

BOARD OF ZONING APPEALS MEETING

MAY 19, 2022

Members Present

Ann Sasser Evans
Nicole Garrison
Gus Dyer
Gus Dolianitis

Members Absent

Lawrence Meder
John Hiltzheimer
Michael Nicholas

Staff

Lisa Jones
Doug Plachcinski
Ryan Dodson

Chairman Dyer called the meeting to order at 10:00 a.m.

I. ITEMS FOR PUBLIC HEARING

1. *Appeal of Zoning Administrator Request PL22-83, filed by Nashawan Enterprises Inc. c/o Nashawan Okam at 403 Jefferson St. (Parcel # 21909). The Zoning Administrator did not allow the property owner to apply for a special use permit to operate a commercial recreation use.*

Mr. Dyer stated Item 1 has been withdrawn.

2. *Appeal of Zoning Administrator Request PL22-84, filed by MKM Partners c/o Shahid Javid, requests an appeal of a zoning violation as allowed in Article 13 of Chapter 41 of the Code of the City of Danville, Virginia at 1501 W Main St. (Parcel # 54805). The Zoning Administrator sent a zoning violation notice to the property owner for operating skill games.*

Mr. Dyer opened the Public Hearing.

Present to speak on behalf of this request was William Shewmake, I am an attorney from Woods Rogers. Mr. Shewmake stated I am representing the Appellant in this case. To briefly summarize, this is a convenience store that has operated as a convenience store for years and as part of its operation is an accessory customary and incidental accessory use, a grand total of two skilled games, which I think the City Attorney can attest. I have someone to testify that it was licensed by the agency prior to an injunction. As we all know there is an injunction that is staying the enforcement of the State Ban on this kind of game until after November. These two games have been in that store for probably 2 to 2 ½ years and did not operate during the ban before the injunctions and I have Mr. Bill Powell here who can contest to that. This is not a principle use of the property it is a convenience store and I would submit that I have photos that I would like to submit in the record. It shows the two skilled games that we have which is next to the lottery kiosk. It shows that it is a very well-kept convenience store which mostly sells food and other items along with lottery tickets. One thing that I will say that I put in the papers, if this was the principal use of the property, we would agree that you would need a Special Use Permit. If they had 10, 15, or maybe 8 of these games then there might be an argument it's a principal use, and I think under the zoning ordinance it can't be in principal use. We are here only on the scope of what the notice of violation allows, and the notice of violation was sent saying that they needed a

Special Use Permit. The case that was recently withdrawn, the Planning Director maybe has taken the position that you can't even have a Special Use Permit but at this point that was the issue: the Planning Director saying that they had to have a Special Use Permit to operate a grand total of two games. As I put out in some detail in our memo, the law is pretty clear, and I have been doing zoning language for about 30 years. The law is pretty clear and this Board as I have mentioned a little bit has recognized that the zoning restrictions apply to the principal uses but what is allowed in the Danville Code and throughout the entire State is if you have a use that is known as customary and incidental which the definition is not that it is in every single business like that but if it is not unusual or rare to have that use in conjunction with the main use then it is permitted under the zoning laws. You can't list every possible accessory use that a primary business might have. It's like when I was growing up pin ball machines and then next a lottery machine. What we are pointing out is with two games it is not the principal use and I think that we can have Mr. Powell testify or I can tell you if you have been in any convenience stores, they are all throughout not only in the City of Danville but throughout the State. That injunction involved allowing some ten thousand games that were in convenience stores. It is a very customary use to this point to have some of these skilled games in a store. The question that you have is having a grand total of two games a primary use of this convenience store or is it an accessory incidental use of this store because if its incidental then it is permitted under the zoning laws. We think that we can't be any clearer from the pictures of the convenience store that just having two games which doesn't raise that much money and it's not the principal use that is permitted and is not a zoning violation and you are not required to go through a Special Use Permit to have one or two games. As a matter of fact, when this issue came up, I know we had several cases before this same Board at different times. You have different members present voting on various things but in a case involving JAL Properties and Abdul Khan and the case involving Mr. Inam Qazi, and another property owned by KFG Properties and Mr. Khan and there were one or two of these games in there and this Board held that if you had one or two games that was an accessory use and that was appealed by the City of Danville and it was ultimately nonsuited and it is a precedent of this BZA to say if you have one or two games that's an accessory use. So, there has been a ruling from this BZA on that very topic. I would be glad to answer any questions, but I have cited the case law and it is very clear that's the issue before you is: is this an accessory use or is it a principal use of the property? That is the issue. If it is an accessory customary incidental use which means, it's not unique or rare then the notice of violation should be overturned. If you would find somehow that it is principal use, then that could be a different issue. They were guided by the decision of this BZA and they have been operating for more than two years again except for the time that the law came in effect and has been enjoined and I will have Mr. Powell testify that there are only two games in the store and those games are registered on the ABC list, so they are among the games that are included in the injunction against the force of the ban and depending on that ruling will determine how long those games will remain. As for now, I don't think you can't go into a convenience store in the Commonwealth of Virginia and not see one or two of these games. I think we have more than shown that it is customary and incidental to have this, and it is a small part of your business. Which convenience stores depend upon. Think of the precedent if you don't allow accessory and incidental uses and all the other kind of small uses that you have that wouldn't be allowed and that is why that principal applies and that is why it is in the Danville Code and that is why it applies throughout the City of Virginia. Like I said I have listed a number of cases talking about how uses that are not permitted as a matter of right could

