



Kent County Board of Zoning Appeals
Department of Planning, Housing, and Zoning
400 High Street, Suite 130
Chestertown, MD 21620
410-778-7423 (voice/relay)

County Commissioners Hearing Room
400 High Street
Chestertown, Maryland

AGENDA

Monday, July 19, 2021
7:00 p.m.

Members of the public are now welcome to attend meetings in person, virtually, or via conference call. You may also listen to the meeting either online at <https://www.kentcounty.com/commissioners/meeting-live-video> OR via the audio-only phone number and conference identification number listed below. If listening to the meeting online, the way for members of the public to provide verbal comments during the meeting is via the audio-only phone number.

Public participation and audio-only call-in number:

1. Dial **1-872-239-8359**
2. Enter Conference ID: **531 619 151#**

Members of the public are asked to mute their phones/devices, until the Board Chair opens the floor for comment. Please note that if you are listening to the online livestream while waiting to call in to participate, there is an approximately 45-second delay. In order to avoid audio feedback issues, please mute the livestream before calling in.

MINUTES

June 21, 2021

APPLICATIONS FOR REVIEW:

#21-25 Thomas Voshell & Chesmar Community Association –
Determination of Non-Conforming Use / Appeal of Administrative Decision of the Zoning Administrator
9155 America Legion Road – Fourth Election District – Zoned Critical Area Residential (CAR)

APPLICANT OR REPRESENTATIVE MUST BE PRESENT

APPLICANTS ARRIVING MORE THAN 10 MINUTES AFTER THE SCHEDULED HEARING WILL NOT BE HEARD AND WILL BE RESCHEDULED AT THE APPLICANT'S EXPENSE.

Meetings are conducted in Open Session unless otherwise indicated. All or part of the Board of Appeals meetings can be held in closed session under the authority of the MD Open Meetings Law by vote of the members. Breaks are at the call of the Chairman. Meetings are subject to audio and video recordings.

Projects will not be reviewed prior to their scheduled time. All applications will be given the time necessary to assure full public participation and a fair and complete review of all projects. Agenda items are subject to change due to cancellations.

Other business without assigned times may be discussed during the meeting.

IN THE MATTER OF THE APPLICATION OF:
(Name, Address and Telephone Number of Applicant)

FOR OFFICE USE ONLY CASE NO.: # 21-25

Thomas Voshell &
Chesmar Community Association
26885 Mallard Rd.
Chestertown, MD 21620
410-810-1381

Date Filed: 6/10/21

Filed by:
Applicant _____

Date of Hearing: 7/19/21

Parties Notified: _____

Notice in Paper: _____

TO THE DEPARTMENT OF PLANNING AND ZONING: In accordance with Article 7 Section 16 of the Kent County Land Use Ordinance, as amended, request is hereby made for an Administrative Hearing for:

Variance _____ Special Exception _____ Determination of Nonconforming Use X

DESCRIPTION OF PROPERTY INVOLVED:

Located on: (Name of Road, etc.) 9155 American Legion Rd., Chestertown, MD 21620

In the 04 Election District of Kent County.

Size of lot or parcel of Land: 8.8 Acre: Map # 38 Parcel # 57 Lot # 4-8&24-30 Deed # /00064/00226

List buildings already of property: American Legion / Frank M. Jarman Legion Home

Subdivision name and address if applicable N/A

PRESENT ZONING OF PROPERTY: CAR

DESCRIPTION OF RELIEF REQUESTED: (List here in detail what you wish to do with property that requires the Appeal Hearing.)

Applicants seek a determination by the Board of Appeals, pursuant to Article VIII, Section 1.7, of the County Zoning Ordinance, that the subject property is NOT a non-conforming property and that any uses on the property must conform to those permitted uses in the Critical Area Residential zone.

Applicants previously requested a nonconforming determination from the Zoning Administrator. (Ex. 1). Section 1.7 provides that the question of whether a nonconforming use exists "is a question of fact and shall be decided by the Zoning Administrator after public notice. At the Zoning Administrator's discretion, a review of a nonconforming use may be submitted to the Board of Appeals for a determination of whether a nonconforming use

DEPARTMENT OF
PLANNING, HOUSING & ZONING
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exists.” The Zoning Administrator opted not to make a factual determination after public notice. In a response from the Zoning Administrator, the uses of the American Legion property “have already been confirmed by the Land Use Ordinance itself” and stated that an appeal could be made to the Board of Appeals. (Ex. 2). The Applicants submit this Application pursuant to Section 1.7, which provides for the Board of Appeals to make the factual determination that the American Legion property is not a nonconforming property and that any uses on the property must be in conformance with permitted uses in the Critical Area Residential zone.

Applicants allege that, to the extent the American Legion was ever a nonconforming property, its nonconforming status has been abandoned. See (Ex. 1). The property owner bears the burden of demonstrating that any use of the property within the Critical Area, that is not permitted in Critical Area Residential, (1) is legally nonconforming and that (2) the use has not been abandoned for more than one year. (Ex. 1).

Present owner of property: Frank M. Jarman Legion Home

Telephone: N/A

If Applicant is not owner, please indicate your interest in this property: Applicants are neighbors of the property.

Has property involved ever been subject of previous application? Not known.

If so, please give Application Number and Date:

PLEASE FILL IN BELOW, OR ATTACH HERETO, A SKETCH OF THIS PROPERTY. (Attached hereto)

List all property measurements and dimensions of any buildings already on the property.

Put distances between present buildings or proposed buildings and property lines.

NAMES OF ADJOINING PROPERTY OWNERS:

(These must be listed or the application cannot be processed.)

Owner(s) on the North: Parcel 56: George and Kristin Baker, 9207 American Legion Dr., Chestertown, MD 21620; David, Marion F. and Thelma Legg, 9219 American Legion Dr., Chestertown, MD 21620; John Mann and Gretchen Frick, 9233 American Legion Dr., Chestertown, MD 21620; George and Kathleen Kendall, 9241 American Legion Dr., Chestertown, MD 21620; Janice and John Newsome, 9265 American Legion Dr., Chestertown, MD 21620; David Baldwin, 9281 American Legion Dr., Chestertown, MD 21620; John Grussing Jr., 9191 American Legion Dr., Chestertown, MD 21620 / Parcel 14: John and Dawn Denton, 9309 American Legion Dr., Chestertown, MD 21620. / Parcel 57: Alexander Burt, 26910 Mallard Rd., Chestertown, MD 21620; Russell and Dianna Frymiare, 222 N. Clifton Ave., Aldon, PA 19018; Brian O’Hare, 9181 American Legion Dr., Chestertown, MD 21620.

Owner(s) on the South: Parcel 58: David Baldwin, P.O. Box 434, Chestertown, MD 21620; Scott and Shari Smith, 120 Jimstown Circle, Chestertown, MD 21620; Emmett Roy and Diane Duke, 26925 Mallard Dr., Chestertown, MD 21620; Dominic and Caroline Rawson, 26909 Mallard Dr., Chestertown, MD 21620; Raymond Lewis Trustee, 26899 Mallard Dr., Chestertown, MD 21620; Susan Crooks, 26895 Mallard Dr., Chestertown, MD 21620; Thomas and Diane Voshell, 26885 Mallard Dr., Chestertown, MD 21620; Gerald and Karen Dockstader, 26875 Mallard Dr., Chestertown, MD 21620; James Menapace and Theresa Woods, 26865 Mallard Dr., Chestertown, MD 21620; Michael Benson and Dean Carr, 1200 Steuart St., Unit 415, Baltimore, MD 21230; David and Ann Townsend, 6230 Chestnut Oak Ln., Linthicum, MD 21090.

Owner(s) to the East: Chester River.

Owner(s) to the West: Parcel 11: Morgan Fields, LLC, 9281 American Legion Rd., P.O. Box 434, Chestertown, MD 21620.

