

MINUTES

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

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

Members Present: Judith A. Mathews, Chair
Kevin Jones
Tad Fogel
Allen Delzell

Members Absent: Paul Welch
Tom Tartt, Vice Chair

Staff Present: Daniel Cobb, Planning Director
Brian Gulden, Board Attorney
Janice H. Pinson, Board Clerk

Others: Mike Vandegrift, Brevard Racquet Club
Josh Vandegrift, Brevard Racquet Club
Attorney Whitfield-Cargile, Attorney for Brevard Racquet Club
James and Lois Bollini, Neighbor
Douglas Campen, Attorney for James and Lois Bollini
Rachel Daniels, Neighbor
Coty Ferguson, Realtor
Ryan Fleming, Tennis Instructor
Reverend Robert Field, Neighbor
Stacey Robbins, Neighbor
DeeDee Perkins, Witness
Jimmy Perkins, Witness
Mary Lisa Patty Abbey, Witness
Gary Daniel, Witness

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

II. INTRODUCTION OF BOARD MEMBERS - Board members, Board Attorney and Staff, introduced themselves.

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

IV. APPROVAL OF AGENDA

Chair, J. Mathews proposed amendment of the agenda to add Discussion of Meeting Schedule for 2019 after New Business.

T. Fogel moved to amend the agenda to add discussion of the meeting schedule, seconded by K. Jones, unanimously carried.

K. Jones moved to approve the agenda as amended, seconded by A. Delzell, unanimously carried

V. APPROVAL OF MINUTES

A. Delzell moved, seconded by T. Fogel that the November 6, 2018, meeting minutes be approved as presented. Motion carried unanimously.

VI. NEW BUSINESS

a. Rehearing of Brevard Racquet Club request to amend Special Exception Permit #00-22 (SUP-18-004).

B. Gulden, Board Attorney explained that a simple majority vote was required for the special use permit to be approved. That the board usually consists of five members, but that there are only four present. He explained that four is a quorum and that three members would be required to vote in favor or against the special use permit. He explained that the meeting would have a time limit, and that if the case was not completed in this time limit the hearing would be continued to a date certain, but that only the four members present would be able to participate for the remainder of the case.

He asked the attorneys present if they had any questions or concerns about four and not five members hearing the case. There were none.

Attorney Whitfield-Cargile requested a two minute recess to discuss the matter with his clients, Mike and Josh Vandegrift.

The Chair granted the request.

Attorney Whitfield-Cargile agreed to proceed with four members after discussion with his clients.

Upon discussion of the time limit to be placed on the meeting. K. Jones moved that a two hour limit be placed on the meeting, beginning at 3:15 PM, and that if the case was not concluded that the board continue the hearing to the next regular meeting to be held on January 8, 2019. A. Delzell seconded the motion, which was unanimously carried.

B. Gulden, Board Attorney, explained the legal principle in NC of parties with standing in the proceeding, and that parties with standing are allowed to testify, call witnesses and cross examine witnesses. He stated that currently the parties to the matter are: City of Brevard, Brevard Racquet Club, James and Lois Bollini and Rachel Daniels and that anyone else that believes they are a party or will testify would need to come forward to be sworn. He explained that at the end of the hearing the public would be allowed to speak for three minutes each.

Attorney Whitfield-Cargile questioned Rachel Daniels party status. He stated that this information was not included in the Order from the August meeting.

Mr. Gulden stated that she could be sworn now and that Attorney Whitfield-Cargile would have the opportunity to question her as to her party status.

Attorney Whitfield-Cargile stated that he had nothing further and was ready to proceed.

Chair Mathews asked anyone else that believes they are a party with standing should come forward to be sworn.

The following were sworn by the Clerk to the Board; Daniel Cobb, Planning Director, City of Brevard, Mike and Josh Vandegrift, Brevard Racquet Club, Coty Ferguson, Realtor, Ryan Fleming, Brevard Racquet Club, Tennis Instructor, Lois Bollini, neighbor, Rachel Daniels, neighbor, Dee Dee Perkins, Jimmy Perkins, Reverend Robert Field, neighbor, Mary Lisa Patty Abbey, Stacey Robbins, neighbor, and Gary Daniel.

The Chair polled the board as to exparte communications and conflicts of interests. There were none.

The Chair asked the parties to the matter if they had any objections to the paneled board. There were none.

The Chair opened the hearing.

Daniel Cobb, Planning Director presented the staff report, a summary of the application and history of the case. Staff report is attached and labeled, Exhibit "A" and does not include exhibits to the staff report because of the volume of these items but they are a part of the permanent record for review upon request.

Mr. Cobb stated for the record that the meeting was properly advertised in The Transylvania Times, property posted and adjoining property owners notified.

Chair Mathews stated how much she appreciated the time spent by Staff on the agenda packet.

Mr. Cobb explained that he was notified last year that the property owner/applicant were using the area that was originally approved for tennis courts in their Special Exception

Permit granted in 2001 as an indoor workout facility. He explained that the term in the ordinance in 2001 was special exception permit and that the current ordinance refers to the same as special use permit and that there are no significant differences; and the application to amend the special use permit was heard at the August meeting and the Board determined there was not sufficient evidence and denied the request. The Applicant requested a rehearing of the application at the September meeting and their request was granted.

