

IN THE MATTER OF	:	BEFORE THE
<b>IRON BRIDGE WINE COMPANY</b>	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 13-028N

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**DECISION AND ORDER**

On November 14, 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 Iron Bridge Wine Company (Petitioner) to expand a confirmed nonconforming use for a 1,059 s.f. addition, in an R-20 (Residential: Single Family) Zoning District, filed pursuant to Section 129.O.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. Terrell Fisher and Steve Wecker testified in favor of the petition. William Spencer testified as the Beaverbrook Community Association representative in opposition to the petition. Joel Barry Brown, James Citro, Sara Chedester, Frederick Polcari, Frank Cockrell and Carole Klawansky also testified in opposition to the petition.

Petitioner introduced into evidence the exhibits as follows.

1. Aerial view of Property
- 2A-D. Panoramic view of existing kitchen in principal building

**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 5<sup>th</sup> Election District on the south side of MD 108 approximately 1,500 feet west of Centennial Lane. It is identified as Tax Map 29, Grid 12, Parcel 105 and is also known as 10435 MD 108 (Clarkesville Pike) (the Property).

2. Property Description. The .9819-acre, irregularly shaped Property is currently improved be two buildings. The principal building site in the northeaster area of the Property, about 22 feet from the front property line along MD 108. Approximately 40 feet to the southwest of the principal building is an L-shaped, one-story frame accessory building currently used for kitchen function and office and storage space. The northern portion of the Property is mostly paved. This paving surrounds the principal building and extends south to a paved parking area approved as an enlargement in BA 03-09N&V. To the parking lot's south are a trash receptacle area and an L-shaped screening fence. A wide ingress/egress entrance in the northwest corner provides vehicular access. There is also a one-way egress near the northeast corner.

3. Vicinal Properties. To the north, across MD 108, is the RC-DEO (Rural Conservation: Density Exchange Option) Parcel 18, a farm in the Agricultural Preservation Easement program. Across from the Property on the parcel is a farm produce stand. To this stand's northwest is an

area approved for an Agritourism Enterprise, beyond which are farm fields. To the east, the R-20 zoned Parcel 106 was approved as a nonprofit club/lodge in Board of Appeals Case No. 11-035C. Beyond Parcel 106 to the east and south are R-20 zoned lots within the Beaverbrook Subdivision, which are each improved with single-family detached dwellings fronting on Dover Court and Durham Road. To the southwest are R-20 zoned lots with private driveway access to MD 108 to the north. On the west side, Parcel 89 is improved with a two-story, frame, single family detached dwelling fronting on MD 108.

4. Roads. MD 108 has two travel lanes within an existing 40-foot right-of-way. The proposed Church Road has about 16 feet of paving within an existing 33-foot right-of-way (ROW). The proposed State Highway Administration ROW is 75 feet from the centerline, or 150 feet. The posted speed limit is 45 MPH. According to the Technical Staff Report (TSR), sight distance from the principal building is about 600 to the west and 500 feet to the east, with MD 108 topography being a factor. Precise sight distance measurements may be determined on through a detailed sight distance analysis, however. Water and Sewer Service. The Property is served by public water and private sewer.

5. General Plan. PlanHOWARD2030 designates the Property as "Established Community" on the Designated Place Types Map and as designated Retail on the Land Use Maps. The Transportation Map depicts MD 108 as a Minor Arterial.

6. Zoning History.

1964. On June 18, 1964, in Board of County Commissioners Case No. 365 (ZB 365) rezoned the Property. The TSR expresses uncertainty as to whether this rezoning included the

eastern portion of the Property identified as "Part One" on the submitted plan. The 1961 Comprehensive Zoning Plan as amended in 1971 clearly depicts the entire Property as R-20.

2002. On November 26, 2002, DPZ confirmed a nonconforming use for a beverage establishment with beverage sales for on and off-site consumption in NCU Case No. 02-05.

2003. On December 24, 2003, the Hearing Examiner in BA Case No. 03-009N&V approved Reuwer Enterprises, LLC's request to enlarge/alter a nonconforming use by constructing a 540 s.f. addition and increasing the land area to add parking spaces. The Examiner also approved a variance to reduce the 50-foot setback from an arterial public street ROW to 28.9 feet for an addition and to reduce the 20-foot side use setback to 11 feet for parking uses.

