

MINUTES

BREVARD BOARD OF ADJUSTMENT – REGULAR MEETING Tuesday, September 4, 2018 – 3:00 PM – Council Chambers

The Brevard Board of Adjustment met in regular session on Tuesday, September 4, 2018, at 3:00 PM in Council Chambers of City Hall.

Members Present: Judith A. Mathews, Chair
Tom Tartt, Vice Chair
Paul Welch
Kevin Jones
Tad Fogel
Allen Delzell

Staff Present: Daniel Cobb, Planning Director
Aaron Bland, Planner
Brian Gulden, Board Attorney
Desiree Perry, Acting Board Clerk

Press Present: Park Baker, Transylvania Times

Others: Chief Phil Harris, Brevard Police Department
Bill Thomas, Sierra Club Representative
Sherwin Shook, Adjoining Neighbor
Cindy MacGregor, Adjoining Neighbor
Michael R. Goforth, PE, Agent for Richard G. Jennings, III Enterprises,
Inc.
Trenton Hardin, Forest Gate Self-Storage
Davis A. Whitfield-Cargile, Attorney
General Manager Josh Vandergrift, Brevard Racquet Club

I. WELCOME – Chair Mathews called the meeting to order at 3:00 PM and welcomed those present.

II. INTRODUCTION OF BOARD MEMBERS - Board members introduced themselves. Chair Mathews explained the procedures for a quasi-judicial hearing.

III. CERTIFICATION OF QUORUM – Chair Mathews certified a quorum of the Board was present.

IV. APPROVAL OF AGENDA

P. Welch moved, seconded by T. Tartt, the Agenda be approved as presented.
Motion carried unanimously.

V. APPROVAL OF MINUTES

T. Fogel moved, seconded by P. Welch, the August 7, 2018, meeting minutes be approved as presented. Motion carried unanimously.

VI. UNFINISHED BUSINESS

SUP-18-001 City of Brevard Police Department – Request for a Special Use Permit to allow for the operation of an Outdoor Firing Range in a General Industrial (GI) District. Subject property is located at 1161 Catheys Creek Road, PIN 8565-93-0873-000.

Chair Mathews asked Board Attorney B. Gulden to describe “standing” for those in the audience; which he did. Chair then asked him if everything was in order for the City’s application to be heard by the Board.

B. Gulden replied, “Yes”. Application has been signed by both Mayor Jimmy Harris and City Manager Jim Fatland on behalf of the City as property owners.

At 3:07 PM Chair Mathews opened the hearing and polled the Board asking if they have had any to ex parte communications or a conflict of interest on the request. All board members affirmed they had no ex parte conversations relevant to the application, and, affirmed they have no conflict of interest.

Sworn In - The following people were sworn in: Daniel Cobb, Bill Thomas, Sherwin Shook, Cindy MacGregor and Chief Phil Harris.

Chair Mathews called upon D. Cobb to present the City staff report.

Staff Report – Daniel Cobb

D. Cobb affirmed the meeting has been properly posted, advertised, and letters of notice were mailed to the adjoining property owners as listed upon the Transylvania County tax records. He presented the Staff Report dated September 4, 2018, (Exhibit A) and offered the following:

1. The subject property borders Pisgah National Forest on two sides, with three private properties on the other sides. The City of Brevard’s Water Treatment Plant (WTP) has been on the subject property in its current location since approximately 1978.
2. Years ago, the Police Department had their firing range located on the subject property; however, due to heavy hurricane flooding in 2004, the firing range was

relocated in 2005 to the City's Wastewater Treatment Plant (WWTP) property off Wilson Road and continued in operation until 2016.

3. In 2016 the City completed the addition of a new 3.2 million gallon equalization tank at the WWTP. With the placement of the tank there is no longer room for the firing range on the property as the tank sits where the range was. Police Department desires to have a new outdoor firing range for training purposes on the WTP property; however, in a different location than the previous range. (Exhibit A, Attachment C & E) If granted, the new range would be in the southwest corner of the property.
4. Police Department is requesting an outdoor firing range for the private use of law enforcement officer training purposes only.
5. Outdoor firing range is a permitted use, subject to standards, with the granting of a Special Use Permit in the GI district.

T. Tartt questioned if, over the past fourteen years since the previous range was closed, the WTP property has been used for anything else other than the water treatment plant. D. Cobb answered, "No, the only use has been the water plant."

