



Town of Pagosa Springs
Planning Commission, Board of Adjustments & Design Review Board
Appeals Hearing
June 30, 2015

Town Hall, Council Chambers, 551 Hot Springs Boulevard, Pagosa Springs, Colorado 81147

- I. **Call to Order / Roll Call:** Planning Commission/ Board of Adjustments Chair Ron Maez called the hearing to order at 5:30 PM. Commissioners Kathie Lattin, Peter Adams, Heidi Martinez and Natalie Woodruff were present. Also present were Planning Director James Dickhoff, Associate Planner Margaret Gallegos, Town Attorney Bob Cole (by telephone), Walmart representatives Joey Lubinski and Tasha Bolivar and approximately 12 persons.

Chair Maez provided an overview of the agenda, thanked everyone for attending and noted that first, the Board of Adjustments (BOA) will consider adopting Resolution 2015-09, which adopts procedural guidelines for the appeals hearing. The second agenda item is the actual Appeals Hearing. During the hearing, the BOA will only hear testimony from the Planning Director and the Appellant - Walmart Real Estate Trust, with time limits for each based on the adoption of Resolution 2015-09. No evidence outside of the "Documents of Record" that were provided prior to the Hearing will be allowed unless approved by the Appellant and the Planning Director.

Chair Maez stated that public comments will not be heard during the Appeals Hearing; however, written public comments received before the Walmart "Notice of Appeal" on April 2, 2015, have been included in the BOA packet for consideration. With that said, he noted that those that property owners that are within 300 feet of the subject property or have received mailed notice of the hearing can appeal the BOA's decision to Town Council. In addition, the Planning Director and the Appellant can also file an appeal. Chair Maez stated that if anyone is interested in submitting a "Notice of Appeal" regarding the BOA decision, should contact the Town Clerk for such requirements and the "Notice of Appeals" must be received by the Town Clerk within 10 days from the date of the decision making bodies' final determination.

For the purposes of conducting an orderly Appeals Hearing, Chair Maez reminded that the BOA and those providing testimony should speak clearly into the microphone. In closing, Chair Maez requested that only those recognized by the Chair may speak, to ensure no one is talking over each other.

II. **Board of Adjustments**

A. **Resolution 2015-09: A Resolution and Order Regarding Procedures Governing the Appeal by Walmart Real Estate Business trust, of the Administrative Decision of the Town Planning Department Director Regarding Parking Lot Lighting.** Pursuant to the Land Use and Development Code (LUDC) Section 2.4.13.E, Walmart Real Estate Business Trust (the "Appellant"), through its legal counsel, has submitted a "Notice of Appeal" appealing the Town Planning Director's interpretation of LUDC section 6.11.4 and the final determination regarding the non-complying nature of the parking lot lighting. The LUDC section 2.4.13.G.5 allows the establishment of procedural rules related to an Appeal Hearing. It was noted that Walmart's legal counsel has consented to the proposed language and terms set forth in in Resolution 2015-09.



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Motion made by Member Lattin, seconded by Member Martinez and unanimously carried to approve Resolution 2015-09, A Resolution and Order Regarding Procedures Governing the Appeal by Walmart Real Estate Business trust, of the Administrative Decision of the town Planning Department Director Regarding Parking Lot Lighting.

B. Appeals Hearing: Walmart Real Estate Business Trust Appealing the Town Planning Director's interpretation of Land Use Development Code section 6.11. Exterior Lighting, and his Final Determination regarding the non-complying nature of the parking lot lighting at the Walmart development located at 211 Aspen Village Drive, with possible Executive Session Pursuant to C.R.S. 24-6-402(4)(b) for the Purpose of Receiving Legal Advice regarding the Walmart Appeal Hearing.

The Board of Adjustments was provided with the following documents, labeled in coordination with its Appeals Hearing Binder tabs:

A- Documents Associated with "Notice of Appeal"

- 1) LUDC section 6.4.13. APPEALS
- 2) Notice of Appeal from Walmart, dated April 3, 2015.
- 3) Walmart Opening Brief, dated April 16, 2015.
- 4) Planning Directors Final Determination, dated March 23, 2015.
- 5) LUDC section 2.4.13. Appeals
- 6) LUDC section 6.11, Exterior Lighting.
- 7) Exhibit C, Appellants provided definitions of Glare
- 8) Exhibit D, Appellants Lighting Guidelines

B- Complaints and comments received prior to April 2, 2015 receipt of "Notice of Appeal".

- 1) Written Complaints received prior to April 3, 2015.

