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JOHN W. CLARK, Maj Gen, USAF (Ret)

JOHN B. DUCHARME

VIA E-MAIL

bza@albanyny.gov

January 31, 2022

City of Albany Board of Zoning Appeals

200 Henry Johnson Boulevard

Albany, New York 12210

Re: Surpass' *opposition* to Druthers' pending application for three variances to construct a large exterior deck in the public right of way along Bridge Street; Project #: 00424; Application: AV# 0079.

Members of the Board of Zoning Appeals:

The law firm of DuCharme Clark, LLP, represents Surpass Chemical Company, Inc., ("Surpass"), which continues to *oppose* the above-referenced application of Druthers Brewing Company II, Inc., ("Druthers") seeking three (3) variances to construct a 13-foot wide, 110 foot long deck in the public right of way along Bridge Street. It is my understanding that the continuation of the public hearing on this application is scheduled before the City of Albany Board of Zoning Appeals ("BZA") for 6:00 p.m., on February 2, 2022.

Surpass' Prior Letters to the BZA

I previously submitted letters dated June 23, 2021, July 23, 2021, and December 6, 2021 to the BZA on behalf of Surpass in opposition to the above-referenced application of Druthers Brewing Company II, Inc., ("Druthers"). Those letters are incorporated herein by reference. They explain in detail how Druthers' application fails to meet all of the elements required for it to receive an area variance as set forth in General City Law §81-a(4). They also set forth and document both Surpass' and the Albany County Planning Board's substantial public health and safety concerns with the BZA granting Druthers' application which include the following five important issues.

- The impairment to Surpass' ability to safely transport chemicals along Bridge Street as it has done for decades due to the anticipated, increased: (a) vehicle traffic traveling on Bridge Street; (b) vehicle parking on Bridge Street; and (c) pedestrian traffic walking on Bridge Street.
- The increased safety concerns for Druthers' patrons who: (a) walk along Bridge Street in close proximity to Surpass' large tank trucks; (b) walk on or very near the unprotected railroad tracks which bring chemicals into Surpass' facilities located on Bridge and Mill Streets; (c) park along Bridge Street in "no parking" zones; (d) park on or very near the unprotected railroad tracks; and (e) will use the ADA compliant ramp which exits into Surpass' scale house driveway frequently used by large tank trucks.
- The increased safety concerns for Druthers' patrons who will be drinking and dining on the proposed exterior deck in close proximity to Surpass' larger tank trucks which transport chemicals and will emit diesel exhaust directly onto them as they use the deck.
- The increased safety concerns for Druthers' employees who will be working on the proposed exterior deck in close proximity to Surpass' larger tank trucks which will emit diesel exhaust directly into their work environment.
- The increased safety concerns for Surpass' employees who may be precluded from parking on Bridge Street in close proximity to their place of employment, and instead be forced to park on Broadway and walk a much further distance to work along dark, dangerous, often icy sidewalks.

Rebuttal to the Applicant's January 12, 2022 Presentation

On January 12, 2022, the BZA conducted a public hearing regarding Druthers' pending application for three variances to construct its proposed, large exterior deck in the public right of way along Bridge Street which would enable Druthers to operate a side walk café capable of serving 60 additional patrons in an industrial neighbor. During the hearing, Chris Martell made a presentation on behalf of Druthers in support of the application. See, 01/12/22 Hearing Video, 57:35-1:33:20; 1:42:30-1:46:30. The purpose of this letter is to set forth Surpass' rebuttal to several comments made by Mr. Martell during his presentation.

1. The Existing Parking Problems at Druthers: Mr. Martell acknowledged that there exists significant issues at Druthers related to the manner in which its patrons currently park. See, 01/12/22 Hearing Video, 1:00:35-1:01:50. Mr. Martell explained that Druthers' patrons currently park on both sides of Bridge Street. They park next to Druthers' brewery in an area which should be the sidewalk. They illegally park along the other side of Bridge Street. And, they even park across an operating, albeit unprotected, commercial railroad crossing which is used to deliver chemicals in bulk to Surpass' Bridge Street facilities. The patrons parking significantly narrows Bridge Street, makes it more difficult and dangerous for Surpass' large chemical tank trucks to travel on Bridge Street, and also forces Druthers' patrons to walk down the middle of Bridge Street. Mr. Martell aptly characterized this as a "*very dangerous situation.*" See, 01/12/22 Hearing Video, 1:15:25-1:15:30.

