

BOARD OF ZONING APPEALS MEETING

October 17, 2019

Members Present

Gus Dolianitis
Ann Sasser Evans
John Hiltzheimer
Gus Dyer
Lawrence Meder
Nicole Garrison

Members Absent

Michael Nicholas

Staff

Ken Gillie
Lisa Jones
Clarke Whitfield
Ryan Dodson

Chairman Dyer called the meeting to order at 4:00 p.m.

I. ITEMS FOR PUBLIC HEARING

1. *Appeal Application number PLAZ20190000347, filed by Shauq Qamar on behalf of Eagle Management Company LLC, requesting an appeal of a final notice of zoning violation for Speedway at 1503 N Main St, otherwise known as Grid 2818, Block, 020, Parcel 000055 of the City of Danville, Virginia Zoning District Map. The applicant is requesting an appeal of a final notice of violation issued by the Zoning Administrator that a Special Use Permit is required for Commercial Indoor Recreation when one has not been issued to operate commercial indoor recreation machines*

Mr. Dyer opened the Public Hearing.

Fielding Douthat, Attorney, stated I am with Woods-Rogers in Richmond and I represent all five of the appeals. I have a presentation that I was going to make and I think that the issues are the same largely for every single appeal. It might be easier for convenience of time if that presentation is made, and then address anything and incorporate that into the other appeals if that would be all right.

Mr. Dyer stated do you feel the cases are all similar enough?

Mr. Douthat stated I feel they are very similar.

Mr. Dyer stated we would have to vote on each applicant individually. If at any point you feel that you need to add something for any specific applicant, then you can do so.

Mr. Douthat stated sure and thank you very much. We are here today because the Zoning Administrator has determined that a convenience store in Danville, Virginia cannot have a video game without a special use permit. The question for the Board today is whether not you agree with the Zoning Administrator, that the presence of a video game in a convenience store requires a special permit. If you do not agree with that is, the presence of two, three or even four video games substantially different from the presence of one? As we discuss it today, I submit to you today that the Law

regarding principle use and accessory use mandates that it is not. As you know, the decision that we are making today is a legal determination and it is different from the discretionary decision made by Zoning Coordinator or Planning Commission. Your determination today will not be limited just to the games at issue today, but it will apply universally as far as special use permits go in the City of Danville. The Danville code recognizes that customary incidental uses are permissible as accessory uses. Accessory use code provisions are not unique to Danville. However, they are prevalent in Commonwealth localities all across the Commonwealth. They are prevalent in localities all across the United States. Likewise, the law regarding, what constitutes a legal accessory use is consistent throughout the Commonwealth and the United States. There is a large body of law that has been developed on this subject, and the reason is. The localities throughout Virginia and throughout the United States have recognized that it makes little sense to require businesses to seek to do business within their locality to seek special use permits each time they seek to engage in an activity that has a minimum impact on their business as a whole. Now, under the law, the test for accessory use is whether, depending upon the principal use and whether it is not wholly unexpected. Now, in this case the principal use of the facility is as the convenience store and it has been a convenience store for some time, and it is a convenience store as we speak and it will be a convenience store tomorrow, whether or not there is a video game in it or not. The games that we are talking about take up a small percentage of space and this store had three games, and that is probably nine square feet. I am ballparking it and I have not done any measurements but if you have seen those games, they stand straight up and they do not take up a lot of space.

Mr. Dyer stated at some point I think we would like to know the square footage of each one of these stores. Do you have that information?

Mr. Douthat stated I do not know if I have that information with me or not but I could certainly get it. I am sure it is within the City's records as well.

Mr. Dyer stated do you have access to that and can you look it up real quick?

Mr. Gillie stated I can attempt to.