7. Proposed Nonconforming Use Expansion. Petitioner proposes to enlarge the nonconforming use to construct a one-story addition of about 1,059 s.f. on the southwest side of the existing main building.

Petition -- Total Increase in Gross Floor Area Calculation Methodology. The petition bases the increase solely on the square footage increase of the main building and thus states, "the proposed enlargement of 1,059 s.f. will exceed the existing 2,284 s.f. of the restaurant structure by 46.4 percent. The proposed enlargement combined with the 540 square foot addition approved in BA 03-09N&V will exceed the originally confirmed 1,744 s.f. of the restaurant structure by approximately 91.9 percent.

TSR -- Calculation of Total Increase in Gross Floor Area Methodology. According to the BA 03-09N&V TSR and as reflected in the Decision and Order, the approved percentage increase in floor area was based upon the floor area of the main building only and neither document considered the floor area of the accessory building. However, the 100 percent increase in floor area restriction imposed by Section 129.0.E.b is "... 100 percent of the gross floor area of structures ..."

Actual Calculation of Total Increase in Floor Area (Applying DPZ's Correct Methodology).

NCU 02-05 ultimately confirmed a 1,744 s.f. main building and a 1,400 s.f. accessory building, for a gross floor area of 3,144 s.f. The 540 s.f. addition approved in BA03-09N&V represented a 17.2 percent increase in the original 3,144 square floor area and a gross floor area of 3,682 s.f. The accessory building was subsequently reconfigured and reduced in size to 1,078 s.f. for a gross floor area of 2,822 s.f., or 3,362 s.f., when considering the first addition (1,744 + 1,078 + 540 = 3,362). The proposed 1,059 s.f. addition, together with the approved 540 s.f. addition (1,599 s.f.) represents a 51 percent increase in gross floor area from the original 3,144 s.f. and a 57 percent increase over 3,362 s.f.

8. Terrell Fisher, project engineer, testified the proposed expansion being would be used only as a kitchen, food prep area and office. There are no proposed changes in property boundaries. No additional seats will be added during the expansion. The accessory building will be used for storage only.

9. Steve Wecker testified to being an Iron Bridge Wine Company owner/operator. He testified that the existing kitchen in the main building is 21' x 18' in area. Referring to Petitioner Exhibit 2A-D, he explained it depicts the current kitchen, which has cold and hot sides and sits below grade. Sometimes there is flooding in the kitchen. All food prep work is currently handled in the accessory building, which also accommodates an office. The cuisine is now based on a farm-to-table theme.<sup>1</sup>

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<sup>1</sup> In the farm-to-table movement, "Shipping is a terrible thing to do to vegetables. They probably get jet-lagged . . ." Elizabeth Berry, food writer, heirloom bean grower.

10. On cross-examination by Mr. Citro, Mr. Wecker disagreed that the use is noncomplying because it serves full-course dinners and has a catering operation.

11. On cross-examination by Mr. Polcari, Mr. Wecker disagreed that the new kitchen would increase business and adversely impact on community owing to an increase in table turnovers and related traffic.

12. William Spencer, President of the Beaverbrook Community Association, testified in opposition to the expansion on four grounds. First, expanded commercial use of the property is not in harmony with the Howard County General Plan because the Iron Bridge application to rezone the property to B-1 was submitted during comprehensive rezoning and then withdrawn. A second R-12 property on MD 108 was denied because the traffic generated from two or three additional residences would increase density and traffic.

Secondly, the expanded use would adversely affect vicinal properties because it would accommodate more patrons by increasing seating capacity, deliveries, trash removal and noise. These conditions would violate the December 24, 2003 Declaration of Covenants (the Covenants) which Mr. Reuwer (the property owner), the Beaverbrook Community Association and affected individuals signed to establish specific commitments and operating conditions in relation to BA Case No. 03-009N&V. These commitments and operating conditions included no parking or building expansion, the use of the barn/garage/shed outbuilding for storage only and no increase in the size of the accessory building. Based on these Covenants, the Association and opposing individuals withdrew their opposition to the petition.

