

BOONE COUNTY BOARD OF ADJUSTMENT

BOONE COUNTY GOVERNMENT CENTER

801 E. WALNUT ST., COLUMBIA, MO.

Thursday, October 23, 2003

Chairperson Bowne called the meeting to order at 7:00 p.m. in the Boone County Commission Chambers having a quorum present.

Chairperson Bowne read the procedural statement stating that this Board is appointed by the Boone County Commission to consider specific application of the zoning and subdivision regulations. The Board is empowered to enter rulings that may give relief to a property owner from the specific application of the Zoning and Subdivision regulations. Generally, variances can only be granted in situations where by reason of shape, topography or other extraordinary or exceptional situation or condition of a specific ordinance would result in peculiar and exceptional difficulties to or exceptional and demonstrable undue hardship upon the owner of the property as an unreasonable deprivation of use as relating to the property. A variance from the strict application of this ordinance can be granted provided the relief requested will not substantially impair the intent, purpose and integrity of the zoning regulations.

Notice of this meeting has been published in accordance with our by-laws for the proper number of days. All decisions of the Board are based on the zoning or subdivision regulations for Boone County, Missouri, and they are hereby made a part of the record of this meeting.

This Board is comprised of five members, with three members constituting a quorum. An applicant must receive at least three votes in order to receive the relief that they have requested from the Board. Any applicant appearing before this Board has the right to be heard by all five members. At times that all five members are not present, the applicant, and only the applicant, may choose to wait until such time as all five members are present to hear their request.

Roll call was taken:

Present: Cindy Bowne, Chairperson
Matthew Thomas, Vice-Chairperson
Linda Rootes
Frank Thomas

Absent: Gregory Bier

Also present: Thad Yonke, Staff
Bill Florea, Staff
Paula Evans, Secretary

Minutes of the September 25, 2003 meeting were corrected on page 4, paragraph 4 where it states “whether those are caused by the setback variance request and the quarter to three-quarter encroachment in to the setback...” This should state “whether those are caused by the setback variance request and the quarter to three-quarter **foot** encroachment in to the setback...” Minutes were approved as corrected.

Chairperson Bowne stated that since her family had a financial interest in the property she would remove herself from the proceedings of the following request. Chairperson Bowne left the Commission Chambers.

Vice-Chairperson M. Thomas took over the duties of Chairperson.

REQUEST

1. Case Number 2003-016

Request by Zackary M. Riley and Autumn J. Cox to certify a nonconforming use for a nightclub located at 6870 E Mexico Gravel Rd., Columbia (Corn's Lake). **Zoning Regulations, Section 8. F.**

Planner, Bill Florea reminded the applicants that since a member has recused them self from the proceedings and there is a member absent tonight and the applicants are required to get three votes for an affirmation and the applicants can choose to table the request until there are more Board Members present that this is the opportunity for the applicant to decide to proceed or ask for the issue to be tabled. If the applicants choose to table their request it needs to be done at this point. It should also be noted that since one member has recused herself from the hearing the applicants could never get more than four members. Tonight the applicants would need to get all three positive votes.

The applicants took a moment to discuss the options.

Mr. Lemon stated that the applicants would like to go ahead and be heard tonight.

Mr. Florea began the staff report stating that the current zoning of the property is A-2 (agriculture); the adjacent zoning to the north is A-R, to the east is moderate density residential, to the south is A-2 and to the west is R-S single family residential. The subject site is located east of Columbia on Mexico Gravel Road. This is the site of the Corn's Lake. There is an older metal building on the site. The requested variance is for a certificate of occupancy for a nonconforming use pursuant to the zoning regulations, section 8.F. certificate of occupancy for a nonconforming use. Nonconforming uses existing at the effective date of this ordinance shall apply for a certificate of occupancy within 6 months from the effective date of this ordinance. Where a certificate of occupancy has not been obtained the existence of such use shall be a question of fact and shall be decided by the Board of Adjustment after public notice and hearing and in accordance with the rules of the Board. Department records do not indicate that a certificate of occupancy was ever issues for the use of this structure. The original zoning for this tract is A-2, an existing land use map prepared as background for the 1973 comprehensive plan does not indicate any particular land use at this location. (The previous sentence was included in the staff report in error. The existing zoning is indeed A-2. However, upon a more extensive review conducted after the section of the report above was written, the existing land use map was found to show the subject property as recreational. This is clarified below in the Boone County Planning and Building Inspection Department findings regarding case number 2003-016, Corn's Lake portion of the staff report.) Section 8.A. nonconforming use of land and buildings; except as otherwise provided herein, the lawful use of open land or of a building existing at the effective date of this ordinance may be continued although such use does not conform to the provisions thereof. The nonconforming use of land shall not be extended or enlarged, either on the same or adjoining property. A nonconforming use of land or building, if no structural alterations are made, may be changed to another nonconforming use of the same or a more restricted classification. Whenever a nonconforming use has been changed to a more restricted use or to a conforming use, such use shall not thereafter be changed to a less restrictive one. The nonconforming use of an existing building may be hereafter extended throughout those parts of that building that were lawfully and manifestly arranged or designed for such use on or before December 27, 1973.

County records, other than the existing land use map, do not reflect the actual land use at this site at the time that zoning regulations went in to effect in 1973. In the past the staff was told that Corn's Lake was a restaurant at one time and also provided recreational swimming opportunities however staff is unaware of

the time period that these activities took place or how long they continued. The zoning regulations stipulate that if a nonconforming use does exist it can be abandoned. Section 8.B. abandonment of a nonconforming uses. A nonconforming use of land or of a building which has been abandoned for a continuous period of 1 year, whether or not the equipment or fixtures are removed shall not again be used except in conformity with the regulations of the district in which it is located. The one year period of abandonment in residential districts shall not be extended because of any amendment or change to the section but shall be counted from the date on which the use was abandoned. The requested variance is to establish level of activity allowed on site and issue occupancy permit for non-conforming use if so determined.

The Board must establish the following:

1. The type and level of activity that took place on this site at the time zoning regulations took effect and whether such use qualifies as a nonconforming use.
2. If a nonconforming use was established in 1973, has such nonconforming use been abandoned according to Section 8.B?
3. If a nonconforming use has been established and has not been abandoned determine whether the original use was changed to a more restrictive/less intensive use and determine the type and level of said use.

If the Board decides that a nonconforming use was established in 1973 and has not been abandoned, a certificate of occupancy will be issued that describes the type and level of activity allowed on the property. If the Board decides that either a nonconforming use was not established or has been abandoned all land use on the property must conform to the A-2 district use regulations.

The burden of proof to establish a nonconforming use is upon the applicant. The Board must decide what weight, if any, to apply to any testimony or evidence introduced in to the record by the applicant or public.

Staff notified 36 property owners of this request.

Mr. Yonke continued the staff report. Mr. Yonke listed the Boone County Planning and Building Inspection Department findings regarding case number 2003-016, Corn's Lake.

Mr. Yonke entered in to the record the following items:

Boone County Zoning Regulations, issue May 1985, revised September 1991.
Boone Zoning and Subdivision regulations adopted December 27, 1973.
Board of Adjustment By-laws.
Land Use law, fourth edition by Dan Mandelker
Existing land use map from 1973.
Aerial photograph from 1968
Aerial photograph from 1976

Mr. Yonke stated using the existing land use map from 1973, Mr. Yonke stated that this was the official map that was used to document existing land uses at the effective date of the ordinance and immediately prior it was used in the construction and decisions on what zoning districts to go on the zoning map. The map inventories existing land uses at the effective date of the zoning ordinance.

Commercial uses on this map are indicated in red.

Mr. Yonke pointed out the taverns which are indicated in red on the map. Mr. Yonke stated that there are four that were found indicated. Mr. Yonke pointed out one on Old Highway 40 near Rocheport, one in

Murry, one in Harrisburg, and one on the outer road of I-70 Drive NW. Those are indicated and specifically marked on the map.