be accessory. As a matter of fact, that is the whole point of the customary incidental accessory use doctrine. It assumes that it cannot be the principal use. If it's a principal use, then it is permitted as a matter of right. It assumes that under the zoning district it isn't listed as a permitted principal use; that's the whole basis. Then the question is it customary or incidental and you're not surprised that it is there. If you go into a convenience store in the last few years, then you're not going to be surprised to see one of these skilled games. This is a grand total of two games and if we were here with ten, twelve or more than that we would have a different issue. I will note that it was withdrawn for one reason, we didn't go for the Special Use Permit because it seemed to me that there were issues if you could get a Special Use Permit. We did the right thing by filing the notice of appeal in the optional time and we feel very strongly that this is an accessory use, very small and very limited and that is all that you are ruling on right now. Two games accessory use and you're not ruling on five or six opening the door. There are two games. I appreciate your time and I think this is consistent with the number of decisions that you have made several years ago.

Mr. Dolianitis stated you are planning on just keeping it at two right now?

Mr. Shewmake stated yes, right now just keeping it at two.

Mr. Bill Powell stated I just want to address that as well because basically all I am doing is operating under what the ABC had allowed us prior to the injunction. We had these two games registered with the ABC. The ABC collected taxes on these games and the injunction that came into place that became so distorted in the State was the injunction only covered the previously licensed games in the State and everyone else took that as free rein to just go out and flood the market with these. We have tried to do this the correct way, legal way, and have followed all the steps necessary in order to keep it within the State's guidelines as well as the City's.

Mr. Dyer stated these are pre-existing games that were previously permitted by the ABC Board.

Mr. Powell stated yes sir.

Mr. Dyer closed the Public Hearing.

Mr. Dyer stated last time we ran across this issue about the number of games, and I don't believe you were in that position at that point, Mr. Plachcinski. My understanding is that you are required to have a Special Use Permit to be an indoor commercial recreation facility and in another part of the City Code that if you have more than three machines that you are an indoor recreation facility and that would be no question that you would be required to have a Special Use Permit if you had more than three machines. Has that been changed?

Mr. Plachcinski stated yes it has been changed. On April 6 of this year, City Council adopted an Ordinance that did several things.

AN ORDINANCE AMENDING CHAPTER 41, ENTITLED "ZONING ORDINANCE" OF THE CODE OF THE CITY OF DANVILLE, VIRGINIA ESTABLISHES 'SKILL GAMES' AS DEFINED BY VIRGINIA CODE AS ADULT-ORIENTED USES AND MOVES STANDARDS FOR ADULT ENTERTAINMENT OUT OF ZONING ORDINANCE SECTION 3.Q.I. AND INTO A NEW SECTION 2. GENERAL REGULATIONS Z. ADULT-ORIENTED USES WITH LOCATIONAL RESTRICTIONS TO AVOID SECONDARY EFFECTS.

Under subsection 4 of that amendment. Adult area uses of which skilled games are under the zoning code even if accessory to a permitted use they must obtain a Special Use Permit.

Mr. Dyer stated that clearly stated regardless of how many games you have you must have a Special Use Permit.

