

IN THE MATTER OF : HOWARD COUNTY
THE WECKERS, INC. : BOARD OF APPEALS
Petitioners : HEARING EXAMINER
: BA Case No. 16-001C&V

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DECISION AND ORDER

On September 14, 2016, 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 The Weckers, Inc. (Petitioners) for an Historic Building Use, Standard Restaurant conditional use and related variances in an R-12 (Residential: Single) zoning district, filed pursuant to §§ 131.0.N.27 and 130.0.B.2 of the Howard County Zoning Regulations (HCZR).

Petitioners certified to compliance with the notice, posting, and advertising requirements of the Howard County Code.¹ The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Adam D. Baker, Esquire, represented Petitioner. Dan Wecker, Brian Collins and Cathy Hudson testified in support of the petition. No one appeared in opposition to the petition.

Preliminary Matters

The conditional use petition (CUP) proposed alternative use "categorizations" of the proposed restaurant site. Under Proposal A, the Race Road site is a use independent of the Elkridge Furnace Inn site at 5774 Furnace Road. Under Proposal B, the Race Road site is part of

¹ A presubmission community meeting was held on December 22, 2015 at the Elkridge Furnace Inn. The location of the meeting did not comply with Howard County Subdivision and Land Development Regulations § 16.128(c)(1), which requires these meetings to be held at a location within the community of the proposed development, in a public or institutional building located within approximately five miles of the subject property.

the Elkridge Furnace Inn "campus." Of key import to the Hearing Examiner's consideration of Proposal B is the location and provision of parking. Under Proposal B, as the Technical Staff Report (TSR) recognized, locating the required parking within the Race Road portion of the "campus" would run afoul of HCZR § 133.0.B.4.d, which prohibits parking facilities on a separate lot from the principal use if such facilities would be "separated from the use being served by a public street." Petitioners therefore sought a variance from this requirement for Proposal B. However, the Hearing Examiner may not grant variances from this definitional requirement and without any such variance, the Proposal B conditional use may not be approved. Petitioners therefore withdrew Proposal B and the contingent variance request at the outset of the hearing and the case proceeded only on Proposal A and the attendant variance requests.

The Applicable Petitions and Plan

This decision and order is based on the revised variance and conditional use petitions and conditional use/variance plan (the Plan) dated as received by DPZ on July 19, 2016 (the July 19, 2016 petitions/plan). Prior to the submission of these documents, Petitioners had submitted two other petitions/plans, the first dated April 20, 2016 and the second, April 28, 2016. DPZ forwarded the April 28, 2016 petitions/plan to the Hearing Examiner for scheduling. Petitioners withdrew the April 28, 2016 petitions/Plan after the hearing had been scheduled but before DPZ prepared its technical staff report. On July 19, 2016, Petitioners submitted revised petitions/plan. The TSR and this decision and order are based on the July 19, 2016 petitions/plan. It appears that the non-DPZ agency comments set forth in the Findings of Fact, except as otherwise noted, were based on the April 28, 2016 submissions.

Petitioner introduced into evidence the exhibit as follows.

1. Three letters to Dan Wecker from the Maryland Department of Natural Resources, March 3, 2016, May 3, 2016 and June 27, 2016

FINDINGS OF FACT

Based upon the evidence of record, the Hearing Examiner finds as follows:

1. Property Identification. The 2.09-acre subject property lies on the southeast side of Race Road and southwest of the intersection with Furnace Avenue. It is located in the 3rd Election District, identified as Tax Map 0038, Grid 0004, Parcels 313 and 414 and known as 5735 Race Road (the Property). The Property is owned by the Maryland Department of Natural Resources, which leases it to Petitioners.
2. Property Description. The trapezoidal Parcel 313 with 184 frontage feet on Race Road is improved with a two-story brick house. The dwelling sits about 32 feet from the Race Road right-of-way (ROW) and about 39.7 feet from the west lot line. The dwelling is listed on the Howard County Historic Sites Inventory as HO-503, Dixon's Brick House. There is a sidewalk and concrete landing area in the dwelling's front and the sidewalk continues around the dwelling's east side. To the dwelling's east is a patio proposed to be used as a base for the proposed tent. To the dwelling's rear are what the Plan identifies as two greenhouses with a shed between them. However, as set forth in Part I of the below Conclusions of Law, these structures are actually hoop houses. Approximately 2/3 of the parcel is encumbered with floodplain, which begins about 120 feet from Race Road and extends across its entire rear width. This parcel is accessed from a 20-foot wide asphalt driveway on the west side of the lot.

Parcel 414 is a 0.67-acre irregularly shaped corner lot with 170 frontage feet on Race Road and 153 frontage feet on Furnace Road. It is accessed from Furnace Road and improved with a 20-space gravel parking lot. About 2/3 of this parcel is also encumbered with floodplain, which also begins about 120 feet from Race Road and extends across its entire rear width to the south property line. There is also a shed along the south lot line and which sits about 30 feet from the west lot line, causing it to encroach in the required setback. Between the parking lot and Dixon's Brick House is a large garden.

