CITY OF NEWPORT
ZONING BOARD OF REVIEW

IN RE: Application of The Preservation Society of Newport County For Special Use Permit
(The Breakers, 44 Ochre Point Avenue, A.P. 36, Lot 59)

DECISION

The City of Newport Zoning Board of Review (hereinafter “the Board”), having
classified evidentiary hearings on December 1, 2 and 8, 2014; having considered the testimony,
exhibits, arguments, and post hearing written submissions by the parties; and having deliberated
and voted on January 5, 2015, hereby makes findings of fact and conclusions of law and renders
its Decision as follows:

I.

The Application Before The Board

1. The application before the Board involves The Breakers at 44 Ochre Point
Avenue, Tax Assessor’s Plat 36, Lot 59.

2. The Breakers is one of the top ten (10) most visited historic house museums in the
United States, among such notables as Mount Vernon and Monticello. It is the third most visited
historic house museum in the United States among museums accredited by the American
Alliance of Museums.

3. The application (Petitioner’s Exhibit 2) seeks an amendment/Modification of the
August 25, 1997 special use permit that allowed a building to be constructed near the entrance to
The Breakers for that aspect of museum operations that involves the limited sale of refreshments.

4. The existing 1997 special use permit authorizes refreshments in vending machines
for ticketed guests in the refreshment building. (PSNC Exhibit 1). The application described the
proposed use as "museum", and the corresponding staff report described the introduction of a refreshment building as "an expansion of the museum use". (emphasis supplied). The Zoning Board made specific findings on the proposal as follows: “... (3) The proposed use is in harmony with the surrounding area and neighborhood uses, and will serve the public convenience and welfare; [and] (4) All of the standards of the zoning code will be met by the construction of the building.” (id., Exh. 1).

5. Under Section 17.108.020 of the Zoning Ordinance, a modification or revision of an existing special use permit, including any "reconstruction, enlargement, extension, moving or structural alteration of an approved special use permit or any building or structure in connection therewith," may be accomplished through a new special use permit application, which is what the PSNC has presented here.

6. The application seeks to consolidate several dated, substandard existing museum operations into a single small building (sometimes referred to herein as "the welcome building") in the vicinity of The Breakers front gate where they currently exist, but in a more appropriately concealed and buffered way. The existing outdoor plywood ticket booth, the existing port-a-potties, the leaky guest education and orientation "tent" that has been used seasonally since 2001, and the existing plywood refreshment building are proposed to be replaced by a more dignified welcome facility of very modest, subordinate scale and low profile.

7. The new building will be concealed in a grove of trees and will not be seen – or heard – from Ochre Point Avenue or any surrounding properties. (Testimony of Alan Joslin; Testimony of Thomas O. Sweeney, SIOR).

8. The proposed building is only 3,650 square feet, six tenths of one percent (.006) of the 13 acre property, and is divided into several different functional areas of museum operations, as follows:
• The ticketing, orientation and interpretation area (which will include state of the art electronic interactive educational display and informational resources): 1,455 S.F.

• ADA compliant restrooms: 535 S.F.

• Area for retail sales of refreshments: 535 S.F.

• Utility closets/areas: 325 S.F.

• Rest and relaxation area with seats for all purposes (i.e., not dedicated or reserved for refreshments), including family members awaiting others in ticketing, orientation, or restrooms, resting in one of the few seats available on the entire property for that purpose; or consuming refreshments: 800 S.F. (47 seats).

(Testimony of Alan Joslin and related PowerPoint presentation). Seasonally, an outdoor patio comprising 650 S.F. and 24 seats will be available with landscaping barriers to deter passage beyond its confines.

9. The refreshment service aspect is, by all metrics, not the principal activity of the welcome center.

10. The PSNC has asked the Board to attach conditions to the amended/modified special use permit to ensure that the refreshment component remains a limited, subordinate aspect of the welcome center, as follows:

• Retail sales of pre-packaged items only (no table service)
• Sales only to ticketed guests, and only during normal museum hours
• No special events or functions
• No kitchen; no food preparation facilities
• No stove, microwave, or dishwasher
• No alcohol
• No exterior signage
• No live music or entertainment.

II.

The “Bad Precedent” Argument

11. Much of the testimony and comments provided in opposition to the application focused on the possibility that the refreshment service would not actually operate in accordance
with those limiting conditions, or that other museum owners would somehow think they could open “restaurants” in their facilities. It was actually suggested at one point during the proceedings that granting this application would mean that dozens of “restaurants” would suddenly spring up at museums all over the R-60 zone without having to secure special use permits. These concerns are unwarranted.

12. Restaurants are not permitted uses in the R-60 zone, by special permit or otherwise. As set forth more fully below, a “restaurant” is defined in the Zoning Ordinance (in every example given in Section 17.08.010) as an establishment whose “principal business is the sale of foods.” The Application before the Board does not involve such an establishment. No such establishment is allowed. The Application does not involve a restaurant.

13. Museums are allowed in the R-60 zone only by Special Use Permit. Any material change or revision of a special use permit use (or structure), including any “reconstruction, enlargement, extension, [or] moving” of a special use or special use structure requires an application to the Zoning Board. (Zon. Ord. § 17.108.020). This application came to the Board under its special use permit powers because the PSNC was proposing to make a change in the way its museum operations were conducted, including the refreshment aspect of museum operations. The same thing happened in 1997 when PSNC came to the Zoning Board and received a special use permit for the refreshment service. No building or zoning permit would have been granted for such changes without a special use permit. It simply cannot be done. If other museums want to serve refreshments, they must first come before this Board and obtain a special use permit or a modified special use permit.

14. Each application before this Board stands on its own merits and is considered on its own unique facts and circumstances. The Board applies the seven special use permit criteria in Section 17.108.020 to the unique circumstance presented in each case.

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15. The special use permit section of the Zoning Ordinance makes clear that each case must stand on its own facts and circumstances, and that no particular Decision sets “precedent.” Section 17.108.020A specifically provides that, “[A]ll such uses are declared to possess such special characteristics that each shall be considered as an individual case.”

