

IN THE MATTER OF : BEFORE THE
KINGS COURT LLC : HOWARD COUNTY
 : BOARD OF APPEALS
Petitioner : HEARING EXAMINER
 : BA Case No. 13-010N

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DECISION AND ORDER

On June 3, 2013, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Kings Court, LLC (Petitioner) for a tent on an existing terrace area of a nonconforming use, in an R-12 (Residential: Single Family) Zoning District, filed pursuant to Section 129.E of the Howard County Zoning Regulations (the "Zoning Regulations").

Petitioner certified to compliance with the notice, posting and advertising requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure.

Sang Oh, Esquire, represented Petitioner. Stuart Tepper, Richard Ackman, Elizabeth Coleman, Bob Kedell, Thomas Eastland, Gino Dercola, Judy Eckles, Harold Eckles, Michael Green, Victor Menez and James Walls testified in favor of the petition. Michael Macan and Ann Apnes testified in opposition to the petition.

A Preliminary Matter

At the outset of the hearing, Petitioner requested a short break in order to discuss the proposed expansion with the large number of attendees, all of who live nearby. The Hearing

Examiner granted this request because no pre-submission meeting is required in relation to petitions to expand a non-conforming use, as is the case for conditional use petitions.¹ Any private agreements made between Petitioner and attendees are not part of this Order.

Petitioner introduced into evidence the exhibits as follows.

1. Aerial Map of Property
2. Aerial Map of Property, (enlargement)
3. Copy of standard banquet contract
4. Photograph of parked vehicles
5. Stop the King's contrivance Restaurant postcard

Opponent Michael Macan introduced into evidence the exhibits as follows.²

1. Requested conditions of approval
2. Aerial photograph depicting Property and vicinal residential properties
3. Aerial photograph of Property and existing tent
4. Aerial photograph depicting distances of vicinal properties from tent
5. Copies of images from the restaurant website

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, the Hearing Examiner finds as follows:

1. Property Identification. The subject property is located in the 6th Election District on the north side of Shaker Drive, north of the intersection with Goodin Circle. It is identified as Tax Map 42, Grid 1, Parcel 267, Lot 5 and is also known as 10150 Shaker Drive (the Property).

¹ The Hearing Examiner has previously granted such requests.

² Mr. Macan had pre-numbered multiple exhibits but did not introduce all of them into evidence. For the reader's convenience, the Hearing Examiner has renumbered them sequentially (as introduced).

2. Zoning History and Description. The irregularly shaped 5.00-acre Property is the site of the Kings Contrivance Restaurant (the Restaurant), which was established in a historic structure and originally received special permit approval in 1961 as a "Restaurant in residential zone."³ The Technical Staff Report (TSR) identifies three additional zoning cases for the use, the most recent being BA 79-34E (1979), wherein the Board of Appeals determined the Restaurant had become non-conforming on the effective date of the 1977 Zoning Regulations, because these regulations no longer permitted restaurants as special exception uses.

The Restaurant is accessed from Shaker Drive along a short, wide pipestem, then curves and rises to the northwest and north. At about 170 feet from the road, the access drive becomes an oval driveway used for parking and vehicle circulation in front of the Restaurant. A second drive curves from the southeast side of the oval driveway and along the Restaurant. The open, outdoor terrace lies to the Restaurant's north.

The remainder of the Property is dotted by trees and is mostly lawn. The Property's high point is to the east of the Restaurant near the beginning of the oval driveway and the land decreases in elevation to the south, east and north.

3. Vicinal Properties. The Property is surrounded by the R-12-zoned Open Space Lot 6. To the north of Open Space Lot 6, the land is zoned NT (New Town.) A narrow Open Space lot lies between Lot 6 and the residential lots of the Village of Kings Contrivance, with these homes fronting on Cape Anne Drive. To the east is the NT zoned Open Space Lot 340. Across Shaker Drive to the south, the NT zoned properties are improved with residences fronting on Goodin

³ The structure is designated as Maryland Historic Trust MHT-293.

Circle. Beyond Lot 6 to the west, the R-12 zoned land is improved with residences on Lots 7-10 of the Macgill's subdivision.