The members of the BZA should be reminded that this "very dangerous situation" has been in existence since in or about 2015, and arose solely as a result of Druthers' acts and omissions. In December 2013, Druthers applied to the BZA for a use variance seeking permission to principally operate an *indoor commercial brewery* in the building located at 1053 Broadway, a use which would be consistent with the long established industrial character of the Bridge Street neighborhood. As an accessory use, Druthers also proposed to operate a *small indoor tasting room* with nineteen 4-person tables, and a bar with 21 stools. The "Project Narrative" which accompanied the Application stated that "*[s]ales from the tasting room are needed to ensure adequate cash flow during the early phases of third-party distribution*" from the *commercial brewery*.¹

On January 8, 2014, less than one-month after Druthers applied to the BZA for a use variance, it was granted. There does not appear to have been any substantial analysis of the traffic and parking issues which would be created along Broadway and Bridge Street as a result of the use variance permitting the operation of an indoor brewery and small tasting room. Instead, the application was granted on the conditions that Druthers: (a) "agree upon a parking and traffic control plan with the division of Traffic Engineering"; and (b) improve the sidewalk located in front of 1053 Broadway. See, the January 13, 2014 letter from the City of Albany Department of Development & Planning attached hereto as **Exhibit A**. Druthers failed to comply with either of these two conditions. Druthers did not agree upon a parking and traffic

¹ The USDO defines an "accessory use" as one incidental to the principal use of a commercial building.
USDO §151-7

control plan with the division of Traffic Engineering. Druthers also failed to improve the sidewalk located in front of 1053 Broadway.

Druthers proceeded to renovate its 1053 Broadway Building into an indoor brewery/restaurant/bar which appears to be much larger than the small tasting room presented in its application for a use variance. Druthers' unauthorized expansion of its small tasting room into a large restaurant/bar has contributed greatly to the traffic, pedestrian, and parking problems on and around Bridge Street. Druthers said expansion without any parking or traffic control plan has created the parking issue which Mr. Martell now concedes is a "very dangerous situation."

In order to now address this "very dangerous situation," Druthers proposes that there be "no parking" along Bridge Street. However, during Mr. Martell's presentation, and in response to a question proposed BZA Member LaBlan, he conceded that the City of Albany has *not* made a determination that there will be "no parking" on Bridge Street. See, 01/12/22 Hearing Video, 1:20:48-1:23:30. BZA Chair Daley set forth that the BZA has no authority to impose as a condition to the approval of any application the requirement that parking be disallowed on a public street. See, 01/12/22 Hearing Video, 1:27:20-1:27:30.

If Druthers is permitted to further expand its use by constructing its proposed, large exterior deck in the public right of way along Bridge Street which would enable Druthers to operate a side walk café capable of serving 60 additional patrons, and the BZA has no authority to address the parking issues which even Druthers now concedes is a "very dangerous situation," then the parking problems will be further exacerbated. Surpass submits that the BZA should not continue to condone Druthers' failures to comply with the initial approval of its use variance which authorized a small tasting room as an accessory use to the commercial brewery by now approving its pending variance applications.

2. Druthers' Claim Regarding Lost Revenue: During Mr. Martell's presentation he claimed that as a result of COVID, Druthers experienced a decline in revenue of its restaurant/bar operation. See, 01/12/22 Hearing Video, 1:01:50-1:03:50. However, the principal use of Druthers' 1053 building is the operation of its commercial brewery. As is stated above, the sales from the accessory restaurant/bar operation were supposed to be needed to ensure adequate cash flow during the early phases of commercial brewery's operation. That brewery has been successfully operating since 2015. Druthers has not submitted to the BZA any "dollars and cents" proof regarding the profitability of the commercial brewery it

operates at 1053 Broadway.

In general terms, Mr. Martell compared the profitability of Druthers' Albany operation with that of its Schenectady and Saratoga Springs operations. However, the Schenectady and Saratoga Springs operations are different from the Albany location which operates both a commercial brewery in addition to its accessory restaurant/bar.

