TOWNSHIP OF DENVILLE
BOARD OF ADJUSTMENT
MINUTES

April 28, 2010

The Board of Adjustment of the Township of Denville held a special meeting on Wednesday, April 28, 2010. The meeting was held in the Municipal Building, 1 St. Mary’s Place and commenced at 6:00 P.M. Chairperson James C. Rodimer presided.

Secretary Probasco read NOTICE OF PUBLIC MEETING.

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

MINUTES:
April 21, 2010
Motion to adopt the minutes as submitted was made by Mbr. Korn, seconded by Mbr. Murphy and unanimously approved by all Members present and able to vote.

PUBLIC HEARINGS:

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

Mark Wilson has recused himself on this application. Prior public hearings were held on March 3, 2010, March 17, 2010 and April 21, 2010.

Chr. Rodimer announced that this was a special meeting being held as a continuation from the April 21, 2010 public hearing. For the record, Larry Wiener, Board Attorney added that there was an audio malfunction at the last meeting where the board members and members of the public heard the planning testimony of Mr. John McDonough, CLA, RLA, PP, AICP of Pennoni Associates.

Richard T. Sweeney, Esq. (Laddey, Clark & Ryan) represented the applicant, The Shoppes at Union Hill, LLC (Five Guys Burgers and Fries). Mr. Sweeney provided a reintroduction of the Exhibits for the record:

- O-1 – Website posting of Five Guys Site and Trade Requirements
- A-1 – Price comparison prepared by Mr. Salvatore
- A-3 – Captive Air System three page cut sheet on filtration
- A-4 – Original Site Plan dated December 13, 2001 (Spillane)
- A-5 – Expansion Site Plan dated December 6, 2007 (Langan)
- A-6 – Aerial photograph
- A-7 – Three prior resolutions from 2007 and 2009
- A-9 – Pennoni Associates Planning Exhibits, dated March 17, 2010 with seven subparts (excluding cover sheet)
  - Page 1 - Aerial photograph from New Jersey Geographic Information Network
  - Page 2 - Aerial photograph with open parking spaces in the northwestern end of the parking lot depicted in a circle. Approximately 1” = 300’ but not true to scale.
  - Page 3 - Two parking lot photographs, one evening, one rain
  - Page 4 - Two façade photographs, one of Red Vanilla, one of Five Guys with awnings.
  - Page 5 - Floor plan, number of seats will be reduced and consistent with prior testimony.
  - Page 6 - Property Tax Assessment Information for 2009 and Final Tax Bill for 2009. Final Tax Bill no longer relevant as it related to submission of the withdrawn 25% restaurant use request.
  - Page 7 - National Restaurant Association Pocket Fact book and Restaurant Industry Information
John McDonough of Pennoni Associates was present and remained under oath. The truck circulation plan was discussed. Vehicles circulate in a clockwise pattern around the rear of the building. All ingress and egress for deliveries and refuse collection are along the back area. Three tiers of buffering, the wall, evergreens (utility pole height) and the maintained mature woodland. Nearest residential property approximately 500 feet away and outside of the 200 ft. perimeter. Nearest residential property off of Peer Place is approximately 1,000 feet divided by a major highway. Open space was discussed. The development does not add any additional storm water or development to the site. Stating that the only change to the site with this application is with the tenancy and subsequent change in use.

Mr. Sweeney asked Mr. McDonough to provide a review of his February 12, 2010 Planning Report for the record. John McDonough provided a summary of the six page document. Indicating that 13 parking spaces are associated with each use with a differential of 26 parking spaces. Appendix A provides a breakdown of the 139 parking spaces, 604 required by ordinance, 465 presently exist. An existing condition for almost a decade. Spoke to the helicopter aerial photograph and “subject ring” observing over time in excess of 26 parking spaces available consistently at any one time. Photos taken the Saturday before Christmas and the Friday and Saturday prior to St. Patrick’s Day. For the record, the variance on page three indicating 25% allowance has been eliminated. Spoke to Medici four prong proof with special respect to parking, litter, noise, traffic and odors were unsubstantial and have all been addressed. No environmental impact and no visual change. Fiscal impact and not a net negative and significant investment to the community. Zone plan impact without substantial impairment. Impact from a planning standpoint being no more intense than for the permitted use in this zone. Zone does contemplate other types of uses in this location such as child care, pharmacy or fish market. Parking variance conclusion as a whole against the detriments with no substantial detriment with a fall back protection of the Title 39 for the police department as a safeguard.