Homeowners Association, name and address if applicable: N/A

BY SIGNING THIS APPLICATION I GRANT THE DEPARTMENT OF PLANNING AND ZONING THE RIGHT TO ENTER ONTO THE PROPERTY FOR THE PURPOSE OF VIEWING THE SITE OF THE APPLICATION.

James McJannet - Attorney

6-10-21

Signature of Owner/Applicant or Agent or Attorney

Date

Please file this form at 400 High Street, Chestertown, MD 21620 accompanied by \$350.00 filing fee made payable to the Board of Appeals. If you have any questions, contact the Clerk at 410-778-7467.

NOTICE: Neither the Board of Appeals or the Planning Office is required to make out this Application. Application should be filled in by applicant or its agent. If the Planning Office assists you, they cannot be held responsible for its contents.

Applicants arriving more than 10 minutes after the scheduled hearing will not be heard and will be rescheduled at the applicant's expense.

MACLEOD
LAW GROUP LLC

C. Daniel Saunders
dsaunders@mlg-lawyers.com

May 25, 2021

Mr. William Mackey
Director of Planning, Housing, and Zoning
400 High St.
Chestertown, MD 21620

Mr. Mackey,

Our firm represents the Chesmar Community Association and other individuals who own property in the Chesmar Community including Thomas Voshell and Gerry Dockstader. The purpose of this correspondence is to request, pursuant to the provisions of the Kent County land use ordinance at Article VIII section 1.1, a formal nonconforming use status determination for the American Legion properties located at 9155 American Legion Dr., Chestertown, MD. The property is zoned Critical Area Residential and falls within the Maryland critical area.

The Association represents over 30 households that, along with Mr. Voshell and Mr. Dockstader, are all within close proximity, sight and sound of the Legion properties. The Legion property has been for sale for several years, and there have been a number of prospective buyers who have looked at the property for a myriad of proposed uses. It is our understanding that the planning office has informally opined that the property is a "nonconforming" property; although, the specific nature of that nonconforming use (or combination of uses) is undefined. As a result, realtors and prospective buyers have been led to assume that virtually any use (or combination of uses) of this property will be allowed in the future. There is tremendous confusion among prospective buyers, realtors, and neighboring residents as to what uses will be lawful on the property in the future.

Prospective purchasers have looked at the property with an eye toward a wide variety of proposed uses. Among the uses that have been mentioned are: high-end restaurant, catering facility, wedding venue (indoor and outdoor), event venue, outdoor sports events, opioid addiction treatment, day camp, campground, healthcare, counseling center, fishing and oyster harvesting, theater productions. Many of these



activities are not allowed under the Critical Area Residential zone. At the very least many would require an application for special exception.

The Legion property is very large, highly visible, environmentally sensitive, and entirely in the critical area. It has a failing septic system and is surrounded by private homes. The use of the property as a Legion Home has been abandoned for many years. Now is the appropriate time for a nonconforming use determination to be made. The purpose of ordinance Article VIII section 1.1 is to eliminate the potential confusion surrounding nonconforming uses, while providing the public forum for a rigorous examination of the essential elements of a nonconforming use: (1) what, if any, recent uses of the property were at one time lawful (the subject of a valid permit) and then rendered unlawful by ordinance change. (2) the exact nature, extent, and duration of each of those uses. (3) whether or not each of those uses was abandoned for more than 12 months after that use became nonconforming. (4) whether or not any nonconforming use was enlarged or increased after it became nonconforming.

The following provisions of Article VIII of the Kent County zoning ordinance are relevant to future uses of the property.

- The **lawful use** of land, including existing nonconforming uses, existing on the effective date of the ordinance ... may be continued provided:
 - The use is not enlarged, increased, or extended to occupy a greater area than that occupied by such use on the effective date of the ordinance.
 - That if **any** use ceases for a period of two years [1 year in the critical area, see section 1.3] the subsequent use of such lands shall be in conformity to the regulations specified for the district in which the land is located. [1.1]
- No building ... used in whole or in part for a nonconforming use which remains idle or unused for a continuous period of [one year in the critical area, see section 1.3]... shall not again be used except in conformity with the regulations of the district in which such building or land is located. [1.2]
- Whether a nonconforming use has ceased is a **question of fact** and shall be **decided by the Zoning Administrator**. At the Zoning Administrator's discretion, a review of a nonconforming use may be submitted to the Board of appeals for a determination of whether a nonconforming use has ceased. [1.2]
- Any lawful use existing on April 12, 1988 [in the **Critical Area**] may continue unless the use is abandoned for more than **one year**. [1.3]
- Whether a nonconforming use exists is a **question of fact** and shall be decided by the Zoning Administrator after **public notice**. [1.7]

The nonconforming use of the land must remain significant and constant to maintain its nonconforming status. Article VIII, Section 1.5 of the Ordinance states that "the casual, intermittent, or illegal use of the land or buildings shall not be sufficient to establish the existence of a nonconforming use. The existence of a nonconforming use on a part of a lot or tract shall not be construed to establish a nonconforming use on the entire lot or tract."



The purpose of nonconforming law is twofold. First, it protects property owners that are using their property legally, at the time a zoning ordinance is enacted and the change in law suddenly makes existing use of a property unlawful. Second, it protects neighboring property owners by ensuring that nonconforming properties eventually become conforming once legal nonconforming uses are abandoned.

The Court of Appeals of Maryland, the highest court in Maryland, has heard numerous cases regarding non-conforming use and has crafted case law for zoning authorities to follow. The Court states, with regard to nonconforming zoning provisions, the purpose is to “reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned.”¹ As explained by the Court of Appeals:

Such nonconforming uses pose a formidable threat to the success of zoning. They limit the effectiveness of land use controls, contribute to urban blight, imperil the success of the community plan, and injure property values. I R. M. Anderson, *American Law of Zoning* §602 (2d ed. 1976).

This Court has repeatedly recognized that one of the fundamental problems of zoning is the inability to eliminate incompatible nonconforming land uses ...

... [T]his Court has recognized that the problem inherent in accommodating existing vested rights in incompatible land uses with the future planned development of a community is ordinarily resolved, under local ordinances, by permitting existing uses to continue as nonconforming uses subject to various limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment. Moreover, this Court has further recognized that the purpose of such restrictions is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence ...

These ordinances must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses.

The County must consider this foundation of the law and whether a decision to grant nonconforming status will, in fact, harm property values of immediately adjacent property owners, especially if nonconforming uses are permitted to expand beyond those uses that were permitted by the American Legion when the property became nonconforming.

Under Maryland law, one nonconforming use cannot transpose into another nonconforming use. Granted, the Court of Appeals has determined that a property owner may intensify the *same* use², the County may not consider a completely different use when granting a nonconforming status. The Court of Appeals states:

While it is true that mere intensification of a nonconforming use is permissible so long as the nature of use is not substantially changed, it is generally recognized that the right of a landowner to continue the same kind of use to which the

¹ *County Comm'rs of Carroll County v. Uhler*, 78 Md. App. 140, 149 (1989).

² *Feldstein v. La Vale Zoning Bd.*, 246 Md. 204, 211 (1967).



property was devoted on the critical date does not confer on him a right to subsequently change or add to that use a new and different one amounting to a drastic enlargement or extension of the prior existing use.³

In other words, a property with a nonconforming day care center cannot operate as a corner gas station because both uses are commercial. In this instance, a property that has historically been used for American Legion meetings and events cannot be used for any other non-residential uses. In a real example decided by the Court of Appeals, the Court determined that a property was not properly granted nonconforming status as a shooting range when the activity on the property (at the time it changed zoning classifications) was used for running dogs – even though there was occasional shooting on the property at that time.⁴ That was considered an improper extension of the use, as opposed to an intensification of the same use.

The Court of Appeals has also determined that the *entire* property must have been used for the purpose of which it is being considered for nonconforming status. For example, in one case a property was being considered for the use of a rubble landfill. The applicant demonstrated that it had a permit for 24 acres of a property to operate a rubble landfill. However, another 31 acres was not permitted for that use and so it could not be granted nonconforming status for the entire property.⁵ So, for example, if only the American Legion building has been used in a non-conforming way, the land around it, including its shores cannot be transformed into non-residential uses.