16. The Board also has the authority to attach special conditions to any approval, again based on the unique circumstances involved. (Sec. 17.108.030).

17. It should also be noted that the application before the Board is not some type of “test case” for whether the sale of limited benign refreshments is allowed in museums. With respect to The Breakers, that determination was made in 1997 through the existing special use permit for the refreshment building that is now proposed to be consolidated into the new visitor services building.

18. The City Council will also have an opportunity to weigh in on the sale of refreshments from a public health and safety perspective. In order for refreshments to be sold – whether or not the establishment is considered a “restaurant” – the City Council must grant a victualing license under Section 5.72 of the Code of Ordinances of the City of Newport based on the criteria prescribed by law for such licenses.

III.

The Special Use Permit Criteria

19. The weight of the evidence, including the expert testimony, was that the special use permit criteria in Section 17.108.020 of the Zoning Ordinance are satisfied, and that the proposed amendment/modification of the existing special use permit is “in accord with the public convenience and welfare,” after taking into account the seven (7) criteria in that section.
20. The proposal is indeed focused entirely on providing for public convenience and welfare. It involves replacing existing undignified, outdated visitor services that are not protected from the weather with more suitable facilities at a world renowned destination that draws members of the public, including seniors and school children, from every part of the City and State, and indeed every part of the globe. And it does so in a moderate, restrained way that is well shielded, buffered, and deliberately minimalistic in terms of the refreshment service. Hence, it promotes public convenience and welfare without being excessive or intrusive on the rights of others.

21. As underscored in the comments of several speakers, keeping The Breakers from falling into disrepair and not allowing deterioration and/or obsolescence in basic visitor services are prudent undertakings. Where, as here, it is tastefully and appropriately scaled and designed, it promotes public convenience and welfare and the Comprehensive Plan, the core considerations of special use permit criteria in the Zoning Ordinance.

22. The weight of the evidence presented supports each of the seven (7) criteria in Section 17.108.020G for determining whether an application is “in accord with the public convenience and welfare”.

23. Those seven (7) criteria, and the weight of the evidence relating to them, are as follows:


(a) The Breakers property consists of approximately 578,877 square feet, roughly 13 acres. At 3650 square feet, the proposed welcome building is only a fraction of that size, and the site is such that it can be tucked into a thickly vegetated grove of trees (that is proposed to be substantially enhanced through the robust landscaping restoration plan included as part of
the application) in the former service area of the property (near the gate house / caretaker’s
cottage and boiler room complex).

(b) It will not be seen – or heard – from Ochre Point Avenue or any surrounding
properties, or even by The Breakers itself. It will be less conspicuous than the outdated
buildings it is replacing. (Testimony of Alan Joslin and Thomas O. Sweeney.)

(c) This application was the last step of a lengthy approval process related to the
building’s design, siting, size, and scale.

(d) In its previous Decision dated March 1, 2014 (PSNC Exhibit 5), this Board found
the building to be compliant with the historic zoning provisions of the Zoning Ordinance.
(§ 17.80, et seq.).

(e) More specifically, in reversing a prior decision by the Historic District
Commission, the Board found that the building meets the Zoning Ordinance’s standards for
“new construction” in that it is “... compatible with the surrounding historic area in terms of
size, scale, siting, massing, setbacks, materials and details” (§ 17.80.050(c)(1)); “of
thoughtful and considered architectural design” (§ 17.80.050(c)(2); and otherwise suitable in
“appearance” (§ 17.80.050(c)(3)). (The evidence presented in the Zoning Board hearings on
this application for a special use permit in December confirmed those same findings.)

(f) This Board also found (in reversing the HDC in its March 1, 2014 Decision) there
as follows:

“... [T]he proposed structure comprises only six tenths of one percent (.006)
of the property, and would replace a tent, ticket booth, port-a-potties, and
refreshment shed that are, by all accounts below, far from ideal for a historic
property of the stature of The Breakers.” (id., p. 7).

(g) This Board also noted in its previous Decision, based on the testimony of Alan
Joslin, (who testified to the same effect here), that,
"[t]he Welcome Center [is] clearly a subordinate building to The Breakers, tiny in size by comparison, nestled in a grove of trees in the former service area near the Caretaker’s Cottage, and specifically designed to blend in with the surrounding area and be inconspicuous … embed[ded] … in the densely vegetated groove such that it would not even be seen from The Breakers or most of the surrounding area, much less be incompatible with it. (PSNC Exhibit 5, pp. 6, 7).

(h) The Welcome Center proposal has also been reviewed and approved by the Rhode Island Historical Preservation & Heritage Commission (“RIHPHC”), the State’s penultimate technical resource on “comptability” issues involving historic properties and neighborhoods. (PSNC Exhibit 6).

(i) The review was extensive, spanning several months, and involving multiple site visits and public hearings in which BOPNA participated. The hearings resulted in both preliminary and final approvals of the project plans (as revised with RIHPHC’s assistance), and a corresponding summary determination dated October 2, 2013 that the Welcome Center, as proposed, conforms to all applicable U.S. Department of the Interior Standards and Guidelines, and would have no adverse impact on The Breakers or the surrounding area. (id.).

(j) Relevant excerpts from the RIHPHC document (PSNC Exhibit 7) include the following:

– “The project will not alter the character of The Breakers as an extraordinary 1890’s mansion surrounded by broad lawns, specimen trees, and great lawn open to the Atlantic Ocean.” (p. 5)

– “The new building will be effectively screened from view from The Breakers mansion, and its design is compatible with but differentiated from the historic architecture on the site … The new construction will not be highly visible because it will be screened by existing and new landscape plantings.” (id., pp. 4, 5).

– “The project has maximized the advantage of site conditions that include extensive landscape screening in order to limit the project’s visibility.” (id., p. 6).
- "The design along the Garden Path will provide more spatial definition and will recall the tiered hierarchy of the Path’s former landscape borders. These measures will protect the historic setting and context of the property." (id., p. 4).

