

**MINUTES OF THE ARAPAHOE COUNTY
BOARD OF COUNTY COMMISSIONERS
MARCH 15, 2005**

State of Colorado, County of Arapahoe. At a public hearing of the Board of County Commissioners for Arapahoe County, Colorado held at 5334 S Prince St. Littleton CO 80166 there were:

Lynn Myers, Chair	Present
Bernard L. Zimmer, Chair Pro Tem	Present
Susan Beckman, Commissioner	Present
Rodney Bockenfeld, Commissioner	Present
Frank Weddig, Commissioner	Present
Kathryn Schroeder, County Attorney	Present
Nancy A. Doty, Clerk to the Board	Absent & Excused
Jennifer Gayer, Deputy Clerk	Present

When the following proceedings, among others, were had and done, to wit:

CALL TO ORDER

PLEDGE OF ALLEGIANCE

ADOPTION OF THE AGENDA

The motion was made by Commissioner Beckman and duly seconded by Commissioner Zimmer to adopt the Agenda as presented.

The motion passed 5-0.

ADOPTION OF THE MINUTES

The motion was made by Commissioner Bockenfeld and duly seconded by Commissioner Beckman to adopt the minutes of the February 22, 2005 Public Hearing.

The motion passed 5-0.

CEREMONIES

There were no ceremonies.

CITIZEN COMMENTS

There were no citizen comments.

CONSENT AGENDA

The motion was made by Commissioner Beckman and duly seconded by Commissioner Zimmer to approve the Consent Agenda as presented.

The motion passed 5-0.

GENERAL BUSINESS AGENDA

Item A – Resolution No. 050158 – Public Hearing, Consideration of a Petition for Inclusion in the Arapahoe County Water and Wastewater Public Improvement District by Foxfield Village Center Partners, LLC

Deputy County Attorney Jack Bush established jurisdiction for the Board to consider this Item. He explained the Board would be acting in the capacity of the ex-officio Board of Directors of the Arapahoe County Water and Wastewater Public Improvement District. He said the item under consideration is a petition for inclusion submitted by Foxfield Village Center Partners, LLC. He said regarding a petition for inclusion, the statute is set it up as a show cause hearing to her objections. He said any property owner within the boundary could object.

Jim Hunsaker, Grimshaw and Herring, representing the applicant. He said the applicant has been working with ACWWA to work out potential service. He said the agreement on service and the terms are not fully agreed upon and he asked that if approved, the inclusion not be recorded or affective until the agreement is reached. He said that should be done within a couple of months.

Mr. Bush said the ACWWA Board considered the matter. He said the process for evaluating petitions is that any petition for inclusion is referred to the ACWWA Board, which recommended approval pending the agreement.

There were no citizen comments.

The motion was made by Commissioner Zimmer to approve the Petition of inclusion in the Arapahoe County Water and Wastewater Public Improvement District, subject to the final service agreement as stipulated.

Seconded by Commissioner Bockenfeld.

The motion passed unanimously.

Item B – Resolution No. 050159 – Public Hearing, Case No. Z04-008, Cherry Creek Market, Preliminary Development Plan

Assistant County Attorney Tim Knapp established jurisdiction for the Board to consider this item. He explained that jurisdiction was established on March 1, 2005 and continued to this date. He said the instructions to the applicant and staff were that the parties attempt to reach a resolution relative to a drive-through facility.

Commissioner Myers said the hearing would be opened for public comment this morning for those who were unable to address the Board at the March 1, 2005 hearing.

