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### VIA E-MAIL

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December 6, 2021

City of Albany Board of Zoning Appeals  
200 Henry Johnson Boulevard  
Albany, New York 12210

Re: Surpass Chemical Company, Inc.'s *opposition* to Druthers' pending application for three variances to construct a 13-foot wide, 110 foot long 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 has been operating its business in the City of Albany for more than 100 years. It owns five parcels of land in the City, located on Broadway, Bridge Street and Mill Street from which it transacts business. All of these properties are in close proximity to Druthers Brewing Company located at 1053 Broadway, at the intersection with Bridge Street, in the City of Albany.

For the reasons which follow, Surpass 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 a public hearing on this application is scheduled before the City of Albany Board of Zoning Appeals ("BZA") for 6:00 p.m., on December 8, 2021.

### Surpass' Prior Letters to the BZA

I previously submitted letters dated June 23, 2021, and July 23, 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.

The letters 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 Surpass’ safety concerns with the BZA granting Druthers’ application which include the following five 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 exists 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.

### **The BZA’s June 23, 2021 Public Hearing**

On June 23, 2021, the BZA held its initial public hearing on Druthers’ application. The public hearing was not concluded that evening. Instead, BZA Chairperson, Richard Berkley, stated that the public hearing would be continued to the BZA’s July

28, 2021 meeting. He noted that prior to making the BZA's determination, it would seek input from both the City of Albany's: (a) Traffic Engineering Division of the Police Department; and (b) Department of Fire and Emergency Services, to analyze the parking, traffic and safety concerns raised by Surpass. See, 1:38:38-1:41:25 of June 23, 2021 public hearing video found on the City's YouTube page.

### **The BZA's July 28, 2021 Meeting**

During the BZA's July 28, 2021 meeting, BZA Chair Berkley did not continue the public hearing regarding Druthers' variance application, but rather adjourned it to the next meeting of the BZA scheduled for August 11, 2021. See, 56:20 of July 28, 2021 public hearing video found on the City's YouTube page. The BZA received no input from any third parties including the City of Albany's: (a) Traffic Engineering Division of the Police Department; and/or (b) Department of Fire and Emergency Services, analyzing any of the parking, traffic and/or safety concerns raised by Surpass in opposition to Druthers' pending application.

### **The BZA's August 11, 2021 Meeting**

On August 11, 2021, the BZA did not continue the public hearing regarding Druthers' application nor did it have any further discussion regarding that application. Once again, the BZA received no input from any third parties (i.e., the Traffic Engineering Division or Fire Department) analyzing any of the parking, traffic and/or safety concerns.

At no time on or before August 11, 2021, did the BZA take any steps to comply with its obligations under the New York State Environmental Quality Review Act, (Article 8 of the Environmental Conservation Law), and its implementing regulations, (6 NYCRR Part 617), (hereinafter collectively referred to as "SEQRA"), which mandates that all local government agencies, including the BZA, not engage in any discretionary action, such as the approval of Druthers' variance application, until it complied with SEQRA. See, e. g., 6 NYCRR §617.3(a).

Despite the foregoing, the BZA passed a motion granting Druthers' variance application. The BZA failed to: (a) take a hard look at any of the issues raised by Surpass; (b) comply with its obligations under SEQRA; and/or (c) comply with its obligations under General City Law §81-a(4) prior to approving Druthers' variance application.

### **The Letter from the Department of Fire & Emergency Services**

Sometime between November 10, 2021 and December 3, 2021, the City's Planning Department placed a letter from the Department of Fire & Emergency Services into the publically accessible electronic file maintained for Druthers' variance application. That letter is dated August 27, 2021. The Department of Fire & Emergency Services requested that Bridge Street no longer allow any parking on either side from Broadway to Mill Street. The BZA has not acted on the Department of Fire & Emergency Services' recommendation in this regard.

Surpass respectfully submits that even if there was no parking along Bridge Street, Druthers would still cause the street to be regularly blocked with the delivery vehicles providing supplies to the restaurant. Druthers has submitted no plans for how deliveries would be received by it if there was no parking along Bridge Street.

### **The Letter from the Police Department -Traffic Engineering Division**

Sometime between November 10, 2021 and December 3, 2021, the City's Planning Department also placed a letter from the Police Department, Traffic Engineering Division into the publically accessible electronic file maintained for Druthers' variance application. That letter is dated August 27, 2021. The Traffic Engineering Division submitted several concerns about the impacts of Druthers' variance application which have not been addressed by the BZA.

