoted To Non-Conforming Use -
Existing:
Proposed:

I hearby affirm that all of the statements and information contained in or filed with this appeal are true and correct.


Appellant Signature

State Of Maryland, Washington County to-wit:

Sworn and subscribed before me this 8 day of May, 2025.




Notary Public



WASHINGTON COUNTY BOARD OF ZONING APPEALS

747 Northern Avenue | Hagerstown, MD 21742-2723 | P: 240.313.2430 | F: 240.313.2431 | Hearing Impaired: 7-1-1

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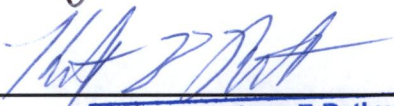
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Sign(s) will be posted on 05/13/2025 and will remain until after the above hearing date.



Jason Divelbiss

Sworn and subscribed before me the day and year first above written.





Notary Public

Seal

My Commission Expires



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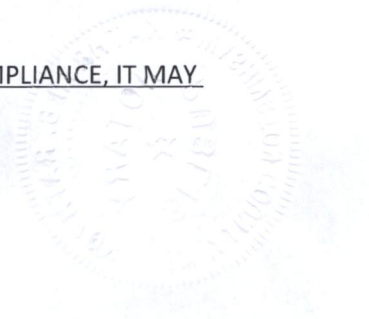
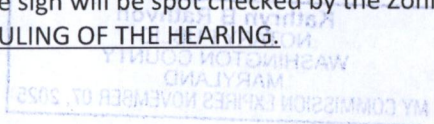
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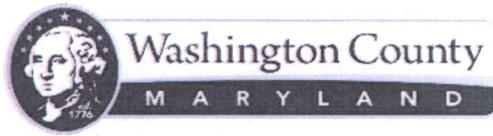
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BOARD OF ZONING APPEALS

747 Northern Avenue Hagerstown, MD 21742 240.313.2430 240.313.2461

7-1-1 WWW.WASHCO-MD.NET

Appeal Charging Error In Administrative Ruling or Action

Property Location: 1221 & 1225 Security Road, Hagerstown MD

Appellant's present legal interest in above property: (Check One)

☒ Owner (Including Joint Ownership) ☐ Lessee ☐ Contract to rent/lease
☐ Contract to Purchase ☐ Other _____

Official or agency from whose ruling or action this appeal is made: Planning Director/
Zoning Administrator

Date of ruling or action: April 14, 2025

On attached sheet please provide:

- Brief description of ruling or action from which this appeal is made. (Attach copy of ruling or document indicating such action)
- Brief description of what, in Appellant's view, the ruling or action should have been
- Section/subsection of the Zoning Ordinance which Appellant contends was misinterpreted
- Error in fact, if any, involved in the ruling or action from which this appeal is made
- Error of law, if any, involved in the ruling or action from which this appeal is made
- Questions of fact, if any, presented to the Board of this appeal
- State of Appellant's interest, i.e. manner in which Appellant is aggrieved by the ruling or action complained of (as property owner or otherwise):

I hereby certify that I have, to the best of my knowledge, accurately supplied the information required for the above referenced appeal.

[Signature]
Signature of Appellant

Kehoe Realty LLC
6390 Riding Horse Drive
W. H. Army, MD 21771
Address of Appellant

jdivelbiss@divelbisslaw.com
Email of Appellant

(410) 365-8254
Phone Number of Appellant

This appeal form is to be used to assist the customer in gathering the information necessary to submit an application. However, the application shall be processed in person.

	<u>Map/Parcel</u>	<u>Premises Address</u>	<u>Owner</u>	<u>Mailing Address</u>
1	0038/0615	458 Antietam Drive. Hagerstown, MD 21742	Washington County Board of Commissioners	100 W. Washington St. Ste 1101 Hagerstown, MD 21740
2	0038/0655	Security Rd. Hagerstown, MD 21742	Holcim US Inc	6211 Ann Arbor Rd. Dundee, MI 48131
3	0038/0754	Security Rd. Hagerstown, MD 21742	Andy B. Stamper Jr. & Pamela K. Stamper	1210 Security Rd. Hagerstown, MD 21742
4	0038/0753	1210 Security Rd. Hagerstown, MD 21742	Andy B. Stamper Jr. & Pamela K. Stamper	1210 Security Rd. Hagerstown, MD 21742
5	0038/0098	1260 Security Rd. Hagerstown, MD 21742	Holcim US Inc	6211 Ann Arbor Rd. Dundee, MI 48131
6	0038/0609	Needys Lane Hagerstown, MD 21742	Gerald E. Levardi	70 Upper Rd. Martinsburg, WV 25401
7	0038/0610	Needys Lane Hagerstown, MD 21742	Anthony Christopher Manilla	19222 Jamestown Drive. Hagerstown, MD 21742

Supplemental Information in Support of Administrative Error Appeal

Description of Ruling from Which Appeal is Made:

For decades the property located at 1221-1225 Security Road (the “**Property**”) has operated as the Creekside Bar & Grill (formerly known as the Creekside Inn) (the “**Business**”).

In recognition of this fact, the Property is proposed in the County’s draft Comprehensive Plan Update to be classified as “Business – Commercial Mix.” See attached Land-Use Map.

Notwithstanding this history and planned update, the Property is currently zoned RS (Residential, Suburban) (see attached Zoning Map) which, although permitting a number of civic, institutional and light commercial uses, does not permit Restaurants, Taverns or Alcoholic beverage package stores all of which are elements of the Business.

