

**TOWNSHIP OF DENVILLE
BOARD OF ADJUSTMENT
MINUTES**

March 3, 2010

The Board of Adjustment of the Township of Denville held its regular scheduled meeting on Wednesday, March 3, 2010. The meeting was held in the Municipal Building, 1 St. Mary's Place and commenced at 7:00 P.M. Chairperson James C. Rodimer presided.

Secretary Probasco read NOTICE OF PUBLIC MEETING.

ROLL CALL: Present: James Rodimer, Kevin Scollans, Roger Spiess, Mark Wilson, Arthur Korn, Sean Ryan, Sally Dankos, Frank Passucci, John Murphy
Prof. Present: Larry I. Wiener, Esq., Nicholas Rosania, PE, William Denzler, PP

MINUTES:

February 17, 2010

Motion to adopt the minutes as submitted was made by Mbr. Murphy, seconded by Mbr. Scollans and unanimously approved by all Members present and able to vote.

PURCHASING:

Motion to pay voucher(s) submitted by Larry I. Wiener, Esq. dated February 23, 2010 subject to the availability of funds, was made by Mbr. Korn, seconded by Mbr. Scollans and unanimously approved by all Members present.

Motion to pay voucher(s) submitted by William Denzler & Associates, dated February 9, 2010 subject to the availability of funds, was made by Mbr. Korn, seconded by Mbr. Scollans and unanimously approved by all Members present.

PROFESSIONAL COMMENTS:

Nick Rosania, Township Engineer stated that the self storage facility project was halfway complete with no construction problems to date.
 William Denzler, Township Planner had no comments.
 Chairman Rodimer welcomed Sean Ryan to the board as second alternate.

RESOLUTIONS:

**BA 10-01: Thomas & Laura Hoffman
 Block 40812, Lot 544.01
 108 Highland Trail**

A motion was made to adopt the resolution by Mbr. Scollans, seconded by Mbr. Dankos and unanimously approved by all members able to vote.

ROLL CALL: Ayes: Scollans, Dankos, Spiess, Wilson, Murphy, Passucci, Ryan

**BA/PSP/FSP/ 09-21 MetroPCS New York, LLC
 Block 21001, Lot 3
 3138 Route 10**

A motion was made to adopt the resolution by Mbr. Scollans, seconded by Mbr. Dankos and unanimously approved by all members able to vote.

ROLL CALL: Ayes: Scollans, Dankos, Spiess, Wilson, Murphy, Passucci, Ryan

PUBLIC HEARINGS:

**BA 09-24 The Shoppes at Union Hill, LLC
 Block 21203, Lot 1
 Route 10 West**

Richard A. Stein, Esq. of Laddey, Clark & Ryan, LLP (60 Blue Heron Road, Suite 300, Sparta) represented the applicant, The Shoppes at Union Hill, LLC. This is the first public hearing on this application after adjournment was requested by letter on February 16, 2010. Mr. Stein, Esq. indicated that the applicant was seeking bulk and use variances for parking and fast food restaurant to allow the Five Guys Burgers and Fries Restaurant to occupy space. Mr. Stein, Esq. stated four professionals would be testifying, the first witness was a representative from the property owner.

Mark Pottschmidt, Partner of Stanbery Development (328 Civic Center Drive, Columbus, OH) was present and sworn in. Mr. Pottschmidt stated he is also an owner of the shopping center.

Mr. Pottschmidt indicated that they believed the original parking ratios for the shopping center were 1 per 200 sq. ft. and that the parking requirements have changed over the years. Mr. Pottschmidt testified that the shopping center was approximately 92,000 sq. ft. with 15% food uses. Approval of the application would bring the total to 18% and a parking variance for 25%. The existing food uses are Qdoba, Panera, Maggie Moo's, Bensi and Starbucks. Stating that by ordinance the Five Guys restaurant would be fast food only because it serves burgers. Mr. Pottschmidt stated that there would be no physical changes to the building and that the applicant would occupy a 1,500 sq. ft. portion of an existing 4,000 sq. ft. space from Red Vanilla leaving approximately 1,500 sq. ft. next to The Five Guys.