Under Maryland law, the “party asserting the existence of a nonconforming use has the burden of proving it.”⁶ Therefore, the Legion, in a hearing before you or the Board of Appeals, must demonstrate that the uses it claims are non-conforming meet all of the statutory requirements, as explained by the Court of Appeals, including demonstrating that none of the uses have been abandoned and have not been historically casual, intermittent, or illegal.

The American Legion property, in recent years, has been inactive. Most significantly, in the last 12 months there has been no significant, ongoing nonconforming use of the property. We respectfully request that the County Zoning Administrator (or County Board of Appeals) make a determination that (to the extent that any ever existed) all nonconforming uses of the Legion property have been abandoned and that accordingly the property must be used consistent with the Kent County Zoning Ordinance going forward.

³ *Phillips v. Zoning Comm'r of Howard County*, 225 Md. 102, 110 (1960).

⁴ *Calhoun v. County Bd. of Appeals*, 262 Md. 265 (1971).

⁵ *Md. Reclamation Assocs. v. Harford County*, 414 Md. 1, 63 (2010).

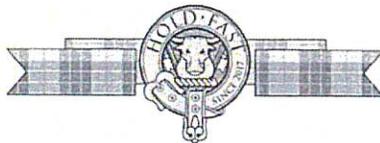
⁶ *Calhoun v. County Bd. of Appeals*, 262 Md. 265, 267 (1971); *Lapidus v. Mayor & City Council of Baltimore*, 222 Md. 260 (1960); *County Comm'rs of Carroll County v. Uhler*, 78 Md. App. 140, 145 (1989).



Best regards,



C. Daniel Saunders



Lance Young

From: Daniel Saunders <dsaunders@mlg-lawyers.com>
Sent: Tuesday, June 1, 2021 2:30 PM
To: Lance Young
Subject: Fwd: response to letter dated May 25, 2021, re American Legion building
Attachments: MacLeod correspondence re American Legion 2021-05-25.pdf; Letter to Karen Kemp-Dockstader 2020-11-18.pdf; Letter from Karen Kemp-Dockstader 2020-10-23.pdf; Letter from Karen Kemp-Dockstader 2020-11-23.pdf

Sent from my iPhone X

Begin forwarded message:

From: William Mackey <wmackey@kentgov.org>
Date: June 1, 2021 at 2:00:28 PM EDT
To: Daniel Saunders <dsaunders@mlg-lawyers.com>
Subject: response to letter dated May 25, 2021, re American Legion building

Dear Mr. Saunders,

Thank you for your letter and your request, received on May 27, 2021, regarding the status of the American Legion building.

In your letter you request a formal nonconforming use status determination for the American Legion properties located at 9155 American Legion Drive.

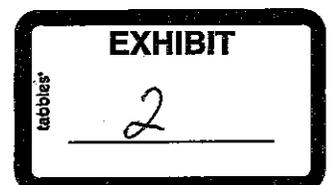
It was my determination in my letter, dated November 18, 2020, and attached, that the determination has already been made by the Land Use Ordinance. The Land Use Ordinance is clear about the status of those uses that predate zoning.

1.7 EXISTENCE OF A NONCONFORMING USE

Whether a nonconforming use exists is a question of fact and shall be decided by the Zoning Administrator after public notice. At the Zoning Administrator's discretion, a review of a nonconforming use may be submitted to the Board of Appeals for a determination of whether a nonconforming use exists. Those nonconforming uses in existence prior to November 18, 1969 are hereby validated, albeit the nonconforming use failed to obtain a certification from the Administrator.

The Department is not aware that the building was abandoned at any time. In my letter, dated November 18, 2020, I explained the package of uses that have been conducted by the American Legion and which any purchaser may continue. If new purchasers planned for new uses in the future, there are processes for formal review included in the zoning code.

Per the Land Use Ordinance provision cited above, the uses have already been confirmed by the Land Use Ordinance itself. If you wish to appeal my response on this matter, you may make an application to the Kent County Board of Appeals to appeal my determination that the Land Use Ordinance has already addressed the matter.



If you have any questions, please let me know.

Sincerely,

Bill

[Logo, company name Description automatically generated]<<https://www.kentcounty.com/>>

William A. Mackey, AICP
Director, Department of Planning, Housing, and Zoning
Kent County, Maryland
400 High Street, Suite 103
Chestertown, MD 21620
410-778-7423, ext. 9
wmackey@kentgov.org<<mailto:wmackey@kentgov.org>>

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October 23, 2020

Mr. Brian Jones
Kent County Planning and Zoning
400 High Street
Chestertown, MD 21620

Brian,

Thank you for discussing with me, last week, the non-compliant activities occurring at the American Legion property, located at 9155 American Legion Road, Chestertown, MD. During our conversation, it was noted the Legion property is zoned **Critical Area- Residential**. This zoning is consistent with all the properties located on both American Legion and Mallard Road, a.k.a. Chesmar Estates. My understanding is the above zoning does not permit business or activities related to business in a **Residential** zone. Moreover, the **Critical Area** designation is limiting as to the volume of use on the septic system.

Unfortunately, the Legion is no longer operating as a community/veterans' organization. In fact, the Legion is no longer operating at this facility and has listed the property for sale through Hogan's Real Estate since February 2019. Since the Legion ceased operations, the facility has been poorly maintained, especially the interior spaces.

Even though the property is listed for sale, use of the building has been "rented" to at least two, possibly three, 3rd party non-profit organizations (NPOs). One of the groups, Food for the Elderly, is using the kitchen to prepare meals, on Thursdays, and distributing them through a process of vans, cars, and trucks driving around the Legion loading from the front door.

Is this not in blatant violation of the zoning? Wouldn't the property at least have to be brought up to code and meet zoning requirements to be rented since these are 3rd party activities?

A second NPO, Community Mediation Upper Shore (CMUP) is in the process of moving into the Legion. This information is a first-hand source, the executive director of the organization, who told me in conversation Thursday of last week the move would be finished soon.

In addition to the above issues, it is known by residents in our community who are both members of the Legion and licensed relators familiar with the environmental condition of the building inside and out including operations related to water, sewer, and drainage that:

- Mold (possibly black mold) is prevalent throughout the building. There is clear visual evidence of mold in the downstairs facilities and stairway;
- The interior environment has not been maintained to a level to prevent mold and mildew and should be considered unfit for use until mitigated.
- The septic is failing and has to be pumped out frequently;
- The number of restrooms for the amount of activity appears insufficient and are outdated.

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It is also my understanding the property may be sold to the three NPOs. A sale may require a zoning change and due process with community involvement, correct? If this is the case, it is much better to bring this non-compliance and violation of the **Critical Area-Residential zoning law** to heel immediately.

The Legion "should not, cannot" be allowed to convey their status to their renters allowing them to operate businesses in violation of the **Critical Area-Residential Zoning**. At the very least shouldn't renting the facility require the Legion to bring the facility up to current code regulations?

We request your department's attention to bring these operations into compliance with current regulations as quickly as possible considering your COVID-19 workload. We understand your tasks are more, staff are few, and not enough hours in the day.

The contact information was provided by one Chesmar's Legion members:

Frank M. Jarman - American Legion Post 36
9155 American Legion Drive
Chestertown, MD 21620
Phone 410-778-9885

Paul Showalter - acting commander
commander@post36.org

Ralph Morgan - finance officer
rhmorgan@oco.net

Thank you for your kind attention. We appreciate your efforts.