Mr. Plachcinski stated yes.

Ms. Garrison stated does that affect the games that were already in place?

Mr. Plachcinski stated they were never legal at this location.

Mr. Dyer stated if they were permitted by the ABC Board, you're not saying they weren't legal by Virginia Code you saying that weren't legal by the City Zoning Code, correct?

Mr. Plachcinski stated correct.

Mr. Dyer stated even when they were legal but that was prior to that ordinance being adopted, correct? Because that wasn't until April of this year.

Mr. Plachcinski stated it's the City's position that without a Special Use Permit skilled games at this location were never legal under the zoning codes.

Mr. Dyer stated does the code still say that you must have a Special Use Permit to be an indoor recreational facility, or does it say you have to have a Special Use Permit for indoor recreational use?

Mr. Plachcinski stated currently?

Mr. Dyer stated yes.

Mr. Plachcinski stated under this it says you must have a Special Use Permit for Adult-Oriented Uses with locational restrictions for secondary-effects of which skilled games is one.

Mr. Dyer stated for the use not for a facility because facility would be a business that has more than three machines. A use is for just having one machine.

Mr. Plachcinski stated we define it as a skilled game not a skilled game facility. So, any skilled game follows into games.

Ms. Garrison stated are these the only games that you are including is that skilled game definition?

Mr. Plachcinski stated the skilled game definition which references the current State Code is *"An electronic, computerized, or mechanical contrivance, terminal, machine, or other device that requires the insertion of a coin, currency, ticket, token, or similar object to operate, activate, or play a game, the outcome of **which is determined by any element of skill of the player and** that may deliver or entitle the person playing or*

operating the device to receive cash; cash equivalents, gift cards, vouchers, billets, tickets, tokens, or electronic credits to be exchanged for cash; merchandise; or anything of value whether the payoff is made automatically from the device or manually. The bill exempts family entertainment centers from the prohibition against the playing or offering of any skill game, provided the prize won or distributed to a player by the skill games offered by such centers is a noncash, merchandise prize or a voucher, billet, ticket, token, or electronic credit redeemable only for a noncash, merchandise prize that also meets certain other requirements”.

Mr. Dyer stated the previously cases that we dealt with last month involves someone coming to apply for a Special Use Permit and you denying the Special Use Permit because in your opinion what they were applying for was illegal. This would still apply if this gentleman would come to you. Would you deny him the opportunity to apply for a Special Use Permit? I think that assumption was made.

Mr. Plachcinski stated skilled games under State Law are illegal period. I don't think that is a question they are illegal. The issue with accessory use let me throw it out there, if it were customary and incidental that there were narcotics sales at convenience stores even if they were illegal would we then be able to say we can allow them under zoning?

Mr. Dyer stated what I am getting at is that because the City Code has changed as of April, these games have become something other than like pinball machine. They were indoor commercial recreation whether you could win money off them or not. After the city passed that ordinance a pinball machine is still indoor recreation, whereas a skilled game has become a skilled game, it's not just indoor recreation.

Mr. Plachcinski stated correct.

Mr. Ryan Dodson, Assistant City Attorney for the City of Danville stated unless the pinball machine gives out money.

Mr. Dyer stated obviously these falls under device where you can receive money if you were to win the money. If you win the game, you can receive money, where there are pacman machines that you can play and just put your quarter in and you get your quarter's worth of entertainment and you don't win anything. What we need to do is we need to break apart the idea that according to the City Code as of April they are not.

Mr. Plachcinski stated correct.

Mr. Dyer stated I am going to let everybody ask their questions so you will be able to answer at one time.

Mr. Shewmake stated thank you.

Ms. Evans stated is this like the situation we had last month where the gentleman came to the Planning Commission because he had his skilled games authorized by ABC and he just didn't have his Special Use Permit?

Mr. Plachcinski stated in that case the applicant had filed their appeal prior to the zoning code changed on April 6.

Ms. Evans stated that is the only reason that we recommended it to City Council for him to be granted a Special Use Permit.

Mr. Dyer stated there are areas of the city where this would be permitted, it's just not in the current zoning. Where this building is located it is not permitted even by a Special Use Permit, is that correct?

Mr. Plachcinski stated that is correct.