- "The project is located a significant distance away from the historic mansion, and therefore the issues of size, scale, and design of the new construction are diminished." (id., p. 6).

(k) RIHPHC’s Executive Director, Edward F. Sanderson, was at all times relevant hereto both the State Historic Preservation Officer and the local Officer for the U.S. Department of Interior’s National Park Service, and thus served as, “the State’s representative to the federal government, to other states, and to other interested parties in matters of historic preservation.” R.I. Gen. Laws § 42-45-9.

(l) RIHPHC’s trained technical staff regularly assists boards and commissions throughout the State on important “compatibility”, siting and design issues. The sixteen (16) member Commission itself includes many of the State’s most experienced preservation architects and other professionals.

(m) As regards this proposal, RIHPHC’s role was even more expansive than usual, as RIHPHC actually holds a deeded interest in The Breakers property: A Historic Preservation Easement which grants review and approval powers over the project. (PSNC Exhibit 7).

(n) Some of the speakers at the hearings suggested that the building should be placed in the parking lot across the street from The Breakers. Apart from the fact that no application to that effect is before the Board, that location would be far more conspicuous and intrusive than the proposed location. (The building is the welcome building for The Breakers and should be concealed on the grounds of The Breakers. The BOPNA has exaggerated the welcome center as a designated welcome center for all the PSNC’s houses. There was no
such evidence. Tickets to all the PSNC’s houses are sold at all houses. There will be no change from the existing tent and ticket booth in that regard.)

[2] "The Resulting Traffic Patterns And Adequacy Of Proposed Off Street Parking And Loading."

24. (a) Michael Desmond was the only traffic expert to testify at the hearings. He is a registered professional traffic engineer with Bryant Associates in Lincoln, Rhode Island, a firm that regularly performs traffic engineering studies for the Rhode Island Department of Transportation, municipalities, and private enterprises (12/1/14 Tr., pp. 55, 56; See also C.V., PSNC Exhibit 20). He has also been Chair of the North Kingstown Planning Board. id.

(b) Desmond’s firm reviewed the welcome building proposal for purposes of assessing its conformance to the special use permit criterion involving vehicles and traffic impacts.

(c) His firm took actual traffic counts at peak traffic times during Labor Day weekend, and then on the following Friday when Salve Regina University was in session. (id., pp. 55-57).

(d) This included studying not only the volume of vehicles, but their circulation and turning patterns.

(e) A large cross section of the neighborhood was studied, including the intersection of Ochre Point Avenue with (i) Narragansett Avenue; (ii) Victoria Avenue; and (iii) Ruggles Avenue, as well as the driveways and parking lot for The Breakers on Victoria Avenue. Those results were evaluated against the “level of service” standards in the Highway Capacity Manual, a core traffic industry resource published by the Transportation Research Board.

(f) Based on this analysis, Desmond opined that the traffic at all key points in the study area functioned at “excellent” (“A” + “B”) levels of service, signifying an absence of
congestion and very good traffic conditions; and the intersection of Ochre Point Avenue and Victoria Avenue (at The Breakers parking lot) functioned at an “acceptable” level of service for vehicles turning east onto Ochre Point Avenue.

(g) Desmond testified that the “acceptable” – and not “excellent” – results at the intersection of Ochre Point Avenue and Victoria Avenue just discussed above were not the result of vehicle traffic congestion, but rather resulted from brief delays to allow people to cross the street from The Breakers parking lot to and from The Breakers.

(h) The evidence was that the PSNC will post a crossing guard at that intersection at peak times to temporarily stop people from crossing as appropriate in the hope that the “acceptable” results in that parking lot crossing area will improve to “excellent”, similar to the rest of the overall area. This will actually result in an improvement – as opposed to a detriment – from this proposal.

(i) Desmond opined that the proposed building is not designed, intended or expected to be a “destination” apart from The Breakers itself, and will not generate additional traffic or vehicles.

(j) Desmond’s expert report was introduced as PSNC Exhibit 16.

(k) Desmond’s testimony was reasonable and credible based on the totality of the evidence.

(l) The objectors to the project presented no expert testimony regarding vehicles or traffic.

(m) The applications and plans reflect that the PSNC is actually proposing to add additional parking on the grounds of The Breakers, and would be capable of reconfiguring the existing parking well in excess of the required number of spaces, which would be subject to a future development plan review process.
[3] "The Nature of The Surrounding Area And The Extent To Which The Proposed Use Or Feature Will Be In Harmony With The Surrounding Area."


(Since they are so similar in purpose, these two special use permit criteria will be considered together here.)

The R-60 zone in which The Breakers is located is not an exclusively residential zone, but is a mixed use zone in which both residential uses and institutional uses are either permitted as a matter of right, or are conditionally permitted by special use permit.

(a) Under Section 17.40.020 of the Zoning Ordinance the permitted or conditionally permitted uses in the District include such diverse uses as: Churches and places of worship; nursery schools and day care centers; parks, playground and playing fields; community residences; family day care; municipal and public service corporation buildings; water and sewer treatment facilities and pumping stations; established museum parking; schools, colleges and universities including fraternity or sorority houses or dormitories for faculty or students; libraries; museums; religious, philanthropic, scientific, literary, historical, fraternal, and charitable institutions; agricultural and horticultural societies; schools of limited instruction; nursing homes; clubs for outdoor recreation; and federal, state and municipal buildings.

(b) Given such a diversity of possible uses in the District, the key is to find a balance that respects all of these potential uses. This is done by limiting scale and requiring proper buffering and screening to try to limit adverse impacts outside of the confines of the property on which the use is taking place. The proposal before the Board has accomplished that.