No significant use for police and fire, private refuse pick ups and the like as associated with use. No significant use for storm water or development to the site. Stating that the only change to the site with this application is with the tenancy and subsequent change in use.

Nick Rosania, Township Engineer referred to his engineering report dated February 16, 2010 and noted that most of the items are primarily of a zoning nature, deferring to Bill Denzler. Satisfied with the testimony.

Bill Denzler, Township Planner inquired about the front façade improvements. John McDonough referred to the signage rendering (Exhibit A-9) showing channel lettering Five Guys and banner with Burgers and Fries beneath it. The sign would be back lit. Entered depiction of actual signage (Exhibit A-12) that would be used if the application is approved. Would include stone and red awnings which is consistent with the other restaurant uses on the site. Bill Denzler referenced the Economic Plan of the Master Plan as it relates to prohibition of fast food. Within the Economic Development section indicating that high value ratables must be attracted to the Route 10 area. As it relates to high traffic, high demand and minimal return on the tax contribution, John McDonough responded that interrelated with traffic is parking and surplus associated with use. No significant use for police and fire, private refuse pick ups and the like as it relates to the demand on municipal service. Mr. Sweeney inquired about the correlation of taxes on the capitalization of income. Mr. McDonough confirmed that this is the case. Spoke to land use for litter, noise and odors have been or will be addressed. Bill Denzler inquired about four other uses in the center that are similar in use (Panera, Maggie Moos, Starbucks and Qdoba) and inquired if there is any detriment of the uses. John McDonough responded no, operationally popular site but not unsafe from a planning standpoint.

Chr. Rodimer opened the hearing to the professionals.
Esq. cross-examined John McDonough regarding convenience stores being a permitted use as well as if other shopping centers having qualities such as double jug-handles, multiple entrances, egress and road frontage. Stating very specific land use and bulk standards exist and discussing improvement performance standards. Mr. Strand asked about the members of the governing body. Mr. Wiener interjected. Mr. Sweeney indicated that no members of the governing body had been addressed.

Chr. Rodimer reminded the public to ask only questions that have not been asked and answered. Navjot Singh (33 Mt. Pleasant Tpke.) inquired about the parking variance, numbers, existing and required. 26 space deficiency. Asking if there is a specific number where a deficiency such as snow that would change the planner’s opinion. John McDonough responded that the number and condition are adequate to support snow removal. Stating that the evidence clear to support the use. Mr. Singh mentioned a traffic accident. Mr. Wiener interjected and stated that testimony and comments would be deferred to the appropriate time. Mr. Singh inquired if the Medici law applied only to new development. Mr. McDonough responded that it also applies to occupancy. Mr. Singh went on to ask about changes. Mr. McDonough replied there will be change but given the condition of the site, there is not a level of substantial detriment (i.e. refuse, traffic, circulation, etc.)

Deborah Wilson (11 Cedargate Road) asked about the frequency of visits and timeframe (Holy Thursday and Good Friday) underutilized parking spots. Mr. McDonough testified to having passed the site hundreds of times and having no record of his site visits. Ms. Wilson sought a comparison of the Bombay refuse to Five Guys. Mr. McDonough did not wish to speculate. Sue Schmidt (12 Birch Run) residing 40’ above this site. Inquired about the receptacle regarding the location, pickups and if the unit will be bear proof. Mr. McDonough stated it was an operational question and did not know. Inquired about witnessing delivery trucks having to back out from the easterly side or to traffic being backed out onto Route 10. John McDonough responded no.

Barbara Horne (41 Old Mill Drive) inquired about $585K in tax revenue being generated as it relates to the proposed use. The Board Attorney clarified that the actual tax for the center was only a reference as it relates to productivity as per the Master Plan. Impact as a ratable but irrelevant as a basis for approval of the application. Dick Sweeney, Esq. added that the productivity of property is a proper consideration for centers such as this being taxed on the income. Barbara inquired about occupancy of the center. Mark Pottschmidt responded to the temporary tenant being six months. Vacancies since Bombay moved out and Red Vanilla since last fall. Vacancies and timeframes were further discussed. Halloween Store for one month and Red Vanilla. Ms. Horne inquired about number of Denville employees. Mr. Wiener interjected. Ms. Horne asked what the differentiating factor between Five Guys and others would be. Mr. McDonough replied price point and exterior aesthetics. Ms. Horne inquired about the signage. Chr. Rodimer indicated that this application was not for a signage variance and proposed signage would be compliant.

