



Land Use and Long
Range Planning
5800 Shier Rings Road
Dublin, Ohio 43016

phone 614.410.4700
fax 614.410.4747

www.dublinohiousa.gov

City of Dublin Board of Zoning Appeals

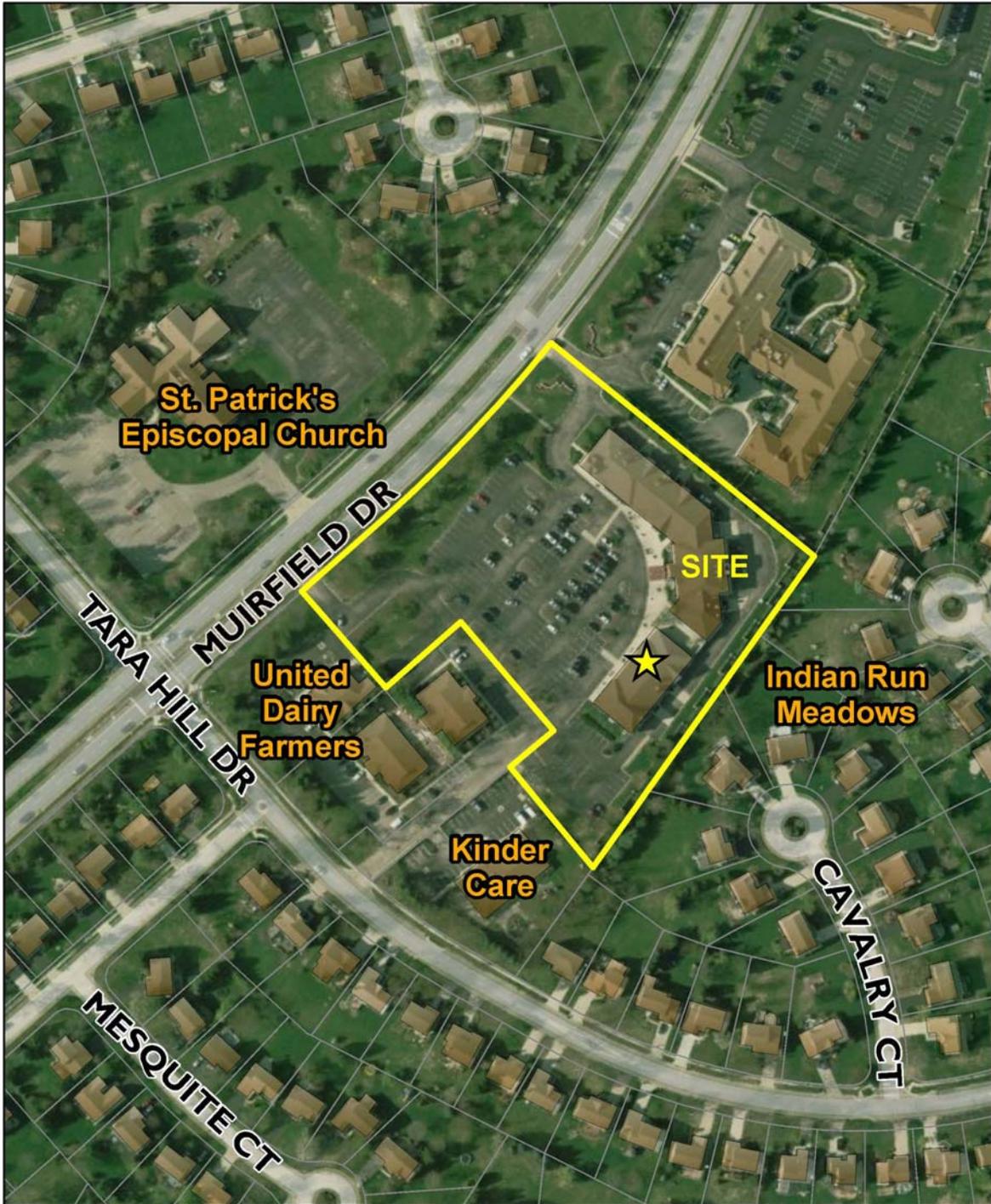
Planning Report

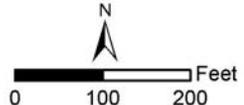
Thursday, July 25, 2013

**Indian Run Meadows PUD, Shoppes at Athenry – Dairy Queen
7106-7196 Muirfield Drive
Administrative Appeal**

Case Summary

Agenda Number	1
Case Number	13-071AA
Location	7106-7196 Muirfield Drive The Shoppes of Athenry Shopping Center located on the east side Muirfield Drive at the intersection with Tara Hill Road.
Proposal	An appeal to the staff decision that an ice cream shop is a fast food and not a full-line restaurant prohibited under the approved Indian Run Commercial development text applicable to the Shoppes at Athery shopping center.
Request	Administrative Appeal Review and approval of administrative appeal under the provisions of Code Section 153.231.
Applicants	Michael Kelley.
Planning Contact	Claudia D. Husak, AICP, Planner II.
Contact Information	(614) 410-4675, chusak@dublin.oh.us
Planning Recommendation	Planning recommends that the Board of Zoning Appeals uphold Planning's determination that a proposed Dairy Queen store is considered a fast food restaurant and does not qualify as a full line restaurant and therefore not a permitted use under the Indian Run meadows development text.



 <p>City of Dublin Land Use and Long Range Planning</p>	<p>13-071AA Administrative Appeal Indian Run Meadows PUD - Shoppes at Athenry Dairy Queen 7148 Muirfield DR</p>	 <p>0 100 200 Feet</p>
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Facts	
Site Area	4.91-acre site, 26,400-square-foot shopping center.
Zoning	PUD, Planned Unit Development (Indian Run Meadows plan).