Mr. Stein referenced that the last hearing was adjourned due to the number of board members but that Mr. Pottschmidt had an opportunity to speak with some citizens in the lobby afterward. Mr. Pottschmidt confirmed that he spoke with a group of citizens after the last meeting. Some of the concerns voiced were for odor and lighting. Mr. Pottschmidt confirmed that the existing lighting installed conforms to the original approved plans and that the odor concern will be addressed by a filtration system.

Chr. Rodimer opened the application to the professionals.

Nick Rosania, PE indicated that he had no questions at this time.

Bill Denzler, PP received confirmation from Mr. Pottschmidt that the only change was an exhaust system on the roof.

Chr. Rodimer opened the application to the board for questions.

Mbrs. Spiess, Wilson and Ryan had no questions.

Mbr. Korn inquired about changes in the parking ordinance as Mr. Pottschmidt indicated. Mr. Denzler responded that the parking was 1 per 200 sq. ft. at the time of the approval for this site, with eateries as 1 per 65 sq. ft.

Mbr. Murphy inquired about the other shopping centers. Mr. Pottschmidt indicated that 6 of the 11 were in NJ with restaurants at roughly 20%. The parking varies by location some 5 per 1,000 sq. ft. and others by restaurant seat count. Mbr. Murphy stated that fast food is defined as over the counter service with a limited menu and drive-through service is not a factor. Mbr. Murphy inquired if four of the five restaurants were considered fast food. Mr. Denzler replied that each would have to be evaluated separately but that the ordinance states hamburgers, chicken or fried fish packaged in paper or disposable wrappers. Mr. Denzler stated that Panera has a more expanded menu and that Starbucks would fall more under a coffee house than a restaurant. Mbr. Murphy stated that the definition of fast food in society today has changed since the 1977 Ordinance. Mbr. Murphy stated that the mall is a model for other shopping centers and looks forward to further testimony.

Chr. Rodimer inquired if Qdoba qualifies as a fast food restaurant. Mr. Denzler stated that he was unable to respond due to his unfamiliarity with Qdoba.

Mbrs. Passucci and Dankos had no questions at this time.

Mbr. Scollans stated that Burger King on Franklin Road gives off a lot of smoke and inquired about the scrubber. Mr. Stein indicated that the Five Guys franchisee would respond in his testimony.

Chr. Rodimer indicated that he had no questions at this time and would wait for the parking testimony.

Chr. Rodimer opened the application to the public for questions only of this witness.

Larry Wiener, Esq. stated that all members of the public would have an opportunity to speak and reminded everyone that at this time it was opened for questions on the testimony from this witness only.

Thomas Zoltner (4 King Hill Court) inquired about an ineffective air handling system on Burger King to reduce the smell and smoke. Mr. Wiener indicated that the question should be deferred to the other witnesses testimony.

Richard Strand (19 Birch Run) inquired about the interest to increase foot traffic. Mr. Pottschmidt answered yes to the desire of increasing foot traffic.

Ed Banagan (38 Old Mill Drive) spoke to the recession as it relates to the traffic. Larry Wiener indicated that statements should be deferred to the end.

Donna Ragaglia (888 Miller Road) inquired if Mr. Pottschmidt lived in Ohio and if he lived near a fast food restaurant. Mark responded yes to the first and no to the second.

Navjot Singh (33 Mt. Pleasant Tpke) inquired about the occupancy percentages and the increase of 15% to 25%. Mr. Pottschmidt confirmed the numbers previously testified and stated the higher percentages are the trend.

Douglas Lynch (36 Cooper Road) inquired if research had been performed regarding walking trails and volume of the farm resources used. Mr. Pottschmidt indicated he had not.

Franco Dichio (7 Aerie Wynde Drive) inquired about the increase of percentages. Mr. Pottschmidt responded that the referenced increase in percentages were square footage not occupancy. Stating that the intent was to build some flexibility on leasing to avoid having to come back for parking variances.

John Backus (42 Smith Road) inquired if there would be modifications to the egress of the parking lot. To which, Mr. Pottschmidt replied no physical changes to the access of the shopping center.