Testimony - Police Chief Phil Harris

Chair Mathews called upon Police Chief Phil Harris (previously sworn in) to present the Police Department's request and the facts of the case. He provided a thorough overview of his submitted "The History and Future of the Brevard Police Firearms Range" Memorandum dated August 9, 2018, (7-pages), submitted with the SUP Application. A copy was provided to the Board within the meeting packet of information. (Exhibit B) In addition, he presented a power-point to provide further information on their request (Exhibit C). Chief Harris' testimony included:

1. From 1983-2005 the Brevard Police Department (BPD) had an outdoor range at the City Water Treatment Plant (WTP) on Catheys Creek Road.
2. The BPD continued use of the range until a large rain event resulted in the destruction of the range, and, there was also an expansion of the Water Treatment Plant (WTP) at about the same time.
3. On May 10, 2005, the Board of Adjustment granted a Special Use Permit with conditions for an outdoor firing range at the City's Wastewater Treatment Plant (WWTP) on Wilson Road.
Conditions: (a) Range to be used by law enforcement only; (b) Limited to 30 training days a year; (c) Sound Mitigation; and, (d) Operating hours 8:00 AM to 10:00 PM.
4. In 2016 the range at the WWTP was closed due to the installation of the new equalization tank. While the outdoor firing range was in operation at the WWTP any concerns by neighbors were addressed and solutions were agreed upon. The BPD had a good relationship with neighboring property owners. (More fully described in Exhibit B.)

5. With the closing of the firing range at the WWTP, the short-term solution for Brevard law enforcement officers has been to use Bear Arms indoor shooting facility for training. However, at Bear Arms only the State minimum requirements for qualification/training is provided for. It is very important to have law enforcement training that goes beyond standing in a line to practice; open outdoor training is also needed. Officers need a training area that allows for a variety of situations to be simulated, an area that allows for barricades, vehicles, etc., to be placed. The area at the WTP would provide such a training area.
6. A brief video was presented. Video showed a citizen had been pulled over and was resisting the law enforcement officer, resulting in the officer being shot and killed. Chief explained the video was shown to help illustrate the need to have an open shooting range area that allows for a variety of situations to be simulated in training.
7. Officers are required by the State to qualify yearly on each weapon they use while on-duty. BPD officers use Glock .40 semi-automatic pistols, 12-gauge shotguns, and AR-15 .223 caliber rifles.
8. Police Department established their criteria for a new range. (Exhibit C, Page 5)
9. Anticipate using the range 30 to 60 times per year; never on Sundays and rarely on Saturdays.
10. The property at the WTP, where the range existed prior to 2005, became an option for a new range when a study determined that a large section of the property once considered for a water retention basin, was found to be unsuitable for a basin. It is our belief it fits our criteria and is an economical solution for the City. City Council approved a \$50,000 budget for development of a new firing range on the City's water plant property. We are currently preparing the site for a firing range.
11. Proposed site has steep, high banks that will help ensure no rounds leave the range. WTP offers a secure driveway and access point to the range; has on-site presence (WTP Staff) most hours of the week; built-in security; no cost to purchase as land is City owned.
12. Photos of the proposed range area showing steep topography that would serve as part of the required buffer were shown. (Exhibit A, Attachment E; Exhibit C, Pgs. 12-14)
13. Official Reviews to Date: (a) NC Environmental Quality Specialists. Adhere to best management practices; lead capture and management will meet or exceed all EPA requirements. (b) Complies with the Transylvania County Water Shed Ordinance. Both have agreed this is an acceptable site for a range. Engineering assistance and routine testing will assure lead management, as well as, monitor runoff.
14. Meets the City Code requirements for Special Use Permit (Exhibit C, Pg. 16)
 - Meets or exceeds all federal, state, county and city laws
 - To be constructed and operated according to EPA and NRA standards
 - Exceeds distance requirement from other properties
 - Buffer zone far exceeds safety requirements
 - Within City sound ordinance requirements and will add sound mitigation (cypress trees)

- Will post no trespassing signs at proper intervals, and eventually build fencing as necessary
 - Lead capture and management will meet or exceed all EPA requirements
 - Range only for law enforcement use
15. Police Department requested Conditions with Special Use Permit –
- Extended hours of operation to 10:00 PM (Ordinance allows up until 9 PM)
16. Proposed firing range will not adversely affect property values. It did not do so in 1983 and do not anticipate it would now.