C- Index of Documents associated with Original Design Review Board (DRB) Public Hearings

D- Documents associated with May 22, 2012 DRB Public Hearing

- 1) May 15, 2012 Correspondence from the Planning Director to Tasha Bolivar.
- 2) Walmart's responses to staff and Bohannon Huston's project comments, dated May 21, 2012.
- 3) Walmart illumination power point presentation, dated May 22, 2012.
- 4) Preliminary Lighting plans dated April 4, 2012

E- Documents associated with July 10, 2012 DRB Public Hearing

- 1) Revised Illumination Plan Dated June 12, 2012.
- 2) Correspondence from Carl Schmidlein of Galloway responding to Town review comments, dated June 21, 2012.
- 3) Amended Bohannon Huston review of re-submitted plans, dated July 3, 2012.



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- 4) Walmart illumination power point presentation, dated July 10, 2012.

- F- Documents associated with August 21, 2012 DRB Public Hearing
 - 1) Walmart response to July 10, 2012 DRB meeting minutes.
 - 2) Walmart illumination power point presentation, dated August 21, 2012.
 - 3) The Edge LED Area Light fixture product information sheet.
 - 4) Revised Illumination Plan Dated August 13, 2012.

- G- Documents Associated with the Final DRB and Town Approvals
 - 1) Resolution 2012-12, "Setting forth findings of fact and conclusions and approving the Walmart major Design Review Development Application".
 - 2) Galloway response to DRB Resolution 2012-012, dated April 11, 2013.
 - 3) Site Plan Approval from the Town, dated May 08, 2013.
 - 4) Final approved illumination plan, dated December 18, 2012.

Planning Director James Dickhoff opened the discussions by thanking the Board for its time and the many citizens in attendance. Director Dickhoff noted that public notices were mailed and apologized for the first letter and then subsequently corrected about public comment not allowance at the meeting. He noted that he has a good working relationship with both Walmart and the architect design team and his finding has not affecting his determination and all parties continue to maintain a professional standing. Director Dickhoff stated that, through the process, plans were modified so that no foot candles would not be over the property boundaries. The Land Use and Development Code Section 6.11.4 (c) outlines the design standards adequate for safety.

Planning Director Dickhoff noted that during the plan review, the first stage was based on submitted plans. The second stage involved an onsite review by staff and final documents. During an onsite inspection, several foot candles exceeded the overage – two lights are polluting the residence across the street, visible light sources were identified in the interior – middle part of parking lot and perimeter around the sidewalk. He explained that the interior lights are not shielded which creates light sources to extend off-site. Compliance can be achieved by shielding, modified or addition of light sensor(s). Dickhoff stated that he has consistently interprets and applies the LUDC uniformly for all resident and commercial projects.

The Planning Director identified the following violations of the exterior Walmart parking lot lights: 1) The LED light sources (light bulbs or LED light boards) are not concealed or shielded to minimize diffusion on adjacent properties. Visible light sources are allowed with a motion detecting device; and 2) Foot-candle meter measurements indicate portions of the perimeter are higher than zero off-site. Director Dickhoff stated that the foot-candle levels have been approved by the Design Review Board (DRB) and physical inspection(s) is necessary to confirm compliance which is handled administratively, separate issue from the Appeals Hearing.



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The Planning Director believes there are two general issues to be considered by the Appeals Hearing: 1) Is the Town's Planning Director's interpretation of LUDC section 6.11 correct, regarding concealing or shielding visible light sources; and 2) If the Planning Director's interpretation of the lighting regulations is correct, are the installed exterior lights at Walmart compliant with the LUDC section 6.11.4.

Walmart Real Estate Business Trust, represented by Attorney Joey Lubinski, thanked the Planning staff for putting together a comprehensive packet for the Board. He stated that the staff report and initial brief appear to be complete and helps to provide the history of the application. Lubinski stated that the threshold issue is that an applicant has a right to rely on the validity of the approvals which includes the major design review.

He noted that the Walmart plan review included the lighting requirements from the onset; it was not buried or glossed-over. He said that it was a repeated topic of conversation including a third party review. Power Point slides were provided in the packet for review and he pointed-out that the lighting met all the criteria, of Articles 3, 4, 5, and 6 in the LUDC, final plans were developed and Walmart obtained a permit and proceeded to build the parking lot. Mr. Lubinski contested that no conditions for the lighting were added to the Resolution and that it was added after construction was completed. He felt that staff detected the lighting issues and that it was a "re-look" at the lighting issues. He noted that his client, Walmart, expected compliance inspections with the Code and not a "fresh-look". He stated that pursuant to discussions, it was discovered that the brightness was 57 to should have been 43 so lights were swapped out to 43.