There were advertising errors which led to the request that the hearing be postponed to the November meeting. All of the documentation before the Board in their packet is available to be broadcast to the public upon request of the Board Chair.

Mr. Cobb explained that the specific request before the Board is stated in their application which is Attachment “R” in the agenda packet. He read the request as stated in the application as follows: “Applicant believes this application is unnecessary and that the current use is already authorized by the existing special use permit. Out of an abundance of caution, at the request of the planning department, applicant seeks to amend the existing special use permit, if necessary, to allow the current domed tennis court, which is an existing indoor recreational facility, to continue to be an indoor recreational facility used for fitness activities.”

Mr. Cobb read the Unified Development Ordinance definition for Indoor Recreation Facilities as follows:

“Recreation facilities, indoor: Uses or structures for active recreation including, without limitation, gymnasiums, natatoriums, athletic equipment, indoor running tracks, climbing facilities, court facilities and their customary accessory uses. This definition is inclusive of both non-profit and for-profit operations.”

He further explained that when originally permitted in 2001, there was no definition in the ordinance. The dome structure was permitted in January, 2013, permit #12-415 (Attachment “J”) but it was for the structure only, not the use.

In summary, Mr. Cobb explained that the request before the Board is to classify the use as an indoor recreational facility, and to do so the following had to be met:

- 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;*
- 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; and*

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.

Mr. Cobb explained that the Board can place conditions on the permit.

After discussion it was determined that if there were questions for Daniel Cobb that they should be addressed, and then the Attorneys could make opening statements if they wished.

Attorney Whitfield-Cargile asked if Daniel Cobb examined Exhibit “F” of the 2001 application with a magnifying glass that morning and made out the words on the building to be athletic club.

Mr. Cobb responded that he could not make out the words.

Attorney Campen had a larger scale copy of the site plan and he allowed the use of it.

Mr. Cobb could make out the words ‘athletic building’ on the larger site plan.

Attorney Whitfield-Cargile showed the site plan to each board member indicating the words athletic club on the building on the site plan. He then admitted the site plan as Applicant’s Exhibit “1”.

He asked Mr. Cobb if athletic clubs were allowed to have athletic activities in the building.

Mr. Cobb stated that they were allowed.

Attorney Whitfield-Cargile passed out a compilation of photographs and stated that he would like to submit them as Exhibit “2” and asked that everyone take a minute to examine them.

He asked Mr. Cobb if he had been in the building, to which Mr. Cobb responded that he had but was not familiar with the layout.

Attorney Whitfield-Cargile asked if the Racquet Club moved equipment from one end of the building to the other, would they be required to amend their permit.

Mr. Cobb responded that they would not.

Attorney Whitfield-Cargile stated that the entire property is permitted as an athletic club, correct?

Mr. Cobb responded, “Yes”.

Attorney Whitfield-Cargile passed out a compilation of photographs and admitted them as Exhibit “2” and asked if they generally showed fitness, and exercise equipment and were within the character of the current special exception permit for the property. Mr. Cobb responded that they were.

Attorney Whitfield-Cargile asked Mr. Cobb if he had ever been in the fit dome.

Mr. Cobb responded that he was considering joining about a year ago and did poke his head in the dome.

Attorney Whitfield-Cargile admitted another group of photos into evidence as Exhibit “3”, He explained that the first photo showed the dome in relation to the athletic club building, the remaining photos show the interior of the dome. He asked Mr. Cobb if the equipment in the dome resembled the equipment in the building. Exhibits 2 and 3 to be similar in nature.

Mr. Cobb responded that it did.

Attorney Whitfield-Cargile asked if Mr. Cobb corresponded with Mike Vandegrift.

Mr. Cobb answered that he had.

Attorney Whitfield-Cargile asked if the correspondence was based on a complaint received by the Bollinis.

Mr. Cobb responded that it was.

Attorney Whitfield-Cargile asked if the correspondence gave Mike Vandegrift the option to apply to amend his permit or to revert the dome back into the approved use of tennis courts and that these were the only options offered.

Mr. Cobb responded that was correct.

Attorney Whitfield-Cargile asked if Mr. Vandegrift applied for the amended permit and stating that he has always been cooperative. He further asked if the only complaint received at that time was the Bollini’s complaint.

Mr. Cobb stated that cooperative is a subjective description and that he did apply for the amended permit and yes, the Bollini’s were the only complaint at the time.

Attorney Whitfield-Cargile asked if the 2000 ordinance was in effect when the special exception permit was granted, if copies had been made and if Mr. Cobb had reviewed the ordinance. He asked Mr. Cobb to read out loud Section 801 of the 2000 ordinance.

Mr. Cobb responded, “Yes” to these questions and read Section 801 as requested, as follows:

801. General.

While there are many uses shown in article VII which are classified as “special exceptions,” only a few require compliance with specific design or other criteria in order to be approved. For these few, the following sections of this article provide both the application procedure to be followed and the special criteria which must be satisfied to obtain approval. For those special exceptions, for which there are no special criteria set forth in section 802, the planning board may recommend to the zoning board of adjustment whether or not the project should be approved based upon overall general intent of this ordinance.

Attorney Whitfield-Cargile asked Mr. Cobb if he agreed with him that the Racquet Club would not have had to submit specific design or criteria in order to be approved. Mr. Cobb stated that this was correct.