Thirdly, the proposed expansion will hinder or discourage the use of the adjoining R-20

zoned property known as 10437 Clarksville Pike. Lastly, parking will be inadequate and ingress/egress to MD 108 will not be improved. Parking is already marginal for the current facility and people looking for parking in adjacent neighborhoods will risk walking along the narrow shoulders of MD 108

13. Mr. Spencer also explained his testimony was prepared before the hearing and based on the assumption that the increase in space would be used in part for seating, which Mr. Wecker explained would not be the case. In light of Mr. Wecker's testimony, he explained on cross-examination that his concerns related to increased traffic from more business on the same footprint (through greater table turnover) were alleviated. He still believes it is risky whenever someone pulls out of the driveway.

14. Mr. Brown testified to being opposed to the expansion based on the Covenants and the original approval. He explained the County was closely involvement with the original approval and that the expansion should be rejected because they are in direct conflict with other documents, and further that no decision should issue until agreement is reached between the community associations and affected individuals, of which he was one.

15. Gregory Polcari testified in opposition because the County Council brokered the original Covenants and they were agreed upon in front of the Hearing Officer. He also believed the accessory building should be taken away if the main building was enlarged, because it would be used for something else. On cross-examination, he testified to not being a signatory on the Covenants. He simply would like the agreements and approvals enforced.

16. James Citro testified to being a Covenants signatory and a 40+ year county resident. He

believes the kitchen enlargement would increase traffic because more tables could be served. When asked on cross-examination what the petitioners could do to gain his confidence, he responded in main part that the business should not get any bigger based on the original Covenants. He is not satisfied that the property owner has allowed the operators to do what they need to do for their business.

17. Sara Chedester inquired as to why Mr. Reuwer was not the petitioner. The Hearing Examiner noted the nonconforming use petition includes Mr. Reuwer's signature authorizing Iron Bridge Wine Company to submit a petition to expand the nonconforming use.

18. Carol Klawansky testified to being opposed to the petition. She is concerned the expansion, one of several along MD 108, will have adverse effects, especially traffic along MD 108. She testified the farm-to-table operation requires less storage area because deliveries are more frequent. She is concerned the kitchen will equal the combined size of the bar and eating area, which seems excessive, in her view. A more efficient kitchen would increase the number of diners served. In her view, MD 108 cannot handle any new traffic. She cannot support the petition owing to the Petitioner's glaring omission of not bringing the community into the process.

19. The Hearing Examiner stated that during her site visit on the day of the hearing, she observed persons parking in the right-of-way in front of the building. She also took notice that the plan depicted a very small triangular portion of the accessory building encroaching onto the 10-foot setback, which might become problematic in light of the Masonic Lodge being developed on the adjoining property. She therefore proposed that as a reasonable condition of



approval, the petitioners would close off the encroaching portion of the use, as had been required in other cases involving minor encroachments of existing uses or structures.<sup>2</sup>

20. Stephen Brent Morris testified to being the president of the holding company representing the Masonic Lodge being developed on the adjoining property to the east.<sup>3</sup> He testified to having a cordial relationship with the Iron Bridge Wine Company, whose compressor is slightly on the Lodge property (about 10 s.f.), which will be rectified. The lodge is now preparing an environmental concept plan. He understood the Hearing Examiner's proposal to close off the encroaching portion of the accessory building and did not object to it.

21. In response to community concerns about the application of the Covenants to the proposed expansion, Mr. Spencer stated an attorney represented the community in the drafting of the Covenants when asked by the Hearing Examiner. Again, when asked, Mr. Spencer read aloud language in the Covenants requiring enforcement through a court action with attorney fees awarded to the prevailing party (the specific performance clause).

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<sup>2</sup> See BA Case No. 07-040C, decided February 25, 2008, Condition of Approval #3, which states "[t]he private academic school use of the building for conference/meeting space is limited to the rooms on the south side of the building that are at least 20 feet from the north side lot line." See also BA Case No. 07-009C, December 3, 2007, Condition of Approval #5, which states, "[t]he Petitioner shall fence off that section of the pole barn lying within the 100-foot lot line setback. A gate may be installed for emergency access."

