



MUDDY BREWING MEDIATION

General Information

B.Z. Boone, owner of Boone's Brewery in the city's riverside district, still flinches when going through a sliding glass door.

Boone has long been a developer of small but successful real estate projects. Two years ago, Boone purchased an old brick warehouse building partially set into a hillside along the banks of a major river. Boone's original plan was to develop the property as a restaurant, and possibly some retail, with three floors of office space above the ground level. Before purchasing the building, Boone hired a structural engineering firm to assess its structural soundness, recommend repairs and improvements needed for its intended use, and estimate the costs. Of course, this informed Boone's bid price for the building. The engineering firm's report indicated the brick warehouse could be converted to a restaurant with side patios, retail, or offices, and calculated the levels of reinforcements and repairs required for the structure and its foundation.

Notably, the structural engineer's report contained a disclaimer to the effect that it had not done a detailed soil or ground condition analysis at the time but had relied on older city maps and records. It also contained what appeared to be "boiler plate" language saying that, given climate change and increasing frequency of extreme weather events possibly impacting the site, these soil and ground conditions may not have remained static.

It's also relevant to know that, about ten years earlier, Boone had become an investor and board member in Outskirts Brewing, a beer brewing venture located in an industrial area outside the city. Not long after the warehouse purchase went through, Boone received a fat investors' check from Outskirts Brewing and, at a partnership meeting, listened to a presentation about future expansion. Boone believed in Outskirts Brewing's product line, but frankly thought it a bit conventional for younger urban customers.

This prompted Boone's decision to build Boone's Brewery - with newer, edgier flavors - in the newly acquired warehouse building, in addition to a restaurant and office space. The warehouse was quite large and could accommodate brewery equipment and cellaring space requirements, especially if Boone dropped retail space ideas. To avoid any conflict, Boone obtained permission from Outskirts Brewing's board, based on the planned distinctiveness of its product and a promise to offer their beer at Boone's Brewery.

Boone spent more than \$5 million to renovate the building, which includes 4 stories plus a basement level. The first floor (ground level) houses a large kitchen and restaurant on the building's east side and brewing equipment on the west side. The west side of the basement level contains cellaring equipment (where the beer ferments and conditions for several weeks after brewing and before serving or bottling) as well as several serving tanks to store beer and cider. The restaurant design included new patio extensions at ground



level. Because it was built into a hill, the basement level also included a walk-out to the back, and patio extensions were constructed there too, just under those on the ground floor. Public tours and post-tour tastings were planned for the basement level, with brewery pub food at the main level. At both levels, the patios were accessed via sliding glass doors set into the original building shell.

The second floor of the building (above the restaurant and brewing equipment) was outfitted as office space and a conference room for Boone's Brewery business. It included four bathrooms – two designated for employees and two for visitors. The third and fourth floors were divided into four office areas, a total of 20 offices, four conference rooms, four small kitchens and four bathrooms (two on each floor). [A rough diagram of the Boone's building configuration plan is attached.] Boone's business plan included renting these office areas to local organizations or companies. At the time of the construction disaster described here, future leases had been signed for one of these office areas and Boone's broker had spoken with several companies interested in rental.

Boone hired Ryan Rorie of Rorie Space Design to design the renovation and build out of the warehouse building. Rorie was a young local architect whose work had attracted considerable notice in the trade. Boone wanted the design aesthetics to be distinctive and be top notch. To command top rental dollars, the office areas had to be light-filled and airy and reflect contemporary design preferences. To maximize total usable area, Boone suggested the design include the basement level below grade space with new walk-out patio area, below a new patio off the restaurant on the ground level. Boone also suggested the restaurant dining area feature operable windows down to table height, that would open to the patio, and a wall of full height sliding glass doors for walking out to the patio.

Rorie signed a standard AIA (American Institute of Architects) contract for the job, with total project costs estimated at \$4 million. Rorie's design fee was set at \$250,000. Rorie was to bill their own and any associate architect's time against the fee, at regular hourly rates.

As general contractor for the project, Boone hired Groban Construction, a small but reputable shop founded by Gary Groban, a neighborhood acquaintance. At the time, Boone knew Gary had just stepped down from an active role in Groban and was succeeded by his son, George. Boone liked the idea of giving George a break and was confident that George had the experience to manage the job, having worked in the business since he was a kid.

Groban and Rorie incorporated the structural engineer's recommendations for securing and reinforcing the structural elements of the building. They did not question the disclaimer language regarding soil and ground conditions and did not seek a current assessment. Boone did not advise them that the engineer's report was obtained before the decision to house a brewery and its cellaring and storage equipment in the warehouse. The engineer's report contains no reference to a possible brewery operation.



All proceeded smoothly at first. Boone liked the practical and creative use of space in Ryan Rorie's plans. He appreciated the contrast of the warehouse brick and bold, gleaming designs. It was a welcome change from the typical brewpub look.