Sherman Feher of the Planning Division presented the staff report, a copy of which has been retained for the file. He said emails for and against have been distributed to the Board, copies of which have been retained for the file. He said the Board directed staff to assist in the resolution regarding differences related to the drive through facility between the applicant and the neighbors. He explained that Planning staff created a process to facilitate a resolution and there were meetings with each interested party to better understand the positions, the reasons for that position and to determine if there was any leeway in that position. He said the next step was to try to resolve things. He said both parties agreed to the process. He said the applicant felt it was important to have a legally enforceable definition for a drive up/drive through facility with a non-alcoholic beverage establishment. He stated that the applicant worked with the Planning staff and the County Attorney's staff, and the initial definition was a plural definition. He explained that after feedback from neighbors, it was determined that that "operations" would be changed to a singular definition of operations. The applicant agreed to that. He said the applicant's position was that a drive through was an important and necessary part of the successful commercial/retail venture. He said the rationale is contained in Attachment C. He summarized that with the January 5 e-mail the HOA indicated a willingness for a "boutique coffee / bagle drive through". He stated that the applicant conceded many other uses. He further stated that the applicant is willing to show a portion of the letter of intent from Starbucks. He said the applicant also felt that there would be a quality development. He said the staff went to the 4 Square Mile HOA meeting to discuss their position. He said after much discussion it was determined that the residents do not want any fast food drive through establishments. He said that position is outlined in Attachment D. He said specific reasons are traffic congestion, pollution and that a fast food drive through is not compatible with the pedestrian oriented retail center. He said because the parties maintained their position and had no desire to work together, staff reworded the definition mentioned above. He said Planning staff has subsequently prepared two resolutions; one is for one drive through non-alcoholic establishment and the second draft is for no drive up / drive through establishment.

Commissioner Beckman asked to see the letter of intent.

Commissioner Myers clarified the first and second option and said the third option was prepared by...

Mr. Feher said he only has two resolutions. He said the third option is that the Board make an alternate motion.

The applicant provided a copy of the letter of intent from Starbucks.

Commissioner Beckman said the attorneys could not agree on language that the Board could concur with. She asked if the language in the draft motions is acceptable to the County Attorney.

Mr. Knapp said yes. He said the County Attorney's office has reviewed both draft motions and the language and said the motions are enforceable. He added that at the last hearing he suggested that a requirement be added to the lease agreement so that zoning enforcement could request information from a tenant. He said the applicant has indicated that he is willing to include that as a condition if the Board desires.

Commissioner Myers said the Board has received a number of letters, copies of which have been retained for the file.

Tim Larson, 15150 E. Iliff Avenue, Westwind Management Group, said he manages homeowners associations exclusively and has been in business for 19 years. He said WMG manages 46 communities with 17,000 homes. He said he represents the management of the Village of Cherry Creek Country Club. He said has past experience with fast food establishments and drive in issues. He said an establishment on Mississippi started out as a fast food establishment. He said later the fast food establishment requested a drive through and that was opposed on behalf

of the client. He said at that time, the establishment approved of one of its employees picking up trash for about one month, but the trash became so prevalent that the HOA has to hire an individual to pick up the trash daily. He said that was at the cost of the client. He said regarding this issue there is great concern regarding traffic issues. He said the noise, congestion and the litter are all concerns. He said he has a letter from Stacey Hart, Cherry Creek Country Club. He read the letter into the record. (Reference 9:48:55 of the audio recording.)

Commissioner Weddig said regarding the project on Mississippi, what type of restaurant was that?

Mr. Larson said Burger King.

Commissioner Weddig confirmed that this situation is a beverage entity.

Mr. Larson said the difference is that when the Burger King was operating without the drive through, there were never problems. He acknowledged that there was a lot of traffic, but with the drive through came more traffic and litter and congestion. He said the biggest issue was the blowing trash.

Commissioner Weddig understood that there was an agreement with Burger King when they got permission for the drive through regarding daily clean up. He asked if anyone ever asked the Planning department to enforce the agreement.

Mr. Larson said the establishment was called as well as the planning department and the only avenue was to take legal action; the association felt it was more appropriate to hire someone to pick up the trash.

David Knapp, 18658 E. Long Avenue, is part owner of the furthest west lot that is being developed. He said the desire is the highest and best use and what is best for the neighborhood. He said he has been told that if this case does not come to fruition, then something better would come along. He said the only other offers he has received were for car storage, automotive maintenance, and thrift stores. He said those options would be worse than a drive through. He said the only other option for highest best use is a car wash or gas station. He said this proposal is a better deal than that.

Tom Goodyear, 9341 E. Jewell Circle, said the problem on Iliff is the traffic. He said a traffic engineer from Arapahoe County said every person that has a driver's license is a traffic engineer. He said this is going to be a coffee house and everyone likes coffee in the morning. He said this proposal would help to impede traffic on Iliff. He said he is against a drive through. He said he is not opposed to a regular coffee shop.