Mr. Douthat stated these games take up a small percentage of space within the store and they would provide a small fraction of the overall revenue. The games are the next generation of a long line of games, commonly, found in convenience stores. Getting back to pinball machines, Pacman machines all of those types of games have been in convenience stores as long as I can remember. These games no more convert a convenience store into a recreation facility than the presence of an ATM converts them to a bank. It is not wholly unexpected that these games would be present in these stores as I have said before it is in the next generation of a long line of games and uses that have been present as accessory uses in convenience stores for a long period of time. To constitute a legal accessory use, it does not have to be present, adjoining, or substantial percentage of the time, it just has to be customary and incidental. The presence of these games is not rare and not unique. Perhaps the best point in this is that the Zoning Administrator issued more than thirty notices of violations in the City of Danville alone. That being said, thirty stores in Danville that we know have these games in them that shows right there that they are not rare or unique. They are present in stores throughout the Commonwealth and I can tell you personally that I have been in

stores in Richmond and all up and down interstate 85 and all up and down 360 and Charlottesville, outside of Danville and these games exist in stores all over the place. They exist in restaurants and they are common at this point and time. They are so prevalent now that the Virginia State Lottery is concerned that it is going to take revenue away from them ,that is how prevalent these games are in the Commonwealth of Virginia. Now, just a few examples of the case law that exists out there regarding what is an accessory use. The Virginia Supreme Court has ruled in *Wiley verses Hanover County* that a pigeon coop in a residential neighborhood constituted a lawful incidental use. The Supreme Court of Nebraska has ruled that the renting of U-Hauls is a customary incidental use for a gas station. Courts in Pennsylvania ruled that tennis courts are valid accessory uses to homes in residential areas. New Jersey has ruled that a beauty salon is an incidental customary use to a home in a residential area. The New Jersey Supreme Court has also ruled that where you land a helicopter is an accessory use to a Corporate Head Quarters. Now, I will submit to you that those uses are valid accessory uses and the games are an accessory use to a convenience store. Now, turning to the Zoning Administrator interpretation the Zoning Administrator reads the parenthetical phrase definition of accessory use, the phrase that says “self or otherwise provided in the ordinance to mandate if the uses that identifies as a permissible use in one zoning district it cannot be an accessory use in another zoning district”. This interpretation is contrary to all to respects, but first, then it guts the definition of an accessory use. The case law recognizes that an otherwise impermissible use is an allowable accessory use because it is simply incidental. That is the essence of the accessory use, it is such a small use that it can be allowed without having go through the special use permit. The contention that City Council has not provided for commercial recreation as an accessory use reveals a fundamental misunderstanding of the law. Governing bodies do not determine in their discretion what constitutes an accessory use. A permissible accessory use is a legal determination made by you or court if necessary after applying the facts to the law in a given circumstance. The Zoning Administrator reading the codes definition of accessory use is contrary to the law, also, contrary to the law of governing statutory interpretation and frankly based on rules of grammar. The Supreme Court has said, let me take a step back there is a large body of law governing statutory interpretation, it has been out there for a long time whether it is a Virginia Code; Federal statute does not apply Virginia obviously, ordinances, whatever it may be the rules are the same. The primary rules you just employ the plain natural meaning of the words used. The ordinance should not be construed singling out a particular phrase various provisions of an ordinance must be read as a consistent harmonious whole that will give effect to each word. Now, the Zoning Administrator reads otherwise provided in the ordinance to apply to the first clause in the definition of an accessory use. The clause before the conjunction, and if you look at the definition, the phrase is behind and it applies to the second clause of the definition. The one after the “and”. It addresses the location of an accessory use. What it is saying is, unless it is otherwise provided for in the ordinance, accessory use must be on the same lot. To read it otherwise respectfully does not make sense. Drafters are assumed to know what they are doing and there is no reason to put a hypothetical clause after a conjunction if it applies to the clause before the conjunction. The reading also restricts landowners rights, if you read it the way that it is set up it is structured. It would say “unless the Zoning Ordinance applies otherwise”, so otherwise it would be an escape valve that the Zoning Ordinance provided in another place. An accessory use must be on the same lot. If you take that clause and put it before the “and” that eliminates that possibility of any other portion of the Zoning Ordinance. Which would