4. Roads. Shaker Drive has two travel lanes with wide shoulders and about 34 feet of paving within an existing right-of-way. The TSR concludes the long-existing entrance raises no sight-distance concerns.

5. Water and Sewer Service. The Property is served by public water and private sewer.

6. General Plan. PlanHOWARD2030 designates the Property as "Established Communities" on the Designated Place Type Map and as Commercial on the Land Use Maps. The Transportation Map depicts Shaker Drive as a Major Collector.

7. Proposed Expansion. Petitioner requests approval for enlargement of the Nonconforming Use to erect an approximately 40'x60' tent over an existing outdoor terrace.

8. Stuart Tepper testified to being a member of the LLC and a property owner. He testified that the Property has been used continuously for the same purpose since 1979. Mr. Tepper further testified that the proposed enlargement is for the existing tent over the lawn/terrace. The lawn/terrace was part of the nonconforming use when the current owners took over the Property in 1975. All outdoor area events must be contracted through the petitioners and are provided as a service for existing patrons, who use the space for wedding receptions and similar events. There is no charge for the tent when it is placed over the lawn/terrace area. There were 8 "tent" functions in 2010, 4 in 2011 and 5 in 2012. The revenue generated from the "tent" use is small relative to that of the 8,500-sq. ft. Restaurant. The tent itself is 40'x 60' and 18 feet in height. It does not add floor area because the area of the tent is already in use. The

tent is located away from residential lots and buffered by distance and landscaping. Referring to Petitioner's Exhibits 1 and 2, Mr. Tepper explained they depict the Property and immediate area. The tent is the white structure visible in Exhibit 1. It is put up in May and taken down in October.

9. On cross-examination by Michael Macan, Mr. Tepper testified to there being no limit to the number of events that could be held. It is part of the normal existing use. He believes the tent use generates about 3 percent of overall revenues. The activities in the tent area include wedding ceremonies, cocktails and h'orderves and similar uses.

10. On cross-examination by James Walls, Mr. Tepper testified that the tent would not change the use of the Property. Without the tent, business would drop off if there were inclement weather. The Restaurant business has dropped off for late evening reservations, so the Restaurant wants the tent to counter this loss in business. The Restaurant's current contract gives the Restaurant sole discretion to control noise or music levels. Petitioner's Exhibit 3. He agreed the Restaurant learned its lesson about loud music and does not intend to permit it in the future.

11. Elizabeth Coleman testified to residing across from the Restaurant. She has lived at her residence for more than 20 years, has never been bothered by noise, was married on the location of the tent and supports the expansion.

12. Robert Kedell testified to residing across the street from the Restaurant. He has found the Restaurant to be a very good neighbor and supports the petition.

13. Michael Macan testified to residing behind the Property, about 200 feet from the tent. Referring to Opponent Exhibit 1, he explained it was a list of 6 conditions that he would like placed on any approval, including a prohibition on amplified sound or music audible beyond the Restaurant building; no outdoor events between 10 p.m. and 10:00 a.m.; a maximum of 4 events a year; a 100-person attendee limit on each event; limiting the presence of the outdoor tent to 90 calendar days per year, and; compliance with all county laws, regulations and ordinances and all permit requirements. These conditions would limit the adverse impact of the use on neighboring properties. He has experienced a great deal of noise relating to the tent use and can see portions of the tent from his property for a large part of the year.

As Mr. Macan also testified, Opponent Exhibits 2, 3 and 4 are aerial photographs showing the Property in relation to neighboring residential uses. He is concerned that the expansion of the "tent" use is not a normal Restaurant use, but rather an impermissible intensification or change of use. This intensification or change of use is visible in Opponent Exhibit 5, images of "tent" events from the Restaurant use. He believes the private events are different from the Restaurant use. Allowing the use of the tent would permit more frequent, larger events (more frequent and longer in duration for any one event.) He has observed traffic and parking problems associated with tent events.

On cross-examination, Mr. Macan testified to being unhappy in the past with events at the Restaurant. He has heard outside voices and loud (amplified) music. He does not object to music if he cannot hear it, but he does object to increased activity. He has not been bothered by any activity relating to the tent use since September 2012.