In May 2023, prior to demolishing the existing building on the Property in anticipation of a full re-build, the Appellant requested and received from the Planning Director / Zoning Administrator confirmation that the Business could be re-established and continue to operate on the Property as a Legal, Non-Conforming Use. See attached letter dated May 20, 2023 on behalf of the Applicant and responsive email from the Planning Director / Zoning Administrator dated June 22, 2023.

In July 2023 (AP2023-027) this Board approved a front yard setback variance from 40’ to 20’ to facilitate construction of the proposed new building. See attached decision of the Board.

With these confirmations and approvals in hand, the Appellant proceeded with demolition of the existing building.

After (i) a protracted delay in the design and engineering process related to the fire protection system for the new building; (ii) an associated re-examination of the project’s overall financial viability; and (iii) an attempt to market and sell the Property inclusive of the partially approved plans to build the new building and continue the Business, the Applicant renewed its request for confirmation of the Business’ status as a Legal, Non-Conforming Use on the Property. See attached letter dated March 21, 2025.

By letter dated April 14, 2025, a copy of which is attached hereto, the Planning Director / Zoning Administrator determined that the Business’ Legal, Non-Conforming Use status could not be confirmed and in so doing stated:

Now that the building has been demolished and the liquor license has been expired for over 6 months, we now find that the owner has abandoned their intent to continue the non-conforming use of the property.

It is from this ruling of the Planning Director / Zoning Administrator that the within appeal is made.

Description of What, in Appellant's View, Ruling Should Have Been:

In Appellant's view, there has been neither a cessation of the non-conforming use nor an abandonment of the intent to continue said use and the Planning Director / Zoning Administrator should have accepted Appellant's March 21st letter in the spirit in which it was submitted. That is, to explain the current status of the Property and the Appellant's intent to continue with the process of re-establishing the Business in a new building just as was previously discussed in 2023.

More specifically, the Planning Director / Zoning Administrator should not have used either demolition of the building or expiration of Appellant's liquor license as the basis for determining that Appellant intended to abandon the Legal, Non-Conforming Use of the Property for the Business.

Without the prior correspondence in 2023 which (i) preceded the demolition; and (ii) confirmed Appellant's intent to re-build, perhaps Appellant's demolition of the then existing building could be interpreted as an intent to abandon the Legal, Non-Conforming Use. However, those steps were taken in 2023 with the express purpose of explaining Appellant's intent and avoid any such conclusion from being reached.

As for the expiration of Appellant's liquor license, that too is being misinterpreted and misapplied by the Planning Director / Zoning Administrator as an expression of Appellant's intent to abandon the Legal, Non-Conforming Use of the Property.

Not knowing exactly how much longer the process was going to take in order to get the Business back up and running, the existing Class B, on & off sale license was allowed to expire in 2024.

However, contrary to the Planning Director / Zoning Administrator's conclusion, Appellant never intended to abandon either the liquor license or its use of the Property for the Business.

To the contrary, once the timeframe for re-opening was known, Appellant's intent was to apply for a new Class D license which would only permit on-site sales of beer, wine and liquor. Without the "off-site sales" component of the prior Class B license, the impediments

to obtaining a new license were significantly lessened and the importance of maintaining the old license greatly diminished. Thus the reason for allowing it to expire; not an intent to “abandon” a liquor license or continued use of the Property for the Business.

This was explained to the Planning Director / Zoning Administrator in Appellant’s March 21st letter and thus also should not have been used as the basis for determining Appellant’s intent to abandon the Legal, Non-Conforming Use.

Section of the Zoning Ordinance Misinterpreted / Misapplied:

Section 4.3 Nonconforming Uses: Any building, structure or premises lawfully existing at the time of the adoption of this Ordinance, or lawfully existing at the time this Ordinance is subsequently amended, may continue to be used without further imposition of use, dimensional, buffer or other Ordinance requirements even though such building, structure or premises does not conform to use, dimensional, buffer or other Ordinance regulations of the zoning district in which it is located. (Subject, however to the following provisions:) (sic) All nonconforming uses shall be subject to the following provisions:

- (d) No land, building, structure, or premises where a nonconforming use has ceased for six (6) months or more shall thereafter be used except in conformance with this Zoning Ordinance.

Error in Fact and/or Law, if any, Involved in Ruling from Which Appeal is Made:

No Cessation

As was presented to the Planning Director / Zoning Administrator in Appellant’s March 21st letter, in this case there has been no cessation of the nonconforming use for a period of six (6) months or more.

Since 2023, following the demolition of the existing building, the Appellant has continued acting consistent with an intent to continue using the Property for the business including the pursuit of redevelopment plans and marketing of the Property for sale as a commercial operation.

Although the prior liquor license for the Business has expired, the Appellant has been in communication with the liquor board regarding his intent to re-apply for a new license once there is a more definite timeline for re-development of the Property, construction of the new building and re-establishment of the Business.

All of these activities are consistent with operation of the Business and continuation rather than cessation of the nonconforming use. As such, the nonconforming use has not ceased.

No Intent to Abandon

Even if there had been a cessation of the nonconforming use for a period of six (6) months or more, there has been and there remains no corresponding intent to abandon.

Maryland common law instructs that “unless so stated in the statute, cessation or discontinuance of a nonconforming use without the substitution of another use or without evidence of an intent to abandon the nonconforming use, will not prevent its resumption.” *Landay v. MacWilliams*, 173 Md. 460, 469 (1938) (emphasis added).

The Washington County Zoning Ordinance DOES NOT specifically provide that mere cessation or discontinuance of the nonconforming use is sufficient to terminate the right to continue a pre-existing nonconforming use.

