MINUTES
BREVARD BOARD OF ADJUSTMENT
January 8, 2013
CONTINUATION OF DECEMBER 11, 2012 MEETING

The Brevard Board of Adjustment met in regular session on Tuesday, January 8, 2013, at 7:00 PM in Council Chambers of City Hall.

Members Present:	Allen Delzell, Chairman Mike Young Jean Haigis-Pedler Carl Brown Judy Mathews
Staff Present:	Brad L. Burton, Assistant Planning Director Daniel Cobb, Planner Aaron Bland, Planner Josh Freeman, Planning Director Janice H. Pinson, Board Secretary Michael Egan, Board Attorney Brian Gulden, Staff Attorney
Others:	Michael Eubanks, Attorney for Applicant

Chairman Delzell called the meeting to order at 7:05 PM.

The Board Secretary stated that the meeting had been properly advertised and there was a quorum present.

Chairman Delzell moved for a motion to approve agenda. C. Brown made a motion to amend agenda to move election of officers to the end of the meeting, seconded by J. Mathews, passed unanimously. Motion made to approve agenda by C. Brown seconded by J. Pedler, passed unanimously.

Approval of Minutes

Chairman Delzell requested action to approve the minutes of the December 11, 2012 meeting. Motion by C. Brown to approve, seconded by M. Young, and passed unanimously. Minutes were approved as written.

Chairman Delzell explained the quasi judicial process, rules of testimony and explained party status to attendance of meeting.

Old Business

Jackson Wine, Agent (Hearing One) A review of violation of Special Use Permit (SUP-12-090) issued to Mr. Jackson Wine for a bar, tavern or nightclub establishment (doing business as "185 King Street), (Hearing Two) Consideration of a proposed amendment to the existing conditions of the permit and (Hearing Three) a six month staff review of the permit for violations.

The following persons were sworn in to testify during the proceedings:

Jackson Wine, Applicant, 185 King Street, Brevard
Ken Brown, 115 Goldens Way, Penrose
Morris Jenkins, 148 W. Probart Street, Brevard
Jackie Tutterow, 123 King Street, Brevard
Margaret Gravely, 123 King Street, Brevard
Daniel Tressler, 266 W. Probart Street, Brevard
Ron Bickford, 104 W. Jordan Street, Brevard – City of Brevard Police Department
Brad Burton, City of Brevard Planning Department, 95 W. Main Street, Brevard

Chairman Delzell asked if any party to the proceeding had a conflict of interest and if there had been any ex parte communications. There were none.

Chairman Delzell turned the meeting over to B. Burton. B. Burton stated that he was going to address the 6 month review first. That he had nothing to report but that the Fire Department had reported that they had not received a key to the establishment to place in the knox box. J. Wine stated that the key has now been provided to the Fire Department.

Attorney Gulden called his first witness and ask him to state his name, where he was employed and for how long and his job duties and responsibilities. Ron Bickford, Brevard Police Department, employed since March 2007, patrols the city; answer calls, things of that nature.

Attorney Gulden ask if he was familiar with 185 King Street and he responded, yes.
Gulden then ask, "Did you receive a call about 185 King Street". Bickford responded, "Yes".
Gulden, "What did you do?" Bickford explained that he drove to the area and could hear music from his car. He noticed that the front door was open. It was established that it was late at night. He was parked across the street from the building, which was approximately 50 feet away and that the windows were down on his patrol car. He checked out with Dispatch and entered the building and asked to talk with the manager. He spoke with Jackson Wine and asked that he turn the music down. He left the building and the music remained at the same volume so he reentered the building and requested to speak to the manager again and was not able to until the music had stopped. He stated that it was 5 to 10 minutes before music stopped. He then left the scene. Bickford stated that at shift change he passed on the information concerning the complaint to his supervisors and that he had a conversation with B. Burton. Gulden ask if he could see the door open and the answer was yes. He asked what day of the week it was and Officer Bickford stated he believed that it was Wednesday. He stated that he did not take decibel readings because he did not know that such a tool was available to him and that he was not trained to use such equipment. He did not know what the decibel level to be in violation of

the noise ordinance.