Dan Larris (18 Henning Terrace) inquired if traffic or safety records research was performed with the towns police. Mr. Pottschmidt indicated that research was performed with the town and the NJDOT at the time of the original plan. Further questions were deferred to the traffic engineer's testimony. Nick Rosania, Township Engineer responded that the police chief's comments were no eventful changes.

William Rohrbach (2 Brodziak Road) inquired if any member of the shopping center was involved in conversations with any other fast food restaurants. Mr. Pottschmidt replied no.

Chr. Rodimer inquired if there were any other members of the public interested in questioning the witness. Seeing none, Chr. Rodimer closed the public portion.

John Salvatore, Partner in the franchisee of Five Guys Burgers (214 Bee Meadow Parkway, Whippany) testified to the differences of a fast food restaurant as a food that is pre-prepared and waiting for you. Indicating that the food at Five Guys is prepared fresh daily, made to order and never frozen. Menu consists of burgers, hot dogs, fries, grilled cheese and veggie sandwiches. Testified that in the industry the restaurant is called fast casual or quick serve. Three other locations of the same size proposed include; Parsippany, Wayne and Madison. Parsippany location has been open for two years with Wayne and Madison each open one year. There is a roof mounted captive air closed ventilation system at the Madison location. This encapsulated system ventilates smoke three times greater than standard systems to the roof and back into a capsule. Capsules are removed by a service and recycled. No complaints in any of the three locations to date with Madison residents even closer than the proposed site in Denville. Mbr. Scollans inquired if it was a charcoal system. Mr. Salvatore indicated he could obtain and provide system details. That the system was a stainless steel grease filter that removes triple the amount of grease of a baffle filter but didn't specify if charcoal was used. Mr. Salvatore indicated that it is not sit in the car, take out food and similar to Qdoba lunch time and dinner volume. Testified that it has a similar operation to Qdoba with the exception being burgers instead of Mexican type food.

Chr. Rodimer opened the application to the professionals.

Nick Rosania, PE inquired about long term use of the encapsulated system as it relates to maintenance. John Salvatore ensured that the system would be maintained as per warranty. Mr. Rosania inquired about mounted fixtures or tables and chairs and the number of patrons expected. Mr. Salvatore responded that tables and chairs are proposed similar to Qdoba. Approximately 300-400 customers per day are anticipated. This amount is much less than a Burger King or McDonalds. Mr. Rosania inquired about the number of cars and traffic that corresponded to that number of customers. Mr. Salvatore preferred not to speculate.

Bill Denzler, PP inquired about the hours of operation, eat-in/take-out percentages and internal process. Mr. Salvatore stated the hours were 11 a.m. to 10 p.m. seven days a week with approximately 80% as eat-in. Typical wait time is ten minutes with customer pick-up at counter when their number is called.

Chr. Rodimer inquired about the capacity of the restaurant. Unsure, John Salvatore thought it might be 70 seats and indicated he could get that number. Bill Denzler, PP added that it would be by construction code occupancy.

Chr. Rodimer opened the application to the board for questions.

Mbr. Spiess indicated his questions were asked and answered.

Mbr. Wilson inquired about fast food, captive air system and parking. John Salvatore stated that the food is not cooked until you order, that the idea of the captive air system is odorless and that he is not concerned about parking for the site.

Mbr. Ryan had no questions.

Mbr. Korn spoke to the definitions of fast food vs. quick serve. John Salvatore provided his opinion, that the food is waiting for you versus specifically prepared. Mbr. Korn asked if he's visited the mall and if parking was readily available at all times. John Salvatore responded that parking has been available all times that he visited.

Mbr. Murphy inquired about the number of 70 seats as it relates to the number of vehicles. John Salvatore chose not to speculate. Mbr. Murphy deferred the question to the traffic specialist. Mbr. Murphy commented that he went to the Parsippany store and as the testimony indicated, there was no odor.

Mbr. Passucci had no questions.

Mbr. Dankos received confirmation from Mr. Salvatore that there was no waitress service similar to Qdoba or Panera.