3. Vicinal Properties. Southeast side of Race Road: To the southwest are three R-12 zoned single family detached lots. The closest lot sits about 20 feet from the Property's southwest property line. Beyond these residential parcels is the State of Maryland-owned, unimproved wooded Parcel 503. Across Race Road: The 5.2-acre, M-1 (Manufacturing: Light) Parcel 429 is improved with a factory listed on the Historic Sites Inventory as HO-945. To this parcel's southeast are several R-12 zoned properties improved with a single-family detached dwelling. South side of Furnace Avenue: To the southeast of Parcel 414 are three, R-12 zoned, unimproved wooded lots fronting on Furnace Avenue. Adjoining Parcel 313 to the south is part of a state-owned park. Parcel 417 is state-owned and Howard County owns Parcels 415 and 416. North side of Furnace Avenue: This area is the site of the Elkridge Furnace Inn and associated parking, which comprises CAC-CLI (Corridor Activity Center: Continuing Light Industrial) Parcels 913, 613, 614, 615 and 338. To the east of these parcels are the R-12 unimproved wooded Parcels 685 and 339 owned by the State of Maryland. The Property's floodplain is part of the Deep Run tributary to the Patapsco River to the east. The Patapsco

River runs behind the Elkridge Furnace Inn. Deep Run runs along and just outside, apparently, the Property's southeasterly lot lines.

4. Roads. Each road has two travel lanes and a paving width that varies between 20-26 feet within a 45-foot ROW. The posted speed limit for both roads is 25MPH. According to Department of Public Works data, the traffic volume on Race Road north of Hanover Road was 537 average daily trips as of May 1998. There is no traffic data for Furnace Avenue.

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

6. General Plan. PlanHOWARD 2030 depicts the Property as Established Community on the Designated Place Types Map. Race Road and Furnace Avenues are depicted as Minor Collectors on the PlanHOWARD 2030 Functional Road Classification Map.

7. The Requested Conditional Use (Proposal A). Petitioners are proposing an Historic Building, Standard Restaurant use on the Property. The HCZR defines a Standard Restaurant as "[a]n establishment which primarily prepares food to be served on non-disposable tableware and consumed on the premises, but may provide incidental carry-out service. A standard restaurant may include an accessory brewery."

The restaurant would comprise a private event/dining venue within Dixon's Brick House. The operation would include a preparation area, warming kitchen, and restrooms within Dixon's Brick House and a tent-covered patio. As noted *infra*, the Howard Preservation Commission's exterior alterations compatibility decision and order found Dixon's Brick House would also be used as cocktail space. No brewery or carry-out is proposed. According to the July 19, 2016 Plan, a walkway provides access from the tent to the proposed parking lot. Two

accessible parking spaces are proposed behind Dixon's Brick House and a pathway labeled "accessible route" will provide access from these spaces to Dixon's Brick House and tent. Twenty parking spaces are proposed in the northeastern portion of the Property. According to the conditional use petition supplement, lighting will be minimal, primarily for safety and where practicable, facing inward and self-contained by vegetation on the Property. Page two of the Plan details the concrete ramp and railing section for accessibility and the applicable paver section, as well as accessibility signage for the accessible parking spaces.

The Property will host events such as rehearsal lunches/dinners, private lunches/dinners, private receptions, and corporate meetings for up to 50 guests. The operation would use five-six employees. There will be no outdoor storage. The hours of operation as proposed are 9:00am to 12:00am. There will be no events on Christmas Eve, Christmas and Easter.

8. The Five Variance Requests.

1. An increase in the 15-foot accessory maximum height limitation for accessory structures imposed by HCZR § 109.0.D.1.b to 17.3 feet for the tent. The petition and the Plan state the area of the proposed tent patio base falls slightly from Race Road toward the rear of the Property, which causes the tent to be slightly higher.
2. A reduction in the 7.5-foot side setback imposed by HCZR § 109.0.D.4.c.(2)(b) to 3.5 feet for an existing shed. The petition and the Plan state the shed is a long-standing accessory structure and only a minor corner portion encroaches into the setback area. The adjoining property is an unimproved lot owned by Howard County.
3. An reduction in the 20-foot use setback imposed by HCZR § 109.0.D.4.c.(3) to 3.4 feet for an existing driveway on the west side of Dixon's Brick House. The petition and the Plan state that its location relative to Dixon's Brick House limits the area for a relocated driveway.
4. A reduction in the required parking from 33 spaces imposed by HCZR § 133.0.D.4 to 22 spaces. The petition and the Plan state the location of Dixon's Brick House and the large area

of floodplain constrain the area available for parking.

5. An reduction in the 20-foot use setback imposed by HCZR § 109.0.D.4.a.(2) to 5.7 feet for an existing and proposed sidewalk and patio. The petition and the Plan state the existing sidewalk and patio has existed in this location for decades.

9. TSR Recommendation. The TSR recommends Proposal A be granted. DPZ's primary concern is Petitioners' calculation of the required parking spaces and attendant variance request. HCZR § 133.0.D.4.n requires 14 spaces per 1,000sf and § 133.0.D.4.o requires 7 spaces per 1,000sf for outdoor seating areas. DPZ finds 57 parking spaces are required, 41 based on the 2,908sf area of Dixon's Brick House and 16 spaces based on the 2,236sf tent area.

10. Agency Comments.

Department of Fire and Rescue (DFR) Comments. On May 12, 2016, the department made this advisory comment. Department of Fire and Rescue Services commented: "Tents are intended for temporary use which means no greater than 180 days. If greater than 180 days in a calendar year it is not considered temporary use and therefore will require a sprinkler and fire alarm due to its size. Fire and Rescue bases capacity on the square footage of the occupancy, not a specified number by the occupant. The code uses two numbers that we apply to assembly occupancies. Seven (7) square feet per person for meetings, meaning just chairs and fifteen (15) square feet per person for banquet, meaning tables and chairs. With that being said, and no indication that the full area is not accessible, the capacity for meetings would be 276 and 129 for a banquet. Any assembly area greater than 100 is required to be equipped with a sprinkler. Also the tent will need to be NFPA 701 compliant." By email of August 23, 2016, Fire Department Assistant Chief Daniel Merson informed DPZ petition reviewer Zan Koldewey of DPZ of his department's decision to stand by its earlier comments.