Surrounding Zoning	<p>North: PUD; Emerald Crossings Retirement Home in the Indian Run Meadows PUD</p> <p>South: PUD; Outparcels within The Shoppes of Athenry including United Dairy Farmers and Kinder Care.</p> <p>East: PUD; Single Family homes in the Indian Run Meadows PUD.</p> <p>West: PUD; St. Patrick's Episcopal Fellowship in the Indian Run Meadows PUD.</p>
Site Features	<ul style="list-style-type: none"> • The Shoppes of Athenry have two buildings forming an L-shape connected by an open space. The shopping center building is in the northeastern portion of the site and parking is in front of the shops. The center has two shared curb cuts along Muirfield Drive. A service drive provides access to the service area to the rear of the buildings. • The site has 469 feet of frontage on Muirfield Drive, and the rear boundary line abuts single-family lots on Wichita Court and Cavalry Court in the Indian Run Meadows subdivision.
Development History	<ul style="list-style-type: none"> • 1978 PUD zoning approved • 1984 revised preliminary development plan approved • 1986 revised preliminary development plan approved • June 5, 1997: final development plan for a 26,400-square-foot shopping center approved • April 15, 1999: conditional use for a patio tabled (Case 99-026CU) • September 16, 1999: conditional use for a patio withdrawn by applicant after a short Commission discussion (Case 99-026CU) • November 10, 2005: conditional use for a patio tabled (Case 05-154CU) • October 11, 2007: amended final development plan for a 2,400-square-foot outparcel denied (Case 07-029AFDP) • January 19, 2006: conditional use for a patio denied (Case 05-154CU) • July 8, 2010: informal review of patio in front of the restaurant (Case 10-025INF) • April 12, 2012: combined rezoning with preliminary development plan and final development plan for a patio for Mary Kelley's approved by the Commission • May 21, 2012: Council approval of rezoning ordinance for Mary Kelley's patio • November 12, 2012: amended final development plan for a new shopping center identification sign approved by the Commission (12-075AFDP)

