

**IN RE: PETITION FOR SPECIAL
EXCEPTION**
S side of New Bengies Road,
1940 feet SW of the c/l of Earls Road
15th Election District
6th Councilmanic District
(New Bengies Road)

Ewings Enterprise, LLC
Legal Owner
Ka-Boom Industries
Contract Lessee

* BEFORE THE
* DEPUTY ZONING
* COMMISSIONER
* FOR BALTIMORE COUNTY

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Case No. 2011-0083-X
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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before this Deputy Zoning Commissioner for consideration of a Petition for Special Exception filed by Dorothea S. Harrison-Ewing, Resident Agent, on behalf of the legal property owner, Ewing Enterprises, LLC, and Timothy M. Fitch, Member, on behalf of the contract lessee, Ka-Boom Industries. Petitioner is requesting a Special Exception pursuant to Section 256.2 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) to allow for storage and sale of explosive materials to be placed on the subject property, to be approved by the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, and complying with Federal Explosive Law and Regulations. The subject property and requested relief are more fully described on the two page site plan which was marked and accepted into evidence as Petitioner’s Exhibits 1A and 1B.

Appearing at the requisite public hearing in support of the requested special exception use were Petitioners Timothy and Lori Fitch on behalf of Ka-Boom Industries and their daughter Jennifer Maggio, who will also be involved in the business, their attorney, Lawrence E. Schmidt, Esquire with Gildea & Schmidt, LLC, and Dorothea S. Harrison-Ewing on behalf of Ewing

Enterprises, LLC. Also appearing in support of the requested relief was Kenneth Wells with kjWells, Inc., the registered property line surveyor who prepared the site plan. Also appearing as interested citizens were Allen Robertson of 1608 Holly Tree Road, Ron Walper of 1123 Chester Road, and Joyce Pekarek of 129 Bengies Road.

Testimony and evidence was presented in the case by way of a proffer from Petitioner's attorney, Mr. Schmidt, and testimony provided where necessary by Mr. Fitch and Mr. Wells and revealed that the subject property is irregular shaped and contains approximately 13.125 acres, more or less, zoned MH-IM M43, which allows for the heaviest and intense manufacturing uses. The property is a largely unimproved, heavily wooded parcel located at the southeast corner of New Bengies Road, northwest of Eastern Avenue and east of Earls Road, in the Middle River area of eastern Baltimore County. The property has no prior zoning history, is not within the Chesapeake Bay Critical Area, and has had no prior permits or other previous activity.

Petitioner Timothy Fitch is a production mechanic (machinist) by profession, performing preventative and corrective maintenance support to production lines and facilitating change-overs and production line set ups. He worked for 16 years for Pepsi-Cola as a truck and trailer mechanic and is currently with Diageo Global Supply – North America as a production mechanic. Petitioner's wife, Lori Fitch, is an auditor with Care First Blue Cross/Blue Shield, and their daughter, Jennifer Maggio, works for the University of Maryland Hospital. At this juncture, Petitioners desire to enter into the explosives business and have already completed the rigorous process of becoming a licensed explosives dealer as Ka-Boom Industries under the auspices of the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (also known as "ATF").

In looking for an appropriate site for the business, Petitioners identified the subject property as being an ideal site and now desire to locate the required facility there. Mr. Schmidt explained that Section 256.2 of the B.C.Z.R. permits “explosives” in the M.H. Zone by special exception. The Zoning Regulations do not specifically define the term “explosives” in Section 101. Therefore, the term is defined according to the most recent edition of Webster's Third New International Dictionary of the English Language, Unabridged. Webster’s defines “explosives” as “a solid chemical compound or mixture of compounds that is used to release energy for performing work (as in blasting or propelling projectiles).” These are essentially the types of explosive materials commonly sold to construction companies for taking down buildings or blasting rock for roads, sewers or high-rise construction that Petitioners will store and distribute from the proposed facility at the subject property.