Bureau of Environmental Health (BEH) comments. On May 5, 2016, BEH commented, "[p]lease note that there are time related noise level limitations that are defined in Howard County Code Subtitle 9 Noise, Section 8.900. Electronically amplified sound, such as music, is subject to these noise standards".

Department of Inspections, Licenses & Permits (DILP) comments. On May 16, 2016, DILP commented, "[t]he approval of the BA should be deferred until the following information is provided: 1. the proposed handicapped parking area shall have a van access parking area that complies with State requirements. The State requires an eight (8) foot wide access aisle for the van accessible parking space. 2. Provide the required signage in the handicapped parking area including the "No Parking in Access Aisle" signage as required by the Maryland Accessibility Code. 3. Spot elevations in all corners of the handicapped parking area to show the required 2% slope in any direction. 4. The parking surface and accessible route shall be stable, firm and slip resistant. Tar and chip surfaces and pavers do not meet this requirement. 5. Provide spot elevations along the accessible route to show that the slopes are within the acceptable

limits. Clarify that accessible route to the restrooms and tent areas. 6. Provide slope and spot elevations for the ramp accessing the restrooms.

11. Historic Preservation Commission (HPC) Review. The HPC approved Petitioners' exterior alterations for architectural compatibility with Dixon's Brick House and provided advisory comments as required for a future site development plan (Case No. 16-32, August 2, 2016). These alterations include an ADA accessible ramp to the building and a patio. The proposed use includes cocktail space within Dixon's Brick House. The decision and order approving the alterations as compatible with the historic area includes testimony about the status of the patio tent, wherein Mr. Wecker's counsel Adam Baker testified the tent is a temporary structure that "could be taken down in one day but it's [sic] not their intention to do so."

12. Mr. Wecker introduced into evidence Petitioners' Exhibit 1, three letters to him from the Property owner, Maryland State Department of Natural Resources (DNR). The March 3, 2015 letter on the signature of Tony Redman, Project Review Director, summarizes DNR's review and approval of the project. A May 13, 2016 DNR letter, also on Mr. Redman's signature, gives final approval for the project based on the plans submitted. Both letters state DNR's approvals are subject to Petitioners obtaining all local permits. The June 27, 2016 authorizes Petitioners to submit the conditional use petition.

13. Findings re: the variance request to reduce the 20-foot use setback imposed by HCZR § 109.0.D.4.c.(3) to 3.4 feet for an existing driveway on the west side of Dixon's Brick House. According to the variance petition narrative, this driveway will be used to access the

two proposed accessible parking spaces. The Hearing Examiner questioned Messrs. Wecker and Collins about any further use of this driveway, noting the absence of any loading or refuse area on the Plan, which may warrant a fence along the common property line as a condition of approval. They testified that the only other use of the driveway would be for delivery drop-offs/pickups at the western side entrance of Dixon's Brick House.

14. Findings re: loading areas and refuse/dumpster locations. The Plan does not depict any loading areas or refuse/dumpsters. Mr. Wecker testified that all event waste would be wheel barreled to the refuse area at the Furnace Inn for removal.

15. Findings re: event tent occupancy. The conditional use petition states events will be limited to 50 persons. DFR calculates the maximum occupancy of the tent as 276 persons for meetings and 129 persons for banquets. The Hearing Examiner explained to Petitioners her obligation to assess all conditional use petitions based on maximum use, and further that said assessment would also implicate the need for even more parking than even the TSR calculated. The Hearing Examiner therefore questioned Petitioners as to how they would limit events to 50 persons. Mr. Wecker testified that all Elkrige Furnace Inn media would expressly reference this 50-person capacity limit. He further testified to limiting table arrangements on the patio or within the tent to eight 48" tables seating up to 6 persons.

16. Findings re: parking requirements. The Hearing Examiner questioned Mr. Wecker about moving some of the proposed parking space out of the floodplain and adding additional spaces. Mr. Wecker testified that the Maryland Department of Natural Resources reviewed the proposed parking area and determined the adequacy of its location, which is partially within a

floodplain, because the parking area is located above an old dwelling foundation. Concerning the number of parking spaces, Mr. Wecker stated they are adequate for the use, which is limited to 50 persons.

17. Findings re: proposed hours of operation. The Hearing Examiner discussed the proposed 9:00am to 12:00am hours of operation, informing Petitioners that they provided no reason for such long hours, especially during the week, and considering their intention to provide "background music" for such events. Mr. Wecker therefore testified to amending the hours of operation as follows: Sunday to Thursday: 9:00am to 10:00pm; Friday and Saturday 9:00am to 11:00pm.

18. Findings re: "background music." The July 19, 2016 CUP supplement states "[t]he proposed use will generate some noise from guests and background music, both of which will operate within the acceptable parameters of the Howard County Noise Ordinance. The Hearing Examiner discussed several conditional use decisions and orders with Petitioners involving event music, explaining that the Hearing Authority has always examined closely operations offering music and consistently imposed conditions of approval to ensure the proposed use does not cause atypical adverse noise impacts. See Conclusions of Law, Part II. The Hearing Examiner therefore questioned Mr. Wecker about the type of music proposed to be offered in the tent and he testified there would be amplified music and agreed to ensure that any amplification would be directed away from area residences. He further testified that the volume of any such music would be lowered to ensure it does not interfere with events at the Elkridge Furnace Inn. When questioned by the Hearing Examiner, Mr. Wecker testified the

Elkridge Furnace Inn has never been cited for a violation of the county noise ordinance.

