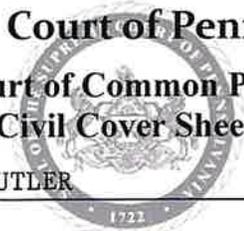


Supreme Court of Pennsylvania

Court of Common Pleas Civil Cover Sheet

BUTLER

County



For Prothonotary Use Only:

Docket No:

TRAD. STAMP

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

Commencement of Action:

- Complaint
- Writ of Summons
- Petition
- Transfer from Another Jurisdiction
- Declaration of Taking

Lead Plaintiff's Name:
Club Leaf and Bean Cranberry, LLC

Lead Defendant's Name:
Borough of Seven Fields, Pennsylvania

Are money damages requested? Yes No

Dollar Amount Requested: within arbitration limits
(check one) outside arbitration limits

Is this a *Class Action Suit*? Yes No

Is this an *MDJ Appeal*? Yes No

Name of Plaintiff/Appellant's Attorney: Kenneth Foltz and Julia Wu

Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)

SECTION B

Nature of the Case: Place an "X" to the left of the ONE case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

TORT (do not include Mass Tort)

- Intentional
- Malicious Prosecution
- Motor Vehicle
- Nuisance
- Premises Liability
- Product Liability (does not include mass tort)
- Slander/Libel/ Defamation
- Other:

CONTRACT (do not include Judgments)

- Buyer Plaintiff
- Debt Collection: Credit Card
- Debt Collection: Other
- Employment Dispute: Discrimination
- Employment Dispute: Other
- Other:

CIVIL APPEALS

- Administrative Agencies
- Board of Assessment
- Board of Elections
- Dept. of Transportation
- Statutory Appeal: Other
- Zoning Board
- Other: Council (Conditional Use)

MASS TORT

- Asbestos
- Tobacco
- Toxic Tort - DES
- Toxic Tort - Implant
- Toxic Waste
- Other:

REAL PROPERTY

- Ejectment
- Eminent Domain/Condemnation
- Ground Rent
- Landlord/Tenant Dispute
- Mortgage Foreclosure: Residential
- Mortgage Foreclosure: Commercial
- Partition
- Quiet Title
- Other:

MISCELLANEOUS

- Common Law/Statutory Arbitration
- Declaratory Judgment
- Mandamus
- Non-Domestic Relations Restraining Order
- Quo Warranto
- Replevin
- Other:

PROFESSIONAL LIABILITY

- Dental
- Legal
- Medical
- Other Professional:

NOTICE

Pennsylvania Rule of Civil Procedure 205.5. (Cover Sheet) provides, in part:

Rule 205.5. Cover Sheet

(a)(1) This rule shall apply to all actions governed by the rules of civil procedure except the following:

- (i) actions pursuant to the Protection from Abuse Act, Rules 1901 et seq.
- (ii) actions for support, Rules 1910.1 et seq.
- (iii) actions for custody, partial custody and visitation of minor children, Rules 1915.1 et seq.
- (iv) actions for divorce or annulment of marriage, Rules 1920.1 et seq.
- (v) actions in domestic relations generally, including paternity actions, Rules 1930.1 et seq.
- (vi) voluntary mediation in custody actions, Rules 1940.1 et seq.

(2) At the commencement of any action, the party initiating the action shall complete the cover sheet set forth in subdivision (e) and file it with the prothonotary.

(b) The prothonotary shall not accept a filing commencing an action without a completed cover sheet.

(c) The prothonotary shall assist a party appearing pro se in the completion of the form.

(d) A judicial district which has implemented an electronic filing system pursuant to Rule 205.4 and has promulgated those procedures pursuant to Rule 239.9 shall be exempt from the provisions of this rule.

(e) The Court Administrator of Pennsylvania, in conjunction with the Civil Procedural Rules Committee, shall design and publish the cover sheet. The latest version of the form shall be published on the website of the Administrative Office of Pennsylvania Courts at www.pacourts.us.

In the Court of Common Pleas of Butler County
Commonwealth of Pennsylvania

Club Leaf and Bean Cranberry, LLC

Civil Division

Versus

The Borough of Seven Fields, Pennsylvania

No

I. Notice

You are hereby notified that the attached matter will be: Filed on May 11 20 20.

Presented to the Unassigned Motion Judge Presented to Assigned Judge _____
on _____ at _____ am/pm.