Sincerely,



Karen Kemp-Dockstader
Chesmar Estates Neighborhood Group
26875 Mallard Road
Chestertown, MD 21620

Cc: Erika Hercher, Kent County Health Department
Chesmar Estates Neighborhood Group

October 23, 2020

Ms. Erika Hercher
Kent County Health Department
125 South Lynchburg Street
Chestertown, MD 21620

Dear Erika,

Thank you for discussing with me, on Friday, the activities related to the preparation and distribution of food occurring at the American Legion property located at 9155 American Legion Road, Chestertown, MD. I have included a copy of a similar correspondence to Kent County Planning and Zoning as this property is in non-compliance with the current zoning according to their office. During a conversation with Brian Jones at P&Z, it was noted the Legion property is zoned **Critical Area - Residential**. This zoning does not permit business or activities related to business in a **Residential** zone. Moreover, the **Critical Area** designation is limiting as to the volume of use on the septic system.

The Legion is no longer operating as a community/veterans' organization. It is disbanded and the property has been listed for sale through Hogan's Real Estate since February 2019.

Even though the property is listed for sale, use of the building has been "rented" to at least two, possibly three, 3rd party non-profit organizations (NPOs). One of the groups, Food for the Elderly, is using the kitchen to prepare meals, on Thursdays, and distributing them through a process of vans, cars, and trucks driving around the Legion loading from the front door. Photos are available upon request.

In addition to the above issues, it is known by residents in our community who are both members of the Legion and licensed relators familiar with the environmental condition of the building inside and out, including operations related to water, sewer, and drainage that:

- The kitchen has not been inspected in at least 3 years, maybe more;
- Mold (possibly black mold) is prevalent throughout the building. There is clear visual evidence of mold in the downstairs facilities and stairway;
- The interior environment has not been maintained to a level to prevent mold and mildew and should be considered unfit for use until mitigated;
- The septic is failing and has to be pumped frequently;
- The number of restrooms for the amount of activity appears insufficient and are outdated.

The Legion "should not, cannot" be allowed to convey their status to their renters allowing them to operate businesses in such poor environmental and potentially dangerous conditions. The landlords, The American Legion, should be held responsible for the mitigation of all the factors relating to the environment inside and outside of this building for the safety and welfare of those working in the kitchen and the offices as well as those receiving food prepared in the kitchen.

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We request your department's attention to bring these operations into compliance with current state health regulations as quickly as possible considering your COVID-19 workload. We understand your tasks are more, staff are few, and not enough hours in the day.

The contact information was provided by one of Chesmar's American Legion members:

Frank M. Jarman - American Legion Post 36
9155 American Legion Drive
Chestertown, MD 21620
Phone 410-778-9885

Paul Showalter - acting commander
commander@post36.org

Ralph Morgan - finance officer
rhmorgan@oco.net

Thank you for your kind attention. We appreciate your efforts.

Sincerely,

Karen Kemp-Dockstader
Chesmar Estates Neighborhood Group
26875 Mallard Road
Chestertown, MD 21620

✓ Cc: Brian Jones, Planning and Zoning
Chesmar Estates Neighborhood Group



**Department of Planning,
Housing, and Zoning**
400 High Street, Suite 130
Chestertown, MD 21620
410-778-7423 (voice/relay)
planning@kentgov.org

November 18, 2020

Ms. Karen Kemp-Dockstader
26875 Mallard Road
Chestertown, MD 21620

Re: Frank M. Jarman American Legion Post 36 at 9155 American Legion Drive

Dear Ms. Kemp-Dockstader:

I'm writing in response to your letter, dated October 23, 2020, which is attached for reference.

It's my understanding that Mr. Brian Jones was able to provide you the name of the zoning district assigned to the property referenced above. Mr. Jones then recommended that you contact the Kent County Health Department and the Chief of Code Enforcement regarding your concerns.

On November 12, 2020, the Health Department responded to your inquiry, noting that there are no violations identified on the subject property by the Health Department. I'm writing to follow-up on your inquiry regarding whether the use is permitted on the subject property.

Please note that the American Legion building and its use predate the County zoning regulations. The current building was dedicated in 1960. Per Kent County's zoning code, under Article VIII. *Nonconformities*, Section 1. *Nonconforming Uses*, Section 1.7 (below), the use is validated.

1.7 EXISTENCE OF A NONCONFORMING USE

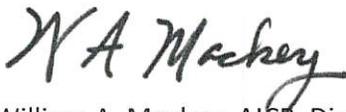
Whether a nonconforming use exists is a question of fact and shall be decided by the Zoning Administrator after public notice. At the Zoning Administrator's discretion, a review of a nonconforming use may be submitted to the Board of Appeals for a determination of whether a nonconforming use exists. Those nonconforming uses in existence prior to November 18, 1969 are hereby validated, albeit the nonconforming use failed to obtain a certification from the Administrator.

It's my understanding from your correspondence, dated October 23, 2020, that the use of the property has not lapsed. Please note that the use need not be performed by a specific entity, such as the American Legion. It's my understanding that the typical use of this property includes aspects like education for families, community services, and youth services including camping. Services provided include a variety of offerings for veterans, as well as disaster relief assistance.

Any purchaser(s) of the property will be able to continue providing the kinds of services described above. If a particular service were considered to be different in kind, there is a process for formal review included in the zoning code. You may wish to review the online code, and specifically the article on *Non-conformities* at <https://www.kentcounty.com/planning/land-use-contents>.

If you have any other questions, please let me know.

Sincerely,

A handwritten signature in black ink that reads "W A Mackey". The signature is written in a cursive, slightly slanted style.

William A. Mackey, AICP, Director

Attachments:

Letters from Karen Kemp-Dockstader, dated October 23, 2020

Letter from Erika H. Hercher, LEHS, dated November 12, 2020

- c: Shelley L. Keller, County Administrator
- Thomas N. Yeagar, Esq., County Attorney
- Erika H. Hercher, LEHS, Licensed Environmental Health Specialist, KCHD
- Brian Jones, Planning Specialist, KCDPHZ

23 November 2020

Mr. William B. Mackey, AISP Director
Department of Planning, Housing and Zoning
400 High Street, Suite 130
Chestertown, MD 21620

Re: Frank M. Jarman American Legion Post 36 at 9155 American Legion Road

Dear Mr. Mackey:

Thank you for your reply (dated November 18) to our correspondence written to your department October 23, 2020, responding to concerns regarding the sale of the Post #036 American Legion facility located at 9155 American Legion Road. This letter reflects the collective concerns of the majority of the 29 homes on both Mallard and American Legion Roads whose names appear at the close of this letter.

Community Impact

Attached is a photo taken by James Menapace (26865 Mallard Road) showing Saturday's (November 21) traffic on American Legion Road. The line started at the front of the American Legion building and continued down the drive continuing .4 mile toward the Morgnec intersection blocking driveways, children's activities, etc. Since the occupants moved into the Legion property this summer, the traffic volume has steadily grown and I have been told it will increase. This is not the historic use of this property, nor the intent of the original exemption permitting a club/private civic organization hosting meetings and community-oriented events on a very limited basis.

Environmental Impact

According to Brian Jones, Planning and Zoning office, all the properties on both American Legion and Mallard Roads, including the Legion, are zoned Residential-Critical Area. Dialogue among our neighbors expresses great concern regarding environmental impact as well as community impact should the Legion, or anyone, increase the load on septic fields adjoining Morgnec Creek and the Chester River. During house construction or renovation, the number of bathrooms are counted. It does not make sense that office space for multiple organizations and their employees be permitted without a proper "impact study." In addition to the busy food distribution days which included a Saturday, there has been a range of 5 to 19 cars a day during the week in the Legion parking lot.

1.7 Existence of a Nonconforming Use:

In your letter you stated: "at the Zoning Administrator's discretion, a review of a nonconforming use may be submitted to the Board of Appeals for a determination of whether a nonconforming use exists."

The majority of neighbors occupying the residential properties on both Mallard and American Legion Roads respectfully request you forward a copy of this letter to the Zoning Administrator or advise us to whom we should formally communicate ensuring this issue has oversight by the Board of Appeals. Now, about that Zoning Administrator – who would that be? According to the county's attorney office, you are the Zoning Administrator or someone you appoint. Please advise as to whom we should contact regarding this increasingly concerning situation. Do we have to wait until the property is sold and the situation gets worse?