19. Findings re: length of time tent is erected. The CUP petition supplements defines the tent as a "temporary tent structure." The HPC August 2, 2016 decision and order approving the exterior alterations includes counsel Adam Baker's statements that the patio tent is actually a temporary structure anchored to the patio which can be "taken down in one day but it's not their intention to do so." The DNR letter of March 3, 2015, Petitioners Exhibit 1, identifies the scope of the project as including "construction of a semi-permanent tent structure" to which 5 of 7 approval conditions apply.

1. Protective mesh matting, or like protective material, is required for access paths for all filling activities and activities occurring on low-lying, unstable or soggy ground.
2. No use of heavy material is permitted, other than what is necessary for completing the filling activities associated with constructing the semi-permanent tent structure foundation.
3. Excavation by hand is permitted for site preparation and construction of walkways, and is allowable to a maximum depth of three (3) inches.
4. Per the submitted engineering specifications "Design Summary" (attachment A), "this structure is designed as a temporary structure...and shall not be in place longer that one hundred and eighty (180) days."
5. The semi-permanent tent structure installation and use shall comply with National Fire Protection Association (NFPA) 102, Standard for Grandstands, Folding and Telescopic Seating, Tents, and Membrane Structures. Additionally, the tent membrane material shall be flame retardant. The manufacturer shall provide materials documenting the flame-retardant properties of the tent membrane.
6. The semi-permanent tent structure installation and use, and installation and use of walkways accessing the structure, shall comply with all requirements of the American Disabilities Act, 2010 ADA standards for Accessible Design.
7. Applicant and/or contractor shall obtain, or consult with the county, and provide to DNR Internal Review documentation that installation of the semi-permanent tent structure, construction of patio and retaining walls, and use of the structure will comply with permits issued from the Howard County Department of Planning.
8. Periodic site visits by Maryland Park Service personnel are encouraged to ensure conditions of approval are met.

When questioned by the Hearing Examiner, Mr. Wecker testified the tent would remain up more than 180 days and that he takes considerable precaution to ensure its safety.

20. Farmer Cathy Hudson testified that the "greenhouses" on the Property are actually hoop houses, which she believes are not structures. She requested a Hearing Examiner ruling on this.

CONCLUSIONS OF LAW

I. Background issues: Tents, Hoop Houses and Evaluation of Historic Sites

A. Tents

Prior to the October 6, 2013 HCZR text amendments enacted during the comprehensive zoning process, the HCZR did not regulate tents as structures requiring zoning approval.

Rather, then HCZR §103.A.193 defined "Structure" as:

Anything 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.

Hence, in Board of Appeals Case No. 13-010N (decided June 24, 2013), which concerned a 40'x60' events tent erected over an outdoor terrace at Kings Contrivance Restaurant in May and taken down in October, the Hearing Examiner concluded in pertinent part that the tent was not a structure enlarging the gross floor area of the non-conforming use.

The 2013 Comprehensive Rezoning revised how the HCZR controlled structures and

added new regulations for various types of accessory structures, including PODS, and maximum accessory structure square footages in certain zoning districts. As part of this update, the County Council also revised the definition of "structure" in HCZR § 103.0.

Structure: Anything constructed or built. The following shall not be considered structures for bulk regulation purposes:

- a. Accessory electric vehicle charging stations, awnings, bus shelters, exterior lighting fixtures, fire hydrants, mail boxes, telephone, electrical or cable equipment boxes, heating and air conditioning units, 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. Outdoor barbecues and firepits if 18 inches or less high above average grade.
- e. Noise barriers or noise walls;
- f. Signs are not considered to be a structure or part of a structure, and are regulated by the Howard County Code.
- g. Stormwater management facilities;
- h. All structures exempt from setback compliance in Section 128.0.A
- i. Outdoor riding rings, wet weather pads, and run-in sheds or similar farm structures with a maximum of three walls and a maximum footprint of 500 square feet.
- j. Similar minor structures as determined by the Department of Planning and Zoning on a case-by-case basis.

Under the 2013 definition, a tent is a structure. It is not a temporary use. It is not a temporary structure. It is not a semi-permanent structure. The current definition has certain implications in the Hearing Examiner's evaluation of any petition proposing a tent structure through the interplay of DFR/DILP permitting requirements for tents, noted supra, and HCZR § 130.0.C, Limitations, Guides and Standards, which precludes applications from being approved where the "Hearing Authority finds that the proposed structure, addition, extension of structure or use, use or change of use, would menace the public health, safety, security, or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood." As the Hearing Examiner explained in BA 15-

009C (Mt. Pisgah African Methodist Episcopal Church, decided July 16, 2016) and the January 14, 2016 Reconsideration Order, the purpose of the appropriate permit for a tent structure is public safety, as reflected in the standard conditional use petition approval condition that the petitioner shall comport with all state and local laws and regulations and obtain all necessary permits.

DFR's comments on the type of permit required for the tent is contingent on the period of time the tent remains up, pursuant to Title 3, Buildings of the Howard County Code, Subtitle 3.100 et seq., which adopts the International Building Code (IBC) as if the Code is set out in full in Subtitle 3.100 et seq. IBC § 3103.1 defines a tent as a temporary structure. Section 3103.1.2 requires a building permit for a tent that covers an area greater than 120sf and used for the gathering of 10 or more persons. If the tent is up for no more than 180 days in a calendar year, DILP requires a new temporary building permit every time the tent is re-erected. If up for more than 180 consecutive days, DFR considers the tent use not to be temporary and requires a sprinkler and fire alarm for tents accommodating 10 or more persons and greater than 120sf in size.