Therefore, as guided by the Court in *Landay v. MacWilliams*, the substitution of another use or evidence of an intent to abandon the nonconforming use is required before the Property Owner’s right to continue operating the Business as a legal, nonconforming use can be terminated.

In this case it is inarguable that there has been no substitution of another use. Moreover, there is no evidence of an intent to abandon the nonconforming use, quite the opposite.

**Draft County
Comp. Plan
Land-Use Map**

Business Commercial Mix

**Subject
Property**

ANTIETAM DR

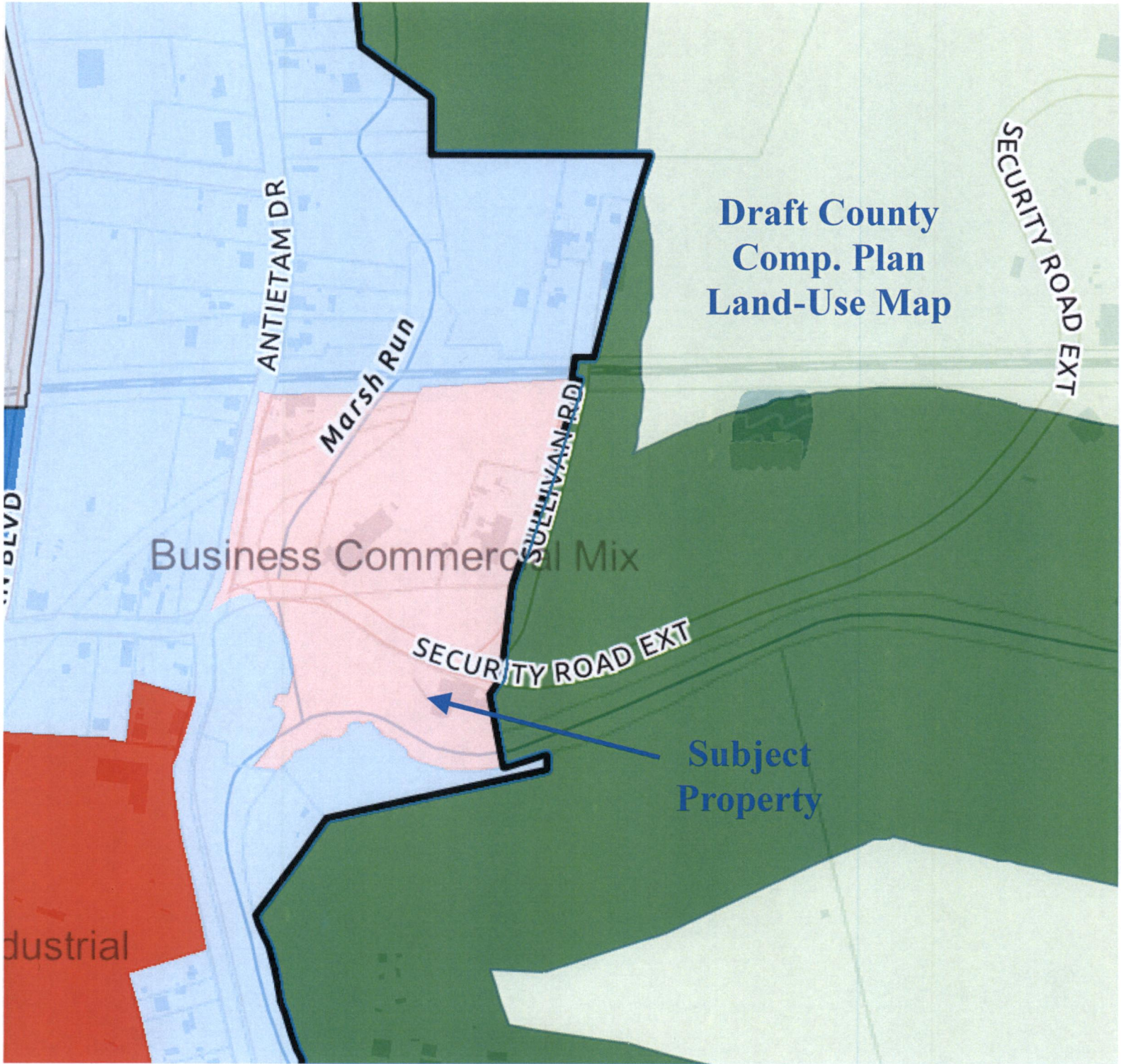
Marsh Run

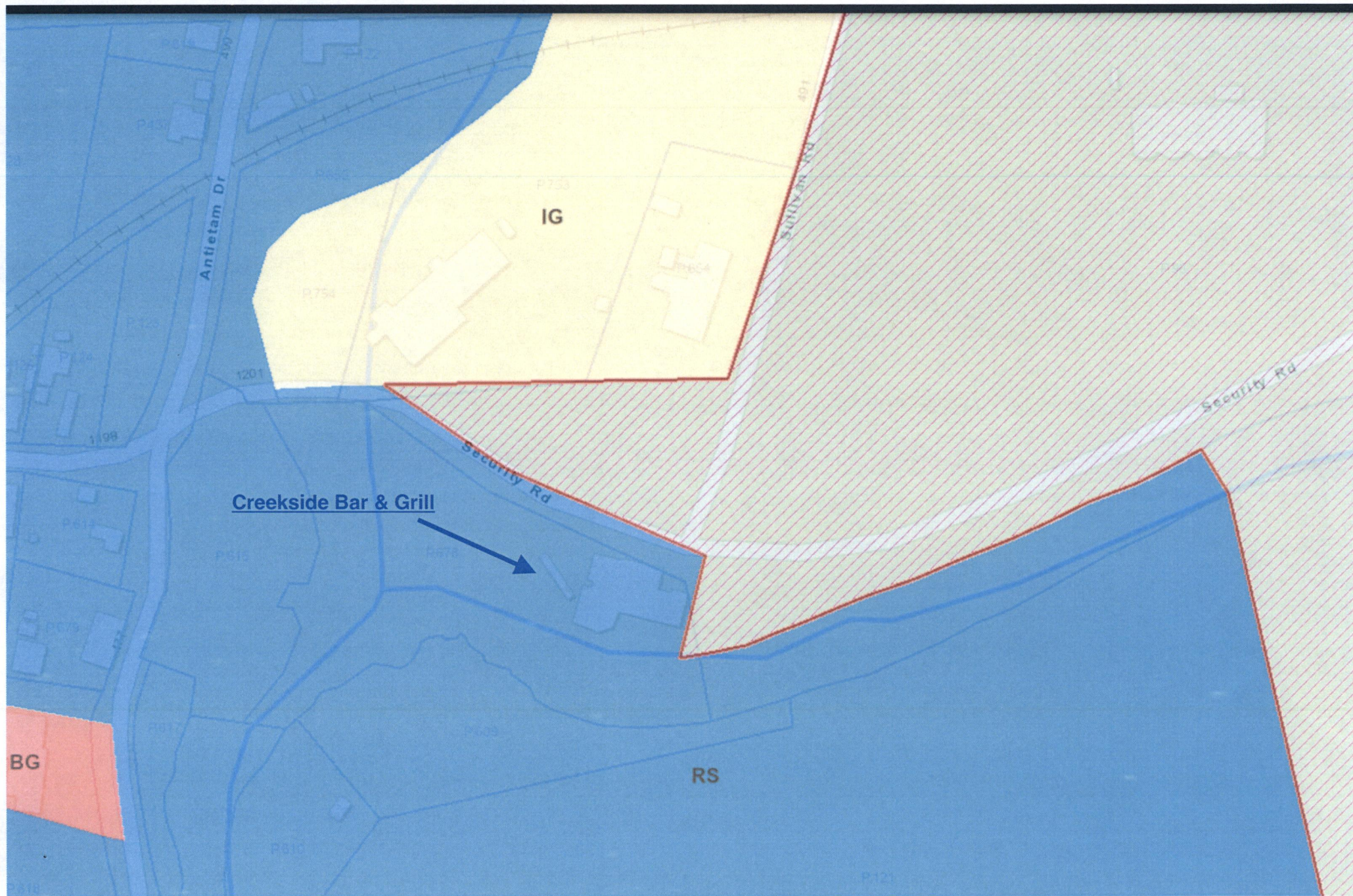
SULLIVAN RD

SECURITY ROAD EXT

SECURITY ROAD EXT

Industrial







May 20, 2023

Jill Baker
Director, Plan Review & Permitting/
Zoning Administrator
747 Northern Avenue
Hagerstown, MD 21740

**Re: Continuation of Pre-Existing, Legal Non-Conforming Use
Creekside Bar & Grill
1221-1225 Security Road, Hagerstown MD 21740
(TM 38; Parcel 678; Tax Acct. No. 18-016613) (the "Property")**

Dear Jill:

On behalf of Kehoe Realty, LLC (the "**Property Owner**") please accept this letter as a request to confirm that the current use of the above-referenced Property as the Creekside Bar & Grill (the "**Business**") is and may continue to operate as a legal, non-conforming use despite being located in the RS (Residential, Suburban) zoning district.

With a demolition permit pending and full-blown site development and architectural plans in process, time is of the essence in obtaining this confirmation.

As provided in Article 4, § 4.3 of the Zoning Ordinance:

No land, building, structure, or premises where a nonconforming use has ceased for six (6) months or more shall thereafter be used except in conformance with this Zoning Ordinance. (emphasis added)