Mr. Dyer stated it's just like you can build a slaughterhouse in the city, but you can't build a slaughterhouse on Riverside Drive. If you have to have a Special Use Permit to have a slaughterhouse even in an industrial area that doesn't mean that you can get a slaughterhouse on a commercial area by Special Use Permit. There are certain activities that are allowed by Special Use Permit only in certain zoning categories. Where this property is located this property is not zoned where he can obtain a Special Use Permit for this type of activity.

Mr. Plachcinski stated that is correct.

Mr. Dyer stated it's just like if you tried to appeal for a Special Use Permit that is not allowed in a residential area. He would be denied the opportunity to apply not because they were judged to be illegal but because they are not permitted in that zoning area where he was applying for that Special Use Permit. Did I say anything wrong in that statement?

Mr. Plachcinski stated no that is correct.

Ms. Garrison stated in the future if somewhere down the road somebody decides to make an actual decision about the legality of the games they still will not be permitted here.

Mr. Plachcinski stated they will still be bound by the location and restrictions that were adopted on April 6.

Ms. Garrison stated November or December comes and they say okay you can have them, but they still would not be allowed here in the city?

Mr. Plachcinski stated I think it is safe to say there's a long way to go to see how this plays out from this date. We have location restrictions that are processed and set up should the State determine there is some measure of permitting or legality.

Mr. Dyer stated that is the main thing that has changed since the last time we judged one of these cases. The city code has changed, and they have been taken out of the zoning category that previously were allowed in to make judgement on.

Mr. Dolianitis stated the store on West Main, so here in the city it is not allowed. Is it allowed in other places?

Mr. Dyer stated this city has a special zoning category for adult entertainment which I think not only includes skilled games but strip joints and other forms of adult entertainment

and that is only permitted in certain areas of the city. It's allowed in the city, but it's just not allowed in every zoning category including the zoning category where this gentleman's business is located right now. That is what's changed since the last time that we had one of these cases. I am assuming it's been removed from HR-C?

Mr. Plachcinski stated yes.

Mr. Dyer stated previously you were allowed to apply for a Special Use Permit for commercial indoor recreation in HR-C Zoning, which changed. The code now requires you to have a Special Use Permit for adult entertainment which skilled games has been defined as and that adult entertainment is not allowed in HR-C.

Mr. Dolianitis stated you can't get a Special Use Permit.

Mr. Dyer stated right.

Mr. Dolianitis stated you need one, but you can't get one.

Mr. Dyer stated again it's based upon the zoning category.

Mr. Shewmake stated I would like to give a background and explain because I think we could resolve, it. If you notice, the notice of violation which is the only thing before you right now, is dated March 21, 2022, prior to the change of the ordinance that was just referred to. I will have to study that to see if it bans accessory uses because prior you could get a Special Use Permit even if it was the primary purpose. So, one of the issues is going to be under the new ordinance does that ban it from a primary purpose or does it ban it from an accessory use. We don't need to decide that today because right now you're just looking at that March 21 document which says get a Special Use Permit. They already mentioned that this is wrong so it should be reversed. The other item is so they can come back and say it now applies and it can be different arguments. I will point out one thing, I do not believe that they can take away an existing right. Let's say that ordinance is valid, and if you do ordinances so that it is a practical matter, and you can't do it anywhere in the city. That can have some legal issues but that is a different matter. That is beyond this BZA.

Mr. Dyer stated we haven't done that.

Mr. Shewmake stated that is right.

Mr. Dyer stated it is allowed in the city but just not at this location.

Mr. Shewmake stated I am not suggesting that's the case. I am very clear on that if they were to come in and I think you denied this because it is March 21 and their argument was, we need to get a Special Use Permit and in fact now you are saying that you can't.

Mr. Dyer stated let me go back and ask why didn't you apply on March 22 for a Special Use Permit?

Mr. Shewmake stated we didn't think we needed it because it is an accessory use.

Mr. Dyer stated it would have been our decision whether you needed it or not. That would be the case that we would be judging right now is whether you needed that Special Use Permit or not. You chose not to apply for a Special Use Permit, and I am assuming that we've now run past the date that now he can apply. Am I correct?

Mr. Plachcinski stated correct.