allow that, would be inconsistent with that clause and therefore is an improper reading. I would like to turn some of the examples the Zoning Administrator uses to try to illustrate his point. For this one particular piece of property he talks about a gas station. A gas station or a convenience store with gas facilities, a gas facility is a primary use of a piece of property. If you have a gas pump or gas station on a piece of property, it fundamentally changes the use of that property and it is completely different from just a convenience store without it. I would ask you to just think about this in common sense terms. How many times has anyone in this room been pulled into a convenience store with a gas station and put gas in their car and never stepped foot in that convenience store. The only reason they were there was to get gas and not only that, once you put gas in you got all kinds of regulations that don't otherwise exist with this. You have environmental regulations and you have stickers on the gas pumps that talk about the department of agriculture. I think they are looking at the way the numbers roll on the machines in the light. You have environmental concerns. It fundamentally changes it and you no longer a mom and pop convenience store on a street corner. It is a place that sells gas, and gas is one of the primary revenue drivers of that store; that is completely different. The other two examples, one is a Kickback Jack's and all you need to do to understand the difference between a Kickback Jack's and what we are talking about today is look at the actual zoning ordinance that allows for the Kickback Jack's and that is in the materials. The number of pool tables must be limited to four, and the number of video games machines must be limited to twenty.

Mr. Dyer stated were those codes or just conditions?

Mr. Gillie stated those are conditions put on a Special Use Permit.

Mr. Dyer those are conditions put on due to parking?

Mr. Gillie stated correct.

Mr. Douthat stated it is titled Ordinance 2010.03.03, but the point being if I was standing before you today and saying that the convenience store should be allowed to have twenty machines then I would submit to you that would be a primary use. That would take otherwise a convenience store and turn it into a recreation facility. That would make it the primary use and that is not what we have here today.

Mr. Dyer stated if one is not and twenty is what is the tipping point?

Mr. Douthat stated that is the decision you have to reach. The question before you is really two-fold. If whether you agree that one game fundamentally changes the store and if not one, does two, three or four and again it's applying the facts to the law. Then the second one, is what I passed out earlier and I have not been there, but I understand that it is a game room here in the City of Danville. If you turn to page 5, RPG & Table top, risk, Cards against Humanity, chess, Magic: the Gathering, Clue, Monopoly, Dungeons & Dragons, PS4, PC & Nintendo and high speed internet and stream and Virtual Reality. This facility was set up to be a game room and it is completely different than a convenience store that has one game. The primary purpose of this facility is to have games as they say on their website people have a place to go in Danville to play games and it is completely different. The point is, it's apples to oranges. There is Kickback Jack's that has twenty video games or an actual game room to a convenience

store that have three. Having said all of that I will come back to what I said in the beginning, the question today is really two fold whether or not you agree with the Zoning Administrator that a single game alters the use of a convenience store so much that it requires a Special Use Permit. If you do not agree with that, then how many does it two, three or four or what number is it. The law of incidental use dictates that it does not alter.

Mr. Dyer stated it seems to me that if we were to say and this goes back to what I was saying about the square footage, the main concern that I have is parking and the store is already required to have one spot for two hundred or two hundred fifty square feet. Is that correct?

Mr. Gillie stated I can tell you exactly and I have that square footage because I was able to look it up while he was talking.

Mr. Dyer stated you made the point yourself that these machines are small and so in two hundred square feet you could probably have ten of these machines. There are not ten parking spots for ten players and that throws parking out into the street or adjacent property owners that is a big concern of mine. I can see where you make your argument if you have one machine per a thousand square feet in a store. There are already five spots for that thousand square feet. The question that I have for our legal team is that it seems to me if we would to say you are allowed one machine per a thousand square feet that is creating code.

Mr. Whitfield stated you are legislating at that point.

Mr. Dyer stated we are legislating code and that is not our purpose.

Mr. Whitfield stated you do not have that authority.

Mr. Dyer stated so if we do not feel that there is sufficient information in the code to interpret, the correct response would be to go to the body that is responsible for creating Code and that is City Council.

Mr. Whitfield stated that is correct.

Mr. Dyer stated what would be the process for us to say we do not have enough information? The other concern that I have and maybe you can address this, is that the code states they have to have a Special Use Permit for a Commercial indoor Recreation facility. It does not say you have to have a Special Use Permit for indoor commercial recreation, which obvious this is. Do you acknowledge this is indoor Commercial?

Mr. Douthat stated I do not acknowledge that. It is a video game. In order for it to be a recreation facility.

Mr. Dyer stated not a facility that the game itself is recreation, its inside and it is commercial.