As per your correspondence, you have validated the existence of the nonconforming uses prior to the November 18th date of our correspondence, as the Legion organization and/or the current use occupants “failed to obtain a certification from the Administrator” to conduct their cross-docking and distribution activities.

Lapse In Use

To further clarify your understanding regarding your statement “that the use of the property has not lapsed,” this is **not** a clear understanding. **The traditional use has lapsed, dwindled, and fallen due to the lack of leadership/administration over the past decade.** The facility has not been used for consistent general membership functions for approximately four years, subsequently negating any prior use acceptance by the county and the community.

When I paid my husband’s dues in person at the Legion office onsite in 2017, I was informed the Ladies Auxiliary had been defunct for “sometime.” I point to this as the current commander Paul Showalter told Erika Hercher, Health Department, the Legion conducts meetings at the building 2 days a week. This is not a true statement, at least as far as membership is concerned. Both Robert McGinnis (26795 Mallard Road) and Gerry Dockstader (26875 Mallard) do not know of meetings 2 times a week and they live here. Once a month there may be a meeting, or perhaps an un-disclosed executive meeting, but minutes and roll call would have to be produced to account for “all” these meetings. It appears Mr. Showalter has his own agenda, not the Legion’s nor the community’s interests who have supported this entity for many years.

At the last general membership meeting, Thursday night, November 19, both Gerry and Bob McGinnis reported the Northeastern Commander who was in attendance commented “that she had watched this Post self-destruct over the years.” Of the 117 active members of Post #036 less than 13 attended this meeting. She was referring to the lack of member access to facility and program planning.

As a Legion member of Post #036 and community, my husband and Bob McGinnis can verify there has been no member Legion activities for least 5 years, maybe more. We acknowledge observing quarterly “Blood Donor Clinics” with the Bloodmobile present onsite, but that’s about the extent of community outreach. Since the last Jamboree for Boy Scouts was 4 years ago, there have been no events focused on family, youth services or the community. This evidence verifies the facilities have not been used for “General Populus Legion Activities” nor for the benefit of the community.

The Legion has adequately maintained the outside of the building and landscape so it is not an “eye-sore,” however, the interior has issues due to lack of use.

Please advise whom we contact regarding an appeal. Thank you, Mr. Mackey, for your kind consideration.

Sincerely,

K. Kemp-Dockstader

Cc: Eric and Karen Colliflower; James and Therese Menapace; Tom and Diane Voshell; Leslie Miller; Joe Adams; Renee D’Que; Russell Frymiare; Brent Applebaum; Bob and Mary McGinnis; Judy and Martin Frank; Ann and Reid Townsend; Dean Carr; Scott Benson; Susan Crooks, Kris Forehand; Jessie Welch; Dominic and Caroline Rawson; Gerald Dockstader; Thomas Yeagar; Shelley Keller; Brian Jones; Erika Hercher

CHRISTOPHER F. DRUMMOND

119 LAWYERS ROW
CENTREVILLE, MARYLAND 21617

Telephone: (410) 758-0030
Facsimile: (410) 758-0032
E-mail: chrisdrummondlaw@gmail.com

To: Kent County Board of Appeals

Date: June 28, 2021

Re: Voshell/Chesmar Community Association Appeal, Case No. 21-25

Thomas Voshell and Chesmar Community Association have submitted an application requesting a "Determination of Nonconforming Use." The applicants question the status of American Legion Post 36 on American Legion Road as a legal nonconforming use. The application is filed under the authority of Article VII, Section 1.7 of the Land Use Ordinance. That Section provides:

EXISTENCE OF A NONCONFORMING USE

Whether a nonconforming use exists is a question of fact and shall be decided by the Zoning Administrator after public notice. At the Zoning Administrator's discretion, a review of a nonconforming use may be submitted to the Board of Appeals for a determination of whether a nonconforming use exists. Those nonconforming uses in existence prior to November 18, 1969 are hereby validated, albeit the nonconforming use failed to obtain a certification from the Administrator.

On May 25, 2021, C. Daniel Saunders, Esquire, on behalf of the applicants, wrote to William Mackey requesting his view on the nonconforming status of the American Legion Post 36's use of its property. On June 1, 2021, Mr. Mackey replied by email. In his email, Mr. Mackey essentially concludes that use of the property had not been abandoned or changed. He also noted that the American Legion Post 36 building was erected in 1960 or 1961 and, therefore, was a "validated" nonconforming use. Mr. Mackey did not submit Mr. Saunders' inquiry to the Board of Appeals as he has the discretion to do under Article VIII, Section 1.7.

Pursuant to Article X, Section 2(1), the Board of Appeals has jurisdiction to "hear and decide appeals of any decisions or determination made by the *Administrator* in the enforcement or administration of this Ordinance." The Section is not mentioned in the Application.

Because a "Determination of Nonconforming Use" was not referred to the Board by Mr. Massey, the Board's jurisdiction is unclear.

If the applicants decide to pursue an administrative appeal, the Board becomes a "super" Zoning Administrator. The Board has all the powers, discretion, and authority of the Zoning Administrator. The Board does not simply agree or disagree with the Zoning Administrator's decision. Instead, it makes its own findings of fact and conclusions of law on the matters raised in the appeal.

The applicants have the burden of proof. In other words, American Legion Post 36 does not have to prove that its use is legally nonconforming. Instead, the applicants must prove that the property has not lost its status as legally nonconforming or that the uses still permitted are narrow in scope.

If you have any questions on these legal issues, please let me know.

LAW OFFICES

CHRISTOPHER F. DRUMMOND

119 LAWYERS ROW
CENTREVILLE, MARYLAND 21617

Telephone: (410) 758-0030
Facsimile: (410) 758-0032
E-mail: chrismdrummondlaw@gmail.com

June 23, 2021

By Email: lyoung@mlg-lawyers.com & U.S. Mail
Lance M. Young, Esquire
MacLeod Law Group, LLC
110 North Cross Street
Chestertown, Maryland 21620

*Re: Voshell/Chesmar Appeal
Case No. 21-25*

Dear Lance:

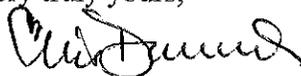
The Department of Planning, Housing, & Zoning has forwarded the application you recently submitted on behalf of Thomas Voshell and Chesmar Community Association. As you know, I represent the Kent County Board of Appeals.

The application invokes Article VIII, Section 1.7 of the Kent County Land Use Ordinance. Article IX, Section 2 is not mentioned. Perhaps you will explain how the Board has jurisdiction to render a determination on the status of a nonconforming use when the matter is not referred to it by the Zoning Administrator. I will likely be asked by the Board whether it has the authority to consider the application given the manner in which it is presented.

I ask that you address why Chesmer Community Association has standing to participate as a party in the appeal. The Department of Assessments & Taxation website does not reveal a stock or nonstock entity with that name. Moreover, community associations generally do not have standing as "aggrieved persons." Finally, provide me with your view on the party with the burden of proof at the public hearing in the event the Board determines that it has jurisdiction. American Legion Post 36 did not initiate a request for nonconforming use determination. In your view, does it nonetheless have the burden of proof and, if so, what is it required to prove given its use and ownership of the property since 1960?

I will appreciate your prompt response.

Very truly yours,



Christopher F. Drummond

CFD/kd

cc: Paul Showalter, Acting Commander (commander@post36.org)
William A. Mackey, Director of Planning, Housing, & Zoning (wmackey@kentgov.org)
Carla Gerber, Deputy Director/Planning, Housing, and Zoning (cgerber@kentgov.org)



Lance M. Young
lyoung@mlg-lawyers.com

July 1, 2021

Christopher F. Drummond
119 Lawyers Row
Centreville, MD 21617

Kent County Zoning Board of Appeals
400 High St.
Chestertown, MD 21620

Christopher,

This letter is submitted in response to your letter, dated June 23, 2021. (Attached). You requested additional information pertaining to the Board of Appeals application for a determination of nonconforming use, which our office submitted on behalf of Thomas Voshell and the Chesmar Community Association. We are submitting this letter to you in your role as counsel for the Board of Appeals (“BOA”) and request that the BOA consider this a supplement to the previously submitted application.