No Cessation

In this case, there has been no cessation of the nonconforming use for a period of six (6) months or more.

Although there have been several periods since 2020 during which the Business may have been closed and not continuously operating, the nonconforming use itself has never ceased because those closure periods were either involuntary (COVID-19 pandemic); seasonal; while the Business was being marketed for sale by the prior owner

as an ongoing commercial operation; or while the comprehensive Property renovations were being planned by the current Property Owner.

All of these activities are consistent with operation of the Business and continuation rather than cessation of the nonconforming use.

In further support of this argument, I spoke with the Chairman of the Liquor Board who confirmed that at no time has the liquor license for Creekside Bar & Grill been surrendered or abandoned. Again, although not currently being actively used due to the planned renovations on the Property, the liquor license remains in good standing with the Liquor Board and will be returned to active status as soon as the Property can be renovated and Business operations restored.

As such, the nonconforming use has not ceased.

No Intent to Abandon

Even if there had been a cessation of the nonconforming use for a period of six (6) months or more, there has been and there remains no corresponding intent to abandon.

Maryland common law instructs that "unless so stated in the statute, cessation or discontinuance of a nonconforming use without the substitution of another use or without evidence of an intent to abandon the nonconforming use, will not prevent its resumption." *Landay v. MacWilliams*, 173 Md. 460, 469 (1938).