Mr. Douthat stated if I may, respectfully, the question before the board and what the appeal is asserting is whether or not having this machine in there changes the zoning so that you would have to have a Special Use Permit.

Mr. Dyer stated what I am trying to do is make a distinction between indoor Commercial Recreation and indoor Commercial Recreation Facility. This is a point that I have brought to you before and you said all you do you just take the common interpretation of the word. Obviously it is indoor, Commercial, Recreation and so therefore if you have one of these machines at your facility. I'm not saying that I agree with that but it's the logical extension of that progression. These are games of skill and this is not guarantee that you will make a profit off of them. If someone has a high level of skill they are going to lose money on these machines.

Mr. Douthat stated they could or they could break even on them.

Mr. Dyer stated any questions from the board?

Mrs. Evans stated correct me if I'm wrong, if you had gone to one of the convenience stores and they had a Pacman machine you would have cited them?

Mr. Gillie stated yes, they need a Special Use Permit.

Mr. Dyer stated is it possible that we could be standing here making this same argument over Pacman machine or Pinball machine.

Mr. Douthat stated the issue on appeal, remember the law of incidental permissible use assumes that you can have a use that would not otherwise be permissible but it is permissible under the permissible incidental use statute. If the Zoning Administrator in this case and he has found that having these machines converted that into a Recreation Facility in therefore you could have a recreation facility without a Special Use Permit the Law of incidental use can trump that, if the use is incidental to the primary use and that is what we just went through. These are convenience stores that people primarily go into those stores to buy milk or whatever it may be, but having a video game in there no more turns that into a recreation facility than an ATM would turn it into a bank.

Mr. Dyer stated that we as a Board do not have that authority. You can't ask us to say one, two or three is not and four is. We can't do that.

Mr. Douthat stated that is correct, but what you are asking to do is to decide on the appeals that are being made and the stores that are being presented to you today. One had three, four, and a couple had two. In order to rule on the appeal what you have to be thinking of logically per the rule on that appeal is four, three or two an incidental use. That is the point that I was making.

Mr. Dyer stated if we do that, if we say okay you have three machines this is not indoor recreation facility, if they add a machine are they back to the same situation. Are you going to say you submitted four machines but now you have five and I feel that this is an indoor recreation facility? Is that what we are looking at?

Mr. Gillie stated yes.

Mr. Dolianitis stated does it make it an indoor facility if the purpose of the machine is to get people to come in that are just going to use that machine?

Mr. Douthat stated the purpose of those machines is certainly to have people use them.

Mr. Dolianitis stated people that like to game let's say.

Mr. Douthat stated with all due respect I can't comment on what somebody else might be thinking in terms of why they would go to a store and play or whatever. I can tell you that in my experience, for what it is worth I have gone to my local seven-eleven where they had it set up to play a video game and I have gone on many occasions to buy a soft drink and a hot dog and decided to play a video game or not. I think it would be unfair to say that somebody is putting a machine into a building with the expectation that no one will play it.

Mr. Dolianitis stated an owner told me that he told the lottery man I make money off this lottery and this machine is so much less space. I can get more money per space for this machine than I do for the lottery. I just wondered what was going through the owners mind.

Mrs. Garrison stated I'm having a problem with incidental use. If you put an ATM and it doesn't become a financial institution and you sell hot dogs and it doesn't make it a restaurant. One game doesn't necessary make it indoor recreation but the determination of that is individual.

Mr. Dyer stated that is why I feel that we are being asked to create the code as well as to determine the code. If we say we let this guy have three machines and his building is three thousand square feet then we are actually creating the code I believe and that is not our job.

Mr. Douthat stated with all due respect I disagree with that and here is why the Zoning Administrator has ruled that you cannot have any machines in any convenience store without a Special Use Permit.

Mr. Dyer stated would it be appropriate for us to say that we disagree with that but we aren't in the position to determine what the number of machines are.

Mr. Douthat stated but sir, if I may, the Zoning Administrator said that you have to have them. The Zoning Administrator has issued zoning violations to stores that have two, three, four and those have been appealed and they are before you. It is the Board Of Zoning Appeals responsibility to rule on those. I understand what you are saying and no one is asking you to legislate, but the point is there is a body of law out there that says that's incidental use.