Michael Eubanks, Attorney for Jackson Wine questioned Officer Bickford as follows: Did you file a written report? His response was, no. Officer Bickford stated that he was responding to a complaint that the music was too loud. That he determined it was too loud because when he arrived he could hear the music from outside the building and that it was late at night. Attorney Eubanks questioned Officer Bickford as to how many noise complaints he has responded to since his employment with the City of Brevard. There were further questions as to the volume of noise complaints received by the City Police. He also asked if witness spoke directly with the Complainant and responded that he received the complaint report directly from Dispatch.

There being no further questions, the next witness, Brad Burton was called. He stated his name position with the City as Assistant Planning Director and described his duties one being Code Enforcement Supervisor. Attorney Gulden asked Burton what some of his duties were as Code Enforcement Officer and he explained his duties one being that of enforcing the City's ordinances. He was asked how he was familiar with the property located at 185 King Street and he stated that he had been involved with the Special Use Permit process from the beginning. He read condition 4 of the SUP from his staff report. "The applicant shall employ necessary sound mitigation strategies to prevent sound external to the structure. Such measures shall conform to all applicable building and fire codes pertaining to flammability and related life-safety issues."

Attorney Gulden asked Burton who imposed this condition on the applicant and Burton responded the Board of Adjustment. B. Burton explained that it was his duty as an Enforcement Officer. He stated that his staff report contained an error and that the date of the supposed violation was in fact October 25th. He discussed the service call by Officer Bickford with Chief Harris at the staff meeting the following Monday and asked the Chief to have Officer Bickford contact him to set up a meeting to discuss. The meeting was held and Officer Bickford relayed to B. Burton what he has testified to here tonight. Attorney Gulden asked B. Burton if he found a violation based on their discussion and he stated that he did because Officer Bickford told him that the whole time he was at 185 King Street there was sound emanating from the building.

Jackson Wine was notified by telephone and a meeting was held with B. Burton to discuss the matter. He was told that there was an alleged violation of his Special Use Permit as to Condition 4. Attorney Gulden asked if Mr. Wine had amended his Special Use Permit and it was stated that he had but not as it relates to Condition 4. He explained that his opinion was that Condition 4 was violated. Burton further explained that Mr. Wine had stated in his narrative which is included in his Staff Report that he was in the process of making changes to the venue room to eliminate sound from leaving the building as follows: glazing to windows, sound proofing curtains to windows and doorways. Burton stated that he has not been back to 185 King nor has Mr. Wine contacted him to let him know that these sound proofing measures have been completed.

Attorney Gulden questioned Burton as to his familiarity to the City of Brevard's noise ordinance. Noise Ordinance is included in his Staff Report amended February 20, 2012 and he read the noise ordinance. Staff Report is attached hereto and incorporated herein as Exhibit "A". Burton stated that he had performed a final inspection at 185 King Street where Mr. Wine had a hi-fi playing through his sound system and that the doors were open and that music could be heard outside the building. Attorney Gulden stated that Mr. Wine believes that he could comply with the City's noise ordinance and asked if Burton thought that possible. Burton stated that he was not an expert but felt as though the measure Mr. Wine is going to impose might not be sufficient for him to be able to comply with Condition 4 of his SUP.

The Board asked B. Burton if at the time that the Special Use Permit was granted to Mr. Wine for 185 King Street, did the Board think it realistic to allow Mr. Wine to retro fit that building and be successful in mitigating sound. B. Burton stated that Mr. Wine testified under oath as to how he was going to successfully mitigate sound. Staff recommended to him that he employ a sound mitigation specialist or engineer that could certify that he could meet the condition of the SUP that no sound would leave the building. This advice was not transferred to the permit only the Condition 4.

Attorney Eubanks stated that it was his understanding that Chief Harris notified Burton of the alleged violation and that he further understood that there is a regular staff meeting. Burton responded yes to both questions. He further asked Burton if he had specifically ask that Chief Harris make routine checks on Mr. Wine's establishment and he answered absolutely not. He explained that in a Technical Review Committee meeting the Chief had stated his concerns about the location of the establishment as it relates to noise.