Matthew Maron (51 Mt. Pleasant Tpke) inquired if quantitative data regarding utilization of parking existed. John McDonough responded no.

Irene Wirth (3 Kathay Terrace) sought clarification on the square footage of the existing Red Vanilla and occupancy. Mark Pottschmidt responded that they were a short term tenant with a month to month tenancy. Richard Sweeney, Esq. objected that Red Vanilla’s tenancy is not relevant. Larry Wiener, Esq. concurred that the questioning was improper. Ms. Wirth inquired about original only having five year leases to eliminate high turnover. Larry Wiener stated that it was not a condition within the resolution. Inquired about why this applicant isn’t going to the Alexis Diner shopping center where parking is available instead of requesting a variance in this shopping center. Applicant’s attorney objected. Board Attorney suggested rephrasing the question. John McDonough responded to the suitability of the site and other sites being unknown. Ms. Wirth went on to argue the number of 5 remaining spaces along with standard turnover. Larry Wiener, Esq. interjected that the testimony was that of the traffic engineer and not that of the planner.

Erika Studint (3402 Scenic Court) inquired about a convenience store being part of a lifestyle center or a porn store. Mr. McDonough indicated that they could be. Asking if there a reason that the interior was not mentioned. Mr. McDonough indicated that there was no disparity on the interior, only that the exterior would match the center.

Sue Filauro (2 King Hill Court) referenced residential zoning, homes existing closer than 500 ft. to the center, the parking deficiency and what the reason was for no count of cars. Mr. McDonough responded that a car count was not required by NJDOT with this use for this applicant to occupy this space. Referenced a letter from the Denville police (Exhibit O-3) addressed to Mr. Pottschmidt. Mr. Pottschmidt was unfamiliar with the letter and timing of same but believed it may be what precipitated the subsequent changes in the original application at the time along with the implementation of the Title 39. Mr. Sweeney responded to the Police department has no concerns regarding the current application that the letter related to the previous application from 2006 where all concerns had been addressed. Ms. Filauro inquired about outdoor events in the
parking lot. Mr. McDonough responded no. Ms. Filauro referenced the number of variances to date and that the applicant was coming yet again for more privileges.

Chr. Rodimer recommended the public hearing after a brief break.

Richard Sweeney, Esq. responded to Ms. Filauro’s question before break and cited the 2006 resolutions Exhibit A-14 and Mr. Desario’s testimony regarding maintaining clear sight lines and cut vegetation. Also referenced by the police department that the board shall impose a condition of providing additional highway safety signs as practical.

Mary McGuiness (6 Smith Road) inquired about the selection of dates for site visits. Mark Pottschmidt responded that dates are picked when the parking lot is expected to be primarily full. Such as Saturdays before holidays - December 12, 2009. Entered a photograph entered as three photos. Exhibit O-4, 5 and 6 The first is an aerial photo taken on Saturday March 6 at 12:50 p.m. The other two are aerial photos taken from the Stanbery Development website. Mark Pottschmidt responded that all the photos were taken of all 6 shopping centers on the same day for marketing purposes and not for the purpose of this hearing. Inquired about environmental impact of the water and sewers on a restaurant versus a retail store. Mr. McDonough responded no comparison study was performed and that he is not an engineer.

Mr. McDonough responded to Exhibit O-4, 5 and 6 and spoke to occupied spaces in various bays 1, 2 and 3, citing the same condition on our helicopter view comparable to the McGuiness Exhibit. Testimony was repeated for the second photograph. For the third photograph from the Stanbery website there was no substantial difference but bays 1, 2 and 3 were not visible on the website photograph provided by Ms. McGuiness.

Chr. Rodimer inquired about other members of the public. Seeing none, closed the public portion.

Chr. Rodimer opened the hearing to the board members for questions of John McDonough.