Initial troubles started a month after Boone moved the company's employees into the new second floor office spaces, while construction continued for the other floors. The faucets in the fancy above-counter sinks in each bathroom splashed with too much force – spraying every user – and the bathroom window fan units let in water when it rained. Boone was concerned not only about the four bathrooms in the Boone company's second floor office space, but also about four bathrooms on each level– a total of 20 bathrooms. Boone mentioned it to Rorie, who promised to check on all sink and window fan problems.

Nine months later, after major construction had been completed and brewery equipment installed, the real trouble began. After two weeks of constant rain, an intense storm dropped 4 inches of water within 24 hours. Fortunately, the Boone Brewhouse property was high enough to avoid rising river water levels. Unfortunately, the rain caused mudslides, which came down the hillside and piled up over the new patios and the original foundation walls. The pressure from the mud caused just enough movement of the foundation that the frames for the moveable windows separating the restaurant and patios at both levels bent and caused the windows to shatter. Similarly, the sliding glass doors also bent and snapped, and the glass doors shattered. The floors and subfloors on that side dipped and buckled under the weight of the wet, muddy soil. This caused interior water damage to the walls and upholstered benches and chairs on that side of the restaurant. Major areas of the floor and subfloor under the brewery equipment at the ground level and lower-level storage area also buckled and dipped. It was certain that the sagging floor and subfloor would only become more pronounced and dangerous when the beer production cycle would be in full swing, and the tanks filled with beer for the grand opening. Full serving tanks and large quantities of cellaring beer are far more heavy than empty brewing equipment. It takes 1-2 months after brewing for beer to be ready to drink, depending upon the type of beer. Thus, Boone couldn't open the restaurant or tasting areas for at least four months after the construction fixes were done in the brewing areas.

To address the simpler bathroom issues, Boone retained another architect/general contractor to review the plans for the bathroom sink and wall fan units. They determined Rorie had spec'd the wrong faucet type for the sink design and inadequate flashing for the wall fans. They found evidence of some interior wall water damage due to the flashing problem. They estimated the cost of redoing the flashing around the fans plus interior wall repairs at \$4,000 per bathroom - \$80,000 - and replacing the faucets at \$500 per bathroom - \$10,000. Thus, Boone's estimated cost for addressing the bathroom issues is \$90,000.

Of course, the major structural damage is the more significant problem. Until that is addressed, Boone cannot operate the brewery or the restaurant. The building inspector has declared the bottom two floors of Boone's Brewhouse to be unsafe and unusable.



Boone (through the insurance company) quickly paid approximately \$100,000 to clean-up and repair water damage to interior restaurant walls and furnishings. The insurance company authorized payment of \$80,000 for purchasing replacement sliding wall window units, and \$40,000 for the sliding glass doors and frames on the bottom and ground floor levels – plus \$60,000 for installation and finishing work. Thus, the insurance company has paid a total of \$100,000 and authorized \$180,000 more. Installation and these insurer payments were delayed pending investigation of the cause of the damage.

Boone hired a new structural engineering expert to determine what caused the windows and door frames opening to the two patio areas to buckle and break, and the floors to dip and buckle. In consultation with the city's building inspector and engineering department, they determined that the heavy brewery equipment carried excessive weight and the ground underneath the warehouse must have shifted over time. The area under the two new patios built out from the original building shell was susceptible to rain and mud. Opening the building to the patio areas, and excavation on that side made the entire building unstable and the ground more subject to shifting, exacerbated by adjacent rain and mud. The site was unstable and subject to landslides.

Boone's expert determined that major foundation work would be required to use the building safely. A retaining wall must be added to the edge of the patio to stabilize the hillside. The foundation walls on the east side of the building must be reinforced to resist the pressure of a future mudslide event. On the west side of the building, blocking and bridging must be installed between the joists under the street-level brewing equipment, and helical pile underpinning must be installed under the basement level to help the foundation support the weight of the working brewery equipment. The expert stated that such a project would cost \$1,000,000 (or more) and would take at least three months from start to finish. No doubt, it would have been faster and less expensive if done during the initial construction and renovation stage.

Reconstruction and repairs are currently underway. For Boone, every minute of delay costs money. Boone's Brewhouse business plan projected \$100,000 per month in restaurant revenues, \$80,000 per month in beer revenues (including outside sales) and \$32,000 per month in rental from the four office units (listed at \$8,000 each): a total of \$212,000 per month. By the time the work is done, it's undisputed that the brewery and restaurant opening date will be a full four months later than Boone had originally planned. Boone's business interruption insurance does not cover any pre-opening period.

Boone sued Groban Construction, Rorie Space Design and Ryan Rorie personally, to recover the Brewhouse losses as well as the cost of all repairs. The complaint states a claim for \$10,000,000, including loss of value to the property, lost reputation, lost rent, estimated cost of repairs, loss of personal property, and a myriad of other items. Unfortunately, Groban Construction recently went into bankruptcy and appears to have little or no assets.

In a recent conversation, counsel for both parties agreed their clients would do well to try mediation to resolve their dispute.