It should also be noted that back on January 8, 2014, the BZA approved Druthers' initial use variance application on the condition that a parking and traffic control plan be completed with Druthers and the City's Division of Traffic Engineering. That plan was never completed and the BZA failed to enforce this condition of its January 8, 2014 approval despite Surpass' requests that it do so.

### **Surpass' Article 78 Proceeding**

In order to obtain judicial review of the BZA's approval of Druthers' variance application, Surpass commenced an Article 78 proceeding in the Supreme Court, Albany County on September 10, 2011, bearing the caption, Surpass Chemical Company, Inc. v. The Board of Zoning Appeals, et al., Supreme Court, Albany County, Index No.: 907953-21; RJINo.: 01-21-139206; Assigned Judge: Hon. James H. Ferreira, AJSC. The BZA was served with Surpass' litigation papers on September 14, 2021.

## **The BZA's Resolution to Re-Hear Druthers' Variance Application**

On October 27, 2021, the BZA unanimously passed a motion to re-hear Druthers' application for a variance and resolve the SEQRA concerns.

### **The BZA's Obligations Under SEQRA**

SEQRA mandates that the BZA not engage in any discretionary action until it has complied with SEQRA. See, e. g., 6 NYCRR §617.3(a). Under a proper SEQRA review, all agencies involved with the proposed action must determine a lead agency. See, 6 NYCRR §617.6(b). In this case, multiple government agencies will be involved with respect to Druthers' application for a variance. In addition to the BZA, Druthers has set forth that it will require an easement from the City of Albany's Common Council and Mayor. See, Druthers' May 17, 2021 Master Application, Part 2. As such, the BZA, Common Council and Mayor must select a lead agency and conduct a coordinated SEQRA review. See, 6 NYCRR §617.6(a)(1)(i).

Once the lead agency is determined, then the first step it must take is to determine whether the contemplated actions are subject to SEQRA. See, 6 NYCRR §617.6(a)(1)(i). The lead agency must determine whether the proposed action is a Type I, Type II, or an Unlisted Action as defined by SEQRA.

A Type I Action is defined as one which is likely to have a significant adverse impact on the environment, and, as such, requires further SEQRA review. See, 6 NYCRR §617.4(a)(i). A Type II Action is defined as one which will not have a significant adverse impact on the environment, and, as such, requires no further SEQRA review. See, 6 NYCRR §617.5(a). An Unlisted Action is defined as one which is not listed as either a Type I or Type II Action in the SEQRA regulations, and, as such, may require further SEQRA review. See, 6 NYCRR §617.2(al).

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 a 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).

### **Druthers' SEAF**

On September 12, 2021, Druthers submitted its Short Environmental Assessment Form ("SEAF"). Surpass respectfully submits that the SEAF is not adequate to address the many environmental concerns raised by its variance applications. The SEAF does not address the significant environmental concerns raised by Surpass which include: (a) the negative impact on human health and air quality for those patrons and employees of Druthers who will be located on the exterior deck when large Surpass tank trucks frequently drive by exposing them to diesel exhaust; (b) the negative impact on human health for those patrons and employees of Druthers who will be located on the exterior deck and exposed to the noise created by Surpass' large tank trucks which will frequently drive by them; (c) the significant changes in parking along Bridge Street which will preclude Surpass' employees from parking on Bridge Street in close proximity to their place of employment, and instead forcing them to park on Broadway and walk a much further distance to work along dark, dangerous, often icy sidewalks; (d) the changes in traffic patterns on Bridge Street and surrounding public roads which will make it more difficult for Surpass to safely transport chemicals to and from its Bridge and Mill Street facilities; and (e) the significant change in the neighborhood's character which is currently an industrial zone, but will become a recreational area with outdoor drinking and dining on Druthers' large exterior deck.

SEQRA mandates that the BZA to take a hard look at each of this environmental impacts before it decides on Druthers' variance applications. The SEAF submitted by Druthers does not address these issues. It fails to provide the BZA with the necessary information for it to take a hard look at them.

### **Druthers' Attorney's November 12, 2021 Letter**

On September 12, 2021, Druthers' attorneys submitted a letter to the BZA requesting three variances which are required before Druthers can lawfully construct a 13-foot wide, 110 foot long deck in the public right of way along Bridge Street. That letter addresses the BZA's obligations under General City Law §81-a(4) when considering an application for an area variance. Despite Druthers' attorneys' arguments to the contrary, Surpass respectfully submits that Druthers cannot meet any of these requirements.