During Mr. Martell's presentation, he acted as if it were common knowledge that all restaurants suffered declines in revenue as a result of the COVID pandemic. This may be true, however, he presented no proof to support his claim with respect to Druthers' Albany operation. It should also be noted that during the COVID pandemic, retail sales of beer nationwide actually experienced an increase annually.

The bottom line is that Druthers' has not submitted any "dollars and cents" proof regarding the profitability of all of its business operations at 1053 Broadway which establish that Druthers' operations are unprofitable, and it needs to expand its restaurant/bar operation by constructing its large exterior deck capable of serving 60 additional patrons in order to achieve profitability.

3. The Undesirable Change in the Character of the Neighborhood: During Mr. Martell's presentation he claimed that the proposed variances would: (a) include the addition of over 150 feet of new sidewalks; (b) build upon the commercial redevelopment Druthers began in 2015; and (c) not threaten the viability of any existing industrial uses in the area. See, 01/12/22 Hearing Video, 1:05:20-1:06:16.

With respect to the sidewalks, as is set forth above, Druthers was obligated to perform this work as a condition to the approval of its 2014 use variance application. See, Exhibit A. It failed to do so. Instead, it allowed its patrons to illegally park on the dilapidated sidewalks, narrowing Bridge Street, and contributing to what Mr. Martell now concedes is a very dangerous situation. Druthers should receive no credit from the BZA for its belated offer to construct these sidewalks.

With respect to Druthers' remaining two claims, its plan to expand its restaurant/bar operation by constructing its large exterior deck creating a sidewalk café capable of serving 60 additional patrons in an industrial area and along an established tractor trailer route is: (a) not consistent with its 2015 construction of an indoor commercial brewery and small indoor accessory tasting room; and (b) will threaten the viability of Surpass' existing industrial uses which have been in operation in this industrial

neighborhood for over 100 years.

4. **Alternatives to the Proposed Variances:** During Mr. Martell's presentation he claimed that there were no viable alternatives to Druthers' proposed variances. See, 01/12/22 Hearing Video, 1:06:16-1:11:00. In response to a question from BZA Chair Daley, Mr. Martell claimed that the size, shape and location of the proposed deck could not be altered because Druthers' needs the seating for 60 patrons to achieve a return on its investment. See, 01/12/22 Hearing Video, 1:27:40-1:33:05.

However, Druthers has not submitted to the BZA any "dollars and cents" proof setting forth the work it proposes nor the actual costs for that work. It appears that a substantial portion of those costs is for the construction of 150 feet of new sidewalks. For the reasons stated above, Druthers should receive no credit from the BZA for its belated offer to construct these sidewalks.

In addition, there is no proof in the record that the proposed deck constitutes the *minimum* variance needed to address any alleged but unproven financial difficulty Druthers' faces.

5. **Druthers' Requested Variance is Substantial:** During Mr. Martell's presentation he claimed that the proposed variances are not substantial using what he characterized as an "impact on the community standard." See, 01/12/22 Hearing Video, 1:11:04-1:11:45.

During Mr. Martell's December 8, 2021, presentation to the BZA, he made reference to what he called the "Community Impact Concept." See, 12/08/21 Hearing Video, 1:33:00. Then BZA Chairperson Berkley requested that Druthers provide a copy of a law review article which discussed it. See, BZA minutes from the December 8, 2021 public hearing stating that Druthers was to "provide the board the law review article that defines community impact standard when determining the test for substantiality." No such law review article has been posted to the project file thereby precluding public comment on it.

That said, the BZA's approval of Druthers' 2015 use variance application approved as an accessory use the operation of a small indoor tasting room with nineteen 4-person tables, and a bar with 21 stools for total seating of 97 patrons. The proposed construction of a large exterior deck creating a sidewalk café capable of serving 60 additional patrons represents a 62% increase in seating capacity and is substantial by any measure.

6. **Druthers' Requested Variance Has a Significant Impact on the Environment**: During Mr. Martell's presentation he claimed that the proposed variances will not have a significant impact on the environment. See, 01/12/22 Hearing Video, 1:11:45-1:12:36.