The Washington County Zoning Ordinance DOES NOT specifically provide that mere cessation or discontinuance of the nonconforming use is sufficient to terminate the right to continue a pre-existing nonconforming use. By comparison, see the language at issue in the case of *Harford County v. McDonough*, 74 Md. App. 119 (1988) which DOES specifically provide that mere cessation or discontinuance is all that is required to terminate the right to continue a nonconforming use. That language stated that: "In the event a nonconforming use ceases for a period of one (1) year or more, **then the nonconforming use shall be deemed abandoned**..." (emphasis added).

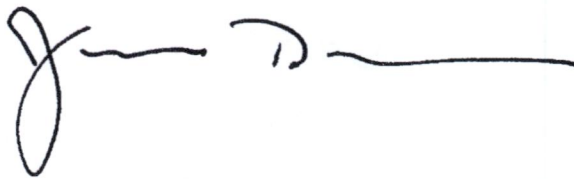
Therefore, as guided by the Court in *Landay v. MacWilliams*, the substitution of another use or evidence of an intent to abandon the nonconforming use is required before the Property Owner's right to continue operating the Business as a legal, nonconforming use can be terminated.

In this case it is inarguable that there has been no substitution of another use. Moreover, there is no evidence of an intent to abandon the nonconforming use, quite the opposite.

As explained above, the Property is actively engaged in the planning and design process for comprehensively renovating the Property and these efforts are well documented with the County.

As always, your consideration of this request and supporting information is appreciated and if further information or explanation from myself or the Property Owner is necessary to process this request please do not hesitate to let me know.

Very truly yours,
JD LAW COMPANY, INC.

A handwritten signature in black ink, appearing to read 'J. Divelbiss', with a large loop on the 'J' and a horizontal line extending to the right.

Jason M. Divelbiss
Attorney at Law

Email: jdivelbiss@divelbisslaw.com

Subject: Creekside Bar and Grill LLC status of non-conforming use
Date: Thursday, June 22, 2023 at 9:17:23 AM Eastern Daylight Time
From: Baker, Jill
To: Jason Divelbiss
Attachments: image001.png, GUIDELINES FOR CREEKSIDE.docx

Hi Jason,

As a follow up to our conversations, and to somewhat document my decision-making process, I've attempted to outline this issue and my deliberation below.

According to the Zoning Ordinance Section 4.3.d, "No land, building, structure, or premises where a nonconforming use has ceased for six (6) months or more shall thereafter be used except in conformance with this Zoning Ordinance." Based on the case law reference you provided in Landay v. MacWilliams the court says that "...without evidence of an intent to abandon the nonconforming use, will not prevent its resumption." So, the terminal question is whether there has been an intent to abandon the non-conforming use. To answer this question you have submitted the attached information from the liquor board showing that the business has continued to maintain a current license even though the business was periodically closed to the public. This letter from the liquor board verifying the continuation of the license seems to prove clear intent that Creekside did not intend to cease the business. Therefore, I am of the opinion that the non-conforming use may continue on this property at this time.

If you have any questions or concerns regarding this issue, please feel free to contact me.

Jill



Jill Baker, AICP, Director/Zoning Administrator

747 Northern Avenue

Hagerstown, MD 21742

Phone: (240) 313-2433

Fax: (240) 313-2431

E-mail: jbaker@washco-md.net

Website: www.washco-md.net

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**BEFORE THE BOARD OF APPEALS
FOR WASHINGTON COUNTY, MARYLAND**

KEHOE REALTY, LLC

Appellants

Appeal No.: AP2023-027

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OPINION

Kehoe Realty, LLC (hereinafter "Appellant") request a variance to reduce the required front yard setback from 40 feet to 20 feet for a proposed new structure at the subject property. The subject property is located at 1221 Security Road, Hagerstown, Maryland and is zoned Residential, Suburban. The Board held a public hearing in this matter on June 21, 2023.

This appeal was heard pursuant to Article 25 of the Zoning Ordinance for Washington County and upon proper notice to the parties and general public as required.

Findings of Fact

Based upon the testimony given, all information and evidence presented, and upon a study of the specific property involved and the neighborhood in which it is located, the Board makes the following findings of fact:

1. Appellant is the owner of the subject property located at 1221 Security Road, Hagerstown, Maryland. The subject property is zoned Residential, Suburban.
2. The subject property has been the home of the Creekside Bar and Grill for at least thirty (30) years.
3. The subject property is long and narrow, and tapers on the east side. It is bounded to the south by the Antietam Creek.
4. Appellant purchased the subject property in August 2022 and plans to renovate the existing building, including a complete tear-down and rebuild. The new

structure will be smaller than the existing building but located in the same general area on the property.

5. The existing building is constructed on the front property line abutting Security Road.

6. Appellant expects the new structure to be located approximately 26 feet from the front yard property line but has asked for 20 feet to account for design changes that may be necessary due to the Antietam Creek.

7. There was no opposition presented to this appeal.

Rationale

The Board has authority to grant a variance upon a showing of practical difficulty or undue hardship. §§ 25.2(c) and 25.56.¹ "Practical Difficulty" may be found by the Board when: (1) strict compliance would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome; and (2) denying the variance would do substantial injustice to the applicant and a lesser relaxation than that applied for would not give substantial relief; and (3) granting the variance would observe the spirit of the Ordinance and secure public safety and welfare. § 25.56(A).

Practical difficulty and undue hardship are the result of a property being unique. "'Uniqueness' of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions." *North v. St. Mary's Cnty.*, 99 Md. App. 502, 514 (1994).)

¹ "When the terms unnecessary hardship (or one of its synonyms) and practical difficulties are framed in the disjunctive ("or"), Maryland courts generally have applied the more restrictive hardship standard to use variances, while applying the less restrictive practical difficulties standard to area variances because use variances are viewed as more drastic departures from zoning requirements." *Belvoir Farms Homeowners Ass'n, Inc. v. North*, 355 Md. 259, 276 n.10 (1999) (citations omitted).