<sup>3</sup> See Board of Appeals Case No. 11-035C, decided March 29, 2012. Owing to the Lodge and Hearing Examiner's concerns about use of the parking area by persons not affiliated with the use (such as Iron Bridge Wine Company patrons), the Examiner granted the petition subject in part to three conditions: 1) the parking lot shall be used only by the Lodge use and not by any other use. Parking lot use by any use other than the lodge will require a reassessment of the Conditional Use; 2) the Petitioner shall erect an ingress/egress gate and provide a Fire Department access box for the building and gate and the gate shall always be locked when not in use by the facility, and; 3) the Petitioner shall post a sign at the ingress/egress gate clearly stating that the parking on the site is for Lodge use only.

CONCLUSIONS OF LAW

**I. Compliance with Section 129.E**

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 indicates the changes or additions are related solely to the relocation of the kitchen prep area and office from their current location in the accessory building to the proposed addition.<sup>4</sup> Mr. Wecker also testified the proposed expansion area would not be used to increase the seating area. No changes in the types of activities associated with are therefore proposed.

Although the opposition expressed concerned that a more efficient kitchen would increase the number of diners served, this potential situation does not change the use impermissibly. Maryland law instructs us that increased activity associated with a change or addition to a nonconforming use is not an unlawful extension or expansion, but simply an

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<sup>4</sup> According to Petitioner's counsel Mr. Oh, the proposed expansion is intended to resolve a zoning complaint about the office and kitchen prep use of the accessory building, which had not been approved in BOA Case No. 03-09N&V.

intensification of the use. Trip v. Baltimore, 392 Md. 563, 898 A.2d 449 (2006). In this petition, the Petitioner is proposing to relocate the kitchen and office to the proposed expansion area. Although the addition may cause an increase in the frequency of "table turnovers" any such intensification in the use is permitted. 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 proposed 1,059 s.f. addition, together with the approved 540 s.f. addition (1,599 s.f.) represents a 51 percent increase in gross floor area from the original 3,144 s.f. and a 57 percent increase over 3,362 s.f. (with the smaller accessory building.) The petition accords with Section 129.E.1.b.

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

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;**

The proposed enlargement complies with all setback requirements. 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 representative of the Masonic Lodge to be constructed on adjoining property did not express opposition to the proposal. Opponents to the proposed enlargement testified to

adverse impacts caused by increased traffic, parking along MD 108 and related safety problems. To mitigate these potential problems, the Hearing Examiner is instructing the Petitioner to install lawful signs in front of the building informing patrons not to park in the right-of-way or along MD 108. Subject to this condition, the Hearing Examiner concludes the petition complies with 129.E.1.e.

## **II. The Declaration of Covenants and Restrictions**

The Beaverbrook Community Association and neighbors are profoundly opposed to the proposed expansion, believing it violates the 2003 Declaration of Covenants between the property owner (Mr. Reuwer), the Beaverbrook Community Association and affected individuals, which Covenants the property owner agreed to in exchange for the Association's and neighbors' withdrawal of opposition to BA 03-09N&V. These Covenants were drafted, apparently, shortly before the Christmas Eve BA 03-09N&V hearing and established specific commitments and operating conditions, including no parking or building expansion, the use of the accessory building for storage only and no increase in the size of the accessory building. They urge the Hearing Examiner to deny the petition.

The Hearing Examiner acknowledges the opposition's position, but as she explained during the proceeding, she has no authority to enforce the Covenants in a governmental administrative hearing. The Hearing Examiner is authorized to hear only those matters that are otherwise within the jurisdiction of the Howard County Board of Appeals pursuant to Section 16.302(a) of the Howard County Code. The Board, in turn, is authorized to hear only such matters as are set forth in Article 25A, Section 5(U) of the Annotated Code of Maryland and as

are further set out in implementing legislation enacted by the County Council, pursuant to Section 501(b) & (f) of the Howard County Charter. Neither Article 25A nor the County Code contains any provision authorizing the Board of Appeals or the Hearing Examiner to enforce or interpret a private contractual agreement between the signatories, however it may concern the use of private property approved in BA 03-09N&V.