Board members asked Chief Harris the following:

- a. Where does the Transylvania County Sheriff's law enforcement officers do their training? If approved, would the range be used by both City and County law enforcement officers for training?
- Answer: The Sheriff's office utilizes Bear Arms, as well as, performs some training in Henderson County on private property. Proposed range would not be a training range for both City and County officers. Its purpose is for City law enforcement training. However, there may be an occasion for special training that would have both City officers and Deputies at the range.
- b. The City Unified Development Ordinance (UD) standard limits a firing operation hours to 9 PM.
- Answer: Included in the SUP Application the Police Department seeks a condition or variance to allow operation until 10 PM.
- c. What are the "books" mentioned as the source of the design and compliance for the range.
- Answer. City's UDO, Environmental Protection Agency (EPA), and the National Rifle Association (NRA)
- d. Will there be a qualified person at the firing range whenever in use?
- Answer. Yes. No training will take place unless an appropriately qualified instructor is on site.
- e. What type of buffer yard is required or proposed?
- Answer: Type C buffer as described in the UDO. There is natural vegetation already there that will meet and/or exceed the standards. Also, cypress trees will be placed around the range.
- f. In advance of using the firing range and in order to advise the adjoining property owners and public, would the Police Department be willing to post their training schedule? Would you also be willing to email the adjoining property owners the schedule?
- Answer: Yes. Willing to post schedule and, if neighbors provide their email address, a copy of the schedule would be sent to them.

Testimony – Sherwin Shook and Cindy MacGregor

S. Shook and wife, C. MacGregor, adjoining property owners and previously sworn in, appeared before the Board and gave the following testimony:

1. They are opposed to the granting of the request for the Police Department to have an outdoor firing range.
2. S. Shook stated he was not notified of this hearing by mail. He learned of it by way of gossip.
3. S. Shook stated he spoke with Sheriff David Mahoney who told him the County Deputies receive the training they need at Bear Arms, except for sniper training. Deputy sniper and rifle training is done in Henderson County at three different farms that they use by invitation. Questioned why, since the City does not have a sniper team, the City of Brevard officers would need an outdoor firing range, and, if they do need such training, questioned why they could not train in Henderson County like the Sheriff's Department.

Chief Harris stated to the Board: Police Department has officers on the tactical team; none presently assigned to sniper duty. When we do, they will train with the Deputies. We do have patrol rifles that require training at distance.

4. S. Shook stated the photo Chief Harris showed of the "bank or buffer" (Exhibit C, Page 13) is in fact at his property boundary. He has horses and other animals on his land behind the proposed range. His home is also located on the property. The noise from shooting would disturb his peace and quiet.

Chief Harris stated to the Board: For pistols, the EPA and NRA Standards require a 15' high buffer and rifles require a 20' high buffer. With the natural berms and slopes that exist on the property significantly more than the required buffer is provided.

5. S. Shook stated one standing at the proposed firing range can see his driveway through the tree line, see the entire skyline, his driveway and barn.

Chief Harris stated to the Board: The Shook's residence is approximately 1200 feet from the proposed range, and, shooting would not be in the direction of their home. The proposed range is further away from their house than the previous range was. There were no shooting incidents when the previous range was in operation.

6. S. Shook stated he frequently shoots his bow and that he has shot an arrow from his house over the proposed range. If his arrows can do this, just think what a misguided bullet could do.
7. S. Shook stated, to prove his rights, has had his property surveyed to prove his boundary lines and distance to his house.
8. C. MacGregor (previously sworn in) asked if the City has recently had their property surveyed. She stated the proposed range is about 200 feet from their property boundary, and, questioned if the Zoning Ordinance's 200 feet distance requirement from the range to their property line is sufficient. Asked what kind of sound mitigation would be provided, and, questioned the sound testing. Testing of one or

two firearms being shot is quite different than having eight officers shooting at the same time during training.

9. S. Shook stated his property is the only one with a view of Pisgah National Forest, and that he has spoken with some realtors and was told that placing the firing range will depreciate his property value.
10. S. Shook stated his house was built after the closing of the former range. Former range was in a different location than what is being proposed now, and, one of the reasons it was closed was because of complaints from adjoining property owners.
11. S. Shook presented two photographs (#1 and #3) into the record (Exhibit D). He stated photos were taken while standing at the “red triangle” (Exhibit C, Page 11) where the officers will be shooting from. The second one (#3) shows his wife, Cindy, standing 200 feet from the range in the direction of the shooting.
12. S. Shook asked the Board to consider all he and his wife, Cindy, have stated and they should not suffer and have their property ruined by the proposed range. If granted he will seek relief from the law. If necessary, he will build a cabin on the property. He concluded by asking the Board members if they owned his property, would they want a firing range next to their home.