(c) The expert testimony of Thomas O. Sweeney, SIOR, an experienced real estate professional and appraiser (See C.V., PSNC’s Exhibit 22) took the Board through an aerial presentation of the area surrounding The Breakers.
(d) Sweeney showed most of the entire area encompassed by the Ochre Point Cliffs

Historic District from Narragansett Avenue to the north, Marine Avenue and the Ocean to the
south, Bellevue Avenue to the west, and the ocean to the east. He demonstrated how it is “a very
mixed-use area”, but consists almost entirely of various institutional uses, most of them
associated with Salve Regina University. The closest two residential properties are well to the
south, over 200 feet away.

(e) Sweeney also confirmed that the proposal will not involve the new introduction of
the sale of food to the area, as there are presently more robust food sales concessions at the
various cafes at Salve Regina University, three of which are in close proximity to The Breakers,
and one of which is right next door to The Breakers (to the north).

(f) Unlike the limited pre-packaged food sales at retail (no kitchen, etc.) proposed for
the welcome building, the other food sales concessions in the area are open to the general public.
Moreover, their food offerings are far more robust than what is being proposed for the welcome
building, and have existed for years without any adverse effect on the neighborhood.

(g) Sweeney expressed an opinion to a reasonable degree of certainty within his
profession that the proposal before the Board is compatible with the surrounding area; will have
no adverse effect on that area; and will not be contrary to public convenience or welfare.

(h) Sweeney opined that the proposal,

“… [W]ould not have any adverse effect on the surrounding property areas.
....

They are … [moving] existing uses on the property, the ticket booth, the
vending machine [building], well noted public rest rooms, Port-a-Johns … and
the tent, which are very visible signs as you approach and go by The Breakers,
and consolidate them in a modern, state-of-the art facility that no one can really see
...

In my opinion that could only have a positive impact on the surrounding area
[I]t’s immersed into the site so … you cannot see this building from the street … You can’t even see it from The Breakers building itself …

[I] think it’s a well thought-out and well designed, well placed facility …

[T]he closest … residential properties … are over 200 feet away. In my opinion, this will have no adverse impact on anything, on the values or use of the properties in the area, specifically the residential ones.”

(i) Sweeney’s expert testimony was not rebutted by any similar expert witnesses, and the Board finds his testimony to be reasonable and credible.

(j) No witness who testified indicated that he or she owned property within the 200’ notice radius area of The Breakers. There was no evidence that any member of the Bellevue-Ochre Point Neighborhood Association (“BOPNA”) owns property within that area. James Moore of BOPNA confirmed in his testimony that earlier this year BOPNA supplied an affidavit to the Superior Court acknowledging that it has no members within the 200’ notice radius area.

(k) Although counsel for BOPNA indicated that he represents John Noffo-Kahn, Mr. Noffo-Kahn did not appear or speak at the hearings, and no evidence was presented in his behalf as to any adverse effect on his particular property or property values.

(l) BOPNA opposed the Application, particularly its refreshment aspect. However, the Board finds it noteworthy that BOPNA and the PSNC entered into a “Statement Of Vision And Shared Goals” for the neighborhood in question (PSNC Exhibit 10 and testimony of James Moore) wherein the limited sale of food at museum attractions was acknowledged to be not just an appropriate use, but a desired use.

More specifically, the following “Action Item” was included within that neighborhood vision statement (at p. 16, Para. 6):
“Encourage reduction of vehicle trips by private automobiles by allowing existing attraction visitors at museum attractions to purchase food in limited quantities at some museum houses, as is done at many museums in the U.S.”

The vision statement also indicated that the special use permit process is the appropriate vehicle for expansions of nonresidential uses (at p. 8).


(a) The PSNC presented expert testimony on this special use permit criterion through Michael Leber, who served on the City of Newport Fire Department for nearly 26 years, eventually becoming Fire Marshall (12/1/14 Tr., p. 75, et seq.).

(b) As Fire Marshall he regularly reviewed plans for development proposals to determine whether they presented any fire safety risk. This included fire code reviews. He continues to do so as a private consultant. He is certified by the State Fire Marshall to do that work, and regularly appears before the State Fire Code Board of Review.

(c) Mr. Leber reviewed the welcome building proposal and plans, and opined that they meet the applicable fire codes, as well as current fire safety “best practices.”

(d) Mr. Leber noted that the building is fully sprinklered and alarmed; is only one level; and exceeds applicable requirements for safe ingress and egress.

(e) Mr. Leber’s C.V. and his report were submitted as exhibits.

(f) His testimony was reasonable and credible.

(g) No expert testimony was presented on this issue by any other witness.
“All Standards Contained In This Zoning Code”

(a) As set forth above, the 1997 special use permit that PSNC seeks to modify in this application established the PSNC’s right to sell limited refreshments at retail to ticketed guests as a function of the “museum” use (and not as a “restaurant”).

(b) The proposed use in the application for the existing approved special use permit was “museum” – not “restaurant” – and the guest refreshment function was recognized as part of the principal “museum” use. (PSNC Exhibit 1).

(c) The application for a modification now before the Board does not break any new legal ground in this respect. Rather, it merely seeks to modify the way – and location at which – the already approved guest refreshment function of the museum use is carried out.

(d) Section 17.100.200 of the Zoning Ordinance lists the various functions that can act as part of the special permit principal use known as “museum”. One of these is, “sales areas for … museum operations … .” (Sec. 17.100.220B(3)).

(e) BOPNA suggests, contrary to what the existing special use permit for The Breakers already provides for, that the only types of “sales areas for … museum operations” that Section 17.100.220B(3) of the Zoning Ordinance permits are “a gift shop and show room for reproduction items.” However, that Section does not say that. It uses the word “including” before the phrase “a gift shop and showroom for reproduction items.” This is important. It means that “a gift shop and showroom” is just an example of two of the types of activities that are included within the phrase “sales areas for museum operations”. They are not the only activities covered by that language.

(f) The word “including” means to take in something as one part, component, or element of a larger “whole” or “group”. (Merriam Webster Dictionary; dictionary.com; The
Free Dictionary, etc.). It would be unreasonable to interpret the word “including” as a word of limitation or exclusivity.