Mbr. Scollans commented about smoke versus odor being captured and inquired if specifications for the system could be provided for the ventilation system. Mr. Salvatore confirmed that the details of the system could be provided and that there was a recommended maintenance program for the system.

Chr. Rodimer commented on odor from Burger King being intentional and that a captive air system would be very different.

Chr. Rodimer opened this portion of the hearing to the public for questions.

Donna Ragaglia (888 Miller Road) inquired about the maintenance of the system. Mr. Salvatore indicated that the team would be cleaned every night by the employees and that Captive Air Systems, Incorporated would be maintaining it.

Thomas Zoltner (4 King Hill Court) inquired about refuse outside of the establishment and what take-out would be in. Mr. Salvatore confirmed that bags, cups and condiments would be provided. Mr. Zoltner inquired if there would be additional trash cans. The Board Attorney received clarification from the applicant that there would be no tables for eating outdoors. Mr. Salvatore indicated that refuse has not been a concern at any of their locations and they don't anticipate it becoming one at this location.

Douglas Lynch (36 Cooper Road) inquired about guidelines for odor and emissions. Mr. Salvatore stated he was unaware if standards existed. Mr. Lynch referenced garbage and was reminded by Mr. Weiner, Esq. that the hearing was open to questions only at this time.

Sue Schmidt (12 Birch Run Avenue) commented on visiting two Five Guys restaurants with two different experiences and inquired if they were typical. At 5 p.m. in Parsippany all customers were take-out. Mr. Salvatore indicated that they do receive call-in orders and regulars. In Madison there were burgers on grill, ready to be assembled comparable to a fast food experience. Mr. Salvatore stated that assembly line is not the operating standard and it would be looked into. Ms. Schmidt inquired about future plans for patio seating. Mr. Salvatore replied that patio seating would not be requested and is not a large part of their business. Ms. Schmidt inquired if other variances would be requested. Mr. Salvatore indicated that they were not seeking sign variances. Larry Wiener, Esq. added that no patio seating would be included as a condition of approval. Proposed signage would be standard face red with white lettering that conforms to the style of the mall. Ms. Schmidt inquired if the other locations were in comparable malls. Mr. Salvatore stated no, that the Union Hill mall was a Life Style Center. Parsippany was a lower end strip mall backed by Route 80 and Madison was a much smaller mall with residents closer to the mall than the proposed.

Navjot Singh inquired about the busy shopping day and empty parking spaces. Mr. Salvatore indicated that he saw a picture of the site on a Saturday before Christmas and there were approximately open parking spaces. Mr. Salvatore stated that there are approximately 30-40 empty spaces and that many of the cars would be existing shoppers. Mr. Weiner indicated that traffic testimony could address. Mr. Singh inquired if the ventilation system would shut down if it exceeded a certain limit. Mr. Salvatore wasn't aware of any. Mr. Korn interrupted regarding laws for fumes and odors. Bill Denzler, PP responded that there is a provision against dust, odors, etc. under zoning and emissions under the building code.

Anthony Gonzalez (20 Cooper Road) inquired about the average time on cooking burgers and fries. Mr. Salvatore responded that the average cooking time is 10 minutes. Mr. Gonzalez stated that at the Parsippany location he waited approximately 4 minutes for his food, similar to the Five Guys location in Nayak, New York at lunch time.

Rosemary Fortunato (54 Old Mill Drive) inquired if a burger could be prepared medium rare and if the food is served on a plate similar to Panera and Qdoba. Mr. Salvatore replied no to both questions.

Al Filauro (2 King Hill Court) indicated that the Five Guys website describes it as a fast food restaurant. Mr. Salvatore indicated that this is incorrect. Mr. Weiner, Esq. indicated that as per Denville's ordinance, the restaurant is considered fast food.

Sue Filauro (2 King Hill Court) inquired about comparison to Qdoba and if there was a use variance. Mr. Denzler indicated that Qdoba had been considered a permitted use as per the zoning officer at that time. Larry Wiener, Esq. replied that this use is not permitted by our zoning ordinance.