Surpass respectfully submits that the variances requested by Druthers are likely to have a significant adverse impact on the environment, and, as such, the BZA is obligated to take a hard look at those impacts. A project's impact on the air quality, traffic, parking, noise, a change in the neighborhood's character, and the creation of hazards to human health are all appropriate environmental concerns for the BZA's required SEQRA analysis. See, 6 NYCRR §617.7(c); see also, Peachin v. City of Oneonta, 194 A.D.3d 1172, 1175 (3d Dept. 2021)(holding that changes in parking are appropriate environmental concerns for a SEQRA analysis); Adirondack Historical Association v. Village of Lake Placid/Lake Placid Village, Inc., 161 A.D.3d 1256, 1258 (3d Dept. 2018)(holding that changes in parking and traffic are appropriate environmental concerns for a SEQRA analysis).

7. **Druthers' Alleged Difficulty Is Self-Created**: During Mr. Martell's presentation he claimed that difficulty he seeks to address with the proposed variances is not self-created. See, 01/12/22 Hearing Video, 1:12:36-1:13:32.

However, during Mr. Martell's June 23, 2021 presentation to the BZA, he, an experienced attorney, conceded that any such difficulty was "***one hundred percent self-created.***" See, 06/23/21 Hearing Video, 58:33-58:35.

On January 12, 2022, Mr. Martell changed his position then claiming that the difficulty was not self-created because the COVID pandemic and its negative impact on the restaurant business was unforeseen. However, his argument ignores the fact that Druthers' 1053 Broadway property is principally used as a commercial brewery, and there is no proof in the record that the COVID pandemic caused any decline in Druthers' retail sales of beer.

Moreover, Mr. Martell purchased the 1053 Broadway property and opened his commercial brewery and small accessory tasting room with knowledge that: (a) it was located in an industrial neighborhood with Surpass Chemical and National Grid as two of its neighbors; (b) it was located on Bridge Street which was used as a tractor trailer route for the transport of chemicals; and (c) the zoning in this industrial neighborhood did not permit the creation of a large sidewalk café to be constructed on the public right of way. Mr. Martell's June 23, 2021 admission that Druthers'

purported difficulty was “one hundred percent self-created” is correct. His subsequent change in position is self-interested and not worthy of credence.

8. The Albany County Planning Board Has Recommended That Application for the Variances Be Denied: During Mr. Martell’s presentation he acknowledged that the Albany County Planning Board recommended to the BZA that Druthers’ application for the variances be denied for three important reasons. See, 01/12/22 Hearing Video, 1:13:35-1:20:40.

a. There is a public health and safety concern with a proposed exterior deck which would serve as a sidewalk café in dangerously close proximity to an industrial tractor trailer route.

In order to address this significant concern, Mr. Martell proposed that Surpass consider changing its well-established, safe tanker truck route. See, 01/12/22 Hearing Video, 1:15:45-1:17:55; 1:45:30-1:46:10. Surpass’ existing tank truck route enables it to safely and efficiently transport chemicals on the streets of Albany. Its tank trucks exit Interstate Route 787, and then travel south on Broadway. When the Surpass tank truck arrives at Bridge Street, it turns left onto Bridge Street. It travels down Bridge Street, by Druthers and then turns right onto Surpass’ scale house driveway.

Established Surpass Tank Truck Route



Druthers' Proposed Surpass Tank Truck Route

During Mr. Martell's presentation, he again claimed that instead of turning left onto Bridge Street from Broadway, Surpass tank trucks could travel to Tivoli Street, then to Mill Street, then take a left onto Bridge Street, and then a left turn into Surpass' scale house driveway as depicted by the redline below.



As the foregoing photographs establish, Mr. Martell's proposed Surpass tank truck route would require the chemical trucks to travel more than one-half mile per run, (20-30 runs/day, 5 days a week, 52 weeks a year). Surpass' management calculated that the greater time and distance for each chemical truck would cost it approximately \$90,000.00 per year in additional overhead costs. Moreover, it will increase Surpass' safety concerns and exposes the community to enhanced risk.

It is unfair for the BZA to burden Surpass with this additional risk and expense so that Druthers can construct a large exterior deck in the public right of way along Bridge Street to benefit its private, for-profit business.

b. There is a public health and safety concern with the proposed ADA compliant deck which will exit in such close proximity to Surpass' scale house driveway placing Druthers' patrons in dangerously close proximity to industrial tractor trailers which emit hazardous materials contained in diesel exhaust.