Mr. Lubinski noted that the question should be, "Did you build in accordance with the approved plans?" and he felt that it is fundamentally unfair for the Planning Department to reopen the issue based on LUDC and not the approved plans. The Resolution addressed certificates of occupancy but not lighting. He stated that ambiguity with practice becomes an unwritten rule that are inconsistent. He believes that, through the reading, Walmart has been consistent with the Code. 6.11.4 (a) – light sources crosses through the subsection, objective that is applied to the project and consistent with the Code. He noted that the fixtures do not exceed the 90 degree standard, the LUDC sentence as a whole, provided with cut-off have met the Code, as required. He noted that the objective of the code is not eliminating but minimizing. Commercial retail parking lot with 35' light poles that meet the Code and it is a subjective interpretation.

Mr. Lubinski stressed that, if there were any issues, they needed to know during the pre-construction in order to meet the Code and that the Town permits exterior lighting under Section 6.11.3 for security and security is needed for parking lots. He said that Walmart is concerned with safety and security. In 2012, raised in the presentations by Galloway, was in the presented Power Point slides. Walmart needs the parking lot adequately lit to minimize incidents for crime, vandalism and safety. It is an important component for parking lots. Black-spots are a



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real danger in lighting. A written brief was provided to the Town in April, 2015 which confirms that they are in compliance with the submitted plans.

Planning Director Dickhoff outlined that the perimeter of the parking lot meets light code; however, non-compliant lights are in northwest corner and three are bleeding over property lines. He stressed that the interior lights are non-compliant and illustrated, through a Power Point presentation, visual effects of cut-off angles at 90 degrees which align perpendicular to ground and also projected other non-compliant angles. He noted that the LUDC outlines that all lighting should be cut off not to exceed 90 degrees to minimize the potential for glare and unnecessary diffusion on adjacent properties. He stated that if the Walmart lights were cut-off less than 90 degree angle, it would resolve the glare/diffusion issues.

Director Dickhoff noted that the Planning Department supports LED lights although they do have a much more intense light source, than traditional light sources, and are more energy efficient. Director Dickhoff noted that the Department has had other compliance issues with lighting and the developers chose how they wanted to resolve the issue. Dickhoff stated that the intent of the Code is that the lights be shielded or concealed and that enforcement be consistent for all residential and commercial properties. He agreed that safety involves lighting but the lighting should not affect the neighboring properties. He explained that most all lights in Pagosa Springs are recessed and/or have a cut-off angle less than 90 to minimize the glare and unnecessary diffusion on adjacent properties. Since the adoption of the Code, other properties such as Wells Fargo, Tractor Supply Company and gas stations have meet the code by providing shielding and/or concealing.

Director Dickhoff noted that the LUDC Subsection (l) is not a subjective interpretation; it is clear about the visibility of the light. The design review is based on the LUDC and once the lights are installed, the Department must perform an onsite review to assure compliance with Section 1.6.2, subsection (a) in the LUDC, Violation, Activity Inconsistent with Code – he noted that Resolution 2012-12 does not waive the violation.

Director Dickhoff reviewed Exhibit C, as provided by Walmart, on page 8, #10b – Appendix C and his letter which outlines the non-compliance lights with visible light source. Dickhoff stated that prior to the inspection and final inspection, the Garden Center lights were installed and will be addressed separately and not a part of this appeal. The wall mounted lights were not inspected and are not a part of this appeal and final determination letter. In the Board's packets, he noted that public comments received prior to the notice of appeal. He said that other letters were received after the appeal notices and not a part of the appeal hearing. Dickhoff stated that on March 24, 2015, he expressed concern to Walmart with the glow and trespass of light and outlined in a second letter dated March 6, 2015. Dickhoff stated that the plan review was completed with a physical inspection which noted that light issues. He was reassured that the new LED light fixtures and shielding would meet the intent of the Code and the conversations were proactive to mediate issues. Dickhoff stated that the light was switched out to reduce light

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would be “after-market”, they could not be put on the interior lights because it could create “dark-spots” over the parking lot that Walmart will not allow because it wants uniformity on lighting due to safety. Dickhoff noted that warranty would be voided – Bolivar agreed that if modified, it would void the warranty. Director Dickhoff stated that additional meter readings were taken from the corners of Walmart’s property; they ranged from .7 fc down to 0 fc although the illumination plan showed 0 fc ratings around property.