14. Ann Apnes, who lives behind and diagonally from the Restaurant, testified to enjoying the Restaurant but opposes the petition because the tent turns the Restaurant into an events facility. In the past, she has heard public speaking and music has made her windows shake. She can see parts of the tent from her house.

15. Thomas Eastland, who lives one house away from the Restaurant on Shaker Drive, testified to the Restaurant being a good neighbor and in support of the petition. He has seen no change in activities and has no problems with the use. He hears nothing from the Restaurant, nor do his neighbors.

16. Gino Dercola testified to residing behind the Restaurant, about 1-2 blocks away. He has heard loud music from the Restaurant for some years, but this has changed for the better in the last few years. He supports the tent if the music discontinues.

17. Judy Eckles testified to living in the first house to the west of the Restaurant on Shaker Drive. The Restaurant is a great neighbor, she hears no noise, and there is no traffic impact.

18. Harold Eckles testified to living in the first house to the west of the Restaurant on Shaker Drive. He supports the petition and wants the Restaurant to have business. He believes the Restaurant is an asset to the community.

19. Michael Green lives across the street for the Restaurant and has never observed a traffic problem. Since the tent was put up, the noise has gone away. He supports the petition.

20. Victor Menez lives on Shaker Drive. He supports the petition if there is no loud music.

21. James Walls testified to residing directly north of the Restaurant, across from the tent. He has complained about loud music and is concerned that the loud music will return, but generally supports the petition.

22. Petitioner rebuttal witness Richard Ackman testified to being the Restaurant operations manager. Regarding the testimony about parking, Mr. Ackman testified that that the Restaurant does not offer a la carte dining when there is an large outdoor tent event, so parking is not an issue, There was a 100+ event about a week before the hearing and no parking problem, as evidenced by Petitioner's Exhibit 4, a photograph taken by Mr. Ackman and depicting the uncrowded oval parking area/driveway next to the Restaurant.

Concerning the testimony about loud music, Mr. Ackman testified to having learned from neighbor concerns about loud music. The Restaurant was obliged to honor all contracts with outdoor music (for dancing) up to September 2012, but is no longer permitting outside dancing (by eliminating an outdoor dance floor). There is some soft outdoor music.

Concerning Petitioner's Exhibit 5, a postcard he received about the hearing and which was apparently sent to area residents urging them to attend the hearing, he explained the photographs of cars and bands on the postcard are not related to the Restaurant.

23. On cross-examination by Mr. Macan about the frequency of Restaurant closings for outdoor events, Mr. Ackman testified that the Restaurant was closed for two events because the same staff is used.

CONCLUSIONS OF LAW

Pursuant to Section 129.E, the Hearing Authority may authorize the extension or enlargement of a nonconforming use or the alteration of a structure containing a nonconforming use, with or without conditions, provided the Petitioner demonstrates compliance with five standards. Based on the testimony and evidence, the Hearing Examiner concludes the proposed expansion complies with these standards and is therefore granting the petition.

a. That any changes or additions to the activities taking place in connection with the nonconforming use will not change the use in any substantial way;

The evidence of record confirms the Restaurant's long history of holding weddings, receptions and other events as a part of the use. Indeed, one neighbor testified to having been married on the site of the tent some 20 years ago. No changes in these types of activities are proposed, only that they may occur within a tent.

The Hearing Examiner further concludes the Restaurant's use of a tent does not impermissibly change the use because it may result in an increase in the number of events held, as one opponent argued. Maryland law instructs us that an increase in the frequency of a nonconforming use is not an unlawful extension or expansion, but simply an intensification of the use. *Trip v. Baltimore*, 392 Md. 563, 898 A.2d 449 (2006). The factual "intensification" issue on appeal in *Trip* being analogous to the facts of this petition, a brief review of the Court's reasoning on this aspect of nonconforming use rights is insightful.