Attorney Whitfield-Cargile stated that these were all of his questions for now, but would like to reserve the right to ask Mr. Cobb additional questions.

Attorney Campen, Attorney for Jim and Lois Bollini requested to approach Mr. Cobb for questioning.

Attorney Campen referred to Exhibit “1”, the site plan from the original special exception permit application, which was granted in 2001. He asked if he understood the earlier testimony correct that the use for the athletic building itself transferred to the dome without an additional permit.

Mr. Cobb responded that he did not recall the exact phrasing, but that the equipment could be moved around within the facility but that on the original site plan existing tennis courts were labeled.

Attorney Campen asked if both blocks on site plan referred to existing tennis courts. Mr. Cobb responded that it did.

B. Gulden asked that Attorney Campen share the information he was questioning Mr. Cobb about with the Board.

Attorney Campen complied with the request and further asked if the fabric dome over the tennis courts was considered a substantial change to the existing special exception permit. Mr. Cobb responded that it was not because the original application included tennis courts to be covered at a later date.

Attorney Campen asked if Mr. Cobb was aware of any factual or procedural errors in the original application.

Mr. Cobb stated that there were none as far as he could tell. Mr. Cobb further explained that he had heard, but had no proof that a tennis court was covered and then the cover came down and the new one was put up.

Attorney Campen asked if the neighbors should have been notified before the dome was installed. Mr. Cobb explained that it was approved with a standard commercial zoning permit and that neighbor notification is not a requirement.

Attorney Campen asked if the Racquet Club is in violation of their permit, why they have been allowed to continue to operate as a functional training facility. Mr. Cobb responded that it was an agreement made with the property owner in good faith to try to work together until the Board reached a decision on the matter.

Attorney Campen asked if the noise ordinance is a useful tool in this situation. Mr. Cobb stated that the property does not lie within the City's jurisdiction so the noise ordinance cannot be applied, explaining that the property lies within the Extraterritorial Jurisdiction of the City of Brevard.

Attorney Campen asked if the noise ordinance was useful to apply. Mr. Cobb stated that he was not a noise expert and that the Police Department had the means to test noise levels.

Attorney Campen asked what the procedure would be if the Racquet Club wanted to start from scratch. Mr. Cobb asked him to clarify if any buildings would be in existence.

Attorney Campen explained that the current building would be in existence but that where the dome is located would just be a grassy field. Mr. Cobb responded that they would have to amend their permit. He explained that the dome was permitted as a temporary structure over tennis courts. He explained that when the dome was permitted it was permitted to cover existing tennis courts as specified on the original approved site plan.

Attorney Campen asked if tennis courts would be defined as fitness activity. Mr. Cobb stated that he would have to refer to the ordinance in effect when the permit was issued, but does not believe there was a specific definition at the time.

Attorney Campen had no further questions.

Attorney Whitfield-Cargile asked to redirect, that he had further questions for Mr. Cobb. He was allowed to proceed with questioning.

He asked Mr. Cobb if the Racquet Club was permitted as an athletic club offering fitness and athletic activities, further stating that there was nothing in the original permit defining or limiting these athletic uses. Mr. Cobb answered that this was correct.

Attorney Whitfield-Cargile further asked what the property was zoned.

Mr. Cobb answered General Residential (GR4).

Attorney Whitfield-Cargile asked if indoor recreation facilities were permitted with a special use permit in the general residential zoning district. Mr. Cobb stated that they were.

Attorney Whitfield-Cargile read from the 2000 ordinance in effect when the original special exception permit was approved, stating that indoor recreational facility was approved without limitations and that the use falls squarely under the definition for indoor recreational facility. Mr. Cobb stated that he would have to review the original site plan to answer this question. He agreed that the site plan listed indoor tennis courts and that it does fall under the current UDO definition for indoor recreational facility.

D, Whitfield-Cargile asked if part of the special exception permit allowed for outdoor recreational activities. Mr. Cobb answered, yes.

Attorney Whitfield-Cargile stated that nothing in the 2000 ordinance dictates that the permittee construct within a specific design. Mr. Cobb responded that the intent of the site plan is to construct as shown and that minor revisions are allowed but that substantial changes are required to be approved by the Board.

Mr. Cobb read the final motion in the minutes in Attachment “H”, page 6, the final motion approving the special exception, which is attached hereto for reference. He further explained that the application was approved based on the submitted site plan.

Attorney Whitfield-Cargile further stated that the board was allowed to impose certain conditions on the permit under the 2000 ordinance and read 802.6 from Exhibit “4”. Mr. Cobb answered that is correct.

Attorney Whitfield-Cargile stated that they did not impose any conditions on this special use permit. Mr. Cobb stated that is correct.

Attorney Whitfield-Cargile stated to be clear the only questions are whether or not the dome can be used for tennis or can it be used for other athletic activities. Stating that the dome was permitted years ago, correct?

Mr. Cobb stated that it was permitted.

Attorney Whitfield-Cargile stated that the question is does using the dome for exercise and fitness require an amendment to the permit.

Mr. Cobb stated that Staff had made the determination that it does require an amendment to the special use permit.

Attorney Whitfield-Cargile stated that Applicant disagrees with an amendment being required and so the second question is do we issue an amendment.

Mr. Cobb stated that this is up to the Board to determine.

