



9. At Council's October 14, 2019 meeting, Applicant described the operation of its Club in Washington, PA and characterized its business model as that of a for-profit private club with secondary retail of cigars. Applicant Ex. 2.

10. Specifically, Mark Zini ("Mr. Zini"), a representative of Applicant, described the Washington, PA operation and facility as a private, members-only cigar bar club likened to a country club only without a golf course. Applicant Ex. 2. More specifically, at the Washington, PA facility:

- (a) Only dues paying club members can purchase cigars. Id.
- (b) Members can work, socialize and entertain friends and professional acquaintances at the facility on a 24 hour, 7 day a week basis. Id.
- (c) Members could bring food and alcohol into the facility; alternatively, the club's concierge services are available for members to coordinate events and entertainment. Id.

11. The Borough Planning Commission ("Commission") did not recommend adoption of Applicant's proposed text amendment, and at its October 14, 2019 meeting Borough Council ("Council") declined to act on Club Leaf and Bean's request to amend the Ordinance. Tr. 11-12; Applicant Ex. 2.

12. Applicant did not appeal from or challenge the rejection of its proposed text amendment.

13. On or about November 15, 2019, Applicant filed a Conditional Use Application ("Application") seeking approval to operate a Retail Business Establishment at the Property.

14. The Ordinance defines "Retail Business Establishment" as, "any business establishment defined in this Article that sells or rents commodities and/or services on the premises directly to the general public, available for immediate purchase or removal. But not including the manufacturing or processing of any products.<sup>3</sup>" Applicant Ex. 3.

15. "Retail Business Establishments" are permitted in the PEDD as a conditional use, subject to certain specific conditions spelled out in the Ordinance.

16. "General public" is not a defined term under the Ordinance.

---

<sup>3</sup> The differentiation between Major and Minor Retail Business Establishments is not material to the instant matter.

17. On January 6, 2020, consistent with applicable legal advertisement and notice requirements, the Applicant appeared before the Commission in order to obtain the Commission's recommendation on the Application.

18. After consideration of the Applicant's presentation, the Commission recommended to Council that the Application be denied on the basis that the principal use of the Property would be as a private club rather than a Retail Business Establishment based upon the total hours of general public operation. Borough Exhibit 2; Tr. 14.

19. A stenographic transcript of the Commission's meeting was made part of the record and incorporated into the record. Tr. 6.

20. On February 10, 2020, a duly advertised public hearing on the Application was convened before Council.

21. All witnesses were sworn prior to offering testimonial and documentary evidence; a stenographic transcript of the proceeding was made.

22. The Applicant appeared by and through its legal counsel, Kenneth Foltz, who offered documentary evidence, his personal testimony<sup>4</sup> and legal arguments.

23. As a preliminary matter, Attorney Foltz concurred that all procedural requirements under the Municipalities Planning Code ("MPC") for consideration of the Application were met by the Borough. Tr. 7.

24. Attorney Foltz raised concerns regarding alleged animus and partiality by Council members against his client's project; this allegation was dispelled through a voir dire of each Council member. Tr. 18; 52-53.

25. Attorney Foltz testified that Applicant would operate at the Property as follows:  
[A] retail shop selling tobacco which would be consistent with fine cigars to choose from, tobacco related products, lighters, ashtrays, cutters, and humidors, as well as ancillary products such as apparel, artwork, and business related items at the premises to the

---

<sup>4</sup> Attorney Foltz offered his personal testimony in support of the Application. No additional witnesses were called at the hearing. Tr. 53. Although Mr. Foltz, like all officers of the court, is bound by ethical rules to address tribunals with candor, it is difficult in this matter to ascribe a specific credibility without any record evidence relating to *the* basis of *his* knowledge.

general public. The cigars for sale will be housed in a secure humidor. The remaining products will be displayed throughout the entire facility. Tr. 8-9.

26. According to Attorney Foltz, the general public would not have ready access to the proposed retail facility; instead the general public could enter the facility only during limited hours and would need to be buzzed into the facility by an attendant who would facilitate any purchases. Tr. 14, 22.

27. By contrast, persons described by Attorney Foltz as “members” would be able to enter the facility twenty-four (24) hours a day, seven (7) days a week, and could purchase items using a remote system and, in particular, Attorney Foltz testified that: Tr. 15.