It appears that the landowner has not raised either the issue of jurisdiction or the issue of standing. This is not surprising, since it is in everyone’s interest (the landowner, potential developers, the neighbors, and County) that the nonconforming status of this land be properly determined now. Accordingly, in the interest of early resolution, we will address those issues now, even though they have not been interposed by a party to the proceedings.

1A. Board of Appeals Original Jurisdiction.

You requested clarification regarding the Board of Appeals authority to consider the application. Article VIII, Section 1.7, of the County zoning ordinance provides:

Whether a nonconforming use exists is a **question of fact** and shall be decided by the Zoning Administrator **after public notice**. At the Zoning Administrator’s discretion, a review of a nonconforming use may be submitted to the Board of Appeals for a determination of whether a nonconforming use exists. ... (emphasis added).

Therefore, when a question of nonconformity is raised, the County is obligated to make a factual determination after public notice. That fact finding determination can be made by the Zoning Administrator. If the Zoning Administrator elects not to make the factual determination

after public notice, that review may be submitted to the Board of Appeals.

The initial request for a nonconforming status determination was submitted to William Mackey, Director of Planning, Housing, and Zoning. *See* Application Ex. 1. The Zoning Administrator’s response stated, in part, that “the uses have already been confirmed by the Land Use Ordinance itself. If you wish to appeal my response on this matter, you may make an application to the Kent County Board of Appeals to appeal my determination that the Land Use Ordinance has already addressed the matter.” *See* Application Ex. 2. Since the Zoning Administrator did not undergo any fact finding after public notice, and stated in his letter that we may “make an application to the Kent County Board of Appeals,” the Zoning Administrator was exercising his discretion to have the formal review of nonconforming use determined by the BOA as permitted under Section 1.7.

1B. Board of Appeals Appellate Jurisdiction.

Alternatively, we submit the application to the BOA under its general authority to “hear and decide appeals of **any decision or determination** made by the Administrator in the enforcement and administration of this ordinance ...” Article X, Section 2.1. If the Zoning Administrator’s **direction** to submit the matter to the BOA was not done under his discretionary authority to do so under Article VIII, Section 1.7, then our appeal may be taken as a matter of right under Article X, Section 2.1, from the Zoning Administrator’s decision not to give public notice or make factual determinations lawfully requested by the applicants.

2. Standing

The ordinance has specific provisions for the expiration of nonconforming uses, often referred to as “sunset laws.” Those sunset laws are there to protect the neighboring properties and the community. There can be no doubt that it is the neighbors who have the right to initiate a nonconforming determination.

The Application to the BOA was submitted on behalf of Thomas Voshell and the Chesmar Community Association (“Association”). The Association includes numerous members of the Chesmar Community in which the American Legion property resides.

There can be little doubt that Thomas Voshell has standing to submit the application as a party directly impacted by the uses of the American Legion property. To have standing for zoning review, the complaining party “must be in ‘sight or sound’ range of the property that is the subject of his complaint. *Md.-Nat’l Cap. P. & P. v. Rockville*, 269 Md. 240, 248, 305 A.2d 122 (1973); *Wier v. Witney Land Co.*, 257 Md. 600, 612-13, 263 A.2d 833 (1970); *Committee for Responsible Dev. On 25th St., et al. v. Mayor and City Council of Baltimore, et al.*, 137 Md. App. 60, 767 A.2d 906 (2001).

Where an individual with standing is a complainant, it is not necessary to determine the standing of any association that is filing jointly. As stated by the Court of Appeals, “Where there exists a party having standing to bring an action or take an appeal, we shall not ordinarily inquire as to whether another party on the same side also has standing. *Bd. of License Comm’rs v. Haberlin*, 320



Md. 399 (1990); *Gardner v. Archers Glen Partners, Inc.*, 405 Md. 43 (2008); *Dorsey v. Bethel A.M.E. Church*, 375 Md. 59 (2003).

3. Burden of Proof.

Under Maryland law, the “party asserting the existence of a nonconforming use has the burden of proving it.” *Calhoun v. County Bd. of Appeals*, 262 Md. 265, 267 (1971); *Lapidus v. Mayor & City Council of Baltimore*, 222 Md. 260 (1960); *County Comm’rs of Carroll County v. Uhler*, 78 Md. App. 140, 145 (1989).

The applicants are requesting a determination that the property in question is not a nonconforming property and that any uses on the property must be in conformance with allowed uses in the Critical Area Residential Zone. If the property owner alleges otherwise, it must demonstrate that the uses it claims are non-conforming meet all of the statutory requirements, as explained by the Court of Appeals, including demonstrating that none of the uses have been abandoned and have not been historically casual, intermittent, or illegal. *See* Application Ex. 1.

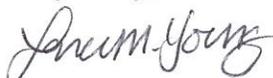
That means, to maintain a status of nonconformity, the property owner must :

- 1) identity and describe each nonconforming use that they claim;
- 2) and as to each use:
 - a) when it began,
 - b) how it was lawful when it began,
 - c) what ordinance change rendered the use unlawful,
 - d) the date of the ordinance change (nonconformity date),
 - e) that the particular use was never abandoned for a period of 12 months between the nonconformity date and the date of the hearing.¹

It should be noted that to avoid sunseting of nonconforming uses, the use cited must **lawfully** continue so that if a use becomes unlawful, by operation of some other (non-zoning) law, that use will not toll the sunset provisions of the law.

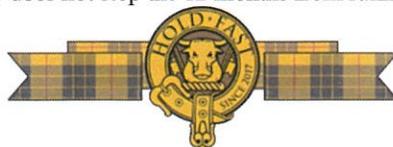
We look forward to the Board’s consideration and review. Please consult with us prior to setting a hearing date.

Very Truly,



Lance M. Young

¹ Intermittent or occasional use does not stop the 12 months from running.



IN THE MATTER OF THE APPLICATION OF: * BOARD OF ZONING APPEALS
Thomas Voshell & Chesmar Community Ass'n * FOR
* KENT COUNTY, MARYLAND
* Case No. 21-25

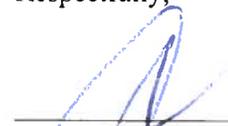
* * * * *

ENTRY OF APPEARANCE

Dear Clerk:

Please enter the appearance of Stephen Z. Meehan and the Law Offices of Stephen Z. Meehan on behalf of the Property Owner, Frank M. Jarman, Post 36, American Legion.

Respectfully,



Stephen Z. Meehan
Law Offices of Stephen Z. Meehan
208 High Street, Ste. 200
Chestertown, MD 21620
(410) 778-7941 (office)
(410) 778-4459 (fax)
smeehan@szmattorney.com

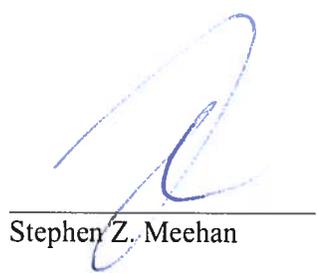
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this ___ day of July, 2021 by U.S. Mail,

First Class, postage prepaid, to:

Christopher Drummond, Esquire
119 Lawyer's Row
Centreville, MD 21617
Attorney for Board of Zoning Appeals

Lance M. Young, Esquire
MacLeod Law Group, LLC
110 North Cross Street
Chestertown, MD 21620
Attorney for Applicant



Stephen Z. Meehan

IN THE MATTER OF THE APPLICATION OF: * BOARD OF ZONING APPEALS
Thomas Voshell & Chesmar Community Ass'n * FOR
* KENT COUNTY, MARYLAND
* Case No. 21-25

* * * * *

MOTION TO DISMISS

NOW COMES the Frank M. Jarman, Post 36, American Legion, Incorporated, Respondent Property Owner, by and through its Attorney, Stephen Z. Meehan, and moves to dismiss this instant action and says:

STATEMENT OF CASE

This is an appeal from the nonconforming use determination of Kent County Zoning Administrator William Mackey made at the request of the Applicant as more fully set forth in a letter from the Applicant’s attorney, C. Daniel Saunders, Esq., “to request, pursuant to the provisions of the Kent County land use ordinance at Art. VIII, Section 1.7, a formal nonconforming use status determination” for the Respondent’s use of the Respondent’s property. See Exhibit 1, Exhibit 2.