This restriction notwithstanding, the Maryland Court of Special Appeals carved out a significant exception to this statutory ban in *Blakehurst Life Care Community v. Baltimore County*, 146 Md. App. 509, 807 A.2d 179 (2002). Because this case concerns a longstanding, evolving written agreement/covenant between a community association and a property owner/operator about the use of a particular property, and how such a document may be enforced in a governmental administrative hearing, a brief review of its history is insightful.

In 1988, Blakehurst Life Care Community was a proposed multi-building, continuing care facility to be constructed on a 41-acre site located within the boundaries of the Ruxton-Riderwood-Lake Roland Area Improvement Association in Baltimore County. A county review group approved the initial facility development plan. Shortly thereafter, the zoning commissioner denied Blakehurst's petitions for a special exception and variance, which decision Blakehurst appealed to the Baltimore County Board of Appeals. The Association opposed both the initial development plan and the special exception/variance petition but withdrew its opposition upon execution of a restrictive covenant agreement allowing the development to go forward subject to compliance with identified maps, plans, plats and other documents. With the consent of the signatories to the agreement, the Board's order contained express language

providing in relevant part that the facility would conform in all respects to the terms and conditions of the agreement and exhibits and included language that the agreement is incorporated as part of the Order as if fully set forth therein.

Over the years, Blakehurst proposed five changes to the development plan, resulting in five addenda to the agreement. A decade or so after the 1988 Board of Appeals order, Blakehurst sought county approval for 63 new parking spaces, which the county ultimately approved as a permissible refinement requiring neither an amendment to the agreement nor the Association's approval. On the Association's appeal of this administrative agency final decision to the Board of Appeals, the Board ultimately ruled a provision in the agreement required Blakehurst to gain the Association's consent in order to amend the development plan. Blakehurst appealed this decision to the circuit court, which affirmed the Board decision. On appeal of that decision to the Court of Special Appeals, the court affirmed the lower court, holding the Board of Appeals could enforce certain parking restriction provisions in the agreement because the signatories consented to its incorporation by reference into the 1988 Board order, making it a public document which thereafter gave the Board authority to both interpret and enforce it.

There is no such incorporative language and signatory consent in the BA03-09N&V decision and order. Such language is a condition precedent to the Hearing Examiner's legal wherewithal to interpret and apply the Covenants impelling the community's opposition to the proposed expansion. The Covenants instead make plain in a "specific performance" clause that a party seeking to enforce its terms must do so in a court of law, as agreed upon.

Lastly, in recognition of the formidable opposition to this petition, the Hearing Examiner reiterates here what she stated at the close of the proceeding. While the Hearing Examiner may not interpret and enforce the Covenants in this Decision and Order, nothing precludes the incorporation of an agreement between the relevant parties, with their consent, into any future decision concerning the nonconforming use, including any appeal from the Hearing Examiner.

**ORDER**

Based upon the foregoing, it is this **10<sup>th</sup> Day of December 2013**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Iron Bridge Wine Company to expand a confirmed nonconforming use through a one-story, 1,059 s.f. addition in an R-20 (Residential: Single Family) Zoning District, is **GRANTED**;

**Provided, however, that:**

1. The enlargement of the Nonconforming Use shall apply only to the 1,059 s.f., one-story addition, as depicted on the Nonconforming Use Plan submitted with the petition plan and not to any new uses or structures in the Property.

2. The office and food prep use area shall be relocated from the accessory building to the main building addition. The accessory building shall be used for storage only. No portion of the accessory building shall be used for food preparation in support of the food service facility. No equipment or support service related to food preparation is permitted in the accessory building, including, but not limited to, the installation or retention of any 220-volt outlet, oven, hood, slicer, grinder, food preparation table, mixer, scale, meatblock, refrigerator, freezer, sink, or icemaker.

3. No portion of the 1,059 s.f. expansion area shall be used for a chef's table or other dining venue where patrons may take food and drink, including tastings. A chef's table is a table or areas located in a restaurant kitchen and reserved for VIPs, special guests or other patrons.



4. The petitioner shall close off, through the construction of a wall, that triangular portion of the accessory building addition encroaching into the setback.

4. The Petitioner shall install lawful signage in front of the main building instructing patrons not to park in the right-of-way or along MD 108.

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**

MICHELE L. LETAWRE

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.