In order to address this significant concern, Mr. Martell again proposed that there be no parking on Bridge Street. See, 01/12/22 Hearing Video, 1:18:55-1:20:40. As is set forth above, the BZA does not possess the authority to impose no parking requirements on Bridge Street.

During the December 8, 2021, public hearing, the BZA requested that Druthers' submit information of the availability of "a monitor that can be used to see the noxious fumes that are being breathed in." See, BZA minutes from the December 8, 2021 public hearing. No such information has been posted to the project file thereby precluding public comment on it.

Mr. Martell also refused to submit the correspondence or report he purportedly received from a mechanical engineer who works in air quality regarding placing Druthers' employees and patrons in dangerously close proximity to the industrial tractor trailers which emit hazardous materials contained in diesel exhaust. See, 01/12/22 Hearing Video, 1:43:55-1:45:25.

Surpass submits that pursuant to the BZA's obligations under SEQRA, it is charged with taking a "hard look" at the potential environmental issues associated with Druthers' pending variance applications. As is set forth above, the project's impact on the air quality, and the creation of hazards to human health are appropriate environmental concerns for the BZA's required SEQRA analysis.

Druthers' failure to provide the BZA with the required information needed for it to take the required hard look must result in the denial of its applications for the variances.

c. There would be an undesirable change in the character of the existing industrial neighbor hood caused by permitting Druthers to build a large exterior deck which will serve as a sidewalk café.

The Albany County Planning Board recommended to the BZA that it consider "the undesirable change in the character of neighbor hood due to the presence of industrial uses in close proximity." See, December 16, 2021 Recommendation.

Druthers' property at 1053 Broadway is located in the "Mixed-Use Formed-Based Warehouse District" ("MU-FW"). See, USDO §375-204(7). While the purpose of the MU-FW District is to allow for a greater variety of building reuse and encourage the redevelopment of the Warehouse District, the BZA is expressly charged with "*protecting the continued viability of the existing industrial uses that are included in and surround that area.*" See, USDO §375-204(7)(b), emphasis added.

The character of Druthers' and Surpass' neighborhood is industrial. Druthers' brewery/restaurant/bar is located in close proximity to Surpass' and National Grid's industrial facilities, as well as unprotected commercial railroad tracks over which large trains regularly transport chemicals in bulk to Surpass' facilities.

Currently Druthers' patrons drink and dine inside the building which houses its brewery/restaurant/bar. The proposed large exterior deck will significantly alter the character of the neighborhood by adding two new entrance points (west and east side of the deck), and cause increased pedestrian traffic to and from those entrance points. The deck will change a normal brick and mortar restaurant/bar operation into a roadside café environment. It will increase the number of people walking on both Bridge Street and the surrounding sidewalks. It will place Druthers' employees and patrons in even closer proximity to Surpass' and other companies' large tractor trailer trucks.

Druthers argues that its proposal will not create an undesirable change in the neighborhood but then asserts that the City should eliminate all parking on Bridge Street. Surpass respectfully submits that this alone would create an undesirable change in the neighborhood. It will increase Surpass' safety concerns for its employees who would be precluded from parking on Bridge Street in close proximity to their place of employment, and instead be forced to park on Broadway and walk a much further distance to work along dark, dangerous, often icy sidewalks. It will cause Surpass' employees to suffer so Druthers can make more money.

Granting Druthers' pending application will exacerbate the already dangerous situation acknowledged by Mr. Martell. It will permit Druthers to substantially expand its current use as a brewery/restaurant/bar operating from inside its building, to operating outside that building on a large exterior deck. This will place Druthers' employees and patrons mere feet away from large, loud, tank trucks which emit diesel exhaust on them and haul tens of thousands of pounds of chemicals and other hazardous materials. The BZA should not sacrifice the safety of Druthers' employees and patrons so a for-profit business can make more money.

An undesirable change will be produced in the character of this industrial neighborhood by granting Druthers' application. If approved, it will cause a substantial increase in vehicular and pedestrian traffic as well as parking. The proposed large exterior deck will permit 60 restaurant patrons to dine outside in this industrial neighborhood, consume alcohol, and then walk along Bridge Street and across the dangerous, unprotected railroad tracks. Mixing intoxicated people with industrial truck traffic, unprotected railroad tracks, and moving freight trains is never a good idea. If the BZA were to grant Druthers' application, it will further exacerbate this already dangerous situation.

