TOWNSHIP OF DENVILLE  
BOARD OF ADJUSTMENT  
MINUTES

April 3, 2013

The Board of Adjustment of the Township of Denville held its regular scheduled meeting on Wednesday, April 3, 2013. The meeting was held in the Municipal Building, 1 St. Mary's Place and commenced at 7:00 P.M. Chairperson Murphy presided.

Secretary Probasco read NOTICE OF PUBLIC MEETING.

ROLL CALL: Present:  John Murphy, Roger Spiess, Sally Dankos, James Rodimer, Frank Passucci, Arthur Korn, Susan Richter
Absent: Sean Ryan, Tom Dolan
Prof. Present: Larry Weiner, Esq., Jason Kasler, AICP, PP

MINUTES:
Motion to adopt the minutes dated March 20, 2013 as submitted, was made by Mbr. Rodimer, seconded by Mbr. Dankos and unanimously approved by all Members present and able to vote.

PURCHASING:
Motion to pay vouchers submitted by Hatch Mott Macdonald (dated March 1, 2013 and March 4, 2013) subject to the availability of funds, was made by Mbr. Korn, seconded by Mbr. Richter and unanimously approved by all Members present and able to vote.

Motion to pay vouchers submitted by Larry I. Weiner, (dated March 13, 2013 and March 28, 2013) subject to the availability of funds, was made by Mbr. Korn, seconded by Mbr. Richter and unanimously approved by all Members present and able to vote.

RESOLUTIONS

BA 13-01: Laurie Moran
19 Pocono Road
Block 50001, Lots 3.01-3.33

Applicant is proposing to locate and operate a food kiosk within the lobby area of the existing building requiring "D" use variance relief for food sales within the district.

A motion was made to adopt the resolution by Mbr. Korn, seconded by Mbr. Richter and unanimously approved by all members able to vote.
Roll Call:
Ayes – Korn, Richter, Rodimer, Dankos, Murphy

PUBLIC HEARINGS

BA/AI 13-02: Becrett, LLC
28 Bloomfield Avenue
Block 50305, Lot 207

Applicant is seeking Appeal of Decision Denying Business License Application of a prospective tenant and Interpretation of Ordinance Sections 19-6.1401 and 19-6.1402 regarding permitted and prohibited uses on the first floor (street level) of the B1 Downtown Business District.

Michael Rowland, Esq. represented Becrett, LLC. Stating that originally the appeal for the business license was based upon three factors but that a fourth had come up. Stated that there would be two witnesses. The first witness, a representative from R3L Math Club, the potential tenant at 28 Bloomfield Avenue. Second witness will be Mr. Keith Beccia, Managing Member of Becrett, LLC.

Larry I. Weiner referenced that both Jason Kasler and Sal Poli was present this evening. Stating that Mr. Poli was leaving for vacation and requested that his testimony be taken out of sequence due to his limited availability.
Sai Poli, Construction Official and Zoning Officer was present and confirmed his position as Zoning Officer since January of 2013. Denied the license based on the zone on the first floor not being a retail use, service use, consistency that a prior tenant was sent to the board for "D" use variance for an insurance agency. Sai Poli confirmed that the business license was denied for a tutoring school. Mr. Jason Kasler's report dated March 28, 2013 was referenced. Michael Rowland, Esq. inquired with Sai Poli about the reasons for denying the business license. Not professional use or service type on the first floor. Stating that the applicant's business was more of a service office and not a service business and should be on the second floor.

Legal counsel for the applicant inquired if the Zoning Officer was aware that other uses performing the same tutoring service are located in the downtown business zone. Mr. Poli confirmed that he was aware of Jackson Tutoring Service and The Math Wizard. Mr. Rowland stated that the Math Wizard was located on Broadway in a first floor location and Jackson Tutoring was on Diamond Spring Road. Mr. Poli confirmed that he signed the business certificate in June 2012 but that Mr. Denzler had signed the application. Mr. Rowland asked if there was a distinction and inquired if it was Mr. Poli's professional opinion that a business license should have been granted. Mr. Poli stated that as Assistant Zoning Officer, he was a subordinate to Mr. Denzler and that he did not believe it should have been issued. He complied with what the Zoning Officer directed at that time. Stating he discussed the matter with Mr. Denzler at the time but did not object or inform Mr. Denzler of his opinion that a business license should not be issued.