In the Hearing Examiner's view, the regulatory inconsistency between the HCZR's control of tents as structures, not temporary uses or structures, and these other county regulations for tents, warrants review for possible revisions to the HCZR. Until then, the Hearing Examiner shall condition approvals of proposed tent structures through appropriate language. Thus, in this case, where Petitioners contend the tent is a temporary or semi-permanent structure, which is not permitted by the HCZR, the requested conditional use

petition is granted subject to this condition of approval: Prior to applying for a permit for the patio tent, Petitioners shall consult with DILP and/or FRS, who shall make a determination as to whether the tent will be erected for more than 180 calendar days within one year. This determination shall control Petitioners' application for the appropriate permit for the patio tent.

B. Hoop Houses

Farmer Cathy Hudson requested the Hearing Examiner to make a legal determination that the hoop houses on the Property, and elsewhere, are not structures regulated by the HCZR. The Hearing Examiner agrees with her that, generally, hoop houses are not structures under the HCZR definition of "structure" because they are actually gardens. The Hearing Examiner also observed during the hearing that HCZR § 128.0.A.12 regulates accessory structures and imposes maximum lot coverage square footage for accessory structures on residential lots developed with a single-family detached dwelling.

a. Size restrictions

(1) The maximum cumulative lot coverage permitted for all of the accessory structures located on any given residential lot developed with a single-family detached dwelling is:

(a) 600 square feet for a lot in the planned public water and sewer service area.

(b) 1,200 square feet for a lot in the RC or RR district which is 2 acres or less

(c) 2,200 square feet for a lot in the RC or RR district which is greater than 2 acres.

(2) The cumulative lot coverage restrictions cited above shall apply to all accessory structures on any residentially zoned lot developed with a single-family detached dwelling, excepting only legitimate farm buildings located on properties meeting the definition of "farm" and swimming pools. Farm structures and swimming pools are not subject to size restrictions; however, they must be subordinate and incidental to the principal use.

Because the lot coverage of the hoop houses is not at issue here, the Hearing Examiner makes no formal conclusions as to whether non-farm hoop houses are accessory structures

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B. Hoop Houses

Farmer Cathy Hudson requested the Hearing Examiner to make a legal determination that the hoop houses on the Property, and elsewhere, are not structures regulated by the HCZR. The Hearing Examiner agrees with her that, generally, hoop houses are not structures under the HCZR definition of "structure" because they are actually gardens. The Hearing Examiner also observed during the hearing that HCZR § 128.0.A.12 regulates accessory structures and imposes maximum lot coverage square footage for accessory structures on residential lots developed with a single-family detached dwelling.

a. Size restrictions

- (1) The maximum cumulative lot coverage permitted for all of the accessory structures located on any given residential lot developed with a single-family detached dwelling is:
 - (a) 600 square feet for a lot in the planned public water and sewer service area.
 - (b) 1,200 square feet for a lot in the RC or RR district which is 2 acres or less
 - (c) 2,200 square feet for a lot in the RC or RR district which is greater than 2 acres.
- (2) The cumulative lot coverage restrictions cited above shall apply to all accessory structures on any residentially zoned lot developed with a single-family detached dwelling, excepting only legitimate farm buildings located on properties meeting the definition of "farm" and swimming pools. Farm structures and swimming pools are not subject to size restrictions; however, they must be subordinate and incidental to the principal use.

Because the lot coverage of the hoop houses is not at issue here, the Hearing Examiner makes no formal conclusions as to whether non-farm hoop houses are accessory structures

subject to § 128.0.A.12. It would appear, however, for guidance, until a case is before the Hearing Examiner to formally interpret the HCZR as applied to hoop houses, that residential garden hoop houses generally would not be subject to § 128.0.A.12. If the number and type of hoop houses are such that they may be subject to the applicable lot coverage maximum, it would seem that the uses might constitute a legitimate farm operation subject to the HCZR definition of farm: a lot or parcel of land used for farming that is 3.0 acres or larger.

c. Historic Sites

The petition involves the evaluation of a proposed standard restaurant use of an historic building in a neighborhood rich with historic buildings and sites. In 2013, the County Council revised the conditional use standards for Historic Buildings to further support their adaptive reuse and added new language in what is now § 131.0.27.D to require a Historic Preservation Commission determination of architectural compatibility *prior* to the approval of the conditional use. Having issued several decisions and orders for Historic Building Use conditional uses, the Hearing Examiner recognizes the importance of these pre-hearing determinations in her evaluations of specific conditional use petitions and includes the Commission's determinations in all decision and orders.

Additionally, while not relevant to this decision and order, I take the opportunity here to state that in light of § 131.0.27.D, I am now requiring, as an internal administrative policy, that all petitioners coming before me who are obliged to submit their plans to HPC for any advisory comments or required review, to provide all HPC "information" during the hearing. Currently, there is no regulation addressing when the HPC issues advisory comments involving a petition

before the Hearing Authority. In the Hearing Examiner's view, all HPC advisory and mandatory compatibility matters should also be incorporated into technical staff reports.

II. General Criteria for Conditional Uses (§ 131.0.B)

Sections 131.0.B.1-3 requires the Hearing Authority to evaluate whether the proposed Conditional Use will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district in which it is located through the application of three standards: harmony with the General Plan, intensity of use, and atypical adverse impacts.

A. Harmony and Intensity of Use

§ 131.0.B.1. The proposed Conditional Use plan will be in harmony with the land uses and policies in the Howard County General Plan which can be related to the proposed use.

The TSR concludes the proposed CUP accords with PlanHOWARD, Historic Preservation Policy 4.10, which seeks to "[s]trengthen historic preservation programs and laws both to prevent demolition and incentivize restoration and adaptive reuse." The proposed CUP accords with this policy because it will restore and adaptively reuse an historic property.

§ 131.0.B.2. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site are such that the overall intensity and scale of the use(s) are appropriate for the site.