Details	Administrative Appeal
<p>Process</p>	<p>Zoning Code Section 153.231(C)(1) allows the Board of Zoning Appeals to review Administrative Appeals from any person or any governmental department affected or aggrieved, or to review any order, requirement, decision or determination where it is alleged by the appellant that there is error or misinterpretation in the administration of the Code. The Board may affirm, deny or modify a decision or determination rendered by Planning.</p>
<p>Applicable Zoning Requirements</p>	<p>The zoning for the Shoppes of Athenry shopping center is Planned Unit Development and is covered by the Indian Run Meadows development text for Commercial Uses, last amended by City Council on May 21, 2012. The following uses are permitted by the development text:</p> <p>H. Permitted Uses</p> <p>1. Those permitted uses shall be those listed in Chapter 153.027, Neighborhood Commercial District except “Eating and drinking places” shall include full line restaurants and shall not include fast food or drive-in restaurants or places primarily designed for entertainment or dancing and referred to by various names such as dance hall, cabaret, and night club and the following uses listed in Section 153.028, Community Commercial District.</p> <p>Mens and boys clothing and furnishings stores Womens accessory and specialty stores Womens ready to wear stores Shoe stores Custom tailors Furriers and fur shops Book and stationery stores Jewelry stores Camera and photographic supply stores Optical goods stores</p> <p>Of relevance to the request is the opening paragraph listing the Neighborhood Commercial District for uses, but specifically stating that “Eating and drinking places” shall include full line restaurants and shall not include fast food or drive-in restaurants...”</p>

Details	Administrative Appeal
Administrative Appeal	<p>The applicant approached the City of Dublin proposing to lease a tenant space within the shopping center to Dairy Queen. On July 3, 2013, Planning determined that the proposed Dairy Queen operations and products fall under the classification of “fast food” and do not fit the requirement for a full service, full line restaurant as required by the Indian Run Meadows development text. The applicant is requesting an Administrative Appeal to the Board of Zoning Appeals to reverse Planning’s decision.</p>

Analysis	Existing Use
Appeal Procedures	<p>Under Section 153.231 (F), an appeal may be taken from any person or any governmental department affected or aggrieved, and review any order, requirement, decision or determination where it is alleged by the appellant that there is error or misinterpretation in any order, requirement, decision, grant or refusal made by an administrative official or body charged with the enforcement and administration of this Code.</p> <p>In deciding the appeal, the Board is to determine whether or not the decision that was made was done so using the proper requirements and standards in this Code. The Board is limited to the information that was available to the administrative official or body who made the decision being appealed. Additional testimony is not appropriate.</p> <p>After a determination that the administrative official or body making the decision did so improperly, the Board may reverse or affirm, wholly or partly, or may modify, the order, requirement, decision or determination appealed from, and may make an order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the administrative official or body from whom the appeal was taken.</p>
Basis of Decision	<p>The Dublin Zoning Code currently uses the now obsolete Standard Industrial Classification codes for identifying specific uses. In this instance, the Neighborhood Commercial District (Section 153.027) lists “Eating and drinking places” under Personal Services, with the SIC designation of 581. The text then also includes the following exception:</p> <p>“Eating and drinking places” shall include <u>full line restaurants</u> and <u>shall not include</u> fast food or drive-in restaurants or places primarily designed for entertainment or dancing and referred to by various names such as dance hall, cabaret, and night club...”</p>

Analysis

Existing Use

Basis of Decision

Neither the Dublin Code nor the Indian Run Development Text contains definitions for “fast food” restaurants, or “full line” restaurants. As a result, the City uses their common and ordinary meanings.

Fast Food

For fast food, Webster’s Collegiate Dictionary uses the definition of “of, relating to, or specializing in food that can be prepared and served quickly” and as “designed for ready availability, use, or consumption...”