In the instate case, the subject property is unique based on the long, narrow shape with a tapering element to the east. This uniqueness is furthered by the presence of the Antietam Creek and corresponding floodplain to the south. When combined, these characteristics make for a small building envelope and push the location of structures closer to the front yard boundary line. The result is a practical difficulty that complicates a permitted or continuing non-conforming use on the property.

Appellant's proposed renovation would reduce the total building size and also moves the location away from Security Road. The Board considers these to be improvements to the operation of the property which observe the spirit of the Ordinance and further secure public safety and welfare. The request is the minimum necessary to afford relief, given that Appellant expects there may be some changes in the exact location of the building footprint due to the floodplain and the Antietam Creek. The variance relief will not confer any special benefit upon Appellants and is necessary to facilitate the continued use of the property in an appropriate manner. The Board finds that Appellant has satisfied the criteria for a variance based on practical difficulty and the relief should be granted.

Accordingly, the variance request to reduce the required front yard setback from 40 feet to 20 feet at the subject property is GRANTED, by a vote of 5-0. Said variance requests are granted upon the condition that the proposed use be consistent with the testimony and evidence presented herein.

BOARD OF APPEALS

By: Jay Miller, Chair

Date Issued: July 20, 2023

Notice of Appeal Rights

Any party aggrieved by a final order of the Authority in a contested case, whether such decision is affirmative or negative in form, is entitled to file a petition for judicial review of that order to the Circuit Court for Washington County within thirty (30) days of the date of the order.

March 21, 2025

Jill Baker
Director, Plan Review & Permitting/
Zoning Administrator
747 Northern Avenue
Hagerstown, MD 21740

**Re: Continuation of Pre-Existing, Legal Non-Conforming Use
Creekside Bar & Grill
1221-1225 Security Road, Hagerstown MD 21740
(TM 38; Parcel 678; Tax Acct. No. 18-016613) (the "Property")**

Dear Jill:

As a follow-up and update to our prior correspondence in May and June '23 regarding the same Property, on behalf of Kehoe Realty, LLC (the "**Property Owner**") please accept this letter as a renewed request to confirm that the Property's current use as the Creekside Bar & Grill (the "**Business**") may continue to operate as a legal, non-conforming use despite being located in the RS (Residential, Suburban) zoning district.

At the time of our prior correspondence in 2023 a demolition permit for the existing structure was pending and the site development and architectural plans for the development and construction of a new building were underway.

After receiving confirmation that the Business could in fact continue on the Property as a pre-existing and legal non-conforming use, the Property Owner proceeded with demolition of the existing building.

Although there has been a significant delay in finalizing the site development and architectural plans for re-developing the Property, the Property Owner has not abandoned said plans or his intent to re-establish the Business on the Property in a new building.

In the interim period since June '23, the Property Owner was engaged in lengthy discussions with the City of Hagerstown, State Fire Marshall's office and his design engineers regarding the functional design of the fire protection system for the new building and the location of the new water mains and service lines to necessary to serve the new fire protection system. After several iterations, all of which provided to be cost

prohibitive, the new building design was modified in a manner that eliminated the need for a sprinkler system other than that needed to protect the kitchen area.

Since 2023 the Property Owner has also evaluated and re-evaluated on several occasions the business decision of whether to rebuild and operate the Business himself or to sell the Property as a ready to go business opportunity for a third party.

Although they have been protracted and perhaps unknown to the County, the Property Owner's actions have been consistent with the intent to continue using the Property for the Business.

As provided in Article 4, § 4.3 of the Zoning Ordinance:

No land, building, structure, or premises where a **nonconforming use has ceased for six (6) months or more** shall thereafter be used except in conformance with this Zoning Ordinance. (emphasis added)

No Cessation

In this case, there has been no cessation of the nonconforming use for a period of six (6) months or more.

Although there were several periods between 2020 and 2023 during which the Business was closed and not continuously operating, the nonconforming use itself never ceased because those closure periods were either involuntary (COVID-19 pandemic); seasonal; while the Business was being marketed for sale by the prior owner as an ongoing commercial operation; or while the comprehensive Property renovations were being planned by the current Property Owner.

Since 2023, following the demolition of the existing building, the Property Owner has continued acting consistent with an intent to continue using the Property for the business including the pursuant of redevelopment plans and marketing of the Property for sale as a commercial operation.

Although the prior liquor license for the Business has expired, the Property Owner has been in communication with the liquor board regarding his intent to re-apply for a new license once there is a more definite timeline for re-development of the Property, construction of the new building and re-establishment of the Business.

All of these activities are consistent with operation of the Business and continuation rather than cessation of the nonconforming use.

As such, the nonconforming use has not ceased.

No Intent to Abandon

Even if there had been a cessation of the nonconforming use for a period of six (6) months or more, there has been and there remains no corresponding intent to abandon.

Maryland common law instructs that "unless so stated in the statute, cessation or discontinuance of a nonconforming use without the substitution of another use or without evidence of an intent to abandon the nonconforming use, will not prevent its resumption." *Landay v. MacWilliams*, 173 Md. 460, 469 (1938).