Testimony – Bill Thomas

B. Thomas, representing Pisgah Group N.C. Sierra Club and previously sworn in, appeared before the Board and gave the following testimony:

1. Presented for the record letter dated July 25, 2018, addressed to County Planning Director Mark Burrows and Chief of Police Phil Harris (Exhibit E), and, Report on Visit to the Planned Firing Range Site on Catheys Creek, dated July 20, 2018 (3 pages) (Exhibit F).
2. Respectfully requested the Board give serious consideration as having a firing range would put a lead source at the City’s pristine watershed area.
3. While what is being proposed appears to meet design standards, the question of whether or not it is wise to deposit lead, even if put in a lead capturing device, into our City watershed should be done.
4. Important to keep in mind that should the firing range be approved, it will mean not only the current administration but also future administrations will need to take care and properly monitor lead removal and test for any leaching.

D. Cobb re-affirmed for the record Notice requirements were met. A letter of Notice was mailed to all property owners of record as listed on the Transylvania County Tax Office records. Included in the listing, Notice was mailed to: Jason Shook Trustee, 50 Oakdale Road, Brevard, NC 28712

- S. Shook acknowledged Jason is his son.

Hearing Closed

There being no further evidence or testimony, at 4:32 p.m. Chair Mathews announced the hearing closed and explained to those present the Board members will now discuss the evidence heard. The issue before the Board is to decide if the application meets the requirements for the requested SUP. Board must agree and have findings to the following three questions A, B, and C, in order to grant the request.

A. The use meets 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;

Finding: According to the testimony given by the applicant and information submitted within the Application, all of the Ordinance requirements will be met.

B. The proposed use or structure will, if developed according to the plan submitted and approved, be visually and functionally compatible with the surrounding area.

- Property is zoned industrial.
- Depends upon how you define the extent of the surrounding area; how big of a circle you draw around the firing range. Proposed firing range is within a quasi-industrial facility. It is compatible with the water treatment plant.
- Mr. Shook's argument is that the surrounding area is bigger and that since his property is contiguous to it (proposed firing range), it should be considered as a part of the surrounding area, and therefore not compatible.
- Chair Mathews offered she assumes the surrounding area is to include the areas as shown upon the submitted map. (Exhibit A, Attachment E)
- Uses are to be considered. Presented has been (1) Firing Range; (2) Water Treatment Plant; (3) Large primarily undeveloped private land with a residence and animals/farming (Shook); and, private land (Hardin), use not known.
- City Ordinance requires a 100 foot minimum distance to an adjoining property boundary; proposed location exceeds this requirement.
- Noise was tested, but not fully. No evidence of expert opinion about noise levels; however, recognize noise level testing in an environmental setting is a very complex process.
- If test was done with only one shot fired, do question if that was sufficient testing.
- Testimony was given a cypress tree buffer would be installed surrounding the firing range. This would have some noise abatement affect; but how much is not known.

C. 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.

- If one is shooting at the range, they would not know that there is a person up in the woods.

- Applicant (Police Department) willing to post and provide training schedule advising adjoining property owners and public when firearm training would take place.
- It is hard to answer this question based on the current state of the record.
- No expert evidence presented to support there will or will not be a detrimental affect upon adjoining property owners land value with a range operating 30 days or so a year.
- P. Welch commented years ago when he worked for the City a firing range was in operation at the head of Kings Creek and he was not aware of any problems associated with the firing range, of complaints, or of any decrease in property values due to the operation of the firing range.

Chair Mathews stated based upon the Boards discussion, it seems the Board does not have enough information to make decisions on some of the required findings.

Consensus: At current state, this application has not provided sufficient testimony or information for findings of fact. Question A is satisfied; Question B maybe but not certain; and, Question C fairly certain not satisfied. Applicant has the burden of proof or persuasion and if the Board doesn't find sufficient evidence, then they are to deny the request. If denied, City Code provides opportunity and conditions for an applicant to request a rehearing.

Motion: P. Welch moved the Board deny the Application for SUP on this record, without prejudice to the applicant's right to come back. Motion was seconded by K. Jones.

Discussion: Board cannot find findings to support questions B and C.

Vote: Motion carried unanimously.

Application denied.

Due to the hour (4:54 p.m.), Chair Mathews asked if the Board members could continue or if they are constrained due to other commitments and need to leave.

Member Excused - P. Welch stated he must leave; however, the remaining members stated they could continue. P. Welch was excused and alternate member A. Delzell will be a voting member for the remaining two requests.