(a) Only “members” would be granted access to “a secure lounge area where [they] may smoke products purchased on the Premises and may be used as a workspace or for general business networking or socializing.” Id.

(b) Only “members” would have free and unsupervised access to a secure area where higher-end cigars and other exclusive products would be available.

(c) In contrast, “non-members” would only be permitted into the secure area to view the higher-end cigars and other exclusive products located there, subject to club personnel supervision. Tr. 15, 56-57

(d) In contrast, “non-members” who purchase tobacco-products on-site are only allowed to use a general public smoking lounge to enjoy their purchases. Tr. 15.

(e) Only “members” could use the facility as a workspace and meeting space. PC Tr. 15-16.

(f) Only “members” or registered guests could attend events in the facility based on music, sports or other entertainment. PC Tr. 19

28. Attorney Foltz’ testimony at the public hearing was consistent with statements made by Mr. Zini to the Planning Commission that “A lot of our business...is corporate entertainment, corporate meetings...” PC Tr. 19.

29. Attorney Foltz also testified that Applicant hoped to, “attract business members that want to come and become members, also to bring their guests, also for corporate events which are held at this facility, political events.” Id. at 19.

30. There is no evidence of record that “membership” could be obtained through minimum purchases of cigars or other items.

31. Neither the Application nor any other writing by the Applicant describes access by non-members to the Property.

32. However, Attorney Foltz orally amended the Application during the public hearing to express the Applicant’s intention to permit non-members limited access to the premises during supervised times, as described above. PC Tr. 7-8; Tr. 15.

33. Attorney Foltz noted to Council that the Applicant “believes that they would have somewhere between four to five, maybe four and a half, full-time equivalents of staff” that would work through the week. Tr. 54.

34. Attorney Foltz testified the staff would be present “not just when the general public will be open and non-members could come into the facility, but also throughout the entire week...” Id.

35. At the Commission meeting where the Application was considered, Attorney Foltz explained that the general public retail hours would be “a limited time period, several days a week for windows” depending on demand. PC Tr. 13.

36. At the public hearing before Council, Attorney Foltz stated that non-member retail hours would be “one day a week where Monday through Friday that there would be hours, and then most likely Saturday there would be hours.” Tr. 58.

37. At the Commission meeting where the Application was considered, the Applicant was unsure of how the size of the general public lounge would compare to the secure, “members only” area as the design of the facility was not complete. PC Tr. 11-12. No evidence was presented at the public hearing before Council regarding this point.

38. Although not noted in the Application, Attorney Foltz answered public inquiries regarding the use of alcohol at the facility. Tr. 32-35. Specifically:

(a) Attorney Foltz indicated that “the alcohol (would be consumed) at the facility, it’s a ...BYOB facility.” Tr. 33.

(b) As described by Attorney Foltz, consumption of alcohol by “members” could occur when staff is not present so drinking during those times would not be monitored. Tr. 33.

(c) Attorney Foltz agreed that “members” would be able to drink without limitation on the premises. Id.

(d) In contrast, “non-members” are not permitted to bring alcohol into the facility. PC Tr. 15.

39. Applicant argued that the membership component of its operation constitutes “general public” access in the same manner as “Costco and Sam’s Club.” Borough Ex. 1; Tr. 16.

40. There was no evidence presented that the membership component of Applicant’s operation provides discounts to members on retail items similar to a warehouse retailer like Costco or Sam’s Club.

41. Rather, Applicant’s membership component was described by Attorney Foltz as giving “members” a significantly expanded menu of amenities including event concierge service, unlimited facility usage, entertainment and an alcohol locker and BYOB rights; this description is substantially similar to the “private club” described by Applicant in October 2019 when it sought to amend the Ordinance. Applicant Ex. 2.

42. As described by Attorney Foltz, to gain membership privileges at Applicant’s facility a person must pass a screening process and pay a monthly membership fee.

43. Attorney Foltz testified that Club Leaf and Bean memberships would cost \$200.00 per month. Tr. 59.

44. Applicants’ “members” are screened to ensure that the Club “knows who their members are, and have that safety and security for who they are letting into their business.” Tr. 15-16.

45. “Members” are also screened to ensure their financial ability to pay the monthly membership fees. PC Tr. 10-11.

46. The Ordinance addresses both primary uses as well as accessory uses.

47. Applicant did not make any specific arguments regarding permitted accessory uses in the Application or at the public hearing.