Mr. Yonke stated that a night club would have been marked in red as a commercial use and would have been specifically indicated on the map as a night club or tavern. The indicated uses in red, which is a commercial designation, are marked with their specific uses. For example, gas stations, taverns, exterminator company, home furnishings, restaurants, grocery stores, antique stores are all specifically listed.

Mr. Yonke asked the applicants to come forward so he could point out the locations of the indicated taverns.

Mr. Yonke pointed out the property identified on the map as Corn's lake is marked in dark green. Mr. Yonke stated that there is no red indicating a commercial use.

Mr. Yonke stated that dark green is used to identify recreational uses on the map. Mr. Yonke pointed out other locations marked in dark green indicating recreational uses. Other lakes that were used for recreational swimming at the time are indicated; Osburns Lake is indicated with dark green as is Pinnacles Park, and Tri-City Lake.

Mr. Lemon asked the date of the map.

Mr. Yonke stated the map is 6 months prior to adoption and is for use for this purpose.

Mr. Lemon stated that there is no exact date on the map.

Mr. Yonke stated there is not an exact date; however it is the map that was used.

Mr. Yonke continued stated that the dark green, the lakes and other recreational uses are indicated so it is an indication of the land uses that were in effect at the time the zoning ordinance was prepared and the map was created.

Mr. Yonke stated the next exhibits, which are all on file and official records in the Planning office, is the 1968 aerial photograph that the County had done of the property. Mr. Yonke pointed out the Corn's Lake property and indicated that the map is dated, the photograph indicates a structure, a lake, and a parking lot on the property, the photo does not indicate the specific use but it would appear to be consistent with the recreational land use that the existing land use map indicated.

Mr. Lemon stated that the aerial photograph does show a structure.

Mr. Yonke stated yes; staff is not disputing that there was a structure. Mr. Yonke stated that the other aerial photograph dated 1976 along with the 1968 aerial photograph are used to bracket the time frame, there are no 1973 photographs. The same property is shown on the 1976 map, Mr. Yonke pointed out the location of the property. Mr. Yonke stated that the photograph is not dated; however, there are only two sets of photographs, 1968 and 1976. Mr. Yonke stated that you can see that this is after because the subdivision immediately to the west was nothing more than a road in 1968; in the 1976 photo it shows a road and houses. It also shows the lake and the building, however at this point, the parking lot has been grown-over somewhat. The photo shows the structure, the lake and parking lot, the parking lot has become overgrown from the earlier photo, the photo does not indicate specific use but continues to be consistent with the existing land use map from the time indicating recreational use and the use appears to have diminished somewhat in terms of the photograph from 1968 to 1976 in terms of the parking lot.

The zoning and subdivision regulations for Boone County that were effective in 1973; these are the regulations, not the current regulations, but the regulations that were in effect at the time the zoning went in to effect. This is what is really in question initially as to what could be grandfathered and what couldn't. The zoning for the property was A-2. A-2 zoning under the 1973 ordinance provides for a privately operated recreational facility on 10-acres or more as a conditional use. The property was 10-acres or larger at the time. The zoning ordinance states that uses eligible for a conditional use can not have nonconforming use status. They are not eligible for nonconforming use. The zoning ordinance makes a distinction between a privately operated outdoor recreational facility and a privately operated recreational facility on 10-acres or larger. The first one is found in the A-R zoning district at that time and the second one is found in the A-2 zoning district. Property would have had to apply for and be granted a conditional use permit to be legal. The zoning ordinance indicates that nonconforming uses must certify their nonconforming use status within 6-months or be a matter of fact; however that is only for uses that are eligible for nonconforming use. If the use is recreational then it is not eligible for nonconforming use status, it would have had to get a conditional use permit at that time.

Next, we have the zoning ordinance dated May 1985, revised in September 1991. The A-2 zoning no longer has privately operated recreational facility on a 10-acre or large as a conditional use. The A-2 now has a privately operated **outdoor** recreational facility listed as a conditional use. The use would not qualify for a conditional use under the 1985 ordinance since there is a structure on the property involved however the use did not have a conditional use permit as required to be legal under the existing regulations in effect at the time. These were the 1973 regulations that were replaced by the 1985 regulations. Since it was 12 years later and they still hadn't gotten the required conditional use permit the use was neither eligible for nonconforming use status under the regulations nor was it legal at the time of adoption of the 1985 regulations. Again, it would not be eligible for grandfather rights, or nonconforming use status.

Effectively the staff findings from the evidence that was found in the Planning office to the best of staff's knowledge from that information the use on the property was recreational at the time the ordinance went in to effect in 1973 or closest to that; it was not a night club which is what is alleged here because that would have been designated as a tavern or nightclub specifically on that original existing land use map. If it had been some kind of commercial use, it would have been marked in red. Additionally on those maps there is one other item to point out, this refers back to the recreational uses shown on the existing land use map and that is that on the land use map the recreational uses are marked in dark green as already noted and shown. We have a location on the map where the use for a driving range and batting cages are indicated, which is considered to be a recreational type use however on the existing map it was marked in red and designated as commercial, showing the distinction. The zoning map indicated that as recreational when they assigned zoning, that information would indicate that they made a distinction between recreational uses that were more commercial in nature by designating them as commercial rather than recreational uses that were more open space and lower intensity recreational uses by designating them in dark green on the existing land use map.

Mr. Yonke stated this in conjunction with the two sets of regulations would indicate to staff that this is not eligible for grandfather rights.

Mr. Lemon, attorney for applicants, cross examined staff.

Mr. Lemon: Who prepared the map?

Mr. Yonke: The map was prepared for the County Court and Planning and Zoning Commission, Boone County Missouri by Harland Bartholomew, and Associates, St. Louis, Missouri.

Mr. Lemon: Who specifically colored in and wrote all the descriptions?

Mr. Yonke: Staff that was in effect at the time.

Mr. Lemon: So we don't have a record as to who did that?

Mr. Yonke: Harland Bartholomew and Associates prepared the plan.

Mr. Lemon: What I'm asking is were records kept of what persons were responsible for preparing this map as far as drawing colors on it and writing labels as to what the commercial and recreational uses were.

Mr. Yonke: They may have.

Mr. Lemon: Do you have those?

Mr. Yonke: I do not have that here and I do not know if it was. However, that is an official map for the County as part of our comprehensive plan and part of our other formal records.

Mr. Lemon: Can you tell us how that map is kept?

Mr. Yonke: That map is kept in our office along with all of the other maps.

Mr. Lemon: Is it secured? Who has access to that map?

Mr. Yonke: The only people who have access to that map are people who come in to the office to view it; it can not leave our offices or building.

Mr. Lemon: You say that people who want to examine the map have access to it, so the general public does have access to the map?

Mr. Yonke: The general public can have supervised access to the map.

Mr. Lemon: Do you have personal knowledge that any access to the map is always supervised?

Mr. Yonke: No, but because that map is generally not where it could be accessed without having to ask one of us to get it for them at which point we would supervise it but I can't say that this was ever done.

Mr. Lemon: How old is that map again?

Mr. Yonke: That map is from 1973.

Mr. Lemon: But we don't have an exact date on it, approximately 1973.

Mr. Yonke: It would be from between 1972 through the effective date of the original zoning ordinance, because that is what it was used to prepare; the zoning ordinance was effective on that date, December 27th. So obviously it was prepared prior to that and that map would be reflecting that land use at that time and immediately proceeding up to it.

Mr. Lemon: So in the period of time when this has been an official map from 1973 up to the current date do you have personal knowledge as to the manner of which that map has been kept?

Mr. Yonke: No I do not.

Mr. Lemon: Is it possible that people could have had access to that map that were not authorized personnel?