(g) It is not unusual for a definitional term for a use in a Zoning Ordinance not to recite every single activity that is included within that use.

(h) For example, the definition of “theatre” in Section 17.08.010 of the Zoning Ordinance is “a building used for the showing of motion pictures or live stage performances.” It doesn’t specifically authorize the sale of popcorn and soda, but anybody knowledgeable about “theatres” knows that that activity is normally and customarily part of the sales operations of the principal use known as “theatre”.

(i) In cases where the scope of activities that are included within a defined principal use are not crystal clear, the Board can look to existing permits relating to the subject property (such as the 1997 special use permit here that allowed guest refreshment sales as part of the museum use) or to expert testimony or other external guidance in the evidence regarding the activities that are normally and customarily understood in the applicable industry as being included within a particular principal use.

(j) The only expert testimony presented on this issue was introduced by the PSNC through Dr. Ford Bell, the President of the American Alliance of Museums in Washington, DC. (12/1/14 Tr., pp. 42, *et seq*.). The American Alliance of Museums is the largest museum organization in the world, with 4,000 museum members.

(k) Dr. Bell explained that the Alliance “accredits museums of all types, A to Z”, and provides various outreach programs involving museums. He further explained that his role as President requires him to understand the features and amenities that are included in museums around the country and around the world. He testified that he has visited approximately 450 museums in the United States over the past three and a half years; has conferred extensively with
museum professionals; has seen and heard of their operations “firsthand”; and has a keen understanding as to what is meant by the term “museum operations”, as does his entire staff.

(l) Dr. Bell squarely opined that the sale of refreshments is a normal, customary aspect of museum operations, “... very, very common in museums in the United States, because it’s part of [the museum] function of providing places where people can come together, where they can meet with friends and have coffee and experience the museum. So it’s very much part of the museum experience.” (id., pp. 46-48).

(m) Dr. Bell testified that he had never heard of a museum being prevented from having food service based on zoning. (id., p. 51). He specifically opined that where, as here, a particular zoning ordinance allowed as part of the principal use known as “museum”, “sales areas for museum operations”, he would regard the sale of refreshments as a normal, customary aspect of museum operations, particularly for a historic house museum of the visitation of The Breakers. (id.). Dr. Bell testified that The Breakers visitation – 400,000 visitors a year – is “astounding”. The Breakers ranks eighth among all the historic house museums in the country, and third among “accredited” historic house museums. (id., p. 45). Dr. Bell advised that of the 50 most visited accredited museums in the United States, 88% provide food service of some type, and 40% of those have more than one food service. (id., p. 47).

(n) Dr. Bell confirmed his familiarity with the very limited scope of the refreshment service proposed for the welcome building at The Breakers (i.e., retail sales for pre-packaged items only; no table service; no kitchen; no stove, microwave, and dishwasher; no alcohol; no exterior; no signage; no live music or entertainment; sales only to ticketed guests during normal museum hours).

(o) He described it as “a very modest proposal ... I would call it minimalist and respectful and very restrained.” (id., pp. 47, 48).
(p) Dr. Bell’s expert testimony was reasonable, credible, and unrebutted by any witness.

(q) PSNC also introduced as an exhibit Internal Revenue Service Revenue Ruling 74-399 (Exhibit 14), which deals with the issue of whether food sales at federally tax exempt not-for-profit museums constitute income from an “unrelated business activity”. The question was whether or not food sales are “substantially related” to a museum. The Internal Revenue Service resolved the issue as follows:

“Because there are places of refreshment in the museum, visitors are able to devote a greater portion of their time and attention to the museum’s collection, exhibits, and other educational facilities than would be the case if they had to interrupt or terminate their tours of the museum and seek outside eating facilities at mealtime. The eating facilities also enhance the efficient operation of the entire museum by enabling the museum staff and employees to remain on its premises throughout the workday. Thus the museum’s operation of the eating facilities is a service that contributes importantly to the accomplishment of its … purposes. Accordingly, the operation of the eating facilities by the museum under the particular circumstances is substantially related to the museum’s … purposes.”

(r) As referenced elsewhere above, in the “Bellevue Avenue/Ochre Point Neighborhood Statement Of Vision And Shared Goals” that BOPNA entered into with the PSNC (PSNC Exhibit 10), the ordinary, customary nature of food sales in museums was acknowledged in the following “Action Item” (at p. 16, Para. 6):

“6. Encourage reduction of vehicle trips by private automobiles by allowing existing attraction visitors at museum attractions to purchase food in limited quantities at some museum houses, as is done at many museums in the U.S.”

This is, of course, precisely what the PSNC is proposing here.

(s) The fact that Section 17.100.220B(3) of the Zoning Ordinance also allows a “luncheon room for employees” as part of the principal special permit use known as “museum” does not mean that a museum cannot sell limited guest refreshments as part of its “sales areas for museum operations”. That “luncheon room” section does not have anything to do with “sales
areas” and stands on its own. The “sales areas” concept is already covered by the section that comes right before it, Section 17.100.220B(3), the section we have just discussed.

(t) If BOPNA’s contention that the Zoning Ordinance does not allow the sale of any food or drink at museums is correct, even the sale of a bottle of water would be prohibited, which is not a reasonable interpretation of the Ordinance.

(u) The Zoning Ordinance does not permit “restaurants” in the R-60 zone. However, the proposal before the Board clearly does not involve a “restaurant”. As set forth elsewhere above, a “restaurant” is defined in the Zoning Ordinance (in every example given in Section 17.08.010) as an establishment whose principal business is the sale of foods. This is not the case with The Breakers or the welcome center. The welcome center is a subordinate, subsidiary aspect of The Breakers, and food sales are a subordinate aspect of the welcome center, representing a minority of its total area.

(v) BOPNA’s argument that the Zoning Board does not have the authority under the Zoning Ordinance to approve this application is a re-hash of the same failed argument BOPNA made to the Superior Court in its lawsuit against the PSNC earlier this year, which the Court dismissed.