Fran Szewc (61 Manor Road) inquired about the filtration system and noise. Mr. Salvatore responded that it's all enclosed, brought up to the roof and then brought back down. Reiterating prior testimony that there have been no complaints regarding odor or noise from the other stores.

Franco Dichio inquired where the smoke goes. John Salvatore responded to the chemical reaction of smoke occurring not being blown into the atmosphere. Larry Wiener, interjected that Mr. Dichio was seeking whether more smoke would be produced from cooking a hamburger and Mr. Salvatore replied no. Mr. Pottschmidt responded to Mr. Dichio that the photograph of the parking lot was taken on the afternoon of December 12, 2009.

Suzanne Zoltner (4 King Hill Court) inquired about the number of employees and if their vehicles are included in the parking count. Mr. Salvatore indicated that 5-8 spots for employees are part of the count.

Irene Wirth (3 Kathay Terrace) inquired about the average age group of patrons targeted by Five Guys and length of stay. Mr. Salvatore indicated that an average demographic isn't available but the customers would be all ages, families, singles, children and adults for an average of 20 minutes. Ms. Wirth inquired if 30 spaces would be available and Mr. Salvatore indicated that spaces would be available even if they are not directly in front of the store.

Ms. Florence Riker (11 Magnolia Avenue) referenced the photograph of December 12th. Mr. Salvatore clarified that it had been taken on one of the busiest days of the year.

Stefan Kosiorowski (12 Old Mill Drive) inquired if any safety study was performed on Route 10 during peak hours and traffic to reflect the impact of the restaurant. Mr. Pottschmidt deferred the question to be addressed in the testimony of the traffic engineer.

Ed Banagan (38 Old Mill Drive) referenced the inability to park at dinner time and inquired if Mr. Salvatore had ever visited the mall during this time, he responded no.

Daniel D. Disario, PE, Director of Transportation Services of Langan Engineering (Headquartered in Elmwood Park, NJ) Mr. Disario stated that parking is not evaluated by specific users when the

user is a part of an overall shopping center and that his testimony would be geared towards overall shopping centers. Testimony will address parking center demands and suggested parking supplies. In Mr. Disario's professional opinion he stated that the board could approve the requested variances without negatively impacting the health, safety and welfare of the public and the specific natures of the shopping center.

Mr. Disario testified that the shopping center contains approximately 92,000 sq. ft. with overall parking spaces totaling 465 onsite. Equating to 5+spaces per 1,000 sq. ft. of gross leasable area which complies with ordinance relating to retail. Referenced several publications from the Urban Land Institute (ULI) all three suggest parking of 4 space per 1,000 sq. ft. of gross floor area. Institute Transportation Engineers (ITE) publication manual reflects parking center trending down on parking spaces to 3 vehicles per 1K sq. ft. of floor area.

Mr. Disario testified to the parking being adequate and good utilization of the land irrespective of the Five Guys Restaurant. Turnover of each space three times within one hour, during an 11 hour day for patrons is more than accommodating and on the conservative side. Traffic operations turning into the driveways and safety concerns within the driveways or impact to Route 10, along Route 10 unperceivable as to traffic associated with 5 Guys. Onsite circulation and ability to turn in and out of the driveways will not be negatively impacted as shopping center driveways have been designed for DOT standards and have been operated and managed consistent with those terms. Police department has indicated that there are no concerns regarding the traffic and safety of this site and its operation or onsite circulation. Stating many of the visitors will be existing patrons already visiting the site or already passing the site on a daily basis. Known as pass-by traffic. Mr. Stein, Esq. asked Mr. Disario if his comments or concerns would change based upon a parking variance for 25% versus the existing 15%. Mr. Disario responded that based upon the ULI and ITE numbers the site has more than adequate parking even in the increased scenario of 25%.

Chr. Rodimer inquired about spaces taken up with snow, addressing monumental snow or taken up by special tent events during off-peak hours. Mark Pottschmidt responded that fashion shows are held during off-peak hours and that more detailed information on the snow removal will have to be obtained from the property management company.

Chr. Rodimer opened the application to the professionals.