Mr. Schmidt stated that the explosives industry is an industry that -- especially in post-9/11 -- is heavily and stringently regulated by the Federal Government, which has also effectively pre-empted any kind of State regulation in the arena. The required license to sell explosives involves strict background checks, fingerprinting, and continued monitoring, and the facility in which the explosives are stored, transmitted, and sold also must meet certain criteria, including a location set back a significant distance from residential areas, rail lines, airports, and other potentially vulnerable areas. Although the subject site meets the Federal criteria, it must still ultimately be approved as a special exception use.

As shown on page 2 of the site plan, the area to be used for the storage and sale of explosives materials is relatively small -- consisting of an approximately 22,000 square foot (0.50 acre) area of disturbance -- as compared with the size of the overall property (13.125 acres). A gravel access road is proposed from New Bengies Road to the site, with a locked

barbed wire fence at the entrance. This access road would lead to a storage container that resembles a sea container, but with much more reinforcement. As also depicted on the site plan, there would be a certain amount of “berming” in order to provide an “earth barricade” as required by the ATF. The size of the container would be approximately 19 feet long by 8 feet wide. The explosive materials would be manufactured elsewhere and purchased by Petitioner for storage and sale from the container.¹ The specific requirements mandated by the ATF are found at Title 18 of the United States Code (“U.S.C.”) and Subtitle 27 of the Code of Federal Regulations (“C.F.R.”), as well as the ATF&E Federal Explosives Law and Regulations (2007). Among other things, these regulations require a valid license and user permit, an artificial barricade with effective screening of the magazine, and stringent records of the storage history and transactions.

Mr. Wells was called upon to provide testimony regarding the special exception criteria set forth in Section 502.1 of the B.C.Z.R. He was offered and accepted as an expert in land use, zoning, and interpretation of the Zoning Regulations. Mr. Wells indicated that he had visited the site on multiple occasions, had prepared the site plan, was familiar with the federal requirements regarding storage and sale of explosives materials, and had discussions with Petitioners regarding their proposed business operation. Based on these considerations, he offered his expert opinion that the proposed use would not have any adverse effects on the 502.1 criteria above and beyond those inherently associated with such a special exception use irrespective of its location within the Zone. More particularly, he indicated that the proposed sale and storage of explosives materials in the manner described at the subject location would not: be detrimental to the health, safety or general welfare of the locality involved; tend to create congestion in roads,

¹ ATF also limits the type and amount of explosive materials that Petitioner can store and sell and regulates the size of containers and the degree of berming that is necessary. Petitioners are also subject to regular inspections by ATF.

streets or alleys therein; create a potential hazard from fire, panic or other danger; tend to overcrowd land and cause undue concentration of population; interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements; interfere with adequate light and air; be inconsistent with the purposes of the property's zoning classification nor in any other way inconsistent with the spirit and intent of these Zoning Regulations; or be inconsistent with the impermeable surface and vegetative retention provisions of the Zoning Regulations.

Mr. Wells based this opinion in part on the fact that the proposed site is very isolated, as shown on the aerial photographs that were marked and accepted into evidence as Petitioner's Exhibits 2A through 2D, and the fact that there would be very little traffic generated from the site. He also based this opinion on the security proposed for the site. As required by the ATF, there will be three different types of locking mechanisms for the container door and bullet-resistant locks, there will be bars across the door at the top and bottom, and the facility will be surrounded by a barbed wire fence. Petitioner and his wife and/or daughter will visit the site at least once per week as required by ATF, and more likely two to three times per week.

Testifying as an interested citizen was Allen Robertson. Mr. Robertson is with the Essex-Middle River Civic Council and the Bowleys Quarters Community Association. He understands that the subject site may be an appropriate location for Petitioner's business at the present time, but he is very concerned about the future based on the proposed 2020 Master Plan, which has identified the area as an intensely developable area, and that this should be taken into consideration in the present case. He also believes there should be more communication between County agencies as to the inconsistencies between proposed/permitted uses in the Regulations and the proposed Master Plan when it comes to matters that truly could impact the

health, safety, and welfare of the area such as Petitioner's proposed use. Ms. Pekarek also expressed concern because she and her family live relatively close to the subject site and she is worried for times when her kids might be riding their bicycles along Bengies Road and just the general uncertainty, whether real or perceived, of living in proximity to an explosives storage facility.

The Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. Comments were received from the Office of Planning dated September 27, 2010 which indicates that they defer to the Bureau of Alcohol, Tobacco, Firearms and Explosives as the regulating agency responsible for a recommendation regarding the appropriateness of this site for this use and compliance with all applicable Federal regulations. Comments were received from the Department of Environmental Protection and Resource Management dated October 12, 2010 which indicates the property must comply with the Regulations for the Protection of Water Quality, Streams, Wetlands and Floodplains, and must comply with the Forest Conservation Regulations. Comments were received from the Fire Marshal's Office dated September 9, 2010 which indicates that the Petitioner must comply with all applicable parts of the Baltimore County Fire Prevention Code, Council Bill 48-10 prior to occupancy or the beginning of operation.

In considering the special exception, I am governed by the criteria set forth in Section 502.1 of the B.C.Z.R. and the relevant case law. The appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its

location within the zone. *See, Schultz v. Pritts*, 291 Md. 1 (1981) and *People's Counsel v. Loyola College in Maryland*, 406 Md. 54 (2008).

Based on the testimony and evidence presented, I am persuaded to grant the requested special exception. First, as a threshold matter, I believe Petitioner's proposed use of a portion of the property for the sale and storage of explosive materials falls within the term "explosives" as a use permitted in the M.H. Zone by special exception pursuant to Section 256.2 of the B.C.Z.R. Further, I am persuaded that Petitioner has met the burden of proof required to demonstrate that the proposed use meets the special exception criteria set forth in Section 502.1 of the B.C.Z.R. Petitioner presented in-depth and expert testimony concerning the property, Petitioner's proposed business and use, the requirements mandated by the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives and Petitioner's compliance, the safety and security measures that will be implemented, and the potential impact that the proposed use would have on the health, safety and general welfare of the locale. After considering this testimony, I am persuaded that the proposed use, while certainly raising questions and concerns based on its perceived -- if not actual -- danger, can exist at the subject site with proper regulation and monitoring by the ATF. Thus, while I can appreciate the concerns of nearby civic associations and those living in the general vicinity of the subject property, I am compelled to grant the requested special exception to use the portion of the property delineated on the site plan for storage and sales of explosive materials, as regulated and limited by the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives. It is also important to note that in response to an email inquiry dated September 29, 2010 from People's Counsel to the Baltimore County Police Department, Chief James W. Johnson indicated in his email reply dated October 6, 2010 that his staff had reviewed

Petitioner's request and that Petitioner "... appears to be a legitimate firm that intends to meet and exceed all regulations and restrictions governing such a business and storage of materials."

Pursuant to the advertisement, posting of the property, and public hearing on this petition held, and after considering the testimony and evidence offered by the respective parties, I find that Petitioner's special exception request should be granted.

THEREFORE, IT IS ORDERED by the Deputy Zoning Commissioner for Baltimore County, this 30th day of November, 2010 that Petitioner's request for a Special Exception pursuant to Section 256.2 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to allow for storage and sale of explosive materials to be placed on the subject property, to be approved by the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, and complying with Federal Explosive Law and Regulations, be and is hereby **GRANTED** in accordance with the site plan accepted into evidence as Petitioner's Exhibit 1, and subject to the following which are conditions precedent to the relief granted herein:

1. Petitioner may apply for his necessary building or use permits, as applicable, and be granted same upon receipt this Order; however, Petitioner is hereby made aware that proceeding at this time is at his own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, Petitioner would be required to return, and be responsible for returning, said property to its original condition.
2. Development of this property must comply with the Forest Conservation Regulations (Sections 33-6-101 through 33-6-122 of the Baltimore County Code).
3. Development of the property must comply with the Regulations for the Protection of Water Quality, Streams, Wetlands and Floodplains (Sections 33-3-101 through 33-3-120 of the Baltimore County Code).
4. Petitioner must comply with all applicable parts of the Baltimore County Fire Prevention Code, Council Bill 48-10 prior to occupancy or the beginning of operation.
5. Petitioner shall continuously maintain and be in compliance with any and all licensing and regulatory requirements of the local, State and Federal Government in the

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

 SIGNED
THOMAS H. BOSTWICK
Deputy Zoning Commissioner
for Baltimore County

THB:pz