(w) The Complaint in the lawsuit BOPNA filed, Civil Acton No. 2014-98, appears in the record as PSNC’s Exhibit 8. BOPNA alleged (in Counts II and III) that the sale of refreshments to guests is not allowed for museums, and constitutes an unauthorized “restaurant” use.¹

¹ The cases BOPNA cites in its legal Memorandum, RICO Corp. v. Town of Exeter, 787 A.2d 1136 (R.I. 2001) and Olean v. Zoning Board of Review of the Town of Lincoln, 220 A.2d 177 (R.I. 1966) do not apply here, because they involved prohibited uses – as opposed to uses allowable (and modifiable) by special use permit. The Superior Court did not accept BOPNA’s arguments based on them.
(x) The Superior Court rejected BOPNA’s argument that the Zoning Board lacks authority under the Zoning Ordinance to approve the proposed activities at the welcome building for a special use permit, subject to the satisfaction of the traditional criteria the Board applies to applications for special permits. (See Superior Court Decision, Gallo, J., PSNC Exhibit 9).

(y) The Court specifically noted that one of the activities the Zoning Ordinance lists as a permitted use for a museum is, “display, information and sales areas for … museum operations” (Sec. 17.100.220B(3)), and that the definition of “museum” in the Zoning Ordinance contemplates, “the sale of goods to the public as gifts or for their own use.” (Sec. 17.08.010).²

(z) Finally, BOPNA asserts that The Breakers is “nonconforming by use” such that the museum operations on the site cannot be moved or altered from what they were in 1977 when museums became a use allowable (and modifiable) by special use permit in the R-60 zone. This is the main argument BOPNA asserted in its Superior Court Complaint, where it alleged (in Count I) that, “Construction by PSNC of the proposed Welcome Center would constitute movement of [a] non-conforming use to another part of The Breakers lot, and a change in the non-conforming use of land”; and that, “The Newport Zoning Ordinance prohibits movement of a non-conforming use to another part of the lot, and prohibits the change in the non-conforming use of land except to a conforming use or structure.” (See Complaint, PSNC Exhibit 8, Paras. 34, 35 at p. 7).

(aa) BOPNA ignores the fact that The Breakers was granted a special use permit for a refreshment building in the area of the front gate in 1997. The Zoning Ordinance specifically provides that, “Any use existing under an approved special use permit application shall not be deemed a nonconforming use”. (Sec. 17.108.020E ; emphasis supplied). And a use allowed by

² The definition of “goods” includes, “food and clothing.” (The American Heritage Dictionary of Cultural Literacy).
special use permit can be extended, enlarged, or moved through a new application for a special
use permit, which is precisely what PSNC has done. (Sec. 17.108.020C).

(bb) Moreover, the Superior Court has already rejected this aspect of BOPNA’s
argument, as follows:

“BOPNA’s first count requests that this Court declare that the Breakers museum
constitutes a legal nonconforming use in an R-60 zone and, therefore, may not be
moved or altered. The Court’s view is that this is a non-issue. The fact that a
museum use may be nonconforming is irrelevant since under the Zoning
Ordinance, museums are permitted in the area by special use permit. ” (Superior
Court Decision, 8/25/14, as amended, PSNC Exhibit 9).

(cc) The Court left the whole matter to the Zoning Board to determine under its
authority to grant, enlarge or modify special use permits, under its traditional criteria, stating:

“Because the Zoning Board is empowered to issue and consider special use
permits, any approvals necessary for the development of the proposed Welcome
Center present questions for the Zoning Board.” (id., p. 6).

(dd) The flaw of BOPNA’s position is this: it fails to recognize that a museum use is
not a “prohibited” use in the R-60 zone, but rather a use that is authorized by special use permit.
Unlike “prohibited” uses, the Zoning Ordinance recognizes that uses allowed by special use
permit are not inherently offensive to the zoning district in which they are located. Rather, they
are uses, “that would be appropriate in such districts if controlled as to number, area, location or
relation to the neighborhood so as to promote the public health, safety, welfare, order, comfort,
convenience, appearance, prosperity or general welfare.” (id., Sec. 17.108.020A.) The Zoning
Ordinance specifically declares that special permit uses like museums, “shall be deemed
permitted in their respective districts subject to the satisfaction of the requirements and standards
[for granting special use permits set forth in the Ordinance].” (id., Sec. 17.108.020A). 3

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3 This language is consistent with the language in the [then new] Zoning Enabling Act of 1991, which
defines a “special use” as, “a regulated use which is permitted pursuant to the special use permit issued by
the authorized governmental entity.” R.I. Gen. Laws §45-24-31(57).
(ee) BOPNA does not dispute that the Zoning Board has the power to grant a special use permit for a new museum anywhere in the R-60 zone. Yet it contends that the Board has no power or authority to allow a museum already in existence for nearly 70 years in that zone to be expanded or re-arranged on its lot by way of a new or modified special use permit. This illustrates the error of BOPNA’s position, which has properly been rejected by the Superior Court.4

[7] “The Comprehensive Plan For the City”

(a) Finally, it is undisputed (including by Roland Chase, one of BOPNA’s attorneys) that consistency with a municipality’s Comprehensive Community Plan is the overarching criterion for all local land use Decisions.

(b) R.I. General Laws § 45-22.2-13 sets forth the so-called “consistency doctrine”, which provides that, “... All municipal land use decisions shall be in conformance with the approved municipal comprehensive plan.”

(c) The Planning Board met and conducted a public hearing to evaluate and determine whether this proposal is consistent with the City’s Comprehensive Community Plan.