Mr. Dyer stated the implications are going to be because I don't see in any of these applications where they are saying or mention a number of machines that they have.

Mr. Douthat stated I just happen to know how many they have.

Mr. Dyer stated so what you are asking us to do, say that we either agree or disagree with Mr. Gillie because this man has x number of machines that he is operating an indoor recreation facility. If I don't know how many machines he's got, then I can't make that judgement because he could easily have fifty machines. Then even though he is selling potato chips and a Coke he is an indoor recreation facility.

Mr. Douthat stated number one on the agenda has one machine and the zoning violation was issued, because that store had three machines. The precise issue I suppose is whether or not three machines constitutes an incidental use. The position that the Zoning Administrator has argued is that any machine in there and he just said if you put a Pacman machine in there, you would have to get a Special Use Permit in order to have just a Pacman machine in a convenience store. The precise question on this appeal is whether or not three is a violation of the Zoning Law and the position that the store takes is no it is not because three would be an incidental use. The use doesn't rise to the level that it's going to convert into a commercial recreation center that would require a Special Use Permit. The examples that have been given as to requiring a special use permit, the Kickback Jack's and The King's Cudgel, those are fundamentally different facilities than a convenience store with three machines. That is why I pointed out the Proffers, which would be no more than twenty games. An actual game room by definition is different from a convenience store.

Mrs. Evans stated is a beauty salon incidental to a residence? Do they have to have a special use permit?

Mr. Gillie stated in the City of Danville they are prohibited under our home occupancy division. They are spelled out in the code. To address Mrs. Garrison question before, what I do as Zoning Administrator, I look at what the definitions are in our zoning code and for convenience store, it talks about the retail establishment and offering for sale or purchase food products and household items and newspapers and sandwiches and other prepared food for off site consumption. The ATM, which he has mentioned, that is a banking thing. Is a bank allowed in that district? If it is allowed in that district then that by right permits banks.

Mrs. Evans stated does any of these applicants facilities have Pacman or Pinball machines?

Mr. Gillie stated prior to these coming in I was unaware of them having any machines. The statement that these are now incidental to it, they have only become very prevalent this year. They have flooded the market and this is something new so I would disagree respectfully with his argument that this incidental. This is all brand new and it couldn't have established incidental because it just started happening and came out very quickly after they received notification that the ABC Lawyer said it was okay. I don't believe that this was incidental. These places as far as I know didn't have these machines before and now they are there and that is why I feel they need the Special Use Permits spelled out in our code. Some of them have applied for them and they have gone through the Planning Commission process to attempt to obtain them. We have a few that already have them, Kickback Jacks and they went through and got the okay for it. We have one that was recently recommended for approval by our Planning Commission and it is going to the City Council in the near future. I believe that all facilities following that same procedure should go through Planning Commission and City Council. It is a legislative

thing. It is something that they should address and that is how it should be handled. I believe that I have acted appropriate in making this determination.

Mr. Douthat stated If I may really quick, I would like to correct something that was said. Accessory use is measured at the time of litigation not the time that zoning ordinance was passed. The reason for that, is times changed and things develop over time but you look at the time that litigation passed and the fact that it is just a new thing that has come in not relevant to this discussion. What is relevant to this discussion is not that they are new but that they are not unexpected in that particular facility. The fact that it is a legit, the whole concept of a legislative function you need to go get a Special Use Permit, that's the way that it has been. That is what the incidental use is designed for. If it is the primary use like a Kickback Jack's or King's Cudgel most certainly, absolutely you need to go through this Special Use Permit process because that's the primary use of what you are going to do with the property. The purpose of the incidental use is to say that this is a convenience store and you have this other use on the side that is customary, is not unexpected and it sort of fits in and you would expect to see it there. It's there so you don't have to go through the Special Use Permit process and remember when I said the fact that accessory use are in the code and not only in Danville but other localities throughout the Commonwealth of Virginia and other localities throughout the United States. In fact there is such a well-developed body of law on this subject is because localities through time, experience, and like they have learned it doesn't make sense to require every business that wants to expand some little minor way that is not necessarily an entire new business to have to go through this Special Use Permit process every time that they wish to expand their business.