Mr. Rowland inquired about the Jackson Tutoring facility. Mr. Poli acknowledged that he was not aware of the business and advised that a violation letter was issued when he became aware at a March 3, 2013 meeting. The meeting was between Mr. Beccia, Mayor, Township Planner and Business Administrator. Mr. Rowland inquired if Mr. Beccia was given a reason other than a business office on the first floor. Stating that it was denied for being an institutional use of a school not allowed on the first floor. Mr. Poli did not recall that this was said during the meeting and referenced his denial letter. The zoning denial of March 7, 2013 was for being contrary to the B-1 Business District, the ordinance and requiring a use variance to obtain a business license. Mr. Rowland also referenced February 28th OPRA requests on February 28, 2013 regarding Math Wizard and Jackson Tutoring.

Mr. Rowland stated that Mr. Beccia stated he had been advised by the prior planner in December of 2012 that only a modification of the existing use variance would be required in lieu of applying for a use variance. Mr. Poli confirmed that he was aware of this situation. Mr. Rowland referenced a February 23, 2013 request for modification to the existing variance and inquired if Mr. Poli was aware. Mr. Poli stated he was not aware of the correspondence to the board secretary. Mr. Weiner asked if Mr. Rowland was referring to a formal application. Mr. Rowland stated that it was not a formal application. Mr. Rowland referenced and distributed a February 25, 2013 letter pointing out that no response was ever received. Chr. Murphy inquired about the use variance being used by the Short Family Agency. Mr. Rowland responded that the use variance was issued for One Right. The Short Family has vacated the space in One Right and has relocated to One Left.

Chr. Murphy opened to the board members for questions.

Mbr. Korn asked Mr. Poli should see letters addressed to the board secretary. Mr. Poli stated that he does not need to receive letter addressed to the board. Only if the board makes a determination. Mbr. Korn stated he had not seen the letter. Mbr. Richter had no questions at this time.

Mbr. Passucci stated he also was not aware of the letter. Mbr. Rodimer asked about the similarities or different characteristics of the businesses and property between Math Wizard and 26 Bloomfield Avenue. Mr. Poli responded that the buildings are similar. Mbr. Rodimer stated that the board members were pro business and inquired why the applicant didn't apply for a use variance. Mr. Rowland was prepared to respond. Chr. Murphy asked that it be addressed later in the testimony so that Mr. Poli could finish. Larry Weiner, Esq. concurred and added that he would also like to comment. Mbr. Dankos had no questions at this time.

Chr. Murphy asked Mr. Poli about the status of the other two businesses. Mr. Poli responded that violations were issued to both Jackson Tutoring and Math Wizard. Jackson Tutoring has responded and they have been advised to make a board application or change their business. Math Wizard has also responded. Chr. Murphy had no further questions and thanked Mr. Poli for his time. Michael Rowland, Esq. also provided his gratitude for Mr. Poli's testimony would assist his client. Sai Poli was excused after it was determined that there were no further questions.

Larry Weiner, Esq. referenced that in the Cox book (Chapter 2832, page 669) a modification of a variance requiring public notice requires public notice again. Mbr. Korn referenced the board's By-Laws (2:9-2) as it relates to a modification of a condition being made by a petition in the form of a letter. Chr. Murphy and Larry Weiner responded that the Cox book supersedes the By-Laws.

Mr. Rowland stated that the application doesn't refer to one side of the building or another but to the entire first floor. Additionally stating that only the condition referring to the insurance agency
would have been modified in the resolution. Further stating that the applicant sought guidance and responded to the guidance they had received. Chr. Murphy stated that an application for a use variance before the board may have gone very smoothly. Michael Rowland, Esq. stated that they applicant didn’t apply for a use variance based upon it being cost prohibitive and time consuming for an applicant. Mr. Weiner understood and commented that this is something that should be voiced to the municipality.