Mr. Yonke: It is possible but they could not have altered it in any way that would be relevant.

Mr. Lemon: You pointed out taverns to us; do you believe you pointed out all the taverns that are in Boone County?

Mr. Yonke: No, we pointed out the taverns that were specifically identified on the map.

Mr. Lemon: So, you admit then that there were taverns in Boone County in 1973 that are not showing on that map.

Mr. Yonke: No, I would not.

Mr. Lemon: So your statement then sir is that at the time this map was drawn up there were only seven taverns in Boone County.

Mr. Yonke: No, at the time this map was drawn up all of the existing taverns that were in the unincorporated areas of Boone County or in the small cities, because they didn't inventory the City of Columbia, were indicated by field survey on the map. Now, I don't know that there were others so I can't indicate that they would all be there.

Mr. Lemon: I guess I am trying to be logical here, if you only found, and approximately, I wasn't counting on my fingers but it was six or seven, if there are only six or seven taverns on the map and it is your statement that this map shows every tavern which has ever been on the map.

Mr. Yonke: No. What I indicated....

Mr. Lemon: Is it true then that there were only seven taverns in Boone County?

Mr. Yonke: There would have been seven identified that the map would help support had potentially nonconforming use status; if they weren't granted the zoning initially. However, the property in question was reviewed because it does have an indication on it and it is not indicated similarly to taverns or commercial uses.

Mr. Lemon: But back to my question sir, is it possible that there were taverns in existence in Boone County that are not shown on that map.

Mr. Yonke: It is potentially possible however we have no record of it.

Mr. Lemon: Do you think it is likely that in 1973 there were only seven taverns in Boone County in the unincorporated areas.

Mr. Yonke: It is highly possible. That map even indicates housing and other uses that are along the roads if there were taverns that would have been along the roadways like that they would have been indicated.

Mr. Lemon: You indicate that the property is marked for recreation.

Mr. Yonke: Correct.

Mr. Lemon: Do you have a list for us of the specific criteria they utilized to mark recreational areas on that map?

Mr. Yonke: No, they used the standard land use colors so it would be assumed that they used the criteria of observation as they went out to indicate.

Mr. Lemon: So it is an assumption then we don't know what they used.

Mr. Yonke: Correct, but it was prepared by professional planning staff so we have to rely on their professional expertise.

Mr. Lemon: Now sir, it was your testimony that there was a building there in 1968, is that correct?

Mr. Yonke: Yes, there was a building there in 1968.

Mr. Lemon: And that building did have a parking lot is that correct?

Mr. Yonke: Correct. We do not refute that in any way.

Mr. Lemon: What do you suggest that building was used for if it was not used as a nightclub or tavern?

Mr. Yonke: It was used as a recreational use. As the other portion of our staff report indicated we have anecdotal information that in the past that had been used as a recreational swimming lake. Buildings and structures such as pole barns and other such are used typically in conjunction with recreational swimming lakes.

Mr. Lemon: Well now sir, this is not a pole barn though is it?

Mr. Yonke: Actually it is not much more than that.

Mr. Lemon: Well it is an enclosed building isn't it?

Mr. Yonke: Right, that is what a pole barn is as opposed to a shelter.

Mr. Lemon: It is a metal building and it is certainly currently being used as a nightclub or tavern, isn't that correct?

Mr. Yonke: I am assuming from the application that it is currently being used as a night club or a tavern and from previous complaints under our zoning we have been told that it is being used that way.

Mr. Lemon: Have you ever reviewed the property.

Mr. Yonke: I have been to the property; I have not seen it used in that form.

Mr. Lemon: So you have seen this building?

Mr. Yonke: I have seen the building and it is what we call a pole barn and if we were issuing a building permit for it, it would be a commercial structure but it would be basically a pole construction with a metal siding.

Mr. Lemon: But it would be a commercial building if you were issuing a permit for it.

Mr. Yonke: It could be a commercial building.

Mr. Lemon: Well sir, first you said it wasn't a commercial building, is it a commercial building?

Mr. Yonke: A commercial building does not make it a commercial use. One is a building code issue; the other is a land use issue.

Mr. Lemon: I understand that but it is a commercial building, you can see that.

Mr. Yonke: I will not concede that the building has a legal use as commercial use.

Mr. Lemon: That is not my question sir, I am not asking you is it legally zoned commercial, I think we all know it is not, my question is, is this a building for commercial purposes.

Mr. Yonke: The building type is the type that could be used for commercial purposes or could be used for recreational or other purposes.

Mr. Lemon: What type of recreational purposes could a building like this be used for?

Mr. Yonke: It could have been used as a private club.

Mr. Lemon: As a private club?

Mr. Yonke: Yes.

Mr. Lemon: How is that defined as a recreational use rather than a night club?

Mr. Yonke: That is actually, in our current ordinance, a private club is just that, a private club.

Mr. Lemon: What about the ordinance in 1973 when it was put in place? What do they say about private club?

Mr. Yonke: They indicated, as we indicated, a privately operated recreational facility on a tract which would be a club, is a conditional use.

Mr. Lemon: They said a privately operated recreational facility but they did not say a private club.

Mr. Yonke: Which it is where it would go if it is not specifically listed with the word club.

Mr. Lemon: This building was there in 1968, is that correct?

Mr. Yonke: Yes.

Mr. Lemon: Were there any zoning ordinances at all in 1968?

Mr. Yonke: No there were not.

Mr. Lemon: Is it possible that it was operated as a business in 1968?

Mr. Yonke: It is possible and it wouldn't even make any difference what it was used as ever prior to 1968 unless it was used as a business and continued being used as a business through 1973 and then maintained that status continually since then. It is possible but is not necessarily relevant whether it was a business in 1968 or not. It would be relevant to know if it was a business and then was a business continually through 1973 at which point it would make a difference.

Mr. Lemon: You confused me a little bit. You were talking about, this is clearly not eligible for grandfathering and I am not tracking with you on that. I am not following your reason.

Mr. Yonke: It is the ordinance. If it is not a commercial structure, it was not marked on the maps that were used to prepare the zoning ordinance, it was not given the status as commercial by the zoning ordinance that was put in to effect, it was not marked on the map, wasn't marked there, it is indicated on the map with the color they used for recreational uses. Recreational uses are allowed in the district as a conditional use and the ordinance specifically says you can't get nonconforming use status, grandfather rights if you are eligible for a conditional use.

Mr. Lemon: So if in fact this was a night club that argument would not apply, is that correct?

Mr. Yonke: Correct. If this was a night club and it was proven, which the burden is on the applicant to do to prove that it was a night club at the effective date of the ordinance in 1973 then it would be possible to try to get a nonconforming use status. But it would then also have to pass the other tests in order to prove that it was in continual, non abandoned and non changed use for 30 years.

Mr. Lemon: The ordinance doesn't actually say continual does it, doesn't it say that it can not be abandoned for more than a year?

Mr. Yonke: Correct. It has to be in use without any modification, which again would have to be shown that it had not been modified in any way since 1973.

Mr. Lemon: Can you tell me where that is about no modification, where in the ordinance is that?

Mr. Yonke: If you look at the ordinance that is in effect both then and now as far as the use, it is incumbent on you to prove that it was effective at the time and that it has been continual because otherwise there is no evidence that it has been in continuance.

Mr. Lemon: One of the things you had said was that it can't be modified and I was just wanting to know where that was.