The proposed use will increase the intensity of use, but the 50-person use limitation will limit the restaurant's potential with respect to access. There is no on-site circulation. The existing driveway on the west of the dwelling will provide access to two accessible parking spaces. The TSR does not address access from the parking lot, which is off Furnace Road. Based on the Hearing Examiner's site visit and knowledge of the area, this section of Furnace Road has

light traffic. The overall intensity and scale of the proposed land use are generally appropriate, given the access and location of the Site.

B. Adverse Impacts

Unlike HCZR §§ 131.0.B.1 and B.2, which concern the proposed use's harmony or compatibility with the General Plan and the on-site characteristics of the proposed use, compatibility with the neighborhood is measured under § 131.0.B.3's six, off-site "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, (d) access, (e) impact on environmentally sensitive area; and (f) impact on the character and significance of historic sites. These six adverse impact tests gauge the off-site effects of the proposed conditional use.

Inherent in the assessment of a proposed conditional use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. The assessment therefore accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed use would have adverse effects in an R-12 district. The proper question is whether there are facts and circumstances showing the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception [conditional] use irrespective of its location within the zones. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995). For the reasons

stated below, and as conditioned, Petitioners have met their burden of presenting sufficient evidence under HCZR § 131.0.B.3 to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with an Historic Building Use, Standard Restaurant conditional use in an R-12 district.

a. The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.

Dust, fumes, odors, vibrations and hazards. The restaurant use will generate some of these conditions as part of its daily operations, but these are inherent to the nature of the use. There is no evidence of any atypical dust, fumes, odors, vibrations, and hazards.

Lighting. Exterior lighting will be minimal, for safety and where practicable, facing inward and self-contained by vegetation. The main purpose of this lighting is to provide visual guidance to persons walking from/to the proposed parking areas/tent/Dixon's Brick House.

Noise. There will be some limited noise associated with arrivals of vehicles and persons walking to/from Dixon's Brick House/the patio tent/parking lot. This minor noise is inherent to the nature of the use. Petitioners are also proposing to host outdoor functions in the patio tent featuring "background music" which will meet Howard County Noise Ordinance. The TSR therefore anticipates there will be no adverse impacts from noise.

Compliance with the county noise ordinance, though, is not the test for atypical adverse noise impacts generated by a proposed conditional use. All development in Howard County must comply with the noise ordinance. What is being tested under § 131.0.B.3.a is whether the

nature of the specific land use proposed would generate atypical adverse noise impacts. If any atypical impacts are found, the Hearing Examiner must impose conditions of approval to mitigate them. If the impacts cannot be mitigated, the petition must be denied. Thus in BA 12-018C (Peralynna Properties, decided November 23, 2013) the Hearing Examiner conditioned approval of a Guest House conditional use in a residential neighborhood subject in part to the prohibition of amplified music, including but not limited to, amplified live music, amplified instrumental and vocal music, and live disk jockeys. On appeal by petitioner, the Board of Appeals granted the petition (decided October 23, 2014) subject in part to the same prohibition on amplified live music.

In this case, a standard restaurant use of an historic building would not typically generate atypical adverse noise impacts, but a restaurant land use featuring outdoor music might, if not mitigated. Of import here is the location of several residences in the area of the Property. Rather than prohibit amplified music altogether, the Hearing Examiner is conditioning approval—requiring mitigation of the atypical noise component of the land use—on all amplified music, including amplification for DJs and all speakers or sound projectors, to be oriented toward Furnace Road. This approval condition takes into consideration Mr. Wecker's testimony that the volume of music at the Property could not interfere with events at Elkridge Furnace Inn and that the Inn has never been cited for a violation of the county noise ordinance.

b. The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

Structures. The proposed use will utilize an existing structure, the long-existing Dixon's Brick House. The patio tent, with the approved minor height variance to accommodate the Property's elevation (without excavation), will be located away from the residences and buffered by Dixon's Brick House. No walls or fences are proposed.

Landscaping. See the evaluation of parking in § 131.0.3.c.

c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be appropriately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

Landscaping. At a minimum, proof of compliance with the buffering and screening standards for these land use areas requires compliance with the Howard County Landscape Manual. Where appropriate, additional landscaping or means of buffering or screening is required as a condition of approval. It is standard operating procedure for conditional use petitioners to submit a landscape plan or a conditional use/variance/landscape plan with the petition. If no landscape plan is submitted, the TSR provides the standard comment that the petitioner must submit the plan at the hearing. No landscape plan was submitted with the petitions nor did the TSR inform petitioners of the need to submit a plan.

The information on the conditional use/plan denotes general areas of vegetation, but nothing specific to demonstrate compliance with the Landscape Manual, particularly for the parking area perimeters along Race and Furnace Roads. The Hearing Examiner is therefore requiring, as a condition of approval, that Petitioners install a Type "E" landscape buffer along these edges, with credit for existing vegetation to remain, with shrub plantings near the

Furnace Road ingress to meet visibility and sight distance at the intersection.

Parking Areas. As discussed in Part IV, Petitioners are requesting a variance to reduce the number of required parking spaces to 22. Notwithstanding the difference between DPZ's and Petitioners' calculation of required parking spaces, and the much larger number of spaces that would be required based on the FRS's occupancy numbers, the Hearing Examiner concludes the parking is appropriate given that that Petitioners will limit the number of persons on the site at any one time to 50 persons, based on Mr. Wecker's testimony and considering, based on the HPC's decision, that Dixon's Brick House will be used only for cocktail service for any given private event.

Still, 22 parking spaces means multiple attendees driving together. Therefore, as a condition of approval, the Hearing Examiner is requiring Petitioners to emphasize on their website and all advertising (internet and paper) and shall require event organizers and persons/organizations who rent the event space to instruct the appropriate persons that the "event site" is located in an historic, environmentally sensitive area with limited parking and to plan and coordinate their visits accordingly. For the same reason, the Hearing Examiner is prohibiting shuttle bus service to/from the site.