Attorney Whitfield-Cargile asked if Mr. Cobb agreed that the original permit was for an athletic club for tennis, pool, and other athletic activities and that the activities in the main building are the same as the activities in the dome. Mr. Cobb stated that based on his recollection and the photographs that have been admitted into evidence today, “yes”.

Attorney Whitfield-Cargile stated that the special use permit is for the entire parcel, not just the building. Mr. Cobb responded that it is now one parcel, but that he believed it was previously more than one and that the special use permit does apply to the entire parcel of land.

Attorney Whitfield-Cargile asked if Mr. Cobb had reviewed the data of the Racquet Club usage in the past three (3) years. Mr. Cobb responded not in great detail.

Attorney Whitfield-Cargile stated that he would go over that with someone else and that he had no further questions.

Attorney Campen requested a couple of minutes to speak with his client, which was granted by the Chair.

Attorney Campen asked Mr. Cobb if it was his testimony that whatever use is in the facility itself is also permissible in the area labeled tennis courts on the original site plan. (Exhibit “1”). Mr. Cobb responded, “No”.

Was the special exception permit issued #00-22 based upon the application and site plan submitted, asked Attorney Campen. Mr. Cobb responded, “Yes”.

J. Mathews asked if the Board had any questions for Mr. Cobb.

Kevin Jones stated that he did and that he was inviting the Board Attorney to chime in if necessary. He explained that the history listened to in the last hour was very interesting, but he had a concern about trying to judge what the history says or about what happened in 2000 or 2017. He further expressed that he was feeling constrained. Because he believes he is to make a decision on the present, and whether it is in harmony with the neighborhood.

Daniel Cobb explained that the special exception permit #00-22 included a site plan that included certain uses in certain areas. One of the tennis courts is now being used for athletic activities and needs to go before the Board of Adjustment to relabel the tennis courts as an indoor fitness facility, so that the Applicant can use as they see fit. So the history is being provided just for what it is, historical context to inform the Board as to how things transpired. That the Board is here to listen and decide on the application to amend the existing special use permit.

Mr. Jones commented that he was still uncertain.

Mr. Gulden explained that he is not testifying but answering the question. That each side gets to present their case. For instance if there is an appeal to superior court, the appeal can be based on legal interpretation and if he understands correctly, the Applicant's position is that they should not be here today because they do not believe there has been a substantial change, therefore, this could be their reason for appeal to superior court.

Mr. Gulden continued stating the Board is here to listen to the special use permit application and to decide whether it is in harmony with the surrounding community, injurious to property values and whether it is detrimental to health, safety and welfare.

Attorney Whitfield-Cargile requested he be allowed to ask Mr. Cobb further questions, which was granted by the Chair.

Attorney Whitfield-Cargile asked if Mr. Cobb had reviewed the 2000 ordinance, stating that is the ordinance that my client's rights were vested in, correct?

Mr. Cobb responded that he had reviewed the ordinance and that they were approved for a special exception permit based on the site plan on the dais and that vested rights is a legal mechanism to which he is not qualified to speak.

Attorney Whitfield-Cargile asked what provision in the 2000 ordinance do you contend requires them to amend their special exception permit.

Mr. Cobb stated that there is nothing in the 2000 Ordinance that would require them to amend, but that the Unified Development Ordinance, the current ordinance, does have a provision that would require them to do so.

Attorney Whitfield-Cargile stated there is nothing in the 2000 ordinance, the ordinance that was in effect when they received their permit to operate as an athletic club that would require them to amend their special exception permit.

Mr. Cobb responded that the current ordinance Chapter 16.11.E does require them to do so. He read for the public a portion of his staff report as follows:

Generally speaking, upon successful approval of a SUP application properties are then developed according to their original plans. Minor field alterations or minor revisions may be reviewed by Staff. However, *substantial change[s] to a special use permit that results in the increase of the intensity, density, or character of the use shall be approved or denied by the BOA as an amended special use permit.*

Attorney Whitfield-Cargile stated that he was reading from the ordinance and it did not read quite the same and stated that Mr. Cobb was probably making the language simpler for the board to understand. Mr. Cobb stated that this was correct.

Attorney Whitfield-Cargile read from Chapter 16.11.E. Substantial Changes. You acknowledge that the character of the use is the same as the character of the athletic club that is permitted. This is looking at the entire property as a whole. Mr. Cobb responded: "Looking at the entire property as a whole I would agree that it is in compliance with their special exception permit."

Mr. Whitfield-Cargile further stated, "Looking at the building on Exhibit "3", to the left of the dome, one end is racquet ball courts and the other fitness equipment. You agreed that the equipment could be moved from one end of the building to the other and it would not change the character of the use. We are not looking at one small footprint but the whole property and the character has not changed."

Mr. Cobb agreed that the character of the use generally speaking has not changed but that the substantial change requiring the Applicant to come back before the Board of Adjustment is that on the site plan that we have been referring to the athletic facility as depicted by the shaded area; and it has now expanded into the area that is specifically labeled as tennis courts and that the area should be used as tennis courts as specified on the site plan.

When questioned, Mr. Cobb responded that the City contends that the intensity of the use has changed and that the property is not looked at as a whole but that the dome is looked at specifically.

Attorney Whitfield-Cargile asked if Mr. Cobb knew how many more people have been on the property since they changed the dome from a tennis court to a fitness facility. Mr. Cobb said he did not but that the matter is before the Board.