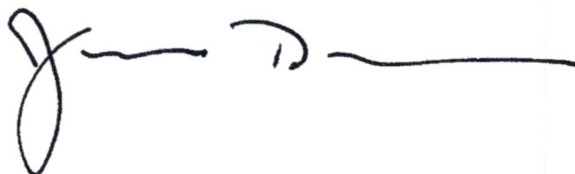
The Washington County Zoning Ordinance DOES NOT specifically provide that mere cessation or discontinuance of the nonconforming use is sufficient to terminate the right to continue a pre-existing nonconforming use. By comparison, see the language at issue in the case of *Harford County v. McDonough*, 74 Md. App. 119 (1988) which DOES specifically provide that mere cessation or discontinuance is all that is required to terminate the right to continue a nonconforming use. That language stated that: "In the event a nonconforming use ceases for a period of one (1) year or more, **then the nonconforming use shall be deemed abandoned...**" (emphasis added).

Therefore, as guided by the Court in *Landay v. MacWilliams*, the substitution of another use or evidence of an intent to abandon the nonconforming use is required before the Property Owner's right to continue operating the Business as a legal, nonconforming use can be terminated.

In this case it is inarguable that there has been no substitution of another use. Moreover, there is no evidence of an intent to abandon the nonconforming use, quite the opposite.

As always, your consideration of this request and supporting information is appreciated and if further information or explanation from myself or the Property Owner is necessary to process this request please do not hesitate to let me know.

Very truly yours,
JD LAW COMPANY, INC.

A handwritten signature in black ink, appearing to read 'J. M. Divelbiss', with a long horizontal line extending to the right.

Jason M. Divelbiss
Attorney at Law

Email: jdivelbiss@divelbisslaw.com



DEPARTMENT OF PLANNING & ZONING
PLANNING | ZONING | LAND PRESERVATION | FOREST CONSERVATION | GIS

April 14, 2025

Jason Divelbiss, Esq.
JD Law Company, Inc.
11125 Bemisderfer Road
Greencastle, PA 17225

Re: Continuation of non-conforming use for Creekside Bar & Grill
Tax ID: 18-016613

Dear Jason:

Thank you for the additional information provided relating to your belief that Creekside Bar & Grill, located at 1221-1225 Security Road has maintained its intent to operate as a legal non-conforming use. We have reviewed your letter dated March 21, 2025 and offer the following decision and explanation.

We acknowledge and confirm that discussions were held in May/June of 2023 regarding the non-conforming status of the business and the pending demolition permit. It was our position that demolition of the existing structure would constitute cessation/abandonment of the non-conforming use. Evidence was provided at that time that a valid liquor license was assigned to the property. We accepted this argument as objective evidence that there was an intent to continue the use as a tavern/restaurant. The structure was then demolished in June or July of 2023.

In June of 2024, the property owner allowed the liquor license for the property to expire. In your letter you state that the property owner intended to reapply for a new license, however, to date, no application has been made to obtain a new license. Based on the discussion and correspondence done in 2023, our determination at that time was that continuation of the liquor license provided the evidence that illustrated that the property owner did not show an intent to abandon. With the cessation of a liquor license for over 6 months, we have determined that this is evidence of abandonment of the non-conforming use.

Also included within your correspondence, you discuss the property owner's discussions with various agencies regarding the functional design of the fire protection system. This may insinuate the property owner's internal intent to continue the business, however, no outward actions were taken to show objective intent that the non-conforming use wasn't abandoned. Furthermore, you state that the owner was deliberating on whether to sell the business or retain the business under their own management. We have not found evidence that shows publicly the outward intent of the property

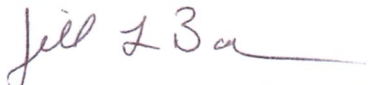
747 Northern Avenue | Hagerstown, MD 21742 | P: 240.313.2430 | F: 240.313.2431 | TDD: 7-1-1

owner to sell within the last six months. Again, this is subjective intent that provides no outward intent of continuation of the use.

Now that the building has been demolished and the liquor license has been expired for over 6 months, we now find that the owner has abandoned their intent to continue the non-conforming use of the property. Should the property owner wish to pursue this endeavor, the property will need to be rezoned to a more appropriate district that would allow for this commercial use.

Should you feel aggrieved by this decision, you have the ability to appeal to the Board of Zoning Appeals. Application for an appeal must be received within 30 days of the date of this letter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jill Baker", with a long horizontal flourish extending to the right.

Jill Baker, AICP, Director/Zoning Administrator
Washington County Department of Planning and Zoning

**BEFORE THE BOARD OF APPEALS
FOR WASHINGTON COUNTY, MARYLAND**

KEHOE REALTY, LLC

* **Appeal No.: AP2025-011**

Appellant

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OPINION

Kehoe Realty, LLC, (hereinafter “Appellant”) files this appeal charging error in the Zoning Administrator’s¹ determination regarding the status of the non-conforming use of a bar and grill on a vacant lot at the subject property. The subject property is located at 1221 and 1225 Security Road, Hagerstown, Maryland 21742 and is zoned Residential, Suburban. The Board held a public hearing in this matter on June 11, 2025, wherein Appellant was represented by Jason Divelbliss, Esq.² This appeal was heard pursuant to Article 25 of the Zoning Ordinance for Washington County and upon proper notice to the parties and general public as required.

Findings of Fact

Based upon the testimony given, all information and evidence presented, and upon a study of the specific property involved and the neighborhood in which it is located, the Board makes the following findings of fact:

1. Appellant is the owner of the subject property located at 1221 and 1225 Security Road, Hagerstown, Maryland. The subject property is zoned Residential, Suburban.

2. The subject property has been the home of the Creekside Bar and Grill for more than thirty (30) years.

¹ For purposes of this Opinion, Zoning Administrator shall refer to Jill Baker, Director of Planning/Zoning Administrator.