Member Adams expressed confusion about Attorney Lubinski’s statement that the lighting was not addressed during the plan review. Member Adams noted that the lighting concerns were raised by the DRB during the application process on May 15, May 21 Aug 12, and Sept 6. Attorney Lubinski explained that the lighting was reviewed and commended on by the Design Review Board (DRB) but that the appealed lighting issued were not specifically addressed or raised – the visible light source. Attorney Lubinski said that each municipality is different with some areas being straight forward while others are underlining with stand-alone. He continued to explain that, if combined, they become ambiguous. He concluded that the Pagosa Springs Code is straight forward but that prohibition is not expressly called-out. He noted that, locality; CDE may deviate from plans with a variance. The Walmart plans, page 5 - #5, site specific basis, adequacy and lighting for adjacent uses, minimum may be appropriate, Walmart and project manager should have been provided with guidance for projects. Page 8 outlines that the spill/light control less than 0.8 at 5’ grade. He also noted that page 10 (e), outlined that if municipality requirement is more stringent, it must be used. In closing, Attorney Lubinski noted that the principle issue is that the policies were never addressed. Ms. Bolivar stated that the requirements met the code – shielded, concealed, need to change options unless issues were raised during the design phase.

Member Adams referenced that a letter from Galloway stated that the lighting would be on from dusk to dawn but was not sure. Ms. Bolivar stated that the hours of illumination are for 24-hours.

Member Martinez asked if it is feasible to install 35 foot poles without light visibility. Director Dickhoff responded that, yes it is feasible but not with HID or LED lighting, shielding must be used for compliance.

Member Woodruff stated that the Town Code outlines that lighting “shall” be shielded, and the applicants guarantee during the time of application that shielding would be addressed and she understood that the lighting would be compliant with Code. Ms. Bolivar explained that Code, section 6.11.4, addresses a 90 degree shielded and the Walmart interior lights are at 80 degrees. Ms. Bolivar and Attorney Lubinski both said that they understood that the inspection would verify that the lights were installed to the plans and comply with plans. Member Adams commented that the material may be in compliance but the lighting effect was not addressed. Ms. Bolivar understood that inspections would ensure, but expected that the inspections are to address that the plans were complete. Attorney Lubinski said that he interprets that the installed shielding meets the requirement and standard of the Code.



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Member Lattin commented that that there are three major items to consider, the corner lights are correct, internal parking lot lights meet the 90 degree or less shielding, and review that the applicant submitted an application that outlined that the foot candles would remain on site. Lattin stated that the foot candles and visible light are different. Director Dickhoff outlined that the staff contents that the light standards do not meet LUDC 6.11.4, sections A, B, C, J, and L and are not in compliance as outlined in Resolution 2012-12, specific to subsection C – prohibits lighting from adding any foot-candles illumination to any location off-site.

Chair Maez asked each party to provide its interpretation of recessed lighting – Director Dickhoff said that the level of the lighting with housing would meet the 90 degree angle but if it is above the fixture, it would not meet shielding. Ms. Bolivar noted that the LED light board are flush – interpretation it that it is fully shielded and further explained that concealed and shielded are two different issues. Chair Maez asked if there is an opinion to screen and/or shield, would it be impossible at 35 feet or would it be seen because of height. Director Dickhoff commented that the performance of light is not meeting the Code; it meets Walmart safety requirements but does not perform to the LUDC. Ms. Bolivar said that the performance can be measured in foot candles (fc).

Member Adams commented that that LED lighting is defused into the air but not into ground, it is a massive explosion above the light source itself. The Walmart lighting is glaring and diffusion is not down lite. No additional comments were received.

Motion made by Member Lattin, seconded by Member Woodruff, and unanimously carried to convene into Executive Session pursuant to C.R.S. 24-6-402 (4)(b) for the purpose of receiving legal advice regarding the Walmart Appeal Hearing.

X. **Executive Session** - Upon motion duly made, the regular meeting adjourned at 7:53 PM and convened into Executive Session at 7:56 PM. The Board reconvened into regular session at 9:05 PM and requested further clarification from the Planning Director and Appellant on the following topics:

1. Light beams
2. Light source
3. Glare or unnecessary diffusion
4. Do you believe if there is a performance standard?

Director Dickhoff stated that light beams are interpreted as the line in which the light travels from the light source to the ground. Light Source would be the actual bulb, led, light board and/or the actual devise that is emitting the light source such as LED board and tradition light. Light glare or unnecessary diffusion – glare is the visual and actual light source; diffusion is could be the different between two light sources such as 15 watt vs 1500 watts– it is the actual



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visibility of the light source. He explained that glare is a nuisance or obtrusive effect, such as seeing a light bulb and the light pollution to other properties. Performance standard, not physically listed in the LUDC but it is implied within the Code that it requires inspection and construction compliance.