Attorney Whitfield-Cargile presented his opening statement, stating that there are two (2) big issues. The Racquet Club obtained a special exception permit in 2000-2001 to operate an athletic club, there were no conditions imposed on the permit. There was nothing in the ordinance at the time that would require to come back and amend the permit. The Racquet Club requests that you find no amendment is needed. If you find that activity is not authorized, the Racquet Club believes the amendment should be allowed to permit to athletic activities within the dome.

The Racquet Club will present evidence from a professional realtor that believes there are no negative impacts on adjacent property values by using this dome for fitness or athletic activities in addition to tennis or as an alternative to tennis.

The Racquet Club will present Officer Shawn Miller with the City on two (2) decibel level readings he took. We would ask that the record remain open for his testimony.

The Applicant will testify, Josh Vandegrift, General Manager and Ryan Fleming, Tennis Professional, will testify.

Attorney Whitfield-Cargile called Coty Ferguson to testify and he testified as follows:

Coty Ferguson introduced himself as a licensed realtor with Fisher Realty. He stated that he moved to Brevard in 2013. He has a college degree in business, a degree in education and is a licensed real estate professional. He explained his training as a real estate agent, continuing education and that as a realtor he helps with buying and selling property, determining listing price and the most appropriate offer on a home. He explained that the Real Estate Commission does not cover training on pricing, that this is learned through your agency or through extra training. He testified that he has taken extra training and is a certified strategic pricing specialist, that he has taken extra training to learn how to effectively price properties. This includes training on factors to add and subtract value from property, training on how to apply those factors to real property you see on the ground and as a strategic pricing specialist, assists clients in determining the sales and purchase prices on properties.

Attorney Whitfield-Cargile offered Coty Ferguson as an expert witness to determine negative or positive impact on adjacent property values.

Mr. Gulden, Board Attorney, stated that it would up to the Board to determine if they would allow Mr. Ferguson to serve as an expert witness and that the Board and Attorney Campen would be allowed to question Mr. Ferguson.

Attorney Campen asked Mr. Ferguson what percentage of properties he has assessed the value of are residential properties and how long he has been a realtor. Coty Ferguson responded roughly 90 percent and that he has been a realtor since 2014.

Attorney Campen asked if Mr. Ferguson had prepared analysis of the properties in the adjacent neighborhood on Country Lane. Mr. Ferguson answered that he had not prepared an analysis of that neighborhood.

Attorney Campen asked what type of things impact the value of residential properties.

Mr. Ferguson stated location, proximity to desirable and undesirable amenities, condition of home(s), condition of the overall neighborhood.

Mr. Ferguson was asked his definition of undesirable amenities. He responded it is not only his opinion, but the State has guidelines as to undesirable amenities, wastewater treatment facilities, electrical substations, grouping of Section 8 houses, proximity to public utilities generation, biodiesel, heavy manufacturing.

Attorney Campen asked if commercial activity that emits a certain amount of noise would be a variable. Mr. Ferguson responded, potentially.

Attorney Campen asked at what level the noise is considered undesirable. Mr. Ferguson responded, the hours of the noise, an example being that schools are noisy, due to marching band, football games, and frequency of the noise, overall hours and the overall volume of the noise.

There were no further questions.

The Chair asked if the Board had questions for Mr. Ferguson.

Mr. Gulden explained that the Board needs to ask questions of Mr. Ferguson to determine if they will qualify him as an expert witness.

A. Delzell moved that Coty Ferguson be accepted as an expert witness in his field as a realtor, seconded by T. Fogel, unanimously carried.

Attorney Whitfield-Cargile asked Mr. Ferguson are you familiar with Brevard Health and Racquet Club, and how are you familiar with the property.

Mr. Ferguson testified when people are looking for property in Brevard that are unfamiliar with the area, he and all of the realtors at Fisher Realty take them on a tour that highlights the amenities, the Racquet Club, Brevard Music Center, the Library to show the amenities available in a town of this size.

Attorney Whitfield-Cargile asked if he was familiar with the Racquet Club other than as a realtor.

Mr. Ferguson said that he is a member of the Racquet Club, and is familiar with the fit dome and has familiarized himself with the surrounding properties.

Attorney Whitfield-Cargile asked if Mr. Ferguson had formed an opinion as to whether the dome used for fitness activities vs. tennis would have a negative impact on the surrounding properties.

Mr. Ferguson stated that he had and that he had visited the property at different times and that when the dome was in use, he could still hear birds chirping and the nearby stream. His opinion is that tennis is a very loud, intense game and that his opinion is that the Racquet Club increases the value of surrounding properties; that in his opinion property values, including the Bollini's property, has added value for being in close proximity to the amenities that the Racquet Club offers.

Attorney Whitfield-Cargile submitted a document as Applicant's Exhibit "5", (Conducted Noise Readings for the "Dome" of Brevard Racquet Club by Shawn Miller, Deputy Chief) and

asked if the document was something that Mr. Ferguson considered in forming his opinion and if he discussed the matter with other realtors and, if so, what was the consensus among his peers as to the overall value.

Mr. Ferguson testified that the document that was being referred to was regarding decibel levels, and that he did discuss the matter with other realtors within his firm and that the general consensus was that the Racquet Club added value to surrounding properties. Further explaining that the decibel readings report helped to form his opinion that the noise levels do not have an egregious or negative impact on adjoining property values.