Conclusion

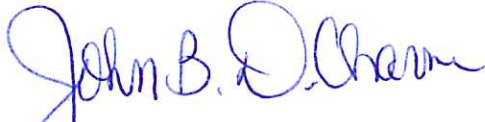
It is respectfully submitted that the facts in the record before the BZA establish that the detriment which Surpass and the surrounding neighborhood will suffer as a result of granting Druthers' application *far exceed* the financial benefit Druthers may obtain

by expanding its non-conforming restaurant into the public right-of-way. As such, the BZA must deny Druthers' application.

Thank you for your consideration of the foregoing.

Respectfully submitted,

DuCHARME CLARK, LLP



John B. DuCharme

JBD:nb

Enclosure

cc: Brett T. Williams, Esq., Assistant Corporation Counsel (via e-mail)
Martha C. Mahoney, Esq., Assistant Corporation Counsel (via e-mail)
Charles W. Malcomb, Esq., Attorney for Druthers (via e-mail)
Alicia Legland, Esq., Attorney for Druthers (via e-mail)
Leonard J. Smith, President of Surpass (via e-mail)
Tyler Smith, General Manager of Surpass (via e-mail)
Michael DeMasi, Senior Reporter, Albany Business Review (via e-mail)

EXHIBIT “A”



CITY OF ALBANY
DEPARTMENT OF DEVELOPMENT & PLANNING

KATHY M. SHEEHAN
Mayor

January 13, 2014

MICHAEL J. YEVOLI
Commissioner

Druthers Brewing Company
c/o Christopher Martell
10 Rolling Brook Drive
Ballston Spa, NY 12020

DOUG MELNICK
Planning Director



Re: 1053 Broadway, Board of Zoning Appeals Case #1-14, 4158

Dear Chris,

21 Lodge Street
Albany, NY 12207
518.434.2532
(fax) 518.434.9846
sustainability@ci.albany.ny.us
www.albanysustainability.org

On January 8, 2014 the Albany Board of Zoning Appeals approved your request for a Use Variance to allow retail sales, a tasting room and restaurant as accessory to a commercial brewing facility proposed to occupy the +/- 23,000 square foot structure at the premises. This approval is valid for a period of six months or until a building permit to undertake work at the premises has been obtained.

ECONOMIC DEVELOPMENT
CAPITALIZE ALBANY CORPORATION
21 Lodge Street
Albany, NY 12207
518.434.2532
(fax) 518.434.9846
development@capitalizealbany.com
www.capitalizealbany.com

The approval is contingent upon satisfaction of the following conditions:

- The applicant shall repair/replace sidewalks, as necessary, along the Bridge Street frontage of the property.
(Contact: Pat McCutcheon, Division of Engineering, 434-2387)
- The applicant shall agree upon a parking and traffic control plan with the Division of Traffic Engineering.
(Contact: William Trudeau, Traffic Engineering Unit, 434-5791)
- The applicant shall ensure adequate water and sewer service capacity in coordination with the Department of Water and Water Supply.
(Contact: Maryella Davenport, Department of Water & Water Supply, 434-5300)

NEIGHBORHOOD & LONG-RANGE PLANNING
21 Lodge Street
Albany, NY 12207
518.434.2532
(fax) 518.434.9846
albany2030@ci.albany.ny.us

Should you have any questions or difficulty contacting the relevant City Staff detailed above, please let me know.

LAND USE PLANNING
200 Henry Johnson Boulevard
Albany, NY 12210
(fax) 518.434.5294

Board of Zoning Appeals
Planning Board
518.445.0754
zoning@ci.albany.ny.us

Historic Resources Commission
518.434.5271
planning@ci.albany.ny.us

We look forward to you successfully achieving your project within the City of Albany.

Sincerely,

Bradley Glass
Senior Planner

HOUSING & COMMUNITY DEVELOPMENT
200 Henry Johnson Boulevard
Albany, NY 12210
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www.albanyny.gov
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cc: Pat McCutcheon, Division of Engineering
William Trudeau, Traffic Engineering Unit
Maryella Davenport, Department of Water & Water Supply