William Packard, 1733 S. Uinta Way, Mountain View Gardens, said he would like to confirm the unanimous decision of the 4 Square Mile residents that no drive through fast food establishment of any kind be allowed in the Cherry Creek Market development. He said the residents feel that spot zoning is wrong. He wondered what happens if the Starbucks closes. He asked who would be responsible for enforcing the requirements of the drive through? He said many Starbucks are open without drive throughs and if Starbucks feels that this is the right area, then they would not need a drive through. He said if not, other good establishments are saying they would like to be in that development. He said this proposal would create a real traffic problem. He said Iliff is heavily used.

Alan Cunningham, 850 Santa Fe Drive, presenting the applicant. He said with respect to the letter from Stacey Hart, he said he was present when Mike Johnston has a conversation with Mr. Hart, who is in California. He said Mr. Hart told Mr. Johnston that he received a letter drafted by Wayne Lorenz that was faxed to him in California. He said Mr. Hart stated that he signed the letter although he did not read it because Mr. Lorenz had stated that there might be a Starbucks. He said he felt that Mr. Hart might be telling Mr. Johnston and Mr. Lorenz what they want to hear to be politically correct. He said Mr. Hart also stated that he would support whatever the residents in Cherry Creek Country Club would like. He said he read letters of support. He said the first letter is from William and Peggy Klaess, a copy of which has been retained for the file. He read the letter into the record. He also read a letter from Michael Connelly, a copy of which has been retained for the file. He said since the last meeting, the applicant has come up with a definition that is enforceable and acceptable to all parties. He said after the March 1st hearing, the applicant provided a definition to staff and the County Attorney that was given to the applicant by Mark Lampert and the HOA verbatim. He said the applicant was told that the definition should be expanded upon, so the

applicant provided two additional definitions. He said upon review the County Attorney decided upon the following definition: restaurants and fast food restaurants would have drive up and drive through facilities are allowed, notwithstanding the forgoing an operation who's principal identity is derived through the sale of non-alcoholic beverages should be allowed to have drive up/drive through facilities. He stated that staff took the definition to the HOA, who did not support it or provide an alternative. He said their hardened stance confirms the negotiation tactics of the HOA regarding this project. He said on January 5, 2005, the applicant received an email from Mark Lampert on behalf of the HOAs. He said the email stated that the HOAs would support a definition that said "restaurants, including drive through for boutique shops, i.e. coffee and bagels. He said the HOA requested restrictions on the following uses: auto sales and repair, parking lot, auto service station, billiard parlor, bowling alley, tennis club, skating rink, convenience store with gas pumps, night club dedicated to live entertainment, hotel/motel, massage parlor, unattended car wash. He said the applicant has removed all of these uses. He said subsequent to what they wanted the HOAs have now rescinded their decision for a drive through. He said this inadvertently demonstrated the HOA has been negotiating in bad faith for quite some time in order to have their cake and eat it too. He said the HOAs have never objected to a drive through at the bank, which has two lanes; Mr. Lampert on behalf of the HOAs has confirmed this. He said he doesn't understand how a car at a coffee drive through is more objectionable than a bank drive through is. He said there is no difference between an idling car at either drive through. He said if stacking distances are controlled, they are one in the same. He said the applicant is simply asking for what was negotiated with the HOAs before they decided to change their collective minds and harden their stance. He said the applicant asks that the BOCC approve this project with the aforementioned enforceable definition and allow this exciting project to move forward.

Commissioner Weddig assumed that the trash and debris issues would be dealt with in a responsible manner.

Mr. Cunningham said all of the service areas would be contained and screened. Mr. Johnston would be the owner of the residential and commercial components and it would be in his best interest to control trash and debris.

Commissioner Zimmer wondered what other uses could be used in that spot.

Commissioner Myers suggested juice establishments.

Commissioner Bockenfeld said Commissioner Beckman asked for a copy of the letter of intent from Starbucks. He said the Board has a copy of a letter of intent dated March 15th, 2005, which is today. He said the letter is unsigned and does not seem that the drive through is a deal breaker for Starbucks. He asked the applicant for a signed letter.

Mike Johnston said the reason the letter has today's date is because he downloaded the original letter he received. He said he has interlineated documents on the negotiations of rent and acceleration clauses and tenant improvement aspects, which he did not want to make public. He said he first received the opening salvo on October 5, 2004 with a letter of intent. He said a number of issues have been negotiated but the drive through has not been an issue of discussion because Starbucks expects a drive through at this location.

Commissioner Beckman asked if Mr. Johnston has informed Starbucks that zoning is an issue and that a decision has not yet been made.