STATEMENT OF FACTS

1. On May 25, 2021, the Applicants, through their attorney, C. Daniel Saunders, filed a request with Zoning Administrator William Mackey requesting that Mr. Mackey make a determination of whether the Respondent, Frank M. Jarman American Legion Post 36 had abandoned its use of its property on Legion Drive. Exhibit 1.
2. On June 1, 2021, Mr. Mackey replied by email advising Mr. Saunders that the Respondent had not abandoned its use of the property and its use was in compliance under the zoning ordinance. Exhibit 2.
3. Mr. Mackey further advised Mr. Saunders that “If you wish to appeal my response to this matter, you may make an application to the Kent County Board of Appeals to appeal my determination of that the Land Use Ordinance has already addressed this matter.” *Id.*

4. At no time prior to issuing his determination, did Mr. Mackey first give public notice of his intention to make the determination, which is required by Art. VIII, Section 1.7 to give the general public notice and an opportunity to appeal any such determination.

5. In addition, Mr. Mackey's determination does not include any language that would suggest that he was exercising his authority under Art. VIII, Section 1.7. which provides in part, "At the Zoning Administrator's request, a review of a nonconforming use may be submitted to the Board of Appeals for a determination of whether a conforming use exists."

ARGUMENT

This Application should be dismissed on the grounds that Mr. Mackey's determination decision was not ripe for appeal. In order for Mr. Mackey's decision to be an effective final determination subject to appeal, he would first have had to provide the public notice of the determination. Until that was complete, there was no final decision to appeal from.

The Board of Zoning Appeals should dismiss this application and remand the matter to Mr. Mackey to properly comply with the zoning ordinance. The public notice is essential because it provides the public with notice of the determination and an opportunity to appeal to this Board. The only people aware of Mr. Mackey's decision from June 1 was Mr. Mackey and his staff and Mr. Saunders and his client. The property owner did not know, at least until the Application was filed.

In addition, this Board should not entertain the application on the theory that it is a *de facto* request from Mr. Mackey to this Board to make the determination. That would have required a written request directly from Mr. Mackey to the Board, which is not the case here. The Applicants have brought this application in response to Mr. Mackey's procedurally flawed determination. Mr. Mackey must correct that procedural error before his determination becomes final and ripe for application for appeal.

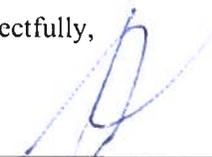
CONCLUSION

For the reasons stated above, this matter should be dismissed.

WHEREFORE, the Respondent respectfully requests this Honorable Board of Zoning Appeals to grant the following relief:

- A. Grant the Respondent's Motion to Dismiss;
- B. Dismiss this Application; and
- C. Grant any and all additional relief the Respondent's case requires.

Respectfully,



Stephen Z. Meehan
Law Offices of Stephen Z. Meehan
208 High Street, Ste. 200
Chestertown, MD 21620
(410) 778-7941 (office)
(410) 778-4459 (fax)
smeehan@szmattorney.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 12th day of July, 2021 by U.S. Mail,

First Class, postage prepaid, to:

Christopher Drummond, Esquire
119 Lawyer's Row
Centreville, MD 21617
Attorney for Board of Zoning Appeals

Lance M. Young, Esquire
MacLeod Law Group, LLC
110 North Cross Street
Chestertown, MD 21620
Attorney for Applicant



Stephen Z. Meehan

MACLEOD
LAW GROUP LLC

C. Daniel Saunders
dsaunders@mlg-lawyers.com

May 25, 2021

Mr. William Mackey
Director of Planning, Housing, and Zoning
400 High St.
Chestertown, MD 21620

Mr. Mackey,

Our firm represents the Chesmar Community Association and other individuals who own property in the Chesmar Community including Thomas Voshell and Gerry Dockstader. The purpose of this correspondence is to request, pursuant to the provisions of the Kent County land use ordinance at Article VIII section 1.1, a formal nonconforming use status determination for the American Legion properties located at 9155 American Legion Dr., Chestertown, MD. The property is zoned Critical Area Residential and falls within the Maryland critical area.

The Association represents over 30 households that, along with Mr. Voshell and Mr. Dockstader, are all within close proximity, sight and sound of the Legion properties. The Legion property has been for sale for several years, and there have been a number of prospective buyers who have looked at the property for a myriad of proposed uses. It is our understanding that the planning office has informally opined that the property is a "nonconforming" property; although, the specific nature of that nonconforming use (or combination of uses) is undefined. As a result, realtors and prospective buyers have been led to assume that virtually any use (or combination of uses) of this property will be allowed in the future. There is tremendous confusion among prospective buyers, realtors, and neighboring residents as to what uses will be lawful on the property in the future.

Prospective purchasers have looked at the property with an eye toward a wide variety of proposed uses. Among the uses that have been mentioned are: high-end restaurant, catering facility, wedding venue (indoor and outdoor), event venue, outdoor sports events, opioid addiction treatment, day camp, campground, healthcare, counseling center, fishing and oyster harvesting, theater productions. Many of these

activities are not allowed under the Critical Area Residential zone. At the very least many would require an application for special exception.

The Legion property is very large, highly visible, environmentally sensitive, and entirely in the critical area. It has a failing septic system and is surrounded by private homes. The use of the property as a Legion Home has been abandoned for many years. Now is the appropriate time for a nonconforming use determination to be made. The purpose of ordinance Article VIII section 1.1 is to eliminate the potential confusion surrounding nonconforming uses, while providing the public forum for a rigorous examination of the essential elements of a nonconforming use: (1) what, if any, recent uses of the property were at one time lawful (the subject of a valid permit) and then rendered unlawful by ordinance change. (2) the exact nature, extent, and duration of each of those uses. (3) whether or not each of those uses was abandoned for more than 12 months after that use became nonconforming. (4) whether or not any nonconforming use was enlarged or increased after it became nonconforming.

The following provisions of Article VIII of the Kent County zoning ordinance are relevant to future uses of the property.

- The lawful use of land, including existing nonconforming uses, existing on the effective date of the ordinance ... may be continued provided:
 - The use is not enlarged, increased, or extended to occupy a greater area than that occupied by such use on the effective date of the ordinance.
 - That if any use ceases for a period of two years [1 year in the critical area, see section 1.3] the subsequent use of such lands shall be in conformity to the regulations specified for the district in which the land is located. [1.1]
- No building ... used in whole or in part for a nonconforming use which remains idle or unused for a continuous period of [one year in the critical area, see section 1.3]... shall not again be used except in conformity with the regulations of the district in which such building or land is located. [1.2]
- Whether a nonconforming use has ceased is a question of fact and shall be decided by the Zoning Administrator. At the Zoning Administrator's discretion, a review of a nonconforming use may be submitted to the Board of appeals for a determination of whether a nonconforming use has ceased. [1.2]
- Any lawful use existing on April 12, 1988 [in the Critical Area] may continue unless the use is abandoned for more than one year. [1.3]
- Whether a nonconforming use exists is a question of fact and shall be decided by the Zoning Administrator after public notice. [1.7]

The nonconforming use of the land must remain significant and constant to maintain its nonconforming status. Article VIII, Section 1.5 of the Ordinance states that "the casual, intermittent, or illegal use of the land or buildings shall not be sufficient to establish the existence of a nonconforming use. The existence of a nonconforming use on a part of a lot or tract shall not be construed to establish a nonconforming use on the entire lot or tract."