Nick Rosania, Township Engineer inquired if Mr. Disario's testimony included actual models. Mr. Disario referenced a North Brunswick shopping center that is larger than Union Hill that has no parking issues. The referenced center also contains a Chipolte which is similar to Five Guys in that they serve food in a bag and you sit down to eat. Mr. Disario's market research across the state of over thirty shopping centers reflects an average ratio of 2.8-3.0 vehicles per 1,000 sq. ft. Mr. Rosania concurred with Mr. Disario that the restaurant would draw away from the traffic stream during peak hours.

Bill Denzler, Township Planner touched on the turnover of the spaces as it relates to retail and restaurants together. Mr. Disario stated that those shopping who then eat at Five Guys are considered retail parking and are not generating additional parking needs whereas those who come strictly to eat will be part of the turnover rate. Mr. Denzler inquired about ULI and ITE parking standards on what size shopping centers? Mr. Disario indicated that the standards are derived from hundreds of shopping centers ranging in size from small neighborhood centers to regional malls. Mr. Denzler inquired about correlation of duration times to size of the shopping center. Mr. Disario indicated that the larger the mall the higher the demand, the smaller the center the shorter the duration time. Mr. Denzler inquired about the type of restaurants as it relates to duration time. Mr. Disario indicated that Bensi would have a higher parking demand than Five Guys. In closing, Mr. Denzler inquired if specific parking counts were available or strictly observation. Mr. Disario indicated no specific data on this site was performed.

Chr. Rodimer opened the application to the board for questions.

Mbr. Murphy spoke to the parking spaces (ULI) Urban Land Institute. Spoke to Pennoni's planning report where 603 parking spaces are required and 465 exist, leaving 138 spaces currently short. This would increase to 147 with if Five Guys is approved. Mr. Disario indicated that this is only if you evaluate by each individual use type. Municipalities fall short of recognizing shopping centers by synergy of individual user and uses on one shopping trip. Further discussion ensued regarding retail versus restaurant versus fast food by ordinance and parking saturation in the proposed 25%. Mbr. Murphy voiced serious parking and traffic concerns at the 25% level.

Mbr. Passucci inquired about the center's location in North Brunswick. Mr. Disario indicated the location was at the exchange of Route 1 and Route 130. Mbr. Passucci received confirmation that the traffic flow is similar.

Mbr. Dankos stated that she frequents the center and has not had trouble parking. Mr. Disario confirmed that parking demand will increase but that the supply can accommodate 25% restaurant use. Mbr. Dankos received confirmation that a small parcel of land was unable to be used due to wetlands.

Mbr. Scollans voiced no concern about parking for Five Guys but does have an issue with 25% restaurant and adding another 7%.

Mbr. Spiess believed it was the consensus of the board that the parking could accommodate Five Guys but that he would prefer that the board not approve going to 25% and would like to see further applicants come before the board.

Mbr. Wilson commented on ideal parking versus availability and more on the westerly than the easterly side of the parking lot. From a traffic standpoint the tenant would be filling an already existing space. Similar to Mbrs. Murphy and Spiess Mbr. Wilson believes each application be evaluated on it's own merit.

Mbr. Ryan had no questions.

Mbr. Korn inquired if another restaurant would have to come before the board for a parking variance. Mr. Denzler indicated that they would have to come for parking as restaurants are permitted by ordinance, fast food restaurants are not. Mbr. Korn inquired about litter and Mr. Disario deferred to the franchisee. Mr. Pottschmidt indicated that the garbage is picked up on a daily basis and as they have not heard prior complaints they assume there is not a problem. Mr. Pottschmidt further added that if Five Guys is approved an additional garbage can would be added in front.

Chr. Rodimer inquired about Stanbery Development previously donating 4.5 acres of property to the township. Mr. Pottschmidt indicated that the property was wetlands and unable to accommodate additional parking. Chr. Rodimer commented that the location would be good for Five Guys and that the increase from 15% to 18% would be acceptable.

Chr. Rodimer announced that the public hearing for this application would be carried to March 17, 2010 without further notice.

Motion to Adjourn.

Denean Probasco, Board Secretary

Date Approved