Mr. Yonke: Under current ordinance section 8 nonconforming use. Nonconforming Use of Land and Buildings. Except as otherwise provided herein, the lawful use of open land or of a building existing at the effective date of this ordinance may be continued although such use does not conform to the provisions hereof. The nonconforming use of land shall not be extended or enlarged, either on the same or adjoining property. A nonconforming use of land or a building, if no structural alterations are made, may be changed to another nonconforming use of the same or of a more restricted classification. Whenever a nonconforming use has been changed to a more restricted use or to a conforming use, such use shall not thereafter be changed to a less restricted use. The nonconforming use of an existing building may be hereafter extended throughout those parts of that building which were lawfully and manifestly arranged or designed for such use on or before December 27, 1973. Because it indicates that the use can not be changed or if it does change to lesser it can not go back it would have to be shown that the use was maintained continually, not having been abandoned for the entire 30 year period and not have changed to a lesser restrictive category. Because if you can't show that either then there is no way to know that it wasn't.

Mr. Lemon: The actual language of it then says that you can not make structural alterations.

Mr. Yonke: To a building. But it also refers to the use of the land and it says that it can not be expanded or that if it changes to a lesser restrictive use then it can not be changed back to the other use. Due to that information being in this clause it is going to be important to establish that this hasn't happened in any way otherwise it would have lost any potential grandfather rights it could have potentially established. That is again, incumbent on the applicant to show it has maintained any grandfather rights it may or may not have had.

Mr. Lemon: Not necessarily the applicant but the property.

Mr. Yonke: The applicant is the one who would be applying for it, but right. The property has to have continued in that state.

Mr. Lemon: The only reason I make that point is that this property hasn't had continual ownership since 1973.

Mr. Yonke: That is what partly makes it very difficult to establish nonconforming use rights after 30 years.

Applicants present:

James Lemon, attorney, 220 N. Tenth St., Hannibal.
Zackary Riley, 1004 N. Seventh St., Columbia.

Mr. Lemon stated that the applicants owned and operate Joy to the World LLC. The applicants company is a Missouri Limited Liability Company, it has been in existence since May 5, 1998, it is continued in good standing with the state of Missouri for all that time. Mr. Lemon presented copies of the certificate of good standing, certificate of organization, and their articles of organization that they have filed with the State.

Mr. Lemon stated that the applicants are here tonight because they have made an application for a certificate of occupancy for a nonconforming use as the Board heard the specific nonconforming use is as a night club. The issue here is for that type of operation the property should be zoned commercially and obviously it is not. The clients have operated this property as a night club facility since their purchase of it in 1998. They purchased an existing club equipped with lights, a sound system, parking area, and various other amenities. They've operated it since then under several different names but have never gone more than 6 months between any changes. They have kept the business properly licensed during their ownership. Mr. Lemon submitted copies of the merchant's licenses showing that the business has been properly licensed the entire time the current owners have possessed the property.

Mr. Lemon stated that in the whole time of their ownership no protest has ever been made to those business licenses and they have been allowed to be licensed as a night club. Mr. Lemon presented a recent copy of an aerial photograph. The property in question is the one that is in the middle of the property, it shows the Corn's Lake that was the lake that was established, the metal building is labeled Outrage, a little lower there are two dark spots, that is a double cell septic system that was installed by a prior owner at the instruction of the City in order to comply with City ordinances. The property in question was originally opened in 1964 as Corn's Lake it operated for about 1 year as a facility for open air dances, concerts, picnics, camping, swimming and various other activities. However, 1 year after this the owner Mr. James "Cornbread" Martin built the night club on the property. He sold liquor by the drink; he charged admission for the events he held there. Mr. Martin and his wife Sheila, operated the property from 1964 through April 6, 1982 as Corns Lake and then as Sheila's, which was a bar or tavern. In 1982 they leased the property to Mike Iaccrino and he operated the property as Mike's Lounge until October 3, 1983. The property continued to be operated as Mike's Lounge by Bev Keller from October 3, 1983 to June 29, 1984. From June 1984 to October 13, 1989 the night club was operated as Paradise

Retreat by Cheryl Perry. In that period of time Mr. Martin sold the property to Clyde and Beulah McCubbin, the sale date was October 31, 1986. They never operated this property themselves but they continued in the existing lease then continued to lease it to others. From October 1989 until February 1998 the property was operated by James Farar as Zazooz and the Bar and Dance Facility. In February 1998, the applicants purchased the property and they have operated it under several different names in that period of time which is shown on the business licenses that they've had.

Mr. Lemon stated to support the timeline the applicants have brought affidavits from various people who have knowledge of the property.

Mr. Lemon summarized the affidavits as follows.

The first affidavit is from Larry Frost, Mr. Frost works for N.H. Scheppers as a driver, in his affidavit he states that he made deliveries to the night club and has seen it operated as Sheila's, Mike's, Paradise Retreat, Zazooz, Bar and Dance Club Facility, the Outrage, Nitro, Urbanites.

The next affidavit is from Cheryl Perry, she is one of the people who operated this as a bar. She indicates that she has been acquainted with the property since the late 1960's when it was known as Corn's Lake, she knew it as a night club known as Sheila's through the 1970's and early 1980's and knows personally that it was run by Sheila Martin. She states that in 1981 she helped start a night club that was known as Mike's, which was owned by Mike Iaccrino. She states that from 1983 to 1984 it was run by Bev Kellar, and then in 1984 she acquired the ownership of the club and ran it as Paradise Retreat. She says she left town for several years but when she returned the club was being run as the Bar and Dance Club Facility and this was around 1994 to 1995.

The next affidavit is from Sherry Gail Morgan, she indicates that she has personal knowledge of the property, she has been acquainted with it since June 1984 and went to the club and knew it as Paradise Retreat. She says she began going to the club regularly in 1985 and has been attending that as a night club ever since. She also indicates that she knows that it has always been used as a night club since 1985 and has not been vacant for more than 6 months in that period of time. She also states that the building has not been expanded or extended since she first saw it in June 1984.

The next affidavit is from Alma Major. Ms. Major is a neighbor of the property. She indicates that she has direct and personal knowledge of the night club and she has been acquainted with the property since the spring of 1993. She says she has known the night club to be operated under the names Bar and Dance Club Facility, the Outrage, the Afterset, Nitro, the Rage and the Gravel Pit. She knows that since the spring of 1993 it has never been operated as anything except a night club.

The next affidavit is Clyde McCubbin. Mr. McCubbin was the person who bought the property in 1986. He states that they bought the club from James Martin on October 31, 1986 and the operated the property as a night club continuously from the date they purchased until they sold the property and that during their ownership they never extended or expanded the building and they did sell the property to Zack Riley and Autumn Cox in 1998 and they have personal knowledge that they operated it as a night club from that time when they purchased it.

The last affidavit is from Beulah McCubbin, Mr. McCubbins wife and she states essentially the same thing.

Mr. Lemon submitted the affidavits to the Board.

Mr. Lemon stated that this building is supported by a two cell lagoon system that is rated for commercial use. The lagoon system was installed specifically because the City required the owners to put it in, in order to

continue running this night club. You can see it on the map. The building is up to code, it has no structural problems of which the applicants are aware. The property has been operated as a night club since the 1960's well before the key date of 1973 for grandfathering a nonconforming use under the ordinances. It's continued to be operated for this use without abandonment up to and including the current date.

Mr. Lemon stated that the applicants have a very substantial file of articles, advertisements, phone book records, and various other supporting documents that support the time line. Mr. Lemon stated that he could submit those in bulk; Mr. Lemon stated that he didn't want to bore the Board but also didn't want to limit the applicants from presenting their full case. Mr. Riley has done a lot of research on this and has a lot of proof showing that this has been operated as a night club facility.

Mr. Florea suggested that the first decision making point is what use existed in 1973, if the applicants could pick out the items that the applicants would like to present that are relevant to that date it might be a good place to start.

The applicants presented the following. Mr. Lemon explained the items as follows.

An article from 1974 from the Columbia Tribune which refers to an incident at Corn's Lake regarding a rock concert that was apparently printed in hoax. They indicated that Leonard Skynard was going to be there and he did not show up.