The General City Law provides the BZA with the statutory authority to grant area

variances under limited circumstances. General City Law §81-a(4)(a). In making its determination, the BZA must take into consideration the benefit to the applicant, Druthers, if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community, including Surpass, by such grant. General City Law §81-a(4)(b).

Surpass has serious public health and safety concerns with Druthers' proposal to construct an exterior deck in the public right of way along Bridge Street, which will seat approximately 60 patrons and bring them in very close proximity to Surpass' large tank trucks used to transport chemicals which frequently travel along Bridge Street. According to Druthers' proposed plan, the eastern end of its deck will have an ADA compliant ramp constructed near Surpass' very busy tractor trailer scale house driveway.

Over the course of any given day between 10 and 30 tractor trailers travel in and out of Surpass' scale house driveway. The BZA must take a hard look at the inherent dangers of permitting both: (a) Druthers staff to work on this deck; as well as (b) the public to drink, dine, and walk in such close proximity to both Bridge Street, an industrial thoroughfare, and Surpass' busy access point to its scale house driveway.

The following photograph depicts a typical scene along Bridge Street during which a large Surpass tank truck used to transport chemicals drives in very close proximity to where Druthers' proposed exterior deck will be constructed in route to Surpass' scale house driveway.



Permitting Druthers' staff and 60 restaurant patrons onto an exterior deck creating,

in essence, a roadside café, and exposing them to heavy industrial traffic will not create a safe and healthy environment for anyone working or sitting on the proposed deck or walking in this area.

The federal Occupational Safety & Health Act mandates that Druthers must provide its employees a place of employment free from recognized hazards that are likely to cause them harm. 29 U.S.C. §654(a). The federal Occupational Safety & Health Administration (“OSHA”), has promulgated regulations setting forth the “permissible exposure limits” for both noise, 29 CFR §1910.95, as well as the hazardous materials contained in diesel exhaust, 29 CFR §1910.1000. These regulations will, in all likelihood, be violated by the noise and exhaust created by the persistent truck traffic which will travel within feet of Druthers proposed exterior deck absent protective equipment like that provided to employees working on airport tarmacs.

The greater vehicle and pedestrian traffic caused by Druthers’ proposed exterior expansion will significantly increase the risk Surpass faces in transporting chemicals through the Bridge Street area. Surpass submits that it would be reckless for the BZA to grant Druthers’ pending application and expose residents and Surpass’ drivers to this potentially hazardous situation. As such, the BZA must deny Druthers’ application.

**Druthers’ Proposed Large Exterior Deck Will Create an Undesirable Change in the Character of the Established Industrial Neighborhood**

In making its determination, the BZA must consider whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance. General City Law §81-a(4)(b)(i). 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. Druthers’ attorney claims that there is “another brewery operating roughly 500 feet from the Property...”. See, pg. 2 of Attorney Legland’s November 12, 2021 letter. However, Surpass does not believe that this brewery operates a large outdoor drinking and



dining area as Druthers is now proposing to construct and operate. 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 trailers.

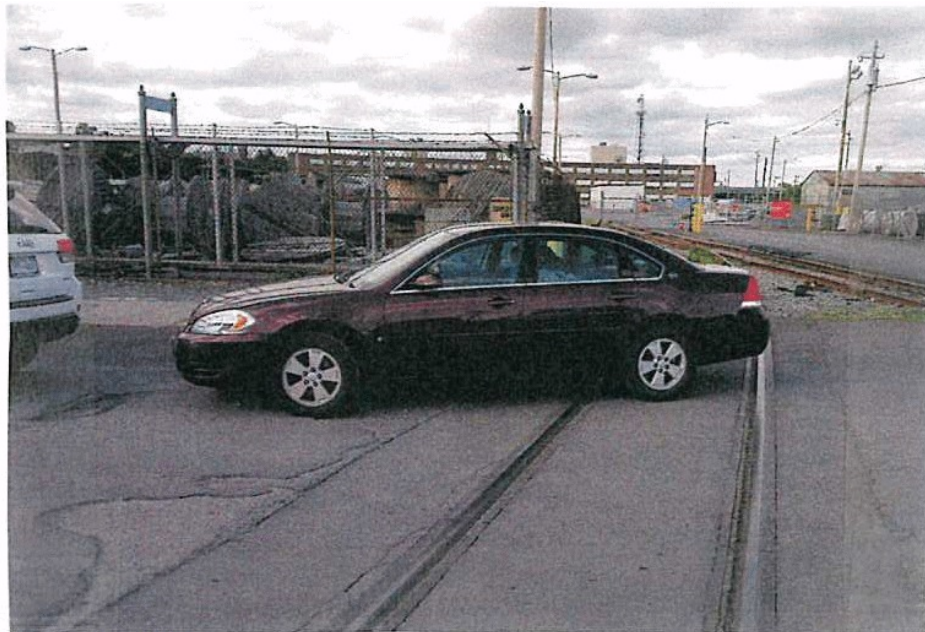
Druthers' attorney argues that her client's proposal will not create an undesirable change in the neighborhood but then asserts that Druthers proposes to eliminate all parking on Bridge Street. See, pg. 2 of Attorney Legland's November 12, 2021 letter. Surpass respectfully submits that this alone will 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.