48. Because the Property is part of an existing shopping complex, Attorney Foltz did not offer detailed testimony going to the the specific conditions set out in Section 1343 of the Ordinance for Retail Business Establishments in the PEDD.

49. Council finds that detailed testimony on the criteria in Sections 1343 (B) through (G), inclusive, of the Ordinance is not necessary here; the Property is within a previously approved existing commercial development that was developed to meet all Borough requirements.

50. A letter of support written by the owner of the Property was offered into evidence which attested that Applicant's operation would be compatible with those of other tenants in the development. Tr. 19-21.

51. Attorney Foltz opined that the impacts of Applicant's proposed use would be less than the restaurant previously operating at the Property. Tr. 20-21.

52. Attorney Foltz agreed though that Applicant's hours of operation (presumably referring to its twenty-four hour, seven day per week model) were different from previous uses of the Property. Tr. 22.

53. Applicant committed to following all state, federal, and local ordinances and laws, including the Pennsylvania Clean Air Act. Tr. 23.

54. Resident Jean Spadacene offered testimony in opposition to the Application. Tr. 25-27.

55. Resident Al Servello also offered testimony in opposition to the proposed use based upon his 31 years of experience in law enforcement. Tr. 29-30.

56. Specifically, Mr. Servello testified that public safety resources are challenged in late night or early morning hours. Tr. 30.

57. Resident Gary Koch testified in opposition to the proposed use and presented a survey of residents indicating a lack of support for a cigar bar. Id. at 31; Objector Ex. 1.

58. Mr. Koch also testified that the unlimited, unmonitored alcohol usage was deeply troubling to him as it could reasonably lead to loss of life. Tr. 33-34.

59. In response, Mr. Foltz noted that the Applicant's Washington County facility has never had a police call and that no member or guest has had a DUI. Tr. 38.

60. Ms. Bruns, also a resident, testified in opposition to the proposal. Tr. 34-37.

61. She noted that residential areas are located within mere blocks of the Property and that neighborhood streets are often used as thoroughfares between the Property's location and northern Allegheny County. Tr. 35.

62. She testified that the hours of operation and related traffic would adversely affect her neighborhood. Tr. 35.

63. Resident Patricia Zupancic testified in opposition to the Application noting that the surrounding area is primarily residential and that the proposed use is not compatible. Tr. 37-41.

64. She explained that a ball field, community pool and children's playground are only a block or two away from the Property. Tr. 38.

65. Resident Sharon Stiller testified that this establishment would result in cut-through traffic in residential neighborhoods and that this use could increase the incidence of littering with cigar butts. Tr. 43.

66. Ms. Stiller expressed concerns about the alcohol policy without any licenses as in the case of restaurants. Tr. 44.

67. Ms. Stiller is concerned about disruptive behavior of guests that potentially increases the need for law enforcement intervention. Tr. 45.

68. Resident Dave Baird testified in opposition to the proposed use. Tr. 49-50,

69. He explained that as a former law enforcement officer, his experience was that establishments that are open late at night always draw police attention regardless of whether there are police calls. Tr. 50.

70. A letter received by Resident Carrie Weinreich was read into the record, and she registered concerns with unregulated alcohol, the proximity to a school bus stop on Castle Creek, use of the balcony accessed from the Property's interior space, the proximity of the adjacent Bruster's ice cream shop and its outdoor eating areas and the increased burden of the police department. Tr. 50-52.

71. Council considered all testimony and documentary evidence offered in this matter and assigned it an appropriate weight

### **Conclusions of Law**

1. The Ordinance permits Retail Business Establishments in the PEDD as conditional uses.

2. By definition, a “Retail Business Establishment” is one “that sells or rents commodities and/or services on the premises directly to the general public, available for immediate purchase and removal, but not including the manufacturing or processing of any products.” Ordinance §202, Definitions.

3. Certain aspects of Applicant’s proposal clearly meet the Ordinance’s definition of a “Retail Business Establishment” but Applicant has not established that its proposed use, in its entirety, is a “Retail Business Establishment.”

4. The sale of cigars and related items to the general public is consistent with a “Retail Business Establishment” as defined in the Ordinance and if Applicant proposed to do only that, then its Application would likely be approved outright. However, other aspects of the Application are clearly outside of the Ordinance’s definition of a “Retail Business Establishment” and standing alone, would not be permitted under the Ordinance absent a use variance.