II. Certificate of Notice/Service

I gave reasonable prior notice of filing and a copy of this document to Megan Turnball, Esquire, mturnbull@wbklegal.com
at 445 Fort Pitt Boulevard, Suite 503, Pittsburgh, PA 15219 on May 8, 20 20 by:
 Personal Service E-Mail Fax Telephone Mail

III. Information for Court Administrator

Is this an original filing in this case? No Yes
Has any Judge been assigned to this matter? No If yes, please check your assigned Judge.

Thomas J. Doerr (Courtroom 1)

S. Michael Yeager (Courtroom 3)

Marilyn J. Horan (Courtroom 4)

Kelley T. Streib (Courtroom 7)

Estimated court time required if the matter is granted:
_____ Minutes _____ Hours _____ Day(s) None

Adverse party position? Opposes Consents Unopposed Unknown

IV. Information for Domestic Relations

Plaintiff Date of Birth _____ Defendant Date of Birth _____

To your knowledge, is there currently an action pending in any of these areas?
Abuse Yes No **Custody** Yes No **Divorce** Yes No **Support** Yes, No
If there was a prior custody action, who was the conciliator? _____

I certify all the above statements are true and correct.

Date May 8 20 20


Signature

Counsel for: Club Leaf and Bean Cranberry, LLC

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

CLUB LEAF AND
BEAN CRANBERRY, LLC,

Appellant,
v.

THE BOROUGH OF SEVEN FIELDS,
PENNSYLVANIA,

Appellee.

No.

**NOTICE OF LAND USE APPEAL
(Conditional Use)**

Filed on behalf of Appellants:
Club Leaf and Bean Cranberry, LLC

Counsel of Record for this Party:

Kenneth C. Foltz, Sr.,
PA ID No. 87298

Julia Wu,
PA ID No. 315768

Leech Tishman Fuscaldo and Lampl, LLC
525 William Penn Place, 28th Floor
Pittsburgh, PA 15219
412-261-1600

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

CLUB LEAF AND
BEAN CRANBERRY, LLC,

No.

Appellant,

v.

THE BOROUGH OF SEVEN FIELDS,
PENNSYLVANIA,

Appellee.

NOTICE OF LAND USE APPEAL

Appellant, Club Leaf and Bean Cranberry, LLC, through its undersigned counsel, files this Notice of Land Use Appeal as more fully set forth below:

I. The Parties

1. Club Leaf and Bean Cranberry, LLC (“Club Leaf and Bean”) is a Pennsylvania limited liability company who is under a letter of intent to lease and occupy the real property located at 530 Northpointe Circle Seven Fields, PA 16046 (“Premises”), a currently vacant premises.

2. The Borough of Seven Fields (“Borough”), located at 2200 Garden Drive, Suite 100, Seven Fields, PA 16046, is a political subdivision established, organized and authorized under and pursuant to the laws of the Commonwealth of Pennsylvania.

3. The Council of the Borough of Seven Fields (“Council”) is the entity charged with interpretation and application of the Borough of Seven Fields, Butler County, Pennsylvania Zoning Ordinance of 215 (“Zoning Ordinance”) as it relates to conditional uses under the Zoning Ordinance

after receiving a written a recommendation from the Borough of Seven Fields Planning Commission (“Commission”) on the proposed conditional use.

II. Jurisdiction and Venue

4. Jurisdiction exists and venue is proper in this Court pursuant to Section 1002-A of the Pennsylvania Municipalities Planning Code (“MPC”) because the property in question is located in Butler County, Pennsylvania. 53 P.S. § 1102-A.

5. Because the property in questions is located in Butler County, Pennsylvania, venue in this Court is proper under Section 1002-A(a) of the MPC, 53 P.S. § 11002-A(a).

III. Factual Background

6. The Premises is located within the Planned Economic Development District (“PEED”) of the Borough.

7. Club Leaf and Bean desires to use the Premises for the purpose of operating a retail establishment selling tobacco and tobacco related products and services.

8. Club Leaf and Bean intends to offer its patrons and consumers two levels of services, one level of service for members who pay a monthly membership fee to Club Leaf and Bean and one level of service for members of the general public; subject to certain background check requirements. The facilities at the Premises will have an area for (i) the retail sale of tobacco and tobacco related products (“Retail Area”) (ii) a lounge area where patrons and members may smoke the products purchased at the Premises and use the area as a workspace or area for general socializing and networking (“Lounge Area”).

9. The general public will have access to and will be able to purchase tobacco and tobacco related products in the Retail Area during certain hours and on certain days.

10. Members will have unlimited access to the Lounge Area and the Retail Area.

11. Club Leaf and Bean also intends to host events with neighboring businesses at the Premises, primarily for members, for cross-promotional purposes.