Mr. Hiltzheimer stated I'm just wondering what would be the alternative if we turn it down, can he apply for a Special Use Permit?

Mr. Gillie stated yes.

Mr. Meder stated in my understanding Kickback Jack's received this Special Use Permit in 2010 for twenty video games and then in 2019 they put three games that are very similar to the games that are represented here in the store.

Mr. Gillie stated correct and I did not cite Kickback Jack's for a zoning violation because they had a Special Use Permit to operate games. I didn't differentiate between the games, because a game is a game.

Mr. Meder stated so Kickback Jack's has games inside of Kickback Jack's that are not video games and would they be in violation of the law then?

Mr. Gillie stated what type of games? I would have to again look at that but they are allowed to have twenty video games.

Mr. Meder stated they are not authorized to have that based on 2010. It did not say games of skill and they put up a dart game, which was not authorized, and they have corn hole also. We did not give them permission for those.

Mr. Dyer stated that is going to be a Kickback Jack's problem.

Mr. Meder stated I'm getting to my point. Both the code and this Special Use Permit is designed in a time prior to these new games that are coming out. Therefore the code is lacking. I'm sure that our codes are lacking in other areas too not just video games. These codes will need to be updated to reflect the allowance of these machines without a Special Use Permit. It is my belief that a convenience store with three or fewer video games machines or whatever type of video machines are there, does not constitute an indoor recreation facility. I find it no different from an ATM, food service, or gasoline. I find the code is incorrect and outdated.

Mr. Michael Scarce stated I am with the Planning Commission and a Real Estate Broker. I am here in both capacities. I just want to say that I think that staff acted properly and correctly in the determination. The very reason for all the questions we are raising, it needs to have a Special Use Permit to be able to look at all of these issues of parking and square footage and that is exactly what we are in the process of doing; we just didn't have all the information brought to us the second time. I think they have acted properly. Our distinguished Lawyer friend here was using a beauty salon in a house as an incidental or accessory use but we can't do that here. You have to follow the code and if someone wanted to do some other kind of special use they would have to come and get a Special use Permit to look at it and examine all the things to make sure it is safe and there is enough parking. I believe that Mr. Gillie is in the process of what you said coming up with some new codes and words and ways to address this so we can all understand. We just want it done right.

Mr. Dyer stated there are convenience stores that are probably lower than one thousand square feet and others that are six thousand square feet.

Mr. Scarce stated in the code, what staff is trying to do is say okay you are a thousand square foot spot and you just need this amount of parking.

Mr. Dyer stated or you have more machines than you have parking spots. If you have a thousand square feet building then you have to have five parking spots. Then you could easily fit twenty of these machines in a thousand square feet.

Mr. Gillie stated correct.

Mr. Dyer stated this needs to be settled by the code by City Council saying we allow this amount of machines per thousand square feet.

Mr. Scarce stated exactly and I believe he is working on that.

Mr. Douthat stated there were a couple of important points that were raised just then and I think we need to understand what is going on here. There was a comment about a beauty salon being allowed as an accessory use because it was a residential thing, that it couldn't happen here because the code wouldn't allow it. Now, I think there is a fundamental misunderstanding here about what these cases are saying. All of the cases addressed accessory uses that arise in a couple of situations, a violation either of the zoning ordinances or a Special Use Permit or something like that. The case in which that is being talked about, the way that case arose, the City alleges that it was a violation of the zoning ordinance and the response to that was no, because it is a use that is incidental to the primary use so therefore it is not a violation and you don't need a

Special Use Permit. That's what the law of incidental use does. All due respect, the discussion about what you would do under a Special Use Permit is not relevant to the issue of whether or not having a single game or two games is an incidental accessory use to the primary use. It removes it from that. The beauty salon is an excellent example of that, because someone said you can't do it under the current law. It's an incidental use so yes you can.

Mr. Gillie stated that case was where?

Mr. Douthat stated I believe in New Jersey. It is the same thing with all of them. It's the Pigeon Coop. Let's use the Virginia Supreme Court, that case was saying that you can't have a pigeon coop in a residential zone under the current zoning law. It's a violation of the Zoning Law and the Supreme Court said no, having a pigeon coop is an incidental use, so therefore you can.