Mbr. Murphy inquired about this applicant being located at the other end of the site and if the applicant would be opposed to having a condition of approval that the restaurants remain where they are currently situated within the mall. Mr. Sweeney responded that another application would require reappearing before the board, that the ordinance would provide protection and that he would need to speak with his client. Mbr. Murphy stated that he will require this information before voting on the application and went on to inquire about existing restaurants (Qdoba, Maggie Moo’s, Panera and Starbucks) having obtained variances. Mr. McDonough responded that they predate the ordinance. Mr. Sweeney indicated that they did not.

Mr. Passucci inquired about the photos taken at rainy/wet times and if site visits were performed during better weather. John McDonough responded to regular visits of the site in all weather. Mbr. Dankos agreed with Mbr. Murphy regarding the location staying the same and inquired about the remaining 1,500 sq. ft. Mr. Pottschmidt responded to having no prospective tenants at this time. Mbr. Dankos inquired if the public liked the mall and the general response was affirmative.

Mbr. Ryan had none.

Mbr. Korn inquired about the demographics of the centers’ customers. Mbr. Murphy added on to the demographic and familiarity with the Five Guys in strip malls and not in lifestyle centers. Chip Ohlsson responded to older malls, demographics and an area as a whole.

Mr. Sweeney requested a brief break indicating that he would like to speak with his client. Mbr. Sweeney, Mark Pottschmidt and Mbr. Murphy had further discussion regarding moving restaurants east to address that specific aspect of the case. Suggesting a condition of approval that future restrictions of restaurant use being no further east of Maggie Moo’s. The applicant was agreeable to a condition of approval regarding future restaurant relocation restrictions.

Chr. Rodimer opened the hearing to the public for questions only on the testimony of Chip Ohlsson.

Ken McGuiness (6 Smith Road) inquired about the exhaust system upgrade. Chip responded to the “S” baffle system. “S” (no mesh), ceramic bead conduit, exhaust hits walls and captured in the system and gravitates back into the restaurant. Mr. McGuiness inquired about the exhaust fan. Mr. Ohlsson responded that there is a big cap on the bowl that blows it up into the system and carried back into the system and does not go back up out of the roof. Mr. McGuiness believed that there was a blower on the roof. Mr. Ohlsson believes the piece he was referring to was not a blower. Mr. Ohlsson indicated that there would be no filters on the roof. Mr. McGuiness suggested a better system exists on the Captive Air website that includes filters on the roof. Mr. Ohlsson indicated that he was told this was the best system for their requirements. Mr. Sweeney, Esq. responded to legal obligations of the installation. Mr. Wiener, Esq. spoke to nuisance codes existing in the ordinance regarding noise and odor that would have to be met.

Navjot Singh (33 Mt. Pleasant Turnpike) inquired about it being a closed system. Mr. Ohlsson explained that the system is considered a closed system and that there is an elbow that expels clean air out. Mr. Singh indicated that his understanding of a closed system is that no air goes out and referenced particle collection efficiency and particle sizes.
Charles Botti (73 Mt. Pleasant Tpke) had no questions for Mr. Ohlsson.

Matt Maron (61 Mt. Pleasant Avenue) spoke to particle size but had no questions.

John Backus (42 Smith Road) inquired about firewalls. The Township Engineer responded that it would be determined by and in compliance with construction codes.

Mbr. Korn inquired of Mr. Ohlsson of the improved model and what prompted the use from what had been used in the past. Mr. Ohlsson indicated that it made sense to take advantage of the opportunity to improve the existing system if it’s more efficient. Chr. Rodimer commented on Qdoba having an older version of the captive air system and never having smelled any food or receiving any complaints.

Charles Botti (73 Mt. Pleasant Tpke) questioned the board attorney as to approvals running with the property or the proposed 2,500 sq. ft. Larry Wiener, Esq. responded that if approved, to having conditions of approval that would only apply to the 18% and would be defined within the resolution to specify that any change of use require future tenants to return to the board for approval.

Carol Spencer (86 Woodstone Road) commented that she wanted the opportunity to make comments tonight if unable to attend the carry date.

Richard Strand (19 Birch Run) stated he will be unable to attend the June 2, 2010 public hearing.

Chr. Rodimer announced that the public hearing for this application would be carried to June 2, 2010 without further notice.

Motion to Adjourn.

Denean Probasco, Board Secretary             Date Approved