During Mr. Martell's June 23, 2021 presentation, he stated that Druthers' exists and is now an established part of the neighborhood operating next to Surpass. See, 41:19-41:30 of public hearing video found on the City's YouTube page. However, Druthers' and the BZA must also acknowledge that Surpass has been in business operating as a chemical company in this industrial area for over 100 years. It was Druthers who elected to construct and operate its brewery/restaurant/bar in an industrial area complete with heavy tractor trailer traffic and unprotected commercial railroad tracks over which large trains regularly transport chemicals in bulk to Surpass' facilities. Surpass, Druthers and the BZA must now strive to protect all parties' property, business, and the public from unintended consequences which can arise when incompatible uses (i.e. a brewery/restaurant/bar and a large chemical company) operate as neighbors.

Granting Druthers' pending application will exacerbate an already dangerous situation. 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.

Surpass representatives have observed Druthers' patrons illegally parking their vehicles on these railroad tracks, as documented by the following photograph.



They have observed Druthers' patrons leave the restaurant and attempt to walk across these railroad tracks both when they were clear of trains and while trains were traveling on the tracks as documented by the below photograph.



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, and permit it to construct a 13-foot wide, 110 foot long deck in the public right of way along Bridge Street, which will seat approximately 60 patrons, the BZA will further exacerbate this already dangerous situation.

**Druthers Has Not Established Any Harm Which  
Necessitates the Consideration of Alternatives to Remedy**

In making its determination, the BZA must consider whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance. General City Law §81-a(4)(b)(ii). It should not be overlooked that in December 2013, Druthers applied to the BZA for a use variance seeking permission to operate a commercial brewery and small tasting room in the building located at 1053 Broadway. See, Case # 1-14, 4158. 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. Druthers' application for the variance was approved by the BZA permitting a small tasting room as an accessory use to the commercial brewery. Druthers then renovated its 1053 Broadway Building into a 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. Now Druthers is seeking to further expand its unauthorized use by constructing a 13-foot wide, 110 foot long deck which will seat approximately 60 patrons. 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. There is no "dollars and cents" proof in the record supporting Druthers' requested expansion of its "small tasting room" and establishing that it is still needed to ensure adequate cash flow from the commercial brewery.

**Druthers' Requested Variance is Substantial**

In making its determination, the BZA must consider whether the requested area variance is substantial. General City Law §81-a(4)(b)(iii). Druthers' application seeking a variance which will permit it to construct a 13-foot wide, 110 foot long deck covering the entire area dedicated to a sidewalk along Bridge Street, which will seat approximately 60 patrons, would constitute a substantial variance.

**Druthers' Proposed Variance Will Have  
An Adverse Effect on the Neighborhood**

In making its determination, the BZA must consider whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood. General City Law §81-a(4)(b)(iv). If the BZA were to grant Druthers' pending application, it will have adverse effects and impacts on the physical and environmental conditions in the neighborhood for the reasons articulated by Surpass in the record before the BZA.

**Druthers' Alleged Difficulty Is Self-Created**

In making its determination, the BZA must consider whether the alleged difficulty was self-created. General City Law §81-a(4)(b)(v). Druthers' attorney claims that "the hardship [Druthers] is facing is not self created." See, pg. 3 of Attorney Legland's November 12, 2021 letter. However, during Mr. Martell's June 23, 2021 presentation to the BZA, he conceded that any such difficulty was "one hundred percent self-created." See, 58:33-58:35 of public hearing video found on the City's YouTube page.

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*

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JBD:nb

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