Mr. Ferguson further testified that discussion of the matter of tennis courts vs. fitness activities under the dome with his peers at Fisher Realty, the general consensus was that it would not negatively affect property values of the property in the surrounding area of the Racquet Club.

Attorney Campen, objected to hearsay evidence.

Attorney Whitfield-Cargile stated that expert witness can rely on hearsay.

Mr. Gulden stated that hearsay cannot be allowed as evidence, but that the Chair needed to determine if she was going to overrule or sustain the objection. He further stated that Mr. Whitfield-Cargile was allowed to rephrase the question.

Attorney Whitfield-Cargile disagreed stating that expert witnesses can rely on hearsay from a book or from other materials available to them.

Chair Mathews sustained the objection.

Attorney Whitfield-Cargile asked Mr. Ferguson if he relied on the consensus of his peers at Fisher Realty to form his opinion as to whether or not tennis vs. fitness activities have a negative impact on surrounding properties of the Racquet Club. Mr. Ferguson responded, "Yes."

Attorney Whitfield-Cargile asked if this opinion was something Mr. Ferguson relied on to form his opinion. He responded, "Yes".

Attorney Whitfield-Cargile asked if the Fisher Realty opinion was consistent with his opinion. He responded, "It is".

Attorney Whitfield-Cargile submitted into evidence Exhibit "6" (Letter from William R. Hall), and asked Mr. Ferguson if it was something that he reviewed and relied upon in reaching his opinion.

Mr. Ferguson, stated he did not rely on the document because he relied on his training as a real estate professional and that property owners are not always the best judge of their property values.

Attorney Whitfield-Cargile asked if the document favorably supported Mr. Ferguson's opinion. Mr. Ferguson responded that it did.

Attorney Whitfield-Cargile admitted in evidence Applicant's Exhibit "7" (Affidavit of Josh Burdette). He asked the witness if he knew Josh Burdette, if he considered the affidavit of Mr. Burdette in forming his opinion and if it supported his opinion.

Mr. Ferguson, stated that Mr. Burdette is a former agent of Fisher Realty, that he respects his opinion and that he did consider the affidavit when forming his opinion and that it does support his opinion.

Attorney Whitfield-Cargile stated he had no further questions for the witness.

Attorney Campen, stated that the question before them was if the fit dome was something that effects the surrounding property values.

Mr. Ferguson stated that the Racquet Club as a whole affects the property value and that the fit dome is just a piece of that property.

Attorney Campen stated that Mr. Ferguson's testimony relates to the fit dome more than to the Racquet Club as a whole, correct. Mr. Ferguson testified that the property is looked at as a whole parcel and that the fit dome is a part of the property that does provide a service that is not provided elsewhere and for that reason is considered on its own merit.

Attorney Campen stated that he wanted to make sure that he understood Mr. Ferguson's opinion and asked if it was his opinion that the Racquet Club affected values of surrounding properties. Mr. Ferguson stated that it does affect property values.

Attorney Campen further asked if then the addition of the fit dome would not have an effect on the property value or increase in property value.

Mr. Ferguson stated that this was not his opinion, that his opinion was that the fit dome enhances the value of the Racquet Club therefore enhancing the value of surrounding properties.

Attorney Campen stated that earlier Mr. Ferguson discussed different types of amenities, desirable and undesirable, and that noise may have a negative impact on property values, correct?

Mr. Ferguson stated his opinion that during certain hours noise is permissible, that is why the City has a noise ordinance and limits the hours noise is permissible. Examples are a

concert venue, sports arena and when the noise becomes undesirable is when it extends past certain hours.

Attorney Campen responded, that the City noise ordinance might be a useful metric to apply in this case.

Mr. Ferguson stated that Mr. Cobb had already stated that the noise ordinance did not apply because the property lies outside the City's jurisdiction but that he agreed that the noise ordinance would be a good standard to some degree.

Attorney Campen stated that Mr. Ferguson had just used the City's ordinance to measure desirable noise levels, so if the noise level rose to be in violation of the City's ordinance then it is possible that it would be considered an undesirable amenity.

Mr. Ferguson responded that if noise was on a regular and continual basis it could be an undesirable amenity.

Attorney Campen stated that this is not what the noise ordinance says, rather it is based on hours. Mr. Ferguson stated that if it is on a continuous basis, but not just a one-time violation, it becomes a nuisance to the community when it happens continuously.

Attorney Campen asked, if the fit dome operates every day. Mr. Ferguson stated that as far as he knew they were open every day, and that if the club is open, the fit dome is open.

Attorney Campen asked Mr. Ferguson if the fit dome is open continuously, and stated so as far as you know it is continuous and therefore the noise from the dome is continuous.

Mr. Ferguson stated that the term continuous should be clarified, since they have hours of operation.

Attorney Whitfield-Cargile objected to the line of questioning.

Attorney Campen asked if there were a decibel level that fell within a violation of the City's ordinance, would Mr. Ferguson agree that this could be a nuisance to the surrounding community.

Mr. Ferguson responded, yes, that if there were decibel readings that failed and were a violation of the City ordinance, but that the readings he reviewed were not in violation.

Attorney Campen asked but if there were you would probably put whatever was emitting the noise in the classification of an undesirable amenity.