² Although the Board had a quorum of four (4) members, Appellant was given the choice to proceed or request a postponement due the potential for a tie vote. Appellant elected to proceed with the hearing.

3. Appellant purchased the subject property in August 2022, with plans to renovate the existing building. The renovation project evolved into a demolition and rebuild project which included plans for a smaller building with a more efficient layout.

4. In June 2023, Appellant sought a variance to reduce the front yard setback to accommodate the planned newly constructed building. Th Board granted the variance request in Case No. AP2023-027.

5. After Appellant determined that the project would require demolition and rebuilding, it sought and obtained confirmation of the non-conforming use as a bar and grill from the Zoning Administrator.

6. After numerous consultations with County officials, the Fire Marshal and City of Hagerstown, it was determined that new plans were necessary to eliminate the need for sprinklers. The new design drawings were submitted as “Creekside 3”.

7. In June 2024, Appellant’s liquor license expired, and a bulk transfer was authorized to another licensee owned by Appellant so that the inventory could be transferred and stored under another license currently in use.

8. In September 2024, Appellant met with the Liquor Board to discuss the lapse in the license for Creekside Bar and Grill. The Liquor Board indicated that upon reapplication, a license would likely be issued for use at the subject property.

9. In February 2025, Appellant listed the subject property for sale.

10. In March 2025, Appellant sought confirmation of the non-conforming use of a bar and grill at the subject property. The Zoning Administrator denied confirmation, on the basis that the building had been demolished and liquor license had expired and was not active.

11. Prior to the request for confirmation, the site plan had been pending without recent activity and there had been little communication between Appellant and the County.

12. Appellant timely filed an appeal charging error in an administrative action taken by the Zoning Administrator.

Rationale

Section 25.2 of the Zoning Ordinance, sets forth the general powers of the Board of Appeals and specifically notes in subsection (a) that the Board has the authority:

To hear and decide appeals where it is alleged that there is an error in any other requirement, decision or determination made by an administrative official in regard to the enforcement of this Ordinance, the Washington County Forest Conservation Ordinance, or of any ordinance adopted thereto.

The Zoning Administrator's determination of whether a non-conforming use continues to exist is clearly within the Board's purview upon appeal charging administrative error. Appellant asserts that it was error for the Zoning Administrator to determine that the subject property no longer met the criteria for a non-conforming use as indicated in her letter dated April 14, 2025. In her decision, the Zoning Administrator referred to Section 4.3(d) of the Zoning Ordinance which provides, "No land, building, structure, or premises where a nonconforming use has ceased for six (6) months or more shall thereafter be used except in conformance with this Zoning Ordinance." The Board is tasked with applying the language of this section to the facts and timeline presented by the parties.

Appellant provided testimony and documentation as evidence in support of the appeal. Mr. Kehoe testified that at all times during the process, he was attempting to move things forward, although he admitted he could have communicated that better to the County. There were significant delays related to consultation with the City of Hagerstown about water service and there was a need to redesign the building to avoid the need for sprinkler installation. Both of these items took several months each and stalled the project beyond his control. As a result of the delays, a calculated decision was made not to renew the liquor license until the project was closer to completion. The meeting with the Liquor Board confirmed Mr. Kehoe's belief that he would be granted a new license upon application and that a bulk transfer was appropriate given the uncertainty of a completion date. Mr. Kehoe was adamant in his testimony that he never intended to abandon the use as a bar and grill.

Appellant argued through counsel that the Board must find evidence of an intent to abandon the use in order to affirm the Zoning Administrator's decision in this case. Appellant cites to *Landay v MacWilliams*, 173 Md. 460 (1938) which undertook an analysis of abandonment and reached the conclusion that mere cessation of a use is not in and of itself, abandonment for purposes of a non-conforming use. Appellant contended that there would need to be evidence of an intention, and an act in furtherance of that intention to find abandonment.

Jill Baker, Director/Zoning Administrator, testified before the Board in support of her decision to deny the non-conforming use. Ms. Baker testified that the previous confirmation was based heavily on the fact that Appellant had an active liquor license and therefore had demonstrated an intent to continue operating the business at the property. She acknowledged that the County was aware of the plan to demolish the building and under normal circumstances, that would be sufficient to eliminate the non-conforming use status. Ms. Baker viewed the demolition, the lack of movement on the site plan and the expiration of the liquor license as clear indications that Appellant had abandoned the non-conforming use.

The Board is persuaded by Appellant's testimony and the argument and case law presented in support thereof. Although Appellant could have avoided any confusion with better communication, it is clear that it has continued its efforts to rebuild the Creekside Bar and Grill and operate the business as a bar and grill. The Zoning Administrator applied the Ordinance based on her experience and judgment of the facts presented. In doing so, it appears that she imposed a requirement that Appellant demonstrate an affirmative act to maintain the nonconforming use status. Based on *Landay* and the subsequent analysis in *McLay v Maryland Assemblies*, 269, Md. 465 (1973), the Board finds there is no such affirmative requirement when considering cessation and/or abandonment. The Board finds that there was no intent on the part of Appellant to abandon the use and that in fact, Appellant was continuing to pursue all options to resume use of the property.

Accordingly, the Board finds that the Zoning Administrator's decision that the non-conforming use of a bar and grill at the subject property had lapsed was in error and should be overturned. Thus, Appellant's appeal charging error and seeking to reverse the Zoning Administrator's decision is GRANTED by a vote of 4 to 0.

BOARD OF APPEALS

By: Tracie Felker, Chair

Date Issued: July 10, 2025

Notice of Appeal Rights

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