Ms. Bolivar explained that light beam is directional light intended to light such as a flood light pointed directly at an object. For light source, she did not disagree with Director Dickhoff, but noted that the LED have dynodes that create light that shines. She commented that glare is a subjective term to each person, it is different. Attorney Lubinski said that definitions are included in the meeting packets but definitions are not defined in LUDC. He stated that it is some sort of direct light that causes striking light or dazzling. Ms. Bolivar said that unnecessary diffusion provides light for safety and that performance standards can be measured by foot candles from property line. Attorney Lubinski stated that lighting performance is the objective test such as the foot candles and cut-off and inspections. He noted that the disagreements are about inspections by Code alone or performance with plans per the Code.

Chair Maez noted that, after an onsite review of the interior lights, he did not see any obtrusive glare, as far as LUDC, performance is an issue and needs to be resolved one way or another. He stated that for both sides, the LUDC leaves room for question.

Member Woodruff asked about excessive diffusion - is there a way to measure and reduce the light and adhere to safety rules? Is there a way to determine? Ms. Bolivar stated that lights meet Walmart's uniformity standards. Woodruff further questioned, if the lights can be modified to have less overlapping to accomplish goal of Walmart? Can excess be measured? Ms. Bolivar said that the only measurement is for foot candles on the ground and to know about a total site standpoint, there is no way to measure the overlap.

Member Adams stated that security is needed; however, he questioned if the lighting could be toned-down without an explosion of light. Ms. Bolivar said that the designers are better with the lighting plans and they would know where the lights need to be, including the overlaps with uniform light. She noted that dimmers must be pre-manufactured and installed with each fixture.

Member Woodruff asked Director Dickhoff about what aspect(s) are they not in compliance. Dickhoff stated that the light sources are visible off-site, the light beam is illuminated beyond the property line, and the interior parking lots have an intense glare. He commended that the manufacture may be able to shield the light in order to stop the beam from crossing line. Non-compliance is specific to LUDC, Section 6.11.4 A and L; however, when compared to the perimeter lights – they are not visible to have a backlit shield within fixture.

Member Adams asked if the appellants felt that they are complying with the light regulations. Ms. Bolivar sated that the defused light is not able to be measured. Member Martinez asked if there are any foot candles that protrude past the property line. Director Dickhoff stated that there



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is .4 (point four) temperature lights outside the property line and the eyelids were rotated incorrectly; however, he noted that it was difficult to measure with all the lights being on at the same time. Ms. Bolivar said that a modeling program can turn off one light but the lights cannot physically be turned-off one at a time on site. She stated that there are foot candles at .1 (point one) at the Walmart entrances as certified by the manufacture. She further stated that eyelid and light pointing need to be addressed.

Member Adams questioned LUDC 6.11.4 as outlined in the legal brief. Director Dickhoff noted that the foot candles can be measured and the meter light source can be seen with human eye. The lights are very obtrusive and LED intensity. He commended that seeing the light source is not subjective. There is a reflection from the light hood and light source. In closing, he noted that there are two definite measurements in the field, meter measurements for the foot candles and human-eye for viewing the light source.

There being no further questions, the Board of Appeals took the following action(s):

Member Woodruff motion to continue the Appeals Hearing for July 21, 2015 at 5:30 PM in the Town Hall to further consider the Appeal and a final determination which will allow the Board time to see the light source from the adjoining sidewalk with the Lighting Model presented by the appellants so that the lights can be turned on and off with the Board conducting a site visit before the meeting date to view the light source and further that the Exhibit Model will show foot candles. **Motion failed** for lack of a second to the motion. Attorney Cole noted that the Board can meet at a group on site to observe but may not discuss among themselves or discuss with staff or appellants.

Chairman Maez stated that the Board must determine whether Walmart is in violation of the LUDC Section 6.11 Exterior Lighting and the Planning Director's determination. Motion made by Chair Maez, seconded by Member Adams that the Board of Adjustments deny the Walmart Appeal of the Planning Director's Determination, and find that the Director's interpretation of the intent of the Land Use Code, Section 6.11.4.A. and J. is correct regarding the requirements for concealing or shielding light sources so as to the subject property and away from nearby properties and vision of passing motorist, and to minimize glare and unnecessary diffusion on adjacent properties. **Motion failed** – two- Maez and Adams in favor with three - Martinez, Lattin and Woodruff opposed.

Motion made by Member Martinez, seconded by Member Woodruff, and unanimously carried to continue the Appeals Hearing to July 21, 2015 at 5:30 PM in the Town Hall to further consider the Appeal and, prior to that date, if not already done, all Board members should conduct an onsite visit.

The meeting adjourned at 9:57 PM.



Ron Maez, Chair
Planning Commission/Board of Adjustments