Full Line

Conversely, full line or full service restaurants have been defined as inviting guests to be seated at tables, while servers take their full order and serve food and drink. The SIC definition (found in the more current North American Industry Classification System, NAICS) is:

722511 Full-Service Restaurants

This U.S. industry comprises establishments primarily engaged in providing food services to patrons who order and are served while seated (i.e., waiter/waitress service) and pay after eating. These establishments may provide this type of food service to patrons in combination with selling alcoholic beverages, providing carryout services, or presenting live nontheatrical entertainment.

The text specifically prohibits fast food restaurants. The applicant has stated that their Dairy Queen operation would primarily serve ice cream and that BBQ sandwiches and hot dogs would constitute up to 10% of the store sales. However, based on this information, Planning has determined that the above definition would appear most closely to match the proposed menu and operations.

The appellants have noted that the language for full line restaurants was intended to be inclusionary. However, the SIC list for this use already specifically lists “restaurants” which would include full line uses. Clearly, the intent of the language was to ensure that restaurants permitted in the center were of a distinct nature that would include full service operations.

This issue was also discussed by City Council on May 21, 2012 when the Mary Kelley restaurant proposed its outdoor dining area. During this discussion Mayor Lecklider noted that he felt that the text was not ambiguous in that “(T)he sensibilities of this community have not changed much in this time period. He believes everyone, including the applicant, understood what was envisioned at that time – a restaurant such as Mary Kelley’s – a sit-down, full service restaurant...” Given this

Analysis	Existing Use
Basis of Decision	<p>discussion at City Council, Planning has been using a stricter line with respect to use determinations for fast food and full line restaurants.</p> <p>With this direction from Council Planning has concluded that a Dairy Queen restaurant both fits within the definition of fast food restaurant and would not qualify as a full-line or full service restaurant, and is not permitted in the Shoppes of Athenry shopping center.</p>

Recommendation	Administrative Appeal
Uphold Planning's Decision	<p>Planning recommends that the Board of Zoning Appeals uphold its determination that a proposed Dairy Queen store is considered a fast food restaurant and does not qualify as a full line restaurant, and therefore is not a permitted use under the Indian Run meadows development text.</p>

ADMINISTRATIVE APPEALS

The City of Dublin Zoning Ordinance stipulates that the Board of Zoning Appeals may hear appeals to any administrative decision rendered by the City in the review, interpretation and enforcement of the Zoning Code. The authority of the Board and the appeal process are outlined in Sections 153.231(C)(1) and 153.235(F).

153.235 (F) Administrative Appeal to the Board of Zoning Appeals

(F) Administrative Appeal to the Board of Zoning Appeals

- (1) An appeal may be taken from any person or any governmental department affected or aggrieved, and review any order, requirement, decision or determination where it is alleged by the appellant that there is error or misinterpretation in any order, requirement, decision, grant or refusal made by an administrative official or body charged with the enforcement and administration of this Code.
- (2) Appeals shall be taken within 20 days after the decision by filing with the officer from whom the appeal is taken and with the Board of Zoning Appeals, a notice of appeal, specifying the grounds. The officer from whom the appeal is taken shall transmit to the Board of Zoning Appeals all the papers constituting the record upon which the action was taken.
- (3) An appeal shall stay all proceedings in furtherance of the action appealed from unless the Director of Land Use and Long Range Planning certifies to the Board, after notice of appeal has been filed, that, due to the facts stated in the certificate, a stay would cause imminent peril to life or property. In this case, the proceedings shall not be stayed other than by a restraining order, which may be granted by a court of record.
- (4) In deciding the appeal, the Board shall determine whether or not the decision that was made was done so using the proper requirements and standards in this Code. The decision of the Board is limited to the information that was available to the administrative official or body who made the decision being appealed. Additional testimony is not appropriate.
- (5) After a determination that the administrative official or body making the decision did so improperly, the Board may reverse or affirm, wholly or partly, or may modify, the order, requirement, decision or determination appealed from, and may make an order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the administrative official or body from whom the appeal was taken.