12. Based on the defined uses provided for in the Zoning Ordinance, Club Leaf and Bean's intended use falls within the definition of a Retail Business Establishment as more fully set forth in Section 202 of the Zoning Ordinance.

13. A Retail Business Establishment is permitted in the PEDD as a conditional use pursuant to Section 3.2 of the Zoning Ordinance.

IV. Procedural History

14. On November 15, 2019, Club Leaf and Bean filed its Conditional Use Application ("Application") with the Borough seeking approval to operate a Retail Business Establishment, as defined under the Zoning Ordinance.

15. On January 6, 2020, Club Leaf and Bean appeared before the Commission to obtain the Commission's recommendation on its Application.

16. The Commission recommended the Council deny Club Leaf and Bean's Application based on the reasoning that the principal use was more akin to a private club rather than a Retail Business Establishment as the proposed retail use was open to the general public less than forty (40) hours a week.

17. Following Club Leaf and Bean's appearance before the Commission, a public hearing on Club Leaf and Bean's Application was held on February 10, 2020 before Council.

18. By written decision issued on March 23, 2020 ("Decision"), Council granted Club Leaf and Bean's Application for conditional use to operate as a Retail Business Establishment at the Premises subject to certain conditions ("Conditions"), as more fully set forth therein.

See Exhibit 1, attached hereto.

V. Reasons for Appeal

19. While a governing body may impose conditions on a grant of conditional use, the conditions must be reasonable. See *In re Maibach, LLC*, 26 A.3d 1213 (Pa. Commw. Ct. 2011).

20. For a condition to be considered reasonable, it must “relate to the specific zoning ordinance at issue.” *In re Maibach, LLC*, at 1216 (Pa. Commw. Ct. 2011) (internal citations and quotations omitted).

21. Further, “where a zoning ordinance defines permitted uses in terms of attributes, conditions designed to ensure that the use complies with the criteria are valid, because they create no restrictions greater than those imposed by the ordinance itself.” *Duffy v. Zoning Hearing Bd. of Upper Chichester Twp.*, 61 A.3d 1069 (Pa. Commw. Ct. 2013).

22. Conditions “must not be so onerous as to preclude the use, and broad policy statements may not form the basis for such conditions. *Ethan-Michael, Inc. v. Bd. of Supervisors of Union Twp.*, 918 A.2d 203, 209 (Pa. Commw. Ct. 2007) (internal citation and quotation omitted).

23. Pennsylvania Courts have emphasized that “[a] zoning hearing board does not enjoy broad, inchoate powers to advance its members' vision of what constitutes the public welfare or even the public welfare as defined in a variety of [protection statutes], be they state or federal. Other governmental agencies bear that enforcement authority. A zoning hearing board's authority is defined by the [Pennsylvania Municipalities Planning Code] and the zoning ordinance.” *HHI Trucking & Supply, Inc. v. Borough Council of Borough of Oakmont*, 990 A.2d 152, 160–61 (Pa. Commw. Ct. 2010).

24. Paragraph 1 of the Decision imposes the condition that the operations at the Premises must be fully opened to the general public whenever any business is conducted at the Premises. See Exhibit 1, attached hereto.

25. Paragraph 2 of the Decision imposes the condition that the occasional closing of the business for invitation only or similar events are permitted but should be limited in duration and frequency. See Exhibit 1, attached hereto.

26. Paragraph 3 of the Decision imposes the condition that the operations at the Premises must close at 2:00 A.M. and reopen no earlier than 6:00 A.M. See Exhibit 1, attached hereto.

27. Paragraph 6 of the Decision imposes the condition that smoking must be restricted to the interior of the Premises and non shall occur outside of the Premises. See Exhibit 1, attached hereto.

28. Paragraph 7 of the Decision imposes the condition that Club Leaf and Bean must clearly label on its construction drawings areas that are reserved for select individuals or groups and must be an incidental and subordinate part of the Premises. See Exhibit 1, attached hereto.

29. Paragraph 8 of the Decision imposes the condition that no alcoholic beverages may be brought or consumed at the Premises unless an employee of Club Leaf and Bean is present. See Exhibit 1, attached hereto.

30. Paragraph 9 of the Decision imposes the condition that the retail portion of the Premises is to stay in place with its approved hours so long as there is business at the Premises. See Exhibit 1, attached hereto.

31. In support of the above-referenced conditions (“Conditions”), the Council determined that there were certain aspects of Club Leaf and Bean’s proposed use and business

model that do not fall within the definition of a Retail Business Establishment. See Exhibit 1, attached hereto.