Something from 1973 stating that there was a concert at Corn's Lake.

An article from the Tribune in which a business man talks about the dances he held at Corn's Lake.

Mr. Riley stated that this article tells why they built the building, winter set in and people weren't coming; they were dancing outside prior to that so they put the building up for their dances.

An article from 1966 indicating the building as a dance hall. Mr. Riley stated that it describes the pole barn.

An article from 1971 in which someone reviewed the place and it indicates that contrary to what the name implies Corn's Crib is not a tall silo brimming with ears of Indian corn but a modern steel structured discotheque.

An article from 1970 regarding a band that was playing in town.

An article from 1970 in regard to the sheriff's department did not know that people were saying that the sheriff's department agreed to cooperate with the rock concert at Corn's Lake.

The applicants presented more articles regarding additional concerts.

Mr. Lemon stated that looks like all the documents up to 1973. The applicants have more documents that go in to the late 1970's

The applicants presented documents dates 1977, 1978, and 1979 which gets in to continued use issues.

An article referring to the property as Sheila's. The owner at the time was Sheila Martin who was the wife of James "Cornbread" Martin.

Articles referring to the property as Mikes Lounge.

Articles referring to Paradise Retreat.

Mr. Lemon stated that these are not photocopies but are printouts from the website. It shows Zazooz and Bar and Dance Club.

A phone record showing Zazooz listed as a night club.

Member Rootes stated that in the affidavits the only one that claims to have knowledge in 1973 is Cheryl Perry. None of the other affidavits made claims concerning what was in effect in 1973.

Mr. Lemon stated that he may need to let his client address that but that was 30 years ago and tracking down people that had specific recollections was a little difficult. One of the reasons Ms. Perry was such a good resource was the fact that she had been an operator of the club in a period of time in which the McCubbins had knowledge the people that sold the property to the applicants. Part of the issue you are looking at is as the Board pointed out if you are looking at trying to prove 30 years it starts to get a little tough in finding references in newspapers etcetera, etcetera is about the best you can do. Without making a legalistic argument, I would also point out that I think it is somewhat telling that the County has been issuing business licenses, required them to upgrade the septic facilities on this club. There are probably some collateral issues but that is not something that the Board would have to decide. But certainly the applicants bought the property in reliance that there was not a problem in that there has never been any attempt to claim that this was not a grandfathered operation.

Mr. Riley stated that the applicants did speak to the County before purchasing the property. A realtor had spoken to the County and then approximately a week after that the applicants spoke to the County. The applicants were told that the property was grandfathered in for night club use. Then the applicants went to where you get your merchants license and Wendy Noren happened to be there that day. The applicants spoke directly to Ms. Noren. This was prior to the applicants buying the property because they knew it was a big purchase. Ms. Noren told the applicants at the time that it was a night club; everybody knows that, you're fine, it's in the data base you just apply for a license and you are good. Mr. Riley stated that he was unaware of what a certificate of occupancy was prior to reading about zoning changes coming up. But the applicants were told specifically by the County that it was grandfathered for a night club. In the year 2000 when the applicants shut down the Outrage before they rented it to a guy for a short stint Mr. Riley called Planning and Zoning to see about getting commercial zoning; Mr. Riley knew they were grandfathered and didn't quite understand that. Mr. Riley stated that he is not sure who he spoke with there, it may have been Stan. Mr. Riley stated that he was told at that time that the applicants can't apply for commercial general zoning because you have commercial general, that is how it works. You've got it, if you want to make a change and put something else there then you have to apply, but for the use you have you can't apply. Mr. Riley stated that he was inquiring about what the applicants could use the property for and trying to understand the grandfathering. The County has stated to Mr. Riley directly, Planning and Zoning has stated twice that it was grandfathered for night club use then Ms. Noren herself had said it has always been a night club out there. Today this is the first Mr. Riley has even heard of anything opposite of that.

Member Rootes stated that the only one that has anything to do with 1973 is Cheryl Perry's affidavit and she said she knew it as Sheila's through the 1970's.

Mr. Lemon stated that is correct.

Member Rootes stated it may be a little in conflict.

Mr. Riley stated the late 1970's is when Cornbread's wife changed and put her name on it, it had been called Corn's Lake and he was operating it. They've owned several businesses and apparently at some point she

wanted to run it and even the phone records changed, the phone records were in his name and it switched to the night club Sheila's.

Member Rootes stated that Ms. Perry is remembering the late 1970's not the early 1970's.

Mr. Riley stated the late 1970's. She was aware that around 1964 when it first opened they had everything out there, dances and concerts and they allowed people to swim. That when she was initially familiar with the property. She does know Cornbread because she ended up renting from him later and said she was familiar with him.

Mr. Lemon stated that when Member Rootes was asking about Ms. Perry he remembered one of the ways that Mr. Riley found out about Ms. Perry. He had run a search of entities and found Paradise Retreat registered to Ms. Perry.

Member Rootes stated that this wipes Ms. Perry's affidavit out from the 1973 time.

Mr. Riley stated that he didn't think that Ms. Perry specifically mentioned it. When she made that Mr. Riley said that anything that you know, tell us. She may have knowledge of 1973 but Mr. Riley stated that he can not speak to that.

Mr. Lemon stated that it has been a while since he reviewed the affidavits. Mr. Lemon asked if there was one that referred to having knowledge that the property was operated as Corn's Lake.

Mr. Riley stated that it was tough to find people but everywhere you go people say that has always been a night club. Bill Crockett is the one that put the double cell lagoon in and John John. A lot of people in town are familiar with it; unfortunately they are not here right now.

Member Rootes asked when the lagoon was put in.

Mr. Riley stated that he believed it was 1989.

Mr. Lemon stated that Ms. Perry's affidavit looks like she said she had been acquainted with the property since the late 1960's when she knew it as Corn's Lake and knew it as a night club known as Sheila's through the 1970's. Mr. Lemon stated that his argument would be the inference was that she was stating, well, I knew it as Cornbread's and then through the 1970's it became Sheila's. Mr. Lemon stated that would be his argument as to what she meant there. Mr. Frost who was the delivery person for N.H. Scheppers says that he has been acquainted with the property since 1964 when he knew it as Corn's Lake and that he has made deliveries to it as a night club and seen it operated as Sheila's, Mikes, Paradise Retreat, Zazooz, Bar and Dance Facility, and then the Outrage, Nitro and Urbanites which were all ran by Mr. Riley.

Member Rootes stated that Mr. Frost stated in the last 25 years.

Mr. Riley stated that is how long Mr. Frost has worked for N. H. Scheppers.

Member Rootes stated that it doesn't go back to 1973.

Mr. Riley stated that Mr. Frost had attended fraternity parties there.

Member Rootes stated that the article from 1971 made reference to a set-up license.

Mr. Riley stated that is a liquor license where people are allowed to bring their own beverages then you sell them sodas and orange juice to go with it.

Member Rootes asked the applicant what kind of liquor license they had now.

Mr. Riley stated that at this time the applicants have no liquor license. The applicants allow people to bring lower alcoholic content. You don't need a liquor license if they bring a lower alcoholic content. You do need one for them to be able to bring whatever they want. Then there is retail where you make the drinks. When the applicants had Outrage they had the full liquor license where they served the people, then the applicants had bring your own licenses after that, which is the set-up license.

Member Rootes asked what kind of liquor license there was in 1973.

Mr. Riley stated that he didn't know to get that information.

Member F. Thomas stated that the applicants didn't know if any merchant's licenses were issued around that time.

Mr. Riley stated that when he went to the merchants licenses they only went back 10 years in the County records.

Member M. Thomas asked the definition of a night club.

Mr. Yonke stated that since it is not specifically defined in either ordinance, the ordinance says to go to the dictionary. Mr. Yonke read: Night club, a place of entertainment, open at night, usually serving food and liquor, having a floor show and providing music and space for dancing.