Attorney Eubanks ask Burton to give the name of any business at which no sound leaves the business. Burton said he could not but it was not his place to do so. The condition was placed on Mr. Wine by the Board of Adjustment. He asked Burton if he did not agree that the condition was impossible to meet. He responded that that was his position. Attorney Eubanks read a section of the Noise Ordinance and asked Burton if that was what he felt like Mr. Wine was in violation of and Burton responded that he was in violation of Condition 4 of his SUP. Attorney Eubanks referred to the current noise ordinance as it pertains to a decibel reading of 10 between the hours of 9:00 PM and 7:00 AM constitutes a code violation. Burton again pointed out to Attorney Eubanks that the alleged violation against Mr. Wine was as it pertains to Condition 4 of his SUP.

Burton explained that decibel readings were attempted to be taken at the final inspection of 185 King Street but could not recall if the readings were in violation of the City's noise ordinance.

Attorney Gulden referred to Mr. Wine's original application wherein he stated that he would use measures to ensure that no sound would leave the building.

Attorney Eubanks questioned the applicant Jackson Wine. Mr. Wine stated that he had been in operation for approximately 5 months and that to his knowledge this was his only complaint. He explained the night of the alleged violation that Officer Bickford came to his establishment asked that he turn the music off and he turned the music off. He stated that a week or so later he was

notified by Mr. Burton and Mr. Freeman that he was in violation of our SUP. He stated that his original intent upon application was that they would not have music outside the building and that all music would be within the structure. He stated that he attends music events in Brevard all the time and is not aware of any music event where the music was contained within the building. He then explained his sound mitigation measures as being walls lined with whisper wall a soundproofing fabric and that walls have been built outside the block and sheetrock installed. Since the supposed violation we have glazed all windows, no longer allow any doors to be open when we are in operation and have ordered curtains to be made out of whisper wall fabric to install over all windows. He requested that the Board amend Condition 4 of his SUP stating that he felt all could agree that the no sound exterior to the building was impossible to accomplish and explained other operating noises that currently leave the building just due to State of NC code requirements ex: ventilation fans. The Board determined that the business has no air conditioning and then was asked why knowing the situation would you have your doors open while music was playing. He admitted that he was wrong and took total blame for the violation. Mr. Wine stated to the Board that he felt that he could fully comply with the City's noise ordinance.

Attorney Gulden questioned Mr. Wine as to his violation and Mr. Wine stated that he did violate Condition 4 of his SUP. There was further discussion about measures to control noise from the business. Mr. Wine further stated that the City's prior noise ordinance had been amended to include decibel levels because the prior ordinance was ruled unconstitutional by a judge. He explained how he believes the decibels readings are taken and determined whether or not to be in violation of the ordinance. Mr. Wine further stated that he felt if the Board would amend his SUP that he could comply with the City of Brevard's noise ordinance.

Ken Brown testified that he felt he was an expert because he has to comply with the ordinances as a builder. He went on to go over his version of the events surrounding the amendment of the City's noise ordinance.

Daniel Tressler testified that he owns the Red House Inn and that his business is approximately 500 feet from 185 King Street and that his business has not been affected by any noise or traffic issues whatsoever as to the operations of 185 King Street.

Brian Phillips was sworn in to testify. He stated that he is a local attorney and blues guitarist. He has played at 185 King Street on several occasions and gave Mr. Wine the highest of praise for keeping the sound at perfect levels.

Morris Jenkins and Margaret Gravely both testified that they live in close proximity to 185 King Street and have no noise complaints.

Attorney Gulden was allowed closing arguments in which he stated that Mr. Wine had admitted to be guilty of the violation of Condition 4 of his SUP and that he would recommend that if the Board does amend the permit to allow Mr. Wine to operate according to the City's noise ordinance that they put a condition in the amendment that Mr. Wine come back within a certain amount of time with evidence to the Board that he has complied with all of the additional measures he has stated he is going to do to mitigate sound from leaving his business at 185 King Street.

Attorney Eubanks stated that if the Condition 4 is amended he feels Mr. Wine can operate 185 King Street and comply with the City's noise ordinance. He also stated that Condition 4 was an impossible standard for Mr. Wine to meet in the operation of his business.
The Board closed the hearing for deliberations. M. Egan, Board Attorney explained to the Board that they need to first determine whether there was a violation and how they are to handle the violation.