32. Further, in support of its conditions, the Court made arbitrary findings of what it believed to be characteristics of a traditional retail establishment without any evidence or support from the record. See Exhibit 1, attached hereto.

33. A “Retail Business Establishment” is defined under Section 202 of the Zoning Ordinance as follows:

*Any business establishment **not otherwise specifically defined in this Article** 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.*

34. The Zoning Ordinance does not impose any requirements or restrictions regarding the products or services offered by a Retail Business Establishment other than requiring that the commodities and/or services be of immediate purchase and removal.

35. The Zoning Ordinance does not require specific hours of operation for a Retail Business Establishment.

36. The Zoning Ordinance in its definition of “Retail Business Establishment” encompasses any other business establishment that is not otherwise defined in the Code, which provides for varying business models and products and services.

37. The Decision of the Council to impose the Conditions is an error of law, not supported by substantial evidence and constitutes an abuse of discretion for all of the additional reasons set forth herein as follows:

a. The Council erred and/or committed an abuse of discretion as the Conditions are unreasonable; they impose greater restrictions than what is required under the Ordinance as to the operations of a Retail Business Establishment.

b. The Council erred and/or committed an abuse of discretion as the Condition set forth in Paragraph 6 of the Decision is unreasonable as issues related to smoking are governed by other governmental agencies and are outside the scope of Council's authority under the Zoning Ordinance and the MPC.

c. The Conditions do not relate to the specific zoning ordinance at issue.

d. The Conditions are so onerous as to preclude the use of the Premises.

e. The Council erred in determining that the health, safety and welfare of the community would be adversely effected without the Conditions.

f. The Council erred in determining that Appellants failed to rebut any alleged evidence that the community would be adversely affected without the Condition.

g. The Conditions set by the Council do not protect the health, safety and welfare of the community.

h. The Council erred and/or committed an abuse of discretion as the Conditions are unreasonable as they are arbitrary, capricious, and discriminatory.

i. The Council erred and/or committed an abuse of discretion as the Conditions are unreasonable as they are contrary to law and the Zoning Ordinance.

j. The Council erred and/or committed an abuse of discretion by incorporating the Council's beliefs as conclusions of law as to characteristics of a traditional retail establishment without any support or evidence in the record.

WHEREAS, for the foregoing reasons, Club Leaf and Bean Cranberry, LLC respectfully requests that this Honorable Court enter an Order:

- a. Striking the conditions set forth in the Paragraphs 1 – 3 and conditions 6 – 9 in their entirety; and
- b. granting any other relief that is just and equitable.

Respectfully submitted:

By: 
Kenneth C. Foltz, Sr., Pa. ID. No. 87298
Julia Wu, Pa. ID. No. 317568

Leech Tishman Fuscaldo and Lampl, LLC
525 William Penn Place, 28th Floor
Pittsburgh, PA 15219
412-261-1600

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Signature:  _____

Name: Julia Wu

Attorney No. (if applicable): 315768

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

CLUB LEAF AND
BEAN CRANBERRY, LLC,

CIVIL DIVISION

Appellant,

No.

v.

THE BOROUGH OF SEVEN FIELDS,
PENNSYLVANIA

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within Notice of Appeal was served this 8th day of May, 2020 upon the following and as follows:

**VIA U.S. First Class Mail Postage Prepaid
and E-mail**

Solicitor for the Borough Seven Fields,
Pennsylvania
Megan M. Turnbull, Esquire
Weiss Burkardt Kramer, LLC
445 Fort Pitt Boulevard, Suite 503
Pittsburgh, PA 15219
mturnbull@wbklegal.com

**VIA U.S. First Class Mail Postage Prepaid
and E-mail**

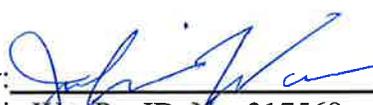
Manager for the Borough Seven Fields,
Pennsylvania
Thomas Smith
2200 Garden Drive
Seven Fields, PA 16046
boroughmanager@sevenfields.org

VIA U.S. First Class Mail Postage Prepaid

President of the Council of the Borough of
Seven Fields
Kimberly Regan-Koch
2200 Garden Drive
Seven Fields, PA 16046

VIA U.S. First Class Mail Postage Prepaid

Chair for the Borough Seven Fields,
Pennsylvania
Suzanne Mills
2200 Garden Drive
Seven Fields, PA 16046

By: 
Julia Wu, Pa. ID. No. 317568
Counsel for Appellant

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."³ 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.

³ 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 testimony⁴ 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

⁴ 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."⁵

⁵ 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.

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

SEVEN FIELDS BOROUGH COUNCIL


Borough Council President