Mr. Lemon read: A place of entertainment, open at night for eating drinking, dancing, etc., and usually having a floor show.

Member M. Thomas stated that a night club is not necessarily an establishment that has a full blown liquor license themselves. They can sell just set-ups at a night club. It looks like for a short time when it was Paradise Retreat it was strictly a set up bar.

Mr. Riley stated that Paradise Retreat and Zazooz both went through periods of having both types of licenses; the set up license and the retail by drink. The applicants as well.

Mr. Lemon stated that there was no definition of bar or tavern in the old regulations although it is referenced in the 1973 ordinance it does not define what those are. Mr. Lemon read the definition of bar and tavern. Tavern: A place where liquor, beer, etc. are sold to be drunk on the premises. Bar: A counter at which alcoholic drinks and sometimes food are served, or an establishment or room with such a counter an article of furniture often on wheels in which drinks, etc., are served.

Staff cross examined the applicants.

Mr. Yonke: Do you have any copies of any merchant's licenses indicating that this was a business in 1973.

Mr. Lemon: I believe my client indicated that when he attempted to get those he was told that those are not kept more than 10 years.

Mr. Yonke: So you do not have one from any other party nor from the County.

Mr. Lemon: I believe that I just said that that would be impossible.

Mr. Yonke: So there is no record of that.

Mr. Lemon: That would be correct.

Mr. Yonke: Do you have a liquor license issued at that time? For 1973?

Mr. Riley: I inquired through liquor control and was told we don't know how you get that.

Mr. Yonke: So there is no indication proof that there was a liquor license in 1973.

Mr. Yonke: Do you have any evidence that the liquor licenses have been maintained continuously since 1973?

Mr. Riley: I don't know that that's relevant.

Mr. Lemon: It doesn't matter.

Mr. Riley: No.

Mr. Yonke: So you do not have any. Is there any period in time since 1973 that for a one year period there was no liquor license of any sort on the property?

Mr. Lemon: We do not know.

Mr. Yonke: Under the affidavits, you have the affidavits here and you've indicated that you've inferred things from the affidavits. The affidavits can't be cross examined so it makes it kind of difficult, do these affidavits state that this use was in effect in 1973?

Mr. Lemon: I believe the affidavits speak for themselves.

Mr. Yonke: Specifically, is there anywhere in here that says that these people know that on the effective date of the regulations this was operating as a night club?

Mr. Lemon: I believe there are two affidavits in which they indicate that the property was being operated as either Corn's Lake or Sheila's. It does not specify. The affidavit from Cheryl Perry actually does make reference to the phrase night club. It refers to night club in the initial paragraph.

Mr. Yonke: It says she had direct personal knowledge of the night club located that the address but it does not say when that knowledge is for it being a night club.

Mr. Lemon: She says, I have direct and personal knowledge of the night club located at the address now known as 6870 E. Mexico Gravel Road, Columbia, Missouri 65202. She says that I have been acquainted with the property since the late 1960's when I knew it as Corn's Lake. She then says in the next sentence I knew it as a night club known as Sheila's through the late 1970's and early 1980's and know that it was run by Sheila Martin. So I would suggest the first three sentences refer to that.

Mr. Yonke: But the first sentence indicates she knows it as a night club and it is possible that she knows it as a night club because it had been operated as a night club after 1973.

Mr. Lemon: Sure.

Mr. Yonke: But not at 1973. That could just as easily be.

Mr. Lemon: Anything is obviously possible.

Mr. Yonke: The second is that she is acquainted with the property when it was known as Corn's Lake but it does not indicate that Corn's Lake is a night club at that time.

Mr. Lemon: She does not make a specific reference. She is talking about night clubs in that area so I would suggest that it is inferred.

Mr. Yonke: Then on three that she knew it as a night club as Sheila's through the 1970's and 1980's but does not indicate that that was in the early 1970's or the time of the effective regulations.

Mr. Lemon: She does not make a specific recollection.

Mr. Yonke: Are you aware that the by-laws of the Board of Adjustment do indicate that the Board is to give weight as they see fit to different levels of things including petitions are not to be taken as heavily as testimony. Affidavits are considered to be better than petitions but since they can't be cross examined... that is in the by-laws, are you aware of that?

Mr. Lemon: I am aware that it is in the by-laws that it says that the Board is to give the appropriate weight. Could you site me to the portion?

Mr. Yonke: It is section K.

Mr. Lemon: Could I finish my question sir?

Mr. Yonke: Sure.

Mr. Lemon: Can you site me to the specific portion at which point it specifies the specific weight that is to be given to each item.

Mr. Yonke: No, are you aware that it is up to the Board and it does indicate that petitions to the Board shall be accepted by the Board but the Board shall decide each member of the Board to himself as to what weight such petition shall carry in the case of which such petitions apply. Under normal circumstances little, if any weight will be given to petitions unless they are in the form of an affidavit and signed mutually and are notarized and are in the original form. Now, these are affidavits however, as we've indicated how are we supposed to cross examine an affidavit in order to get information.

Mr. Lemon: I guess I ask is it your inference that you double the veracity of these persons testimony and if so I would suggest that possibly what we need to do is ask for a continuance and we can bring those people here.

Mr. Yonke: I am not doubting the veracity, I'm just saying that what they have stated here does not indicate clearly that they have knowledge that at the effective date of the ordinance that it was operating as a night club, what a night club would be, that a night club could not also be designated as a recreational type of use that the activities that they are calling a night club would not constitute a night club but would indeed a constitute a recreational use.

Mr. Lemon: Well, I would suggest a couple of things because you raised four or five points. One, I think there is no definition of night club in your ordinances so I think probably a dictionary definition would apply. I suggest, two, I think the average and common standard would probably be what you would want to take a look at and I think all of us probably have some concept as to what a night club is. I would also point out to you that the bulk of those affidavits are from people who worked at the facility or owned the facility and possibly they would have a better knowledge than your man on the street as to what a night club is and is not and I suggest that probably if they indicate that it was a night club it probably was a night club.

Mr. Yonke: So they are indicating that it was a night club at certain periods in time, potentially after 1973, not necessarily then.

Mr. Lemon: And once again now we are getting in to the issues of your not being able to cross examine because you are just going to have to take my word for it and obviously you don't want to do that.

Mr. Yonke: You've implied that you are inferring things from it; we can't ask if that is indeed what they meant.

Mr. Lemon: I don't know that I said infer, I said that we've offered these affidavits in support of our timeline. In defense of the affidavits I guess what I would state is that we contacted these people and indicated what the problem was. These affidavits are not in Mr. Riley's language, they are not in my language, this is based upon our interview of them and we've put their own words on the affidavits and because of that, yes, they do sound a little bit open ended but the reason I did it that way is I am not going to put words in to these peoples mouths so we wanted to get their own words in exactly what they thought. So what I would say is they gave these statements based upon our statement that hey, the County is claiming that this wasn't a night club and they are trying to shut Zack and Autumn down and this was the answer they gave in reply to that question which was a specific listing of when they knew the property was operated as a night club.

Mr. Yonke: Okay, so you didn't just say a few minutes ago that you inferred that these three statements all work together they are not separate statements and that they aren't implying that the....

Mr. Lemon: Which three statements?

Mr. Yonke: Three statements on the Frost affidavit that you just came over here and indicated.

Mr. Lemon: I'm not tracking your question.

Mr. Yonke: You indicated just a few minutes ago by my recollection that you inferred that the three first statements, one, that I have direct and personal knowledge of the night club located at the address known as 6870 E. Mexico Gravel Road, Columbia, Missouri 65202. Two, that I have been acquainted with the property since 1964 when I knew it as Corn's Lake. And three, that I have been employed by N. H. Scheppers as a delivery person for the last 25 years are all inter-related. You inferred from that, but they are three separate statements that each one could be correct without having anything to do with implying that the other one was a night club. For example, two doesn't say it was a night club, it says that I have been acquainted with the property since 1964 when I knew it as Corn's Lake. It does not indicate that Corn's Lake was a night club, correct?