J. Pedler moved that the Board of Adjustment find that there was a violation of Condition 4 of SUP 12-090 in October of 2012, J. Mathews seconded the motion, and the Board voted unanimously that there was a violation.

C. Brown made a motion that the Board make a review in 6 months, J. Mathews seconded. The following Board members voted in favor, A. Delzell, J. Pedler, C. Brown and J. Mathews and Mike Young voted in opposition. M. Young explained his concerns about placing a condition on the applicant that they knew he could not meet. There was further discussion about the impossibilities of Condition 4.

M. Young made the Motion as follows: With regard to Case No. SUP-12-390, the application of Jackson Wine to amend Special Use Permit SUP-12-090 (and by reference SUP-11-009), which authorized the operation of a private night club, by modifying Condition Number 4 contained therein relating to noise mitigation, I move the Board to make the following findings of fact:

a) If Condition 4 is modified as stated herein, the use will continue to meet all requirements and specifications of the Ordinance and any adopted land use plans and is in harmony with the general purpose and intent and preserves its spirit;

b) If Condition 4 is modified as stated herein, the proposed use or structure will continue to be visually and functionally compatible with the surrounding area;

c) If Condition 4 is modified as stated herein, the proposed use or structure will not be injurious to the public health, safety, and welfare, and will not be detrimental to the value of adjoining property and associated uses.

Accordingly, I further move the Board to approve the application to amend SUP-12-090 (and by reference SUP- 11-009) thereby modifying Condition Number 4, thereof, to read as follows:

Condition Number 4. The applicant shall employ necessary sound mitigation strategies to ensure that the use complies with the City of Brevard Noise Ordinance. Such measures shall

conform to all applicable building and fire codes pertaining to flammability and related to life safety issues.

All remaining conditions and requirements of the previously approved Special Use Permits shall remain in full force.

J. Pedler seconded and the Board voted unanimously to amend the Special Use Permit.

New Business

Roger Frisbee, Agent for PharmAgra Labs – Variance request (new additions to existing structure). VAR-12-402 – requesting variance from rear set back requirement at property located at 158 McLean Road.

Roger Frisbee, Applicant, 68 Chestnut Stump Road, Hendersonville, NC and Peter Newsome, 130 Old Souther Road, Mills River, NC were sworn.

Chairman Delzell questioned the Board as to exparte communications and conflicts of interest and there were none. R. Frisbee, Applicant was asked if he had any objections to the Board and he replied that he did not.

Daniel Cobb presented his staff report and provided a visual presentation of the property and surrounding area. He explained the Applicants desire to renovate his industrial building and the location of the expansion would require a 39 foot reduction in a 40 foot front yard setback requirement. He referred the Board to page 4 of his staff report and stated that each of the requirements must be meet. The staff report is labeled Exhibit "B" and attached hereto and incorporated herein by reference. He also stated that he thought it a practical necessity for the addition to in the location requested and further explained the nonconformity to the Board.

R. Frisbee gave a quick summary of his variance request and explained the hardships of trying to place the addition at any other part of the building or property. He stated he would have to do such extensive refiguring of operations that he would have to close for approximately 6 months.

After further discussion it was concluded that the adjoining property owner's input was necessary in order for the Board to move forward with any decision.

Board directed Staff to notify adjoining property owner for discussion.

J. Pedler moved to continue hearing until next regularly scheduled Board of Adjustment meeting, February 12, 2013, seconded by J. Mathews and unanimously passed.

Election of Officers

C. Brown was nominated for the office of Chair and elected unanimously. A. Delzell was nominated for Vice Chair and elected unanimously.

Other Business

J. Pedler opened a discussion as to the need for additional board members and how to acquire them.

M. Egan, Board Attorney answered procedural questions for the Board.

There being no further business by motion by C. Brown, seconded by J. Pedler and passed the meeting adjourned at 10:15 PM.

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Allen Delzell, Chairman

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Janice H. Pinson, Board Secretary