The purpose of nonconforming law is twofold. First, it protects property owners that are using their property legally, at the time a zoning ordinance is enacted and the change in law suddenly makes existing use of a property unlawful. Second, it protects neighboring property owners by ensuring that nonconforming properties eventually become conforming once legal nonconforming uses are abandoned.

The Court of Appeals of Maryland, the highest court in Maryland, has heard numerous cases regarding non-conforming use and has crafted case law for zoning authorities to follow. The Court states, with regard to nonconforming zoning provisions, the purpose is to "reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned."¹ As explained by the Court of Appeals:

Such nonconforming uses pose a formidable threat to the success of zoning. They limit the effectiveness of land use controls, contribute to urban blight, imperil the success of the community plan, and injure property values. 1 R. M. Anderson, *American Law of Zoning* §602 (2d ed. 1976).

This Court has repeatedly recognized that one of the fundamental problems of zoning is the inability to eliminate incompatible nonconforming land uses ...

... [T]his Court has recognized that the problem inherent in accommodating existing vested rights in incompatible land uses with the future planned development of a community is ordinarily resolved, under local ordinances, by permitting existing uses to continue as nonconforming uses subject to various limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment. Moreover, this Court has further recognized that the purpose of such restrictions is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence ...

These ordinances must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses.

The County must consider this foundation of the law and whether a decision to grant nonconforming status will, in fact, harm property values of immediately adjacent property owners, especially if nonconforming uses are permitted to expand beyond those uses that were permitted by the American Legion when the property became nonconforming.

Under Maryland law, one nonconforming use cannot transpose into another nonconforming use. Granted, the Court of Appeals has determined that a property owner may intensify the *same* use², the County may not consider a completely different use when granting a nonconforming status. The Court of Appeals states:

While it is true that mere intensification of a nonconforming use is permissible so long as the nature of use is not substantially changed, it is generally recognized that the right of a landowner to continue the same kind of use to which the

¹ *County Comm'rs of Carroll County v. Uhler*, 78 Md. App. 140, 149 (1989).

² *Feldstein v. La Vale Zoning Bd.*, 246 Md. 204, 211 (1967).



property was devoted on the critical date does not confer on him a right to subsequently change or add to that use a new and different one amounting to a drastic enlargement or extension of the prior existing use.³

In other words, a property with a nonconforming day care center cannot operate as a corner gas station because both uses are commercial. In this instance, a property that has historically been used for American Legion meetings and events cannot be used for any other non-residential uses. In a real example decided by the Court of Appeals, the Court determined that a property was not properly granted nonconforming status as a shooting range when the activity on the property (at the time it changed zoning classifications) was used for running dogs – even though there was occasional shooting on the property at that time.⁴ That was considered an improper extension of the use, as opposed to an intensification of the same use.

The Court of Appeals has also determined that the *entire* property must have been used for the purpose of which it is being considered for nonconforming status. For example, in one case a property was being considered for the use of a rubble landfill. The applicant demonstrated that it had a permit for 24 acres of a property to operate a rubble landfill. However, another 31 acres was not permitted for that use and so it could not be granted nonconforming status for the entire property.⁵ So, for example, if only the American Legion building has been used in a non-conforming way, the land around it, including its shores cannot be transformed into non-residential uses.

Under Maryland law, the “party asserting the existence of a nonconforming use has the burden of proving it.”⁶ Therefore, the Legion, in a hearing before you or the Board of Appeals, must demonstrate that the uses it claims are non-conforming meet all of the statutory requirements, as explained by the Court of Appeals, including demonstrating that none of the uses have been abandoned and have not been historically casual, intermittent, or illegal.

The American Legion property, in recent years, has been inactive. Most significantly, in the last 12 months there has been no significant, ongoing nonconforming use of the property. We respectfully request that the County Zoning Administrator (or County Board of Appeals) make a determination that (to the extent that any ever existed) all nonconforming uses of the Legion property have been abandoned and that accordingly the property must be used consistent with the Kent County Zoning Ordinance going forward.

³ *Phillips v. Zoning Comm'r of Howard County*, 225 Md. 102, 110 (1960).

⁴ *Calhoun v. County Bd. of Appeals*, 262 Md. 265 (1971).

⁵ *Md. Reclamation Assocs. v. Harford County*, 414 Md. 1, 63 (2010).

⁶ *Calhoun v. County Bd. of Appeals*, 262 Md. 265, 267 (1971); *Lapidus v. Mayor & City Council of Baltimore*, 222 Md. 260 (1960); *County Comm'rs of Carroll County v. Uhler*, 78 Md. App. 140, 145 (1989).



Best regards,



C. Daniel Saunders



Lance Young

From: Daniel Saunders <dsaunders@mlg-lawyers.com>
Sent: Tuesday, June 1, 2021 2:30 PM
To: Lance Young
Subject: Fwd: response to letter dated May 25, 2021, re American Legion building
Attachments: MacLeod correspondence re American Legion 2021-05-25.pdf; Letter to Karen Kemp Dockstader 2020-11-18.pdf; Letter from Karen Kemp-Dockstader 2020-10-23.pdf; Letter from Karen Kemp-Dockstader 2020-11-23.pdf

Sent from my iPhone X

Begin forwarded message:

From: William Mackey <wmackey@kentgov.org>
Date: June 1, 2021 at 2:00:28 PM EDT
To: Daniel Saunders <dsaunders@mlg-lawyers.com>
Subject: response to letter dated May 25, 2021, re American Legion building

Dear Mr. Saunders,

Thank you for your letter and your request, received on May 27, 2021, regarding the status of the American Legion building.

In your letter you request a formal nonconforming use status determination for the American Legion properties located at 9155 American Legion Drive.

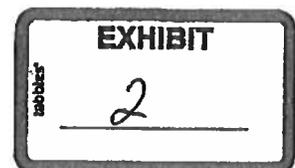
It was my determination in my letter, dated November 18, 2020, and attached, that the determination has already been made by the Land Use Ordinance. The Land Use Ordinance is clear about the status of those uses that predate zoning.

1.7 EXISTENCE OF A NONCONFORMING USE

Whether a nonconforming use exists is a question of fact and shall be decided by the Zoning Administrator after public notice. At the Zoning Administrator's discretion, a review of a nonconforming use may be submitted to the Board of Appeals for a determination of whether a nonconforming use exists. Those nonconforming uses in existence prior to November 18, 1969 are hereby validated, albeit the nonconforming use failed to obtain a certification from the Administrator.

The Department is not aware that the building was abandoned at any time. In my letter, dated November 18, 2020, I explained the package of uses that have been conducted by the American Legion and which any purchaser may continue. If new purchasers planned for new uses in the future, there are processes for formal review included in the zoning code.

Per the Land Use Ordinance provision cited above, the uses have already been confirmed by the Land Use Ordinance itself. If you wish to appeal my response on this matter, you may make an application to the Kent County Board of Appeals to appeal my determination that the Land Use Ordinance has already addressed the matter.



If you have any questions, please let me know.

Sincerely,

Bill

[Logo, company name Description automatically generated]<<https://www.kentcounty.com/>>

William A. Mackey, AICP
Director, Department of Planning, Housing, and Zoning
Kent County, Maryland
400 High Street, Suite 103
Chestertown, MD 21620
410-778-7423, ext. 9
wmackey@kentgov.org<<mailto:wmackey@kentgov.org>>

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IN THE MATTER OF THE APPLICATION OF: * BOARD OF ZONING APPEALS
Thomas Voshell & Chesmar Community Ass'n * FOR
* KENT COUNTY, MARYLAND
* Case No. 21-25

* * * * *

ORDER

UPON CONSIDERATION of the Motion to Dismiss filed by the Frank M. Jarman, Post 36, American Legion, Incorporated, Respondent Property Owner, and any opposition there to, it is this _____ day of _____, 2021 by the Board of Zoning Appeals of Kent County

ORDERED, that the Respondent's Motion to Dismiss is hereby GRANTED; and it is further

ORDERED, that the Application is hereby DISMISSED.

Chairman

Member

Member