Mr. Dyer stated so even if the code says no pigeon coops.

Mr. Douthat stated it's an incidental use.

Mr. Dyer stated I can see their argument if it's not specified and if it's not in the code. If the code itself says pigeon coops are not allowed in residential areas.

Mr. Douthat stated I can't speak for what a court would say but the argument would be that's incidental. What a court would decide, on that I don't know. The question here again is whether or not the with the Zoning Administrator, first would one machine violate the Danville Ordinance. If you agree with that, then that is that, but if you do not think that one machine violates the Danville Zoning Ordinance, it does not convert a convenience store into something else. Again, a Commercial Recreation facility requires and you have to have a Special Use Permit. So it's essentially saying if you put one machine into a convenience store that it turns that convenience store into a Commercial Recreation facility.

Mr. Dyer closed the Public Hearing.

Mrs. Evans stated when we first started the lottery in Virginia, not every convenience market sold lottery tickets was that an incidental use. Did they need a Special Use Permit to sell lottery tickets?

Mr. Gillie stated lottery is a function of the State under Virginia's Dillon Rule. I have no authority to regulate anything that is a function of the State. I have no regulations and I'm not permitted to put any regulations over the lottery. That is a question that I can't answer for you.

Mrs. Garrison stated so let me see if I understand this. We as a Board can not state that one machine or ten machines is allowed.

Mr. Dyer stated the initial question before us right now, if in fact there is one machine in a million square foot building, does that make that million square foot building an indoor commercial recreation facility? If you agree with that then that is as far as we have to go.

Mrs. Garrison stated so if we say one machine does not make this an indoor recreation facility.

Mr. Dyer stated we can't go further than that point.

Mr. Meder stated when we vote on one that has ten machines and we say Mr. Gillie was correct, it is an indoor recreation facility, we just set the precedent. If we say that one, two and three are okay.

Mr. Gillie stated you would be legislating it at that point and that is why it is the Planning Commission's responsibility.

Mr. Dolianitis made a motion to uphold the decision of the Zoning Administrator that this is indoor commercial recreation for Appeal Application PLAZ20190000347. Mrs. Evans seconded the motion. The motion was approved by a 4-2 vote.

2. *Appeal Application number PLAZ20190000348, filed by Abdul Wahid Khan on behalf of JAL Properties, requesting an appeal of a final notice of zoning violation for Liberty Sunrise at 2010 W Main St, otherwise known as Grid 0610, Block 003, Parcel 000030 of the City of Danville, Virginia Zoning District Map. The applicant is requesting an appeal of a final notice of violation issued by the Zoning Administrator that a Special Use Permit is required for Commercial Indoor Recreation when one has not been issued to operate commercial indoor recreation machines*

Mr. Dolianitis made a motion to uphold the decision of the Zoning Administrator that this is indoor commercial recreation for Appeal Application PLAZ20190000348. Mrs. Garrison seconded the motion. The motion was approved by a 3-3 vote.

3. *Appeal Application number PLAZ20190000349, filed by Asif Bilal Khan on behalf of W Henry Hardy Inc, requesting an appeal an appeal of a final notice of zoning violation for North Main Texaco at 2434 N Main St, otherwise known as Grid 2810, Block 003, Parcel 000006 of the City of Danville, Virginia Zoning District Map. The applicant is requesting an appeal of a final notice of violation issued by the Zoning Administrator that a Special Use Permit is required for Commercial Indoor Recreation when one has not been issued to operate commercial indoor recreation machines*

Mrs. Evans made a motion to uphold the decision of the Zoning Administrator that this is indoor commercial recreation for Appeal Application PLAZ20190000305. Mr. Dolianitis seconded the motion. The motion was approved by a 4-2 vote.

4. Appeal Application number PLAZ20190000350, filed by Inam Qazi, requesting an appeal of a final notice of zoning violation for Carter's Quick Shop at 3103 W Main St, otherwise known as Grid 0505, Block 002, Parcel 000003 of the City of Danville, Virginia Zoning District Map. The applicant is requesting an appeal of a final notice of violation issued by the Zoning Administrator that a Special Use

Permit is required for Commercial Indoor Recreation when one has not been issued to operate commercial indoor recreation machines

Mrs. Evans made a motion to uphold the decision of the Zoning Administrator that this is indoor commercial recreation for Appeal Application PLAZ20190000305. Mr. Dolianitis seconded the motion. The motion was approved by a 3-3 vote.