VII. NEW BUSINESS

A. SUP-18-003 Richard G. Jennings, III Enterprises, Inc. – Request for a Special Use Permit to amend existing Special Use Permit #SUP-14-103 (Forest Gate Self-Storage) to allow for an additional 25,500 square feet (phase three) to the self-storage building. Subject property is located at 196 Ecusta Road, PIN 8597-43-0833-000

At 4:59 PM, Chair Mathews opened the hearing and polled the Board asking if they have had any to ex parte communications or a conflict of interest on the request. All board members affirmed they had no ex parte conversations relevant to the application, and, affirmed they have no conflict of interest.

Sworn In - The following people were sworn in: Aaron Bland, Michael Goforth, and Trenton Hardin

Chair Mathews called upon A. Bland to present the City staff report.

Staff Report – Aaron Bland

A. Bland presented the Staff Report dated September 4, 2018, (on file), and offered the following:

1. Special Use Permit #14-103 was approved by the Board on April 8, 2014. Forest Gate Self-Storage was then developed in two phases over the next several years, in accordance with the SUP approved by the Board.
2. Applicants seeks to add an additional 25,500 square feet to the storage facility. Addition will be consistent with the style of the existing building.
3. If granted, the SUP process is only to allow the project to move forward as a permitted use, and the applicant will have to apply for zoning site plan approval by staff for the addition, which will involve a complete site plan review for UDO compliance.

Testimony – Michael Goforth

Chair Mathews called upon the applicants Agent M. Goforth, (previously sworn in) to present the request and facts of the case.

1. The eight foot offset shown on the site plan is needed in order to provide for traffic needs and a sewer easement.
2. Proposed addition design and construction will be the same style as exists on phase 1 and 2 of the storage units.

Hearing Closed

At 5:06 PM Chair Mathews announced the hearing closed. Board members will discuss the evidence heard and consider the three questions (findings) needed to grant the request.

Motion – Following a brief discussion, K. Jones moved the amendment to SUP request before the Board be granted, without conditions, with the following findings: Question A – Request meets the Ordinance as the addition will be identical to what is already there; Question B - Will be visually and functionally compatible with the area as the new structure will look like the existing structure; and, Question C - It is compatible and will not be detrimental to adjoining properties. Motion was seconded by T. Tartt. Motion carried unanimously.

B. SUP-18-002 Brevard Health and Racquet Club - Request for rehearing by Brevard Racquet Club to amend Special Exception Permit SUP-18-002 to modify the use under the dome structure. Applicant's agent is Attorney Davis A. Whitfield-Cargile. Property is located at 1325 N. Country Club Road within the corporate limits of the City in a General Residential (GR) zoning district. PIN #8585-31-5597

Attorney B. Gulden read aloud City Unified Development Ordinance, Chapter 16, Section 16.10 General requirements for quasi-judicial hearings and decisions, Paragraph F Rehearings. He reminded the Board they are not ruling on whether or not what has been submitted are facts, but rather are acknowledging specific information to enable the Board to determine whether or not there has been a substantial change in facts, evidence, or conditions in the case has been presented in writing or graphically.

Staff Report and applicant submittal is included in Minutes by reference. (Exhibit G)

D. Whitfield-Cargile approached the Board to provide additional handout information. Letter addressed to the Board of Adjustment dated September 4, 2018, (via hand delivery), 5 pages. (Exhibit H)

From the audience Mr. Jim Bollini, adjoining property owner to the Racquet Club, questioned the applicants ability to provide additional information at this time as it's his understanding the rule is rehearing information from the applicant must be provided within 15-days of the Board's decision.

Chair Mathews explained the applicant's agent, Attorney D. Whitfield-Cargile, requested a rehearing within the 15-day period and provided in writing additional information. The request and information he provided was given to the Board within the meeting Agenda packet materials in advance of tonight's meeting. Action taken by the Board will only be based upon the information provided in advance of the meeting.

Motion – A. Delzell moved that the Board grant the applicant's request for a rehearing. Motion was seconded by T. Tartt.

Discussion: Rehearing will take place at the Board's next regular meeting scheduled for Tuesday, October 2, 2018.

Vote on the Motion: Motion carried unanimously.

VIII. REMARKS – None

IX. ADJOURN

K. Jones moved, seconded by T. Tartt, the meeting be adjourned. Motion carried.
Meeting adjourned at 5:17 PM.

Desiree Perry, Acting Board Clerk

Judith A. Mathews, Chair