Mr. Shewmake stated when the board with the Special Use Permit and what the history is what you're saying that is a discretionary act of sudden need. There is no basis if you are applying for it that's completely discretionary. What we are saying is no because we have two reasons why we appealed now. We wanted to see if you had a matter of right, because if you had a matter of right then you don't need a Special Use Permit. If that were turned down, thinking what the existing law was then you could ask for a Special Use Permit. What we are saying is it is not a discretionary act. This is an accessory use on the law since it was in place, we had the rights, and we were trying to define what was the right that he had. Did he have the right to use two machines without a Special Use Permit. Let's say the ordinance is changed on April 6, and now you can't get a Special Use Permit. There are all kinds of legal issues attached with that though because there is also a doctrine called non-conforming use which means the Government if you are doing something that was allowed by right during an ordinance changed then you can't take it away. For example, if they take away the use of a convenience store from this district, they couldn't shut him down saying it is now illegal.

Mr. Dyer stated commonly referred as being grandfathered in. We are very much aware of that.

Mr. Shewmake stated if we had a subsequent notice of violation the appeal notice would have probably been very different which is not in conforming use. He was there, he was allowed as a matter of right, it was two machines, he pre-existed the ordinance, and can't expand a non-conforming use. He mentioned a case that was applied to before the ordinance change now is grandfathered in. If you are in before this thing changed you should be able to have the rights prior to the change. New people are coming in, new additional machines, new machines out of stores then that new ordinance would apply. I think the law dictates you don't look at the April change because this is a March notice of violation. Which you have to look at is that on March 21, was this an accessory use. That is the only limited issue that you have before you today. It could be that the director of planning will come and say look I think that the new laws somehow apply to you, and he can issue a notice of violation and we will look at it and then appeal. I am pretty comfortable of the case laws someone would say at the very least. It is a non-conforming use; we had the right before the ordinance therefore this new law doesn't apply retroactively, which I think that principal was recently declined. That is totally different from what we have today. Your issue is on March 21, this thing says get a Special Use Permit which they now admit is incorrect for multiple reasons and we ask you to reverse his decision from March 21 and then we will see where it comes from there. I don't think the hearing today based on a March 21 notice of zoning violation meets now that the laws have changed because that is a whole list of issues. In fairness what you do is don't uphold this and I will be glad to talk to the planning director about what we can do. I do believe very strongly that if it is an accessory use, it was in place for years, it was registered with the ABC and the man is not stuck because you can't take away the rights

that vested in and depended upon. I would ask you to reverse the decision based on that and understanding the new ordinance change does not apply to this case. Thank you.

Mr. Plachcinski stated I just want to point out that you cannot consider something that's illegal under the State Code a legal non-conforming use. The ABC doesn't set zoning, it doesn't grant a land use permission, and certainly even though they may have been registered or allowed by the ABC Board up until June 30, 2021, this particular location has never had the zoning ability to have these uses.

Ms. Evans stated they would have if they had a Special Use Permit?

Mr. Plachcinski stated yes.

Ms. Evans stated they might have if they had applied for a Special Use Permit on March 22? Possibly?

Mr. Plachcinski stated possibly.

Mr. Dyer stated that is what we would be arguing about.

Mr. Plachcinski stated regardless of that there is no vested right, in my opinion.

Ms. Garrison stated haven't we also decided the legality of the games are not within our purview.

Mr. Dyer stated we cannot determine whether these games are legal or not legal. We are basically a panel jury. I will acknowledge that I feel like that in prior cases that if you had three or fewer games you were not required to have a Special Use Permit because the code said you had to have a non-conforming facility and not to just have the games in it. The facility was defined as the use of more than three games. That is just my personal opinion, and that is how I have voted in the past on what my understanding of the law was. My feeling is that if they had in fact applied for a Special Use Permit prior to the change to the city code I probably would agree that they were not required have a Special Use Permit.

Mr. Dyer closed the Public Hearing.

Ms. Evans made a motion to deny PZ22-84. The motions fails because there is no seconded motion.

Mr. Dyer stated just a reminder to the Board failure to pass a motion basically upholds the Zoning Administrators decision.

Ms. Garrison made a motion to overturn the Zoning Administrator. Mr. Dolianitis seconded the motion. The motion was 3-1.

Mr. Dyer states unfortunately you must have four affirmative votes because we are a Board of seven. Despite the fact that we are the only four here that may give you grounds to make some kind of appeal.

Mr. Shewmake stated can we make some kind of motion to defer.