5. In reaching this conclusion, Council is following standard rules of statutory construction, including: “Words and phrases shall be construed ... according to their common and approved usage...” See 1 Pa. C.S.A. §1903(a).

6. Standard dictionary definitions of the phrase “general public” include, “all the people of an area” (Merriam Webster) and “ordinary people, especially all people who are not members of a particular organization or who do not have any special type of knowledge” (Cambridge English Dictionary).

7. As described by Attorney Foltz and Mr. Zini in the testimony before the Commission and at the public hearing, Applicant will not be operating a “Retail Business Establishment” during all hours when Applicant’s business will be in operation.

8. A fair summary of the testimony is that there will be many hours where Applicant’s business is not open to “all people”, but instead open only to members of Applicant’s “Club.”<sup>5</sup>

---

<sup>5</sup> Applicant argued that its “Club” is similar to other retail establishments, such as Costco or Sam’s Club that operate on a “membership” basis. Council is not persuaded by this analogy. “Membership” at those establishments does not require a background check, or payment of significant monthly fees. Moreover, all shoppers/members at those other retail establishments receive the same benefits and amenities. Here, Applicant’s intent is to differentiate “members” from the general public by offering “members” greater access to the facility, the ability to purchase items without staff present, etc.

9. Because some aspects of Applicant's proposed use are permitted, Council is reluctant to fully deny the Application, instead, Council believes it better to impose conditions addressing aspects of Applicant's proposed use that are not clearly within the scope of a "Retail Business Establishment."

10. Applicant presented no evidence regarding whether other "Retail Business Establishments" allow or permit their customers to bring alcoholic beverages into those establishments when they are open for business.

11. Council believes it unlikely that "Retail Business Establishments" would ordinarily allow customers to bring their own alcoholic beverages into those establishments when they are open for business, particularly late at night or without supervision.

12. Applicant presented no evidence regarding whether "Retail Business Establishments" generally allow or permit customers to enter their facilities and purchase items when employees of the establishment are not present.

13. Council believes it unlikely that "Retail Business Establishments" generally allow or permit customers to enter their facilities and purchase items when employees of the establishment are absent.

14. Council has the power to impose conditions on the grant of a conditional use where those are reasonably related to a valid public interest. Pennsylvania Municipalities Planning Code Section 913.2(a), 53 P.S. §10913.2(a).

15. Council finds credible the testimony of law enforcement officers that establishments open during late night or early morning hours, especially those where alcohol is present, require additional police concentration and effort and may create threats to public safety.

16. Council finds there is substantial evidence of record to conclude that permitting alcoholic beverages to be consumed at all hours and without responsible persons present poses a risk to the public health, safety and welfare not ordinarily associated with "Retail Business Establishments."

17. It has long been the law of Pennsylvania that where adverse affects on the public health, safety or welfare from the grant of a conditional use can be ameliorated by appropriate

conditions, then such conditions should be imposed instead of denying the conditional use outright. See, *Good Fellowship Ambulance Club's Appeal*, 406 Pa. 465, 178 A. 2d 578 (1962), *Lower Merion Township v. Enokay, Inc.*, 427 Pa. 128, 233 A.2d 883 (1967), and generally, Ryan, *Pennsylvania Zoning Law and Practice* §5.2.7

18. Accordingly, Council enters the following Decision with the conditions enumerated therein.

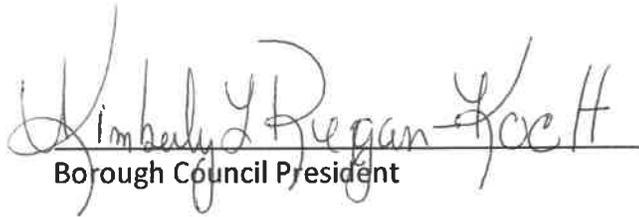


and must, as determined by the Borough's code enforcement officer make up a clearly incidental and subordinate part of Applicant's facility.

8. No alcoholic beverages shall be brought onto or consumed at the establishment unless an employee is present.

9. The retail portion of this establishment shall stay in place with its approved hours and conditions for as long as the establishment is in business at this location.

SEVEN FIELDS BOROUGH COUNCIL

  
Borough Council President