(d) Following that hearing the Planning Board issued an advisory opinion to this Board (PSNC Exhibit 11) that the proposal is “consistent with the goals and purposes of the

4 BOPNA cites cases in its Memorandum on this issue that actually have no bearing whatsoever on the situation before the Board here. In Lindberg’s Inc. v. Zoning Board of Review, 262 A.2d 628 (R.I. 1970), a special use permit for a gas station was denied because the Zoning Ordinance there specifically prohibited gas stations (even by special use permit) within 200 feet of a church or a cemetery. V.S.H. Realty v. Zoning Board of Review of Town of East Greenwich involved a similar situation where a gas station could not satisfy the specific requirements for a special use permit for that use under the zoning ordinance.

Cohen v. Duncan, 970 A.2d 550 (R.I. 2009) involved a Newport hotel in a residential zone and thus did not involve a use allowable (and modifiable) by special use permit, contrary to the situation here. Similarly, Town of Charlestown v. Beattie, 422 A.2d 1250 (R.I. 1980) and Zielstra v. Barrington Zoning Board of Review, 417 A.2d 303 (R.I. 1980) involved prohibited uses, as opposed to uses allowable (and modifiable) by special use permit, the situation here.
Comprehensive Land Use Plan, subject to the condition that no changes occur to the plans as submitted and reviewed by the Planning Board.”

(e) The Comprehensive Plan speaks repeatedly and emphatically about encouraging “cultural” and “heritage” tourism, and the need to “consciously market” [Newport’s] many cultural attractions”. This emphasis is on enhancing and improving these cultural and heritage attractions for visitors, which is the precise goal of the welcome building.

(f) The Comprehensive Plan also repeatedly encourages expansion of year round tourism at the City’s cultural and historic attractions. The current outdated, seasonal ticketing, orientation, restroom and refreshment building services do not serve this goal well.

(g) Rarely does a project conform to a comprehensive plan more thoroughly than this one does. The specific sections of the Comprehensive Plan with which the proposal is consistent include the following:

**ELEMENT 1** (Executive Summary)

**Section II B (“The Historic Character of Newport”)**
(“The citizens of Newport, as well as the City’s numerous visitors cherish the City’s wealth of history. The City’s architectural stock is such with treasures … [including] the late 19th and early 20th Century opulent “summer cottages” of the Four Hundred, including The Breakers, Marble House and other elegant mansions”);

**Section II D (“Newport’s Economy”):**

**Goal 1** (“Preserve Newport’s History and Natural Resources and Enhance the City”);
(…” [c] “Preservation of architectural heritage of Newport; [d] Supporting ‘cultural tourism’ through activities that encourage Newport visitors to respect the community’s heritage”;

**Goal 3** (“Celebrate Newport’s Historic and Cultural Diversity”) (… [a] Improve the working relationship between local government and the City’s non-profit arts, historicand cultural organization … [c] Encourage tourism sensitive to the social and physical fabric of the City… [d] Encourage historic preservation as a value in land use policy”);

**Goal 6** (“… Improve … working partnerships [with] … private organizations to develop a plan for regional economic situation”);

**Section IV** (“Vision Statement”)

24
(“Newport must continue to preserve and enhance access to the community’s natural and cultural resources for all citizens”);

**Implementation** “We must improve the working relationships now existing between the City of Newport ... and local cultural organizations”; “Newport should emphasize “cultural tourism.” We must consciously market our many cultural attractions and our rich heritage ... we must seek out and draw the tourists who respect and appreciate the beauty of our City and who respect the right so its residents ...”;

2("Short Term Priorities") ... “To encourage expansion of year round tourism by promoting programming at the City’s Cultural and Historic Attractions”; ... Preservation of Newport’s heritage and architectural resources ...”

**ELEMENT 2** (“Land Use”)

**Goal 1:** “Protect Newport’s Historic Character And Natural and Cultural Resources”;

**Goal 1C:** “Foster and Enhance the City’s Museums, Libraries, Art, Theatre, Musical Organizations, and Other Cultural Institutions”;

**Goal 4:** “Private Business, Employment and Economic Development Consistent With the Community’s Character And Limited Resources In Order to Sustain Newport’s Economic Vitality”;

**Goal 4D:** “Encourage Investment by the Public and Private Sectors that Will Stabilize and Improve Public Opportunities.”

**Appendix 2:**
- Figure 2.4 (“Existing Zoning Map”)
- Table 2.1; Table 2.3
- Figure 2.5 (“Future Land Use Map”)

**ELEMENT 4** (“Economic Development”)

“Newport’s location, natural and cultural resources, and sense of history are responsible for the growth of tourism into a primary source of revenue ... unique natural and cultural resources provide Newport with a competitive advantage.”

Sec. A(1) (“Major Employers”) lists the Preservation Society of Newport County as one of “several employers that make a major contribution to the full time development base of the community.” ...

*Manage Tourism.* “... The health of the Newport economy is closely tied to its tourism industry. Newport’s beaches, mansions, historic neighborhoods, spectacular scenery, and other
qualities, continue to support growth and development in the tourism industry. The negative consequence of this growth have taken the form of notorious party houses, traffic congestion, and parking shortages with serious questions regarding the impact of this on the quality of life for Newport’s residents.”

Newport must manage tourism effectively so that the community’s character and quality of life do not unalterably change. Tourism activities should foster and enhance the same qualities that make Newport a place to live. The following actions are recommended:

**Expand Heritage And Cultural Tourism**
- Expand cooperative programs and events that provide an introduction to a variety of cultural and historic resources.
- Encourage the expansion of year-round programming at Newport’s cultural attractions.
- Focus on Newport’s natural and historic assets in economic development marketing programs;

**Encourage “Family Oriented” Tourism Activities**
- Consider tourist activities aimed at maximizing benefits to people of all ages as well as to reorient Newport’s image away from alcoholic consumption.
- Encourage museums and/or attractions that focus on educational or interactive exhibits suited for children as well as adults.
- Focus marketing on cultural and heritage programs.