Mr. Dyer stated we have already voted on it so I will leave it up to our legal counsel.

Mr. Plachcinski stated you can amend your motion as long as the people supporting this agree to it.

Mr. Shewmake stated I know that is for a special exception does that rule apply to the appeal?

Mr. Dyer stated I don't know if that is just the simple majority.

Mr. Dodson stated thankfully I have the State Law and the City Code on the BZA here let me see what I can find.

Mr. Dyer stated do we in fact have seven members or are we only six members?

Mr. Dodson stated is Michael Nicholas officially off?

Mr. Dyer stated I don't know if it makes a big difference.

Mr. Plachcinski stated I don't think he has submitted a resignation.

Mr. Dyer stated three would still make a majority of six.

Mr. Shewmake stated I think there is something in the law if you don't have seven that maybe it can be deferred.

Mr. Dodson stated I know if there is a tie then you are allowed to come back because we had that happen, I think on one of these cases previously. Let me see what I can find.

Mr. Shewmake stated I think it is based on that whoever made the motion to reconsider, and we would be happy with a deferral of the decision. I think that is a fair way to do it. Thank you for giving me the opportunity to speak.

Mr. Dyer stated Ryan is this something that we can do a little research on and get back to these folks or do we need to have a final decision at the meeting today?

Mr. Dodson stated if you want you might move on to the next item and I'll keep reading this.

Mr. Dyer stated so are we tabling this?

Mr. Plachcinski stated no, you will have to make a separate motion by the end of the meeting.

Mr. Shewmake stated I would be agreeable to a motion to reconsider a defer and I think that would clearly be allowed.

Mr. Dyer stated even though we have already voted?

Mr. Plachcinski stated you can reconsider.

Mr. Dodson stated especially since technically while voting, you didn't have the numbers your needed.

Ms. Garrison made a motion to postpone the decision on the application until the June Meeting. Ms. Evans seconded the motion. The motion was approved by a 4-0 vote.

3. Special Exception Request PZ22-97, requesting a Special Exception for a side yard setback as provided for in Zoning Ordinance Article 13.G.7.a. at 604 Memorial Dr. (Parcel #24515.)

Mr. Dyer opened the Public Hearing.

Present to speak on behalf of this request was Sahin Mahmut. Mr. Mahmut stated this is the KFC building at 604 Memorial Drive. I am in the process of purchasing the building and during the inspection process we came across something very minor, an issue with the side yard setbacks. The issue I believe is the side facing the park.

Mr. Dyer stated the drive thru side.

Mr. Mahmut stated yes, the drive thru side and it's not the whole wall of the building. It is only the drive thru that will be a little extension and it's the only one corner of the drive thru section it is encroaching 1 foot and 1 inch. I found out that it has been there for the last thirty years.

Mr. Dyer stated I don't think in that configuration because full disclosure my dad built the first Kentucky Fried Chicken building and that was like 1964. That was a cinderblock building and that is long gone.

Mr. Mahmut stated everything has come to a stop because the bank doesn't want to do anything because of violations. That is why I am here requesting a special exception to this slight setback.

Mr. Dyer stated so this drawing that we have up on our screen when was this done?

Mr. Mahmut stated that was done in October of 2021, I believe.

Mr. Dyer stated so that is when it was discovered. Is this a result of the setback changing?

Mr. Plachcinski stated I'm not really sure. We don't have any data to go on.

Mr. Dyer stated I know that one time in commercial you had to be five feet off the property line. So, probably when this building was built it was not in violation.

Ms. Evans stated it's not the building it is the drive thru.

Mr. Dyer stated correct. So, technically to me it should be grandfathered in. If it is easier to just to grandfather, it's in.

Mr. Plachcinski stated it's easier because the lender doesn't want to see this legal nonconforming. They want to see it as legally conforming, and this special exception allows that.

Mr. Dyer stated okay.

Mr. Dyer closed the Public Hearing.

Ms. Evans made a motion to approve Special Exception Request PS22-97. Ms. Garrison seconded the motion. The motion was approved by a 4-0 vote.

II. APPROVAL OF MINUTES FROM APRIL 21, 2022

The April 21, 2022, minutes were approved by a unanimous vote.

III. OTHER BUSINESS

With no further business, the meeting was adjourned at 10:45 a.m.

APPROVED