Mr. Ferguson responded, yes, if it was a regular and continuous violation of the ordinance.

Attorney Campen had no further questions.

Chair Mathews, asked if anyone had further questions of Mr. Ferguson.

The Board had none.

Attorney Whitfield-Cargile stated he had redirect for Mr. Ferguson, which was allowed.

Attorney Whitfield-Cargile asked if Mr. Ferguson spent a great deal of time looking at the Racquet Club property and area and if he was familiar with it, if he had read the complaints in the agenda packet from some of the neighboring properties and what hours he had visited the property.

Mr. Ferguson responded that he had looked at the property, reviewed the neighbors' complaints and had visited the property in the morning and evening hours. He added that he had visited when there was a class in session in the fit dome, but did not attend a class.

Attorney Whitfield-Cargile asked if he took in the characteristics of the property and the activities and if he witnessed anything while on the property that he would consider to have negative impacts on adjacent property values. Mr. Ferguson responded that he did, and that he did not witness anything that would have a negative impact on adjacent property values.

Attorney Whitfield-Cargile asked Mr. Ferguson if he were asked if a decibel reading were above the noise level allowed, if that would affect neighboring property values and you answered, "no", correct? Mr. Ferguson responded if the noise levels exceeded the allowed level of the noise ordinance, and did so on a regular and continuous basis, then it would have an effect.

Attorney Whitfield-Cargile stated so if the noise rises to a nuisance level...

Attorney Campen objected, stating that it called for a legal conclusion. The conclusion being what a nuisance is.

The Chair sustained the objection.

Attorney Whitfield-Cargile asked if Mr. Ferguson had a general understanding as a realtor of nuisances. Mr. Ferguson said that it probably would be better for him to use the term annoyance, since nuisance was a legal term.

Attorney Whitfield-Cargile asked if he was familiar with the principle and if it was the threshold that he might use when something might have a negative impact on property values. Mr. Ferguson stated that once something rises to the level of a nuisance that he believes it would affect property values.

Attorney Campen asked Mr. Ferguson if he had visited any of the properties surrounding the fit dome and if so, which properties and that whether Fisher Realty had listed properties in the neighborhood. Attorney Campen asked if he had visited the neighborhood during the tenure of the fit dome and the typical times of day visited. Mr. Ferguson answered that he had and that the normal hours were 9 AM to 5 PM.

Attorney Campen asked if this is when they typically ran classes at the fit dome.

Mr. Ferguson stated that he had knowledge that there were classes earlier than 9 AM and that he thought there were not any past 5 PM. He stated that the first class starts at either 6:30 or 7:00 AM.

Attorney Campen had no further questions.

Attorney Whitfield-Cargile asked if the first class starts at 6 AM would that have any effect on your opinion. Mr. Ferguson responded that it did not.

J. Mathews asked if Board had questions for Mr. Ferguson.

T. Fogel asked what is considered a nuisance decibel level and if the reading that was taken by Officer Shawn Miller was taken at the Bollini home. Mr. Ferguson responded that he would rely on the Police Department's expert opinion on determination of nuisance decibel levels and that he used their report to form his opinion. He believes that the decibel readings were taken from the Bollini property and the Racquet Club property.

Attorney Whitfield-Cargile corrected him by stating that the Bollinis would not allow Shawn Miller on their property, the readings were taken from the corner of the Racquet Club property right below the Bollini's property, so that he would not go on their property without their permission. He hoped that Shawn Miller would be able to attend the next meeting and testify as to decibel levels.

B. Gulden explained that information supplied by Attorney Whitfield-Cargile cannot be considered, that attorneys are not allowed to testify.

There were no more questions of Coty Ferguson.

Attorney Whitfield-Cargile asked if he could call one last witness.

J. Mathews allowed him to call the witness.

Ryan Fleming, Tennis Director was called.

Ryan Fleming stated his name and that his occupation is the Tennis Director and Assistance Manager at the Racquet Club.

D. Whitfield Cargile asked what he did as the tennis director and if he used the fit dome in his tennis instruction and how he used it.

R. Fleming testified that he teaches tennis and supervises other instructors, that he uses the fit dome in his tennis instruction. He testified that tennis includes fitness in many forms and that he takes members to the fit dome to train.

Attorney Whitfield-Cargile asked if Mr. Fleming had used the indoor tennis courts and the fit dome during times of lighter and more intense usage periods.

Mr. Fleming stated that he had and testified that noise generated from indoor tennis exceeds the noise level during physical training in the dome and explained that noise levels when trying to teach tennis, especially to younger people, can become very loud because of the need to rise above their noise level to keep the class organized.

When asked if Mr. Fleming was familiar with the Bollini's complaints about noise when the fit dome was being used for tennis, he replied that he had heard about them.

He further testified that tennis class attendance outnumbered fit dome class attendance. He was asked if that is why the noise was more intense, and he responded, that he believed so.

Attorney Campen asked what type of exercises are typical at the fit dome at this time.

Mr. Fleming responded, running, biking, lifting, as in pull ups, bands, jump ropes, turf that you slide sleds back and forth across.

Attorney Campen asked if there were cross fit classes in the fit dome.

Mr. Fleming responded that he had seen a board with things written on it but was not aware of cross fit classes in the dome.