Appellant Trip was the owner of a club featuring late night adult entertainment. He appealed a citation relating to this use to the board of municipal and zoning appeals, which determined his club was a lawful nonconforming use but limited the late night use to two nights a week, based on testimony that the nonconforming late night use occurred only twice a week, at least for the past 17 years. On appeal, the Circuit Court and Court of Special Appeals upheld the two-night nonconforming use condition, reasoning it was consistent with the policy against the expansion of such uses, on the theory that, without them, the nonconforming use would be an impermissible "temporal" expansion of the club use. *Trip v. Baltimore*, 898 A.2d 454. Reversing, the Court of Appeals held that a more frequent use of a lawful nonconforming use is a permissible *intensification* of the use if the nature and character of the use are unchanged. The court distinguished between a lawful intensification and unlawful extension of a nonconforming use, such unlawful extension being a physical expansion of the area occupied at the time the use became nonconforming and beyond what the local ordinance permitted. *Id.* at 460.

In this petition, the Restaurant is proposing to utilize a tent to accommodate the same types of events long held on the terrace as part of the Restaurant operation, 30+ years of using the terrace/lawn area for weddings, receptions and similar events. As Messrs. Pepper and Ackman testified, the tent will allow events to be held during inclement weather and certainly, as one opposition witness argued, the presence of the tent may facilitate an increase in the frequency of outdoor events. Nonetheless, such "temporal" intensification of the Restaurant use is permitted as long as the tent area is not associated with a substantial change in use.

There being no substantial change in use proposed, the Hearing Examiner concludes the petition accords with Section 129.E.1.a.

b. That an enlargement may not exceed 100 percent of the gross floor area of structures or 100 percent of the gross acreage in the case of nonconforming land, above that which legally existed at the time the use first became nonconforming;

The tent does not add floor area. Section 129.E.1.b is therefore inapplicable.

c. That the outdoor land area occupied by a nonconforming use may be enlarged only to provide additional parking area;

The TSR references the BA 79-34E TSR, which describes the nonconforming area of the Restaurant as the Property in its entirety as of 1979.⁴ No additional parking is proposed. The petition complies with Section 129.E.1.c.

d. That an enlargement would not cause a violation of the bulk regulations for the zoning district in which the property is located;

No enlargement is proposed. Additionally, the tent location exceeds all setback requirements on the recorded plat. The petition accords with Section 129.E.1.d.

e. That the extension, enlargement or structural alteration would not cause an adverse effect on vicinal properties.

The tent is well separated from vicinal residential lots and buffered by Open Space Lot 6 and adjacent open space areas. Additionally, Petitioner frankly acknowledges past problems with outdoor music and will no longer permit loud music or outdoor dancing. The Hearing Examiner concludes the petition complies with 129.E.1.e.

⁴ At that time, the area was a 13-acre lot, which was later subdivided to create the Property, Lot 6.

Further Conclusions

The petition also asks the Hearing Examiner to take into consideration the submission of the petition at the request of the Department of Planning and Zoning even though Petitioner believes the petition unnecessary because the Restaurant seeks only to allow a tent to cover the existing terrace. At closing, Petitioner echoed this belief through counsel, who stated Petitioner submitted the petition in good faith.

To honor DPZ's request and Petitioner's good faith submission of the petition, the Hearing Examiner took jurisdiction of the case and held the requisite due process hearing. However, it was well within my authority to have dismissed the petition at the outset of the hearing for lack of jurisdiction. The erection of a tent is not a physical enlargement of the gross floor area of a structure or of gross floor area within the meaning of the Howard County Zoning Regulations.⁵

⁵ Section 103.A.193 defines a "Structure" as "[a]nything constructed or built, the use of which requires permanent location on the ground, or attached to something having permanent location on the ground. The following shall not be considered structures for bulk regulation purposes:


- a. Awnings, bus shelters, exterior lighting fixtures, fire hydrants, mail boxes, telephone equipment boxes, newspaper boxes and survey monuments;
- b. Gardens, driveways, walks, patios, and parking surfaces;
- c. Ground level decks, limited to decks elevated 18 inches or less above average grade and having no railing, walls or roofing;
- d. Noise barriers or noise walls;
- e. Signs are not considered to be a structure or part of a structure, and are regulated by the Howard County Code.
- f. Stormwater management facilities;
- g. Similar minor structures as determined by the Department of Planning and Zoning on a case-by-case basis.

ORDER

Based upon the foregoing, it is this 24th Day of June 2013, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Kings Court, LLC for expansion of a nonconforming use for a tent on an existing terrace area, in an R-12 (Residential: Single Family) Zoning District, is **GRANTED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.