Driveways, Loading Areas and the Accessible Parking Area. There are two proposed driveways, one off Furnace Road and the second off Race Road, for which a variance is being granted. The driveways are appropriately located. Concerning the location of the loading area by the side of Dixon's Brick House, which was not shown on the Plan and the location of the accessible parking area, the plan does not depict any buffering or screening as required by the

Landscape Manual. Because the driveway setback variance reduces the area between the driveway and parking to 3.5, there is insufficient room for substantial landscaping to buffer and screen the parking and loading uses, other than shrubbery. The Hearing Examiner is therefore requiring Petitioners to install a continuous line of evergreen shrubbery in the area between the driveway and property line, up to the ROW and so as not to reduce visibility at the intersection with Race Road, and to the southern end of the driveway. Petitioners shall consult with DPZ, which shall determine the appropriate type of shrubbery to be planted.

Refuse areas. No refuse area is depicted on the conditional use/variance plan. Mr. Wecker testified all waste would be wheelbarrowed across Furnace Road to what the Hearing Examiner understands to be a refuse collection area at the Elkridge Furnace Inn. In the Hearing Examiner's view, a single refuse collection point is an appropriate solution and will eliminate adverse impacts on all adjacent properties except the Inn, which Petitioners own. While the Hearing Examiner concludes this system will minimize adverse impacts on adjacent properties, she acknowledges having limited knowledge as to whether county law would permit this. Any such law would trump the Hearing Examiner's approval of this refuse disposal system.

d. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.

The Race Road driveway lies about 350 feet from the intersection with Furnace Road and about 540 feet from a southwest curve in the road. The driveway on Furnace Road lies about 50 feet from Race Road to the west and about 250 feet from an eastern curve in the

road. The TSR concludes there appears to be adequate sight distance for the required stopping sight distance of 155 feet for a car going 25MPH.

e. The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

Significantly, the Property is not only state-owned; it, together with the Elkridge Furnace Inn, is located entirely within the Patapsco Valley State Park, specifically the Belle Grove Area. The on-site floodplain is one small area of the large, partially wooded floodplain of the Patapsco River and its Deep Run tributary. It is because of these environmentally sensitive areas—comprising both flora and fauna—that the Hearing Examiner has even considered Petitioners' request for a parking variance. In the Hearing Examiner's view, the Property, as developed under the requested conditional use, should be disturbed to the minimum extent possible to protect its unique location. For this same reason the Hearing Examiner believes the headlights of 22 vehicles parked on the Property at night should be directed away from this natural area to the extent possible. As a condition of approval, then Petitioners shall install "back-in parking only" signage on the southern parking spaces.

f. The proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

This petition concerns the development of an historic structure, Dixon's Brick House, within an area of Howard County dotted with multiple historic properties and structures. The TSR's assessment of the proposed use for compliance with this standard includes a map of these properties. The conditions of approval imposed on the granting of the conditional use petition are intended to safeguard this historic area.

III. Specific Criteria Historic Building Use, Standard Restaurant (§ 131.0.N.27)

A Conditional Use may be granted for the conversion of a historic building in the RC, RR, R-ED, R-20, R-12, R-SC, R-SA-8, R-H-ED, R-A-15, R-APT, R-MH, POR, B-1, B-2, M-1, and M-2 Districts to apartments and in the RC, RR, R-ED, R-20, R-12, R-SC, R-SA-8, R-A-15, R-APT and R-MH Districts to business and professional offices, specialty stores, standard restaurants, arts and crafts classes, antiques shops, art galleries, craft shops; bakeries (provided all goods baked on the premises shall be sold at retail from the premises); furniture upholstery, and similar services; personal service establishments; seasonal sale of Christmas trees or other decorative plant materials, subject to the requirements of Section 128.0.D.4; service agencies; or community meeting halls, provided that:

a. The building is a historic structure as defined in these regulations.

Parcel 313 is listed in the county Historic Sites inventory as HO-503, Dixon's Brick House, and is included in the National Register for Historic Places as HO-357. The petition complies with § 131.0.N.27.a.

b. The maximum number of dwelling units permitted shall be one dwelling unit for every 800 square feet of building area.

No dwelling units are proposed. This section is inapplicable.

c. Extension or enlargement of the principal historical structure and all accessory structures may not exceed 50% of the gross floor area of each individual building above that which existed on August 1, 1989, when ZB 882R was adopted adding the historic building use category to these regulations.

The proposed stairs and ADA accessible ramp comprise about 75sf, or 2.6% of the gross floor area of the building, in compliance with § 131.0.N.27.c.

d. Exterior alterations to the historic structure shall be architecturally compatible with the historic structure as determined by the Historic District Commission, prior to the approval of the Conditional Use.

The Historic Preservation Commission (formerly the Historic District Commission) granted approval for the ADA accessible ramp, porch/landing area, and steps on August 2, 2016, in compliance with § 131.0.N.27.d.

e. An historic building converted into a community meeting hall or offices shall be subject to the following standards:

- (1) No material or equipment shall be stored outside of structures.**
- (2) Parking areas shall be set back a minimum of 30 feet from all property lines or public street rights-of-way and screened from the roadway and adjacent properties.**
- (3) The site shall have frontage on and direct access onto a collector or arterial road designated in the General Plan.**

The requested conditional use petition is for a standard restaurant. This section does not apply.

f. On an ALPP purchased or dedicated easement property, the following additional criteria are required:

- (1) The use shall not interfere with the farming operations or limit future farming production.**
- (2) Any new building or building addition associated with the use, including any outdoor storage and parking**

The Property is not subject to an ALPP easement. This section is inapplicable.