Mr. Lemon: If your point is that in each statement they didn't say and by the way this was a night club when I worked at Scheppers and by the way this was a night club when I was acquainted with it, you are absolutely correct but I would also point out to you that that is not the way people talk.

Mr. Yonke: But I would also like to point out that it doesn't support that it was there in 1973.

Mr. Lemon: I think we are going to have to agree to disagree on that because I think an affidavit should be read as a document in the whole. If that document is taken as a whole I think each statement goes together. I think you try to analyze any affidavit or any statement and say well we want to only look at this statement and we only want to look at that statement, certainly I suppose you can say that this affidavit doesn't prove because they didn't say it in number one, well this affidavit doesn't prove it because they didn't say it as number two. They said it throughout the affidavit and I think you have to read the affidavit as a whole.

Mr. Yonke: In respect to the articles from the newspapers. Is there any newspaper article here that indicates that at the effective date of the ordinance Corn's Lake was operating as a night club?

Mr. Lemon: I'm not aware whether any affidavit specifically says in 1973 on the date that the County ordinances for Boone County went in to affect Corn's Lake was operated as a night club, no.

Mr. Yonke: I asked about the newspaper articles.

Mr. Lemon: I think my answer is that no, no article specifically says on the date when these ordinances went in to affect Corn's Lake was a night club. Once again, I think what I stated was that these articles are offered in support of the fact that this property was being operated as a night club in that period of time.

Mr. Yonke: What qualifications do you have for the articles in terms of the authors of the articles in order to determine the difference between a recreational land use and a commercial land use as a night club?

Mr. Lemon: Could you repeat the question?

Mr. Yonke: What information do you have as to the qualifications of the people writing these articles to determine the difference between a night club and a recreational land use?

Mr. Lemon: Absolutely none. I would suggest to you though that in particular if you are referring to the articles in which they reviewed the property I would suggest to you that I doubt the Tribune would be hiring someone who didn't, was not able to identify a night club and if in fact for instance a Tribune reviewer refers to a building as not a silo but a modern steel disco tech that they would have the knowledge as to what they were looking at. But I do not have the specific credentials on that writer. I would find it unlikely the Tribune would hire that was not credential to identify that.

Mr. Yonke: So you were indicating that a night club is the only land use that would have bands play?

Mr. Lemon: I think that you could also have bands play at bars and taverns but I would suggest if it is a place of entertainment, open at night for eating, drinking, dancing, etc., and usually having a floor show I would say that is a night club and I would suggest that this building was clearly a place of entertainment that clearly it was open at night from all of the supporting articles because many of them do refer to periods to what time the place opened or when the dance was. Many of them refer to dances; many of them refer to bands which I would suggest is a floor show. So I guess what I would suggest to you is by the definition of what a night club is I think all of those articles go towards proving that this is a night club.

Mr. Yonke: So the bands played only inside the building they never played outside of the building?

Mr. Lemon: I don't think anyone has ever suggested that.

Mr. Yonke: Never suggested what?

Mr. Lemon: That the bands never played outside also.

Mr. Yonke: The bands could have played outside.

Mr. Lemon: Absolutely, I will state that Mr. Riley has told me that he knows that the bands did play outside. Bands both played inside the night club and outside in open air concerts.

Mr. Florea: We have seen documentation that the County has that has established that as a recreational land use. Is it not possible that the recreational land use that was mapped by professional planners who are trained to identify land uses was the primary use of the property and there may have been an incidental use intermittently as a night club, is that possible?

Mr. Lemon: I would say that anything is possible but I have to take issue with one of your statements that everything was mapped by professional land use experts. I asked you all if you had specific knowledge as to the specific persons who drew the colors and put the penciled in names and I believe you stated to me that you did not have direct knowledge. So the first issue I have to take is that you assume facts that are not in evidence. I don't know for a fact that for instance maybe Bill that worked there in the 1970's had his mom come in on the evenings and mark up what she thought the properties were. You guys have presented this map that's got seven taverns in the entire County and you are stating to me and to the Board that clearly your map has to be absolutely accurate and clearly there were no more than seven taverns in Boone County in 1973 in anyplace except inside the City of Columbia. I would suggest to you that that is just crazy.

Mr. Florea: I don't believe that that's what was testified to but this property was specifically mapped as a use so we would know that it was looked at specifically.

Mr. Lemon: So are you conceding that the map may not be accurate in regard to the number of taverns and that possibly there are taverns that have been missed.

Mr. Florea: No, I'm not; I don't have any information that indicates that there were more than seven taverns.

Mr. Lemon: But you are assuming these maps are correct.

Mr. Florea: The County Commission and the Boone County Court used these maps as fact in the original zoning. They were used in establishing zoning. This property was looked at specifically which is why it is indicated as recreational on the map. Some properties were not even looked at.

Mr. Lemon: I'm stating that you can not give me the name of the person who drew the colors on it, you can not give me a statement of how you kept the records, you don't have a custodian who has come and testified as to how the records have been kept since 1973, you have admitted that the records have been open to the public and although you stated that they should be supervised you don't know personally for a fact that they were always supervised from 1973 forward. What I'm stating is you've showed that this map has got seven dots for taverns and I find that highly un-probable and I'm suggesting to you that perhaps your map is not 100-percent accurate. My sub-suggestion to you was the fact that if in fact we have an over 100-acre recreational area and they had already colored it in green perhaps they didn't find it necessary to show the separate tavern that was also located along with the recreational area. That is my only point in regard to the map.

Mr. Yonke: So you are indicating though that as a recreational use marked on that map that the activities that are described in terms of concerts and other things are solely related to a night club use.

Mr. Lemon: I don't believe we've made that statement. We've stated that building has been used as a night club.

Mr. Yonke: So you agree that concerts and other activities that might have taken place outdoors could be considered a recreational use?

Mr. Lemon: I certainly believe they could be considered a recreational use, I would suggest to you that they could also be considered a portion of the night clubs operation I know I personally have attended outdoor concerts at formal bars and taverns and I have played sand volley ball at bars in St. Louis and various places like that. I would suggest to you that absolutely you are correct, certainly you can play volley ball or you can have an outdoor concert at a facility that was not a tavern. However, I would suggest to you that this building was built in 1965 as a tavern, you have not suggested to me an alternate use that in fact we have a lot of supporting evidence showing that its been operated as a night club or tavern.

Mr. Yonke: (To Mr. Riley) Do you remember talking to me in the office about this property?

Mr. Riley: When?

Mr. Yonke: You came in and talked to me several months ago, I spoke with you personally, you asked me about this property. I told you it did not have a certificate of occupancy for a nonconforming use and that it may be eligible for grandfather rights but that it was not grandfathered.

Mr. Riley: You did tell me we didn't have a certificate of occupancy.

Mr. Yonke: And I indicated that to you.

Mr. Riley: Yes.

Mr. Yonke: You just indicated a little while ago you had never heard of it until basically this evening.

Mr. Riley: No, I didn't hear of the need to have one.

Mr. Yonke: But you just said that I told you...

Mr. Riley: No, you told me it didn't have one, I didn't understand what meant.

Mr. Yonke: And that it didn't have grandfather rights.

Mr. Riley: I don't recall you saying that.

Mr. Yonke: I did say that to you personally.

Ms. Cox: I was there and you did not say that.

Mr. Riley: She was present back in November

Mr. Yonke: That is incorrect. However who did you speak to in the offices prior to that conversation that told you that you didn't need anything and when were those dates.