When asked if he had ever done cross fit, he responded that he had and that it included rowing, throwing a medicine ball in the air and catching it, lunges, lifting weights above your head and dropping them below the shoulders.

When asked if he was aware of the class schedule and any classes that involved the dropping of weights.

He stated that he was not aware of any classes where people were instructed to drop weights, but when lifting weights there is always the possibility of dropping them.

Attorney Campen asked who regulates the music in classes. R. Fleming responded, "the instructors".

Attorney Campen asked if anyone could adjust the volume of the music; if there was a manager that regulated the music and had he been in the fit dome when there was yelling to encourage others.

Mr. Fleming testified that he was not sure how the music was regulated, and when teaching tennis, sometimes the students get loud and that his tennis students are between the ages of 4-18 years of age, He added that the average age of fit dome class attendees is mid-twenties to mid-fifties.

Attorney Campen asked what type of exercises his tennis students perform. Mr. Fleming responded, jumping rope, running, treadmill, walking with weights and floor exercises, such as planks, pushups.

Attorney Campen asked where Mr. Fleming typically taught tennis classes. Mr. Fleming responded in the indoor tennis facility, not in the fit dome.

Attorney Campen further asked if the material of the indoor tennis building was a different type than the material the fit dome was made of. Mr. Fleming responded that he believed it was made of some type of siding.

Mr. Campen asked if the building where tennis was instructed, in his opinion, created more ambient noise, noise that echoes and easily compounds, more than that of a fabric structure. Is it possible that this metal building is louder because there is no place for the noise to escape? Mr. Fleming stated “no”, and that he has been in tennis facilities that are made of metal but that this building has some type of fabric on the walls that does not allow the sound to escape the building.

Attorney Campen asked if Mr. Fleming had heard noise outside the indoor tennis facility. Mr. Fleming responded that he had when tennis was being played, that he lives in an RV right outside of the facility.

Attorney Campen asked if the noise from the indoor tennis facility was louder than the fit dome and Mr. Fleming responded that it was louder than the indoor fitness and the fit dome.

When asked if the doors were left open to the indoor tennis facility, he responded that they are for air flow.

Attorney Whitfield-Cargile asked that he be allowed to ask further questions of Mr. Fleming.

Attorney Campen agreed to allow further questions so that the witness would not be required to return to the next meeting.

Chair Mathews agreed to allow the testimony to continue.

Attorney Whitfield-Cargile asked if Mr. Fleming had been in different types of rooms, in different types of buildings and which activity does he believe is louder, tennis or fitness? Mr. Fleming testified that he believes that the type of tennis that he teaches is louder, and some tennis, such as doubles where people are just playing, might not be as loud, but that the type of tennis that he is exposed to and teaches is louder.

Mr. Whitfield-Cargile asked why tennis players typically workout. Mr. Fleming testified that most tennis players get in shape in order to play tennis and that this is normal. Most tennis members are full club members and use the total facility.

When asked if he played music during tennis instruction, he stated that he did play music during cardio tennis classes. There might be tennis and training at the same time. When asked if there was yelling during tennis activities, he responded that there was and that it is common. He further testified that there was yelling during tennis as well.

Attorney Campen asked what is the typical tennis class schedule. Mr. Fleming responded 6:30 AM and the latest being approximately 8:30 PM.

There were no further questions.

Chair Mathews, continued the meeting to January 8, 2019.

Attorney Whitfield-Cargile requested that the members of the board be able to visit the facility prior to the January 8th meeting.

Attorney Campen objected because of the control that the applicant would have over the facility and situation and because it is the total crux of the matter and that he strongly objects to this being allowed.

J. Mathews stated that most members had either been to the facility or even been members. Dr. Delzell responded that he had never been in the facility.

Attorney Whitfield-Cargile asked to respond to Attorney Campen.

Chair Mathews stated that he needed to respond to her and to the Board, that it was their decision to make.

Dr. Delzell asked that he be allowed to visit the facility on his own.

Chair Mathews sustained Attorney Campen's objection.

Mr. Gulden cautioned the Board as to visiting the facility as a group. He explained that they have all visited properties in the past for cases and they should feel free to do the same in this case.

Attorney Campen stated that he felt if the board went as a group that they could all possibly be adversarial witnesses in the case.

After further discussion, it was agreed that the board should feel free to visit the property and adjoining properties as they felt necessary to decide the case.

Attorney Whitfield-Cargile stated that this was all he wanted to request.

Motion to continue the case until January 8, 2019 at 3:00 PM was made by Mr. Jones, seconded by Dr. Delzell, unanimously carried.

Mr. Gulden explained that the board seated today would have to hear the case on January 8th and wanted to confirm that all members present would be available. They all responded that they would be available.

VIII. REMARKS –

J. Mathews asked for any remarks.

K. Jones stated that he would reserve his until the end of the hearing.

T. Fogel stated that he had a clarification to note about something in the packet, but that he wanted both parties present and would bring it up later.

B. Gulden encouraged Mr. Fogel to write it down so that he remembered to mention it later.

Mr. Jones moved that the board approve the meeting schedule for 2019 as presented, seconded by Mr.. Fogel and unanimously carried.

IX. ADJOURN

Mr. Jones moved, seconded by Dr. Delzell, the meeting be adjourned. Motion carried. Meeting adjourned at 5:36 PM.

Janice H. Pinson, Board Clerk

Judith A. Mathews, Chair