**Goal 4: “Encourage Economic Development That Is Compatible With And Will Preserve The City’s Natural, Historic, And Cultural Resources”**

**Goal 4A: “Enhance And Manage The Image Projected Of Newport Outside Its Boundaries”**

**Goal 4E: “Expand The City’s Role To Initiate, Promote, And Facilitate Events And Activities That Capitalize Upon Newport’s Assets And Heritage”**

**Goal 5: “Minimize Potential Adverse Effects Of Tourism On Newport Residents”**

**Goal 5A: “Place A High Priority On Bringing Visitors To Newport In The Off-Season”**

- **ELEMENT 5 (“Natural And Culture Resources”)**
  - “Along with its extraordinary natural resources, Newport’s historic, architectural, and maritime resources are the City’s greatest assets in shaping a vision for the future. The City recognizes that the preservation of our cultural heritage protects the unique character of Newport and provides important environmental, economic, and educational benefits to the community”
  - “As the economic base of Newport and the island as a whole has become more and more dependent upon the tourism and convention industry, the value of the
City’s historic resources has been a huge asset in attracting visitors to the City ... As the trend in ‘heritage tourism’ grows nationwide, Newport is well-suited to benefit, and should make sure this is adequately covered in marketing efforts.

**Goal 1A:** “Educate And Inform The Public About Natural And Cultural Resource Matters

**Goal 3D:** “Promote The Development And Growth Of Newport’s Artistic And Cultural Recourse.”

**Goal 4:** Increase Public Awareness Of, And Access To, Newport’s Natural And Cultural Resources

25. Consistent with the above noted goals and objectives, the PSNC and its museums generate in excess of $100 million each year for the local economy. (PSNC Exhibit 13).

IV.

*Other Relevant Considerations Of Record*

26. Various members of the public provided comments at the public hearings that underscored the public convenience and welfare aspects of the proposal and/or its consistency with the City’s Comprehensive Plan, which comments the Board credits, including but not limited to, the following:

(a) Evan Smith, President and CEO of Discover Newport, the local convention and visitors’ bureau, emphasized the importance of tourism to the local economy and the need for the stewards of the extraordinary assets that draw visitors to Newport, particularly The Breakers, to maintain and improve their visitor amenities lest they become obsolete.

(b) Mark Brodeur, the Director of Tourism for the State of Rhode Island, drew attention to the need to provide an appropriate visitor experience at the State’s major attractions; the need to provide suitable facilities and refreshments, particularly for seniors and the twenty percent (20%) of Americans that have some type of disability; the benign nature of the
refreshments being served; and the absence of any adverse impact from those refreshments on the local hospitality industry.

(c) Martha Sheridan, President and CEO of the Providence and Warwick Convention and Visitors Bureau, registered similar views.

(d) Jody Sullivan, the Executive Director of the Newport County Chamber of Commerce, reinforced the importance of providing public convenience by replacing the current “eyesore” facilities at The Breakers with ones more in keeping with the times and with visitor expectations. She noted how she had conferred with dozens of members of the local business community, and how favorably that community regards the proposal.

(e) Eric Hertfelder, a historic preservation professional for 40 years, spoke of the importance of The Breakers as an historic site and the improvements the proposed plan provides for in terms of rehabilitating the original landscape features and serpentine path, as well as PSNC’s credentials as a good steward.

(f) Several citizens noted how superior, and less conspicuous, the welcome building will be in comparison to the existing seasonal welcome “tent” and how the refreshment function is more benign than the various cafes at nearby Salve Regina University that, unlike the welcome building, are open to the public. One neighborhood resident for twenty years noted how PSNC has improved and stabilized the area with its operations and stewardship, and how the refreshment service conducted at The Elms in past years never detracted from the neighborhood in any way. She also noted the importance of visitor amenities, including refreshments, for young children and pupils that are brought to The Breakers to learn of Newport’s cultural and social heritage.

(g) J. Timothy O’Reilly, president of Newport Harbor Corporation, a major business owner in the area restaurant industry, expressed his support for the proposal, and opined
that its benign refreshment service would have no adverse effect on the local restaurant industry. The Rhode Island Hospitality Association, the trade association for local restaurants and hotels, submitted a letter to that effect as well.

(h) John Peixinho, a local business owner and past Chair of the Historic District Commission, focused on the proposal’s compliance with the Comprehensive Plan’s emphasis on encouraging cultural and heritage tourism, and suitable year round amenities for that purpose.

(i) There were also a substantial number of citizens who respectfully spoke (or submitted letters) in opposition to the project, and whose viewpoints the Board has carefully taken into consideration. Those viewpoints generally involved the “bad precedent” issue that has been discussed above; fears that the visitor refreshment service would detract from the neighborhood by expanding beyond the scope of its approvals; and/or ideas as to other locations in the City where a welcome facility could be located. Not all of those comments involved matters within the Board’s purview, and most have been addressed elsewhere above.

Conclusion

For all the reasons set forth above, and considering each of the above-referenced seven (7) considerations provided for in the Zoning Ordinance, the application for a special use permit is in accord with the public convenience and welfare. The Application for a special use permit is granted, subject to the following conditions relating to the welcome building:

(a) Food sales shall be limited to pre-packaged items only (no table service);
(b) Sales of food shall be only to ticketed guests, and only during normal museum hours;
(c) There shall be no special events or functions;
(d) There shall be no kitchen and no food preparation facilities;
(e) There shall be no stove, microwave or dishwasher;

(f) There shall be no sale or service of alcohol;

(g) There shall be no exterior signage;

(h) There shall be no live music or entertainment;

(i) The project shall be commenced and substantially completed within two (2) years;

(j) The project shall be submitted for development plan review prior to issuance of a building permit as recommended by the Zoning Officer in the staff comments.

The Board voted on this application as follows:

Acting Chairman Christopher Kirwin: Aye
Acting Secretary Heidi Blank: Aye
Michael Martin: Aye
Donald Boucher: Aye
Robert Buzard: Nay
Rebecca McSweeney, Chair Recused
Lynne Ceglie Recused

Christopher Kirwin
Acting Chairman
January __, 2015