IV. Evaluation of the Requested Variances

The standards for variances are contained in HCZR § 130.0.B.2.a. Pursuant to this section, the Hearing Examiner may grant a variance only if the Petitioner demonstrates compliance with all four variance criteria. Based upon the foregoing Findings of Fact, and for the reasons stated below, the Hearing Examiner finds the requested variances comply with §§

130.0.B.2.a.(1) through (4), and therefore may be granted.

(1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.

The first criterion for a variance is that there must be some unique physical condition of the property, e.g., irregularity of shape, narrowness, shallowness, or peculiar topography that results in a practical difficulty in complying with the particular bulk zoning regulation. Section 130.0.B.2.(a)(1). This test involves a two-step process. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A “practical difficulty” is shown when the strict letter of the zoning regulation would “unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974). With respect to the first prong of the variance test, the Maryland courts have defined “uniqueness” thus.

In the zoning context, the ‘unique’ aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. ‘Uniqueness’ of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, *environmental factors, historical significance*, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to characteristics as unusual architectural aspects and bearing or party walls. *North v. St. Mary’s County*, 99 Md. App. 502, 514, 638 A.2d 1175 (1994) (italics added).

Variance 1. The Property's topography and the large flood plain area cause practical difficulty in complying with the 15-foot accessory maximum height limitation for accessory structures.

Variance 2. The shed is a long-standing accessory structure. The buildable area for a relocated shed is limited by the large area of floodplain, causing practical difficulty in complying with the 7.5-foot side setback.

Variance 3. Owing to the location of the historic Dixon's Brick House, and to the Property's location within an environmentally sensitive area, the variance for a reduction in the 20-foot use setback imposed by HCZR § 109.0.D.4.c.(3) for an existing driveway is warranted based on practical difficulty.

Variance 4. A reduction in the required parking to 22 spaces. The large area of flood plain and the Property's location within a sensitive environmental area cause practical difficulty. See also Part III's evaluation of the conditional use petition for atypical adverse impacts.

Variance 5. A reduction in the 20-foot use setback imposed by HCZR § 109.0.D.4.a.(2) to 5.7 feet for an existing and proposed sidewalk and patio is warranted by practical difficulty. The petition and the Plan state the existing sidewalk and patio has existed in this location for decades.

(2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

For the reasons set forth in the evaluation of HCZR § 130.0.B.2.a(1) and as further discussed and conditioned in Part II's evaluation for atypical adverse impact, the Hearing Examiner concludes the five requested variances will not alter the essential character of the neighborhood or district in which the lot is located and will not substantially impair the appropriate use or development of adjacent property. The granting of the variances will not be detrimental to the public welfare.

(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

Petitioners did not created the practical difficulties or hardships.

(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

The requested variances are the minimum necessary for a reasonable use of the Property and therefore the minimum necessary to afford relief.

ORDER

Based upon the foregoing, it is this **29th day of September 2016**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of The Weckers, Inc. for an Historic Building Use, Standard Restaurant conditional use and five related variances in an R-12 (Residential: Single) zoning district, is **GRANTED**;

Provided, however, that:

1. The Conditional Use shall be conducted in conformance with and shall apply only to the Conditional Use as described in the petition and depicted on the July 19, 2016 Conditional Use/Variance Plan and not to any other activities, uses or structures on the Property.
2. Petitioners shall install a Type "E" landscape buffer along the parking perimeters following Race and Furnace Road, with credit for existing vegetation to remain, and with shrub plantings near the Furnace Road ingress to meet visibility and sight distance at the intersection.
3. Petitioners shall install a row of evergreen shrubs along the common lot line with the adjoining Parcel 0883, beginning at a point at Race Road, between the driveway and the lot line, that will not interfere with visibility and sight distance at the intersection and ending at the southernmost area of the driveway for which a variance is granted. Petitioners shall consult with DPZ, which shall determine the appropriate type of shrubbery to be planted.
4. No delivery vehicle shall park in the western driveway next to the side entry of the Dixon's Brick House except for drop-offs and pick-ups.
5. Petitioners shall emphasize on their website and all advertising (internet and paper) and shall require event organizers and persons/organizations who rent event space to emphasize that the event space is located in an historic, environmentally sensitive area with limited parking and to plan their visits accordingly.
6. No shuttle service pickup or drop off is permitted.
7. The hours of operation shall be: Sunday to Thursday: 9:00am to 10:00pm; Friday and Saturday 9:00am to 11:00pm. All music shall end ½ hour before the evening closing time.

8. All amplification for DJs and all speakers or sound projectors and all amplified music, live or recorded, shall be oriented/directed toward Furnace Road.
9. Prior to applying for a permit for the patio tent, Petitioners shall consult with DILP and/or FRS, who shall make a determination as to whether the tent will be erected for more than 180 calendar days within one year. This determination shall control Petitioners' application for the appropriate permit for the patio tents.
10. Petitioners shall install "back-in parking" only signage on the southern parking spaces.
11. Petitioners shall comply with the Historic Preservation Commission's August 2, 2016 decision.
12. Petitioners shall comply with all Maryland Department of Natural Resources project approval conditions, as set forth in the March 13, 2015 letter introduced as Petitioners Exhibit I.
13. Petitioners shall comply with all agency comments.
14. Petitioners shall obtain all required permits.
15. Petitioners shall comply with all applicable federal, state and county regulations and laws.
16. Because the granting of the conditional use petition is contingent on these conditions of approval, a failure to comply with any condition is a violation of the HCZR and DPZ may enforce the zoning violation pursuant to Howard County Zoning Regulations § 102.0.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER


MICHAEL LEFAIRE

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.