Kimberly Logsdon, managing member of R3L Math Club Denville, LLC (762 Route 15 South, Jefferson Square, Suite 2D, Lake Hopatcong, NJ) was present and sworn under oath. R3L Math Club is a larger corporation of the Mathnasium franchise. Mathnasium, a math learning center currently has an operating facility in Mendham since December. They work with students from grades K through 10 to improve their math skills during a six to twelve month period. This is done using worksheets after having completed an assessment to determine their level. All tutoring occurs onsite. Other onsite training includes private tutoring, SAT and summer programs. Michael Rowland inquired if a variance was required to open the center in downtown Mendham. Ms. Logsdon stated they went to the Planning Board and received approval the same night. Larry Weiner inquired about a typical day. Ms. Logsdon stated they envision four instructors with up to eighteen students with primary hours outside of regular school hours. They will be open a minimum of twenty hours a week. Typically 3 - 8 pm.

Chr. Murphy opened to the board professionals for questions.

Jason Kasler, PP had none at this time.

Chr. Murphy opened to the board members for questions.
Mbr. Rodimer had none.
Mrs. Dankos, Korn and Richter had no questions.
Mr. Passucci inquired about the assessment tools used. Ms. Logsdon stated it is a five page exam depending on the grade level. The proprietary learning program is developed specific to each student. With a separate binder for each client. The facility requests the permission of the parent to advise the school that they are working with a student and can be contacted. Three to one is the ideal ratio of instructor to student but they can go up to four to one. Mr. Logsdon was was excused as there were no further questions.

Keith Beccia (3 Quail Run, Boonton Township) was present and sworn under oath. Mr. Beccia stated he was a retired CEO, Real Estate Investor and Manager of commercial rental properties. Property owner of approximately 30-40,000 sq. ft. (4-5 buildings) in Denville. With combined interests of approximately 2.6M sq. ft. of properties in NJ and out of state.

Spoke about 26 Bloomfield Avenue property and the uniqueness of the property being elevated, was built approximately 10 years ago. Topography of the land has the first floor being almost the second floor due to the pitch. Even an elevator is required for the nine steps to the first floor level which is approximately ten feet above the ground.

Mr. Beccia explained that he has a long term tenant on the second floor but has had many tenants over the past years. Making it difficult for retail use on the first floor. Mr. Rowland referenced the resolutions attached to the application. Mr. Beccia referenced the move of the Short Family Agency’s relocation from One Right to One Left and the vacated space was for proposed tenant of the Mathnasium. Also referenced meetings with Bill Denzier in December 2012. Stating that when administrative change, the rules and interpretations seem to change. Stated that he advised the Mayor and meeting attendees that the ordinance needs to be changed. Mr. Beccia testified that the first time he heard that the math center would be an institutional use or a school was the day before. Stating it was never mentioned at the meeting with administration. Exhibit A-1A through A-1J letters correspondence packet detail including print outs from the Math Wizard and Jackson Tutoring Service webpages. In Mr. Beccia’s observation of the webpages, the businesses are similar to the proposed tenant R3L Math Club. Referenced the planner’s report was the first time they were told it’s an institutional use instead of a professional. Chr. Murphy questioned whether the planning report actually stated it was an institutional use, stating that it’s merely citing the section of the ordinance. Larry Weiner, Esq. stated that the applicant could easily have been denied based upon the fact that it’s not an insurance company. Michael Rowland, Esq. disagreed. Further stating that the math center is not a school, institutional or professional use. Mr. Weiner stated that it is on the first floor. Mr. Rowland stated that it is a permitted use on the first floor as a retail or business service and asked what Mr. Kasler’s opinion was. Mr. Beccia stated that it is a service use on the first floor but not street level. Chr. Murphy sympathized with the applicant for misunderstandings and the townships change of planners. However, he pointed out that Mr. Beccia’s opinion was as a landlord and not that of a certified planner. Mr. Beccia confirmed.

At the request of his client, Michael Rowland, Esq. referenced the prior subpoena request. Larry Weiner, Esq. deferred the discussion of the subpoena matter to later in the meeting.

Chr. Murphy opened to the board professionals.