Mr. Johnston said he asked Starbucks what their response would be. He said Starbucks representative said that in this location, Starbucks expects a drive through.

Commissioner Beckman said because of language in the letter of intent, she is surprised that Starbucks has not asked about the zoning.

Mr. Johnston said Starbucks is opening 15 new locations in Colorado this year and they try to streamline as much language as possible. He said he does not want to downplay this location, as it is not a high priority location for Starbucks. He said he believes that it would not hurt Starbucks to not be here.

Commissioner Beckman asked to see the drawing for the building.

Mr. Johnston said there would be 28 single-family homes. He said the Starbucks would be in the lower right hand corner. He said the bank is located on the corner and the drive through is northward along the Yosemite location.

Mr. Cunningham described the location on the map.

Commissioner Weddig said it seems that there would be a sharing arrangement between the banks and Starbucks.

Mr. Johnston said two banks are interested in the location. He said there is a Starbucks at the corner of Colorado Boulevard and Yale Avenue, which does not have a drive through. He said that is a difficult pedestrian/car situation with people parking then walking through the drive areas. He said a drive through would not be adverse to an individual who wants a cup of coffee and there is not a lot of difference between an individual going through a drive through and getting out of the car. He said the impact to the traffic would be the same.

Commissioner Beckman said she didn't understand that there was a drive through bank attached and she wondered why the County could allow a drive through bank but not a drive through Starbucks. She wondered what would happen to the site pad when the bank is no longer there.

Mr. Feher said this is a PDP for zoning for uses. He said the site plans talks about conceptual locations, architecture, etc., and staff is specifically addressing the uses listed on page 2. He said with the streamlined process staff asked for more information up front. He said the list on page 2 is the original modified list that was presented to the Planning Commission. He said the PC came up with more restrictions and there have been ongoing negotiations. He said the bank with the drive through has never been an issue between the neighbors and the Board. He said the neighbors had concern about the litter and smells and pollution. He said this presentation is conceptual and some of these issues would be discussed during the FDP. He said regarding spot zoning, a PUD is a customized zone that allows a specific choice of uses.

The motion was made by Commissioner Zimmer to approve Case No. Z04-008, the Cherry Creek Market, Preliminary Development Plan, that the Board of County Commissioners has read the staff report and received testimony at the public hearing. The Board of County Commissioners finds itself in agreement with the staff findings, including all the plans and attachments as set forth in the staff reports dated February 14, 2005 and March 11, 2005 and approve this case subject to the following conditions:

1. The applicant must make all minor modifications to the Preliminary Development Plan as requested by the Public Works & Development Department prior to the submittal of mylars.
2. The applicant must address the Division of Engineering's comments and concerns, contained in the Engineering Staff Reports.
3. The Planning Commission's recommendation of allowed commercial uses will be incorporated with the addition of "Restaurants and Fast Food Restaurants without drive-up/drive-through facilities are allowed, notwithstanding the forgoing, only one operation whose principal identity is derived through the sale of non-alcoholic beverages shall be allowed to have a drive-up/drive-through facility".

Seconded by Commissioner Weddig.

Commissioner Beckman said her concern last week was that the language could not be agreed upon and that changed when an attorney confirmed that this is something that could be done and is enforceable. She said a drive through exists on the site and she does not see a difference. She said she would support the motion and allow the drive through because the attorney feels that enforcement is possible.

Commissioner Weddig said because of the current state of the property this is a good project. He acknowledged that the project is not perfect but no matter what is developed, there would be issues. He said this is a desirable project and the numerous restrictions put this above any development in the near future.

Commissioner Zimmer reminded the audience that this has been a collaborative process. He recalled the new sub area plan for the 4 Square Mile area. He said he understands the concern and said he has worked in this area for over 20 years. He said good development is needed in this area. He said he believes that the County has put enough restrictions on the property so that the desired outcomes of the developer and the residents have been considered. He said the some neighborhood concerns might be exaggerated to some degree.

The motion passed 4-1, Commissioner Myers opposed.

COMMISISONER COMMENTS

There being no other business before the Board, the Chair adjourned the hearing at 10:30 AM.

ARAPAHOE COUNTY BOARD OF COUNTY COMMISSIONERS

**NANCY A. DOTY, CLERK TO THE BOARD
BY JENNIFER GAYER, DEPUTY**