5. Appeal Application number PLAZ20190000351, Arshad K Khan on behalf of KFG Properties LLC, requesting an appeal of a final notice of zoning violation for Skyview at 1131 South Boston Rd, otherwise known as Grid 2716, Block 008, Parcel 000006 of the City of Danville, Virginia Zoning District Map. The applicant is requesting an appeal of a final notice of violation issued by the Zoning Administrator that a Special Use Permit is required for Commercial Indoor Recreation when one has not been issued to operate commercial indoor recreation machines

Mrs. Evans made a motion to uphold the decision of the Zoning Administrator that this is indoor commercial recreation for Appeal Application PLAZ20190000351. Mr. Dolianitis seconded the motion. The motion was approved by a 3-3 vote.

II. APPROVAL OF MINUTES

The September 19, 2019 minutes were approved by a unanimous vote.

III. OTHER BUSINESS

Mr. Gillie stated at the last Planning Commission meeting Planning Commission recommended for staff to look into amending the code to address the concerns that were raised at today's meeting. Staff is at this time trying to formulate some regulations that may clarify the issue in front of this Board. I believe the legislative portion of it is Planning Commission and they are advertising for a Public Hearing and are going to go through and try to amend the code to catch up to this. I believe that is what you are asking for. The code has not kept up with the times and I don't disagree with you. We are trying to address that through the changes of Planning Commission recommending or will be heard by Planning Commission and hopefully recommended.

Mr. Meder stated I think that nails it right on the head because I don't think you should be driving around town citing people for these games. I don't think that the business owners should have to go for a Special Use Permit. I think if the code was clear, then possibly they could have these games. If the code was clear, there is a lot of money and expense at this point.

Mr. Dyer stated I believe that City Council should say that if you have one machine then you are creating an indoor recreation facility. I don't agree with that, I think that they have that authority. I think they have the authority to say you can't have a beauty shop in a residential neighborhood. Can we still recommend that this needs to go before City Council?

Mr. Gillie stated the wheel is already in motion because the Planning Commission made their own recommendation last month for staff to look into amending this code portion. That is already in motion. All you can do is do the same thing that they have taken care of.

Mr. Dyer stated I believe at some point that we denied one of these applications where they actually had less than one machine per thousand square feet. Is there any recommendation, is it flat out that you don't want them or do you think that you should have one if you have x number of square feet or do you think there should be a limit on total of machines that you should have.

Mr. Dolianitis stated if you approved one what is going to keep that person from putting twenty more?

Mr. Dyer stated because we are only approving three. If the applicant only had three and we said okay that doesn't make them an indoor recreation facility and if Mr. Gillie would to go in and found out that they had four then they would be cited for the violation. We were not granting them a Special Use Permit, that's Planning Commission and City Council. Any recommendation members would like to make to City Council?

Mrs. Evans stated I can see one game.

Mrs. Garrison stated one game to me is an incidental accessory use. When you start one, two, three, four, five and six, there needs to be and I know they are looking at it and I don't see saying we have no information about actual information about these facilities. One game is incidental and three you are in the business of gaming. If he had stood there and said one game, I would have voted against Mr. Gillie.

Mr. Dyer stated so there are no other recommendations for Council, that we allow one but not two.

Mrs. Garrison stated If they can present this, my building and this is my square footage and this is my parking and this is my plan then go for it but as an incidental use, you know yourself we were children and we went to the store and there was a Pacman machine.

Mr. Dyer stated do we need to make an official recommendation?

Mr. Whitfield stated yes if that is your recommendation then you need to, but let me point out something. One of the reasons that you all didn't make a determination on one, that was the ultimate issue, you are quasi-judicial body, you can only vote on the cases before you. You can't vote on a case that is sort of out there.

Mrs. Evans recommends from the Board that City Council allow one machine before requiring a Special Use Permit. Mr. Meder seconded the machine. The motion was approved by a 5-1 vote.

With no further business, the meeting adjourned at 5:20 p.m.

APPROVED