Jason Kasler, PP stated that the date of the March 29, 2013 letter was incorrect and was actually April 1, 2013. Stating for the record, a planner does not deny applications but provides a
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professional opinion to the board as to the interpretation of Mr. Poli and the reasoning behind it. Explaining that work cannot be performed until an application exists. MLUL doesn’t allow one use to be swapped with another, requiring a decision by the board. Mr. Kasler substantiated that institutional use was not mentioned at the March 5th meeting. The township planner went on to describe that Retail Sales are cut and dry. Retail Services are somewhat fuzzier with items being “altered” or “fixed” such as a vacuum repair, tailor or framing. Mr. Kasler went on to state that professional offices are clear but service offices are not as clear. While the tenant may not fit the traditional definition of a school, schools are institutional uses. The board can determine it is a service use, it would not be permitted on the first floor. Possibly an expansion of a non-conforming use.

Chr. Murphy opened to the board members.

Mbr. Rodimer commented that it was a fine line and would support expanding the use.
Mbr. Dankos agreed with Mbr. Rodimer and sympathized with Mr. Beccia.
Mbr. Korn referenced having been under the impression that a modification was possible, commented on having it in writing and apologized for the confusion of this application.
Mbr. Richter had no further questions.
Mbr. Passucci had no questions.

Chr. Murphy commented to Mr. Beccia and first and foremost apologized to the change in personnel and their different interpretations. Stating that the board has a duty to follow the rules. Referencing the prior resolution and Mr. Beccia’s cherry picking. Commenting that the matter could have easily been resolved by a use application.

Mr. Weiner’s only comment was that should a variance be required in the future, the resolution be modified more expansively to avoid this from happening.

Michael Rowland, Esq. stated this is a ‘service business’ similar to a nail salon. Disagreeing that the application was cherry picked. Asking that the decision of the board tonight determines whether the type of business is that the business is permitted on the first floor. Stating that proffer of proof Mr. Denzler would confirm to modifications of resolutions have taken place. Mr. Weiner stated that he doesn’t recall this having been the place. Confirming that the board make a decision that it’s found approvable. Mr. Rowland referenced his previous request for subpoenas. Mr. Rowland requested that a consensus of the board be obtained. Chr. Murphy agreed that a non-binding poll of the board take place.

Mr. Kasler stated that he cannot provide advice to the applicant as he is not their planner. A service retail could be a slippery slope by opening the first floor retail when that may not be what the ordinance intended. Instructional hours for these types of uses are not typical with retail. Being more inclined to a service office versus retail. Confirming that it could be a ‘niche’ for a particular use. Mr. Rowland asked if Mr. Kasler found this to be a professional office. Mr. Kasler did not believe it to be a professional office. Whether it’s a first floor or second floor use would not apply. Mr. Kasler confirmed that Mr. Poli verbally denied this for being a professional office this evening but did not recall this was said at the meeting with the mayor. Mr. Rowland stated that the letter of denial was not clear as to the reason for denial. Stating that it’s difficult to appeal a decision without clear reason for denial and that the denial states the whole section of the ordinance. Mr. Kasler stated that Mr. Poli stated it was denied because it does not comport.

Chr. Murphy opened to the board members.

Chr. Murphy agreed with the township planner that the service would be a slippery slope. Stating that board would most likely approve the use variance. Summing it up that the board is in a catch 22 with two other businesses operating currently.
Mbr. Rodimer commented that decisions are made on a case by case basis. Agreeing that the location is a difficult one and a good use for the area.
Mbr. Dankos commented on the unfortunate situation and inquired if books are involved. Mr. Beccia stated there were books but it’s not a standard retail business. Confirming she was leaning to overturning the decision of Mr. Poli.

Mbr. Korn confirmed that he agreed in overturning the decision of Mr. Poli, that this is a service niche business.
Mbr. Richter agreed to give them the license.
Mbr. Passucci concurred with the board members.

Michael Rowland, Esq. stated that he would waive the need for subpoenas. Asking that the board direct Mr. Poli issue a business license for a service type business with some type of retail.

A motion to approve this application to overturn the zoning officer’s decision was made by Mbr. Korn, seconded by Mbr. Dankos, and unanimously approved by a majority of members eligible to vote.

Roll Call: Ayes – Korn, Dankos, Rodimer, Passucci, Richter Nays - Murphy

Motion to Adjourn.