Mr. Riley: In that office nobody told me I didn't need anything, they told me it was grandfathered. The person who told me I didn't need anything was Wendy Noren when we were inquiring what we had to do to get a merchants license.

Mr. Yonke: So the determination of whether a land use is legal or not in your opinion is determined by the County Clerk's office by Wendy Noren.

Mr. Lemon: I think you are asking my client to make a legal conclusion which certainly, as a non lawyer, he is probably not qualified to make. I believe he has told you that Wendy Noren told him he was grandfathered, Wendy Noren is a County official and he relied on that, I believe that has been his testimony. He is not testifying as to what the legal effect of a statement from Wendy Noren is.

Mr. Yonke: He has testified that he assumed from Wendy's conversation to him that he was grandfathered.

Mr. Lemon: I don't believe he said assumed. I believe that he stated that she specifically said he was grandfathered.

Mr. Yonke: And why would you expect that the County Clerk who doesn't deal with land use has the authority to tell you, more than anyone else that you are grandfathered and that would be good enough for you?

Mr. Riley: Planning and Zoning told me on the phone, when we came down to talk to Wendy Noren to find out what we had to do to get a merchants license. So planning and zoning had told me on the phone and then Wendy Noren confirmed. I didn't know about building code and that kind of stuff, I've never owned a building, I have another small business and we are in the City and I rent out office space and I know what I have to do there. About a week before that in my realtors office she had called and spoken to somebody and was told the same thing, their exact words were, the building is grandfathered in for night club use.

Mr. Yonke: And who did you speak to specifically and on what date.

Mr. Riley: I don't know the date, well, we signed our contract, it would have been November or December. I would have to look at our paperwork, I could come up with a better exact date because it was in relation to, we submitted a contract to purchase the property and the owners at that time made a counter offer and when that counter offer came back, I said to Autumn, well I know our realtor told us she talked to planning and zoning and we were in her office and we only heard one end of the conversation, now that we are going to be signing another contract I really want to go talk to the zoning people myself. That was when we called and talked to the zoning people and we got off the phone and then I said I don't know what we have to do to get a business license in the County why don't we go there and talk to them specifically. That was when we went in to the office and sat down and found out what we have to do to get a liquor license and what we have to do to get a merchants license. That was when Wendy Noren looked everything up in the computer and she said that everybody has heard of Corn's Lake, you are good, it's been a night club for years, you're good.

Mr. Yonke: So it is possible that she was indicating that she was not going to question it further before she issued you a liquor license.

Mr. Riley: All I know is she told me what I needed to do. Everything was uniform. I had a realtor who had looked in to it by speaking to planning and zoning, I spoke to planning and zoning, she was kind of the cherry on the cake, I wasn't relying on her word, I had already been told by planning and zoning.

Mr. Yonke: But the only person you can tell me told you this is Wendy Noren who does not work for the Planning and Building Inspections Office, you can not specify anyone specifically who would be the one you would know that can tell you that they told you this. You've called in to question an official document because we can't tell you the specific person or the specific time frame of an official document that is maintained by our office yet you expect us to take testimony that is to the effect that you were told it was grandfathered when the ordinance says specifically otherwise what is required to be grandfathered. You've acknowledged that I told you in person that it didn't have a certificate of occupancy which again, the ordinance specifies specifically you can not have grandfather rights or a nonconforming use unless you have a certificate of occupancy and you have acknowledged that.

Mr. Lemon: I would dispute one point that you've made which is you can not have grandfather rights without a certificate of occupancy. I believe your grandfather rights are rights that exist no matter what. In order to get the certificate of occupancy according to your ordinances you had to apply within six months of 1973 or you could bring it to the board and apply for it. However, if you have grandfather rights you have grandfather rights whether you have applied for a certificate of occupancy or not, your rights are the same. It is a question of fact.

Mr. Yonke: That is not what the ordinance says. If you have not come and established...

Mr. Lemon: Your ordinance speaks for itself.

Mr. Yonke: That is correct. If you have not come forward

Mr. Lemon: Let's take a look.

Mr. Lemon read from the zoning ordinance (section 8.F.) Nonconforming uses existing at the effective date of this ordinance shall apply for a certificate of occupancy within six months from the effective date of this ordinance. Where a certificate of occupancy has not been obtained the existence of such use shall be a question of fact and shall be decided by the Board of Adjustment.

Mr. Lemon: However, if you have grandfather rights those rights are rights that exist as a right. You do have to prove up your facts. But I am taking issue with your statement. I'm not taking issue with the fact that it is a question of fact which has to be proven here.

Mr. Yonke: If you have not done so yet, you have not established that you have any grandfather rights. Is that correct?

Mr. Lemon: It has not been established under your ordinances as they are written that you have grandfather rights. Whether grandfather rights exist under Missouri Statute I would have to say that is a completely separate issue because you have grandfather rights under a particular ordinance but there is also case law and applicable statute which can give you possible grandfather rights which may not exist under the ordinance.

Mr. Yonke: But they have not been established formally by the process set out in the zoning ordinance.

Mr. Lemon: Not by your zoning ordinances. I'm not disagreeing with that fact. I'm taking issue with the idea of grandfather rights because grandfather rights is a legally specific term and your ordinance does not make reference to grandfather rights. It doesn't use that phrase.

Mr. Yonke: No, it uses the more specific nonconforming use which in land use terms is actually more appropriate than grandfather rights which is more of a layman's term.

Mr. Lemon: I understand but what I am saying is I feel as if you are attempting to get my client to make an admission that he does not have grandfather rights which is a legal term under Missouri case law and statute which is a very different issue than does he have a certificate of occupancy under your zoning ordinances.

Mr. Yonke: Then we can clarify that in that I am not trying to get him to say officially that he does not believe he is entitled to some form of a grandfather right. I'm not trying to make him say he doesn't believe he is entitled to it because he made the application. We think he believes he thinks he is entitled to it.

Mr. Lemon: I need to clarify an answer I made to you earlier. You had asked me the question whether or not live bands could be some recreational type purpose and I indicated to you that I thought it was possible. I had forgotten that I needed to refer to a decision that the Board of Adjustment made Thursday, May 27, 1999 in regard to a request for a certificate of occupancy for the Pinnacle Hill Store and at that meeting the Board determined that live bands fall in the general commercial district and would not have been appropriate in that case so I would have to say that apparently this Board has determined that if you have a live band this is something that is in a general commercial district so I would have to revise my answer and say no, it couldn't be a recreational use.

Mr. Yonke: So it could not be used even incidentally in a recreational district.

Mr. Lemon: I don't know.

Mr. Yonke: According to what your interpretation is.

Mr. Lemon: I am relying on this decision but apparently according to this decision live bands fall in the general commercial district in Boone County.

Mr. Yonke: We will reserve the right to further cross at re-examination because it is important to open the public hearing.

Open to public hearing.

Speaking in favor of the request:

Deven Johnson, 707 Fairview Ave., Columbia.

Mr. Johnson stated that he has worked off and on for Mr. Riley at the bar that he owns. There has always been a DJ to provide entertainment. When he has rented it out to people to use it's they've had their own entertainment as well. Mr. Johnson stated that he wanted to collaborate that since they bought it in 1998 they've used it continuously throughout the period that they've owned it. There has been a lapse of use but it hasn't been very long because they wanted to change their clientele, I don't think it has been over six months when they weren't using it as a night club and that was just a transitional period. Lots of people go out there and enjoy the property and use it. Mr. Johnson stated that when he first started working for Mr. Riley they had several people who remembered the place as Zazooz. Mr. Johnson stated that he can not attest to anything in 1973 but would like to attest that it has been a night club and the applicants bought it for that purpose and are very sure that it had been grandfathered in to be used as a night club.

Mr. Yonke: All you are basically indicating is that you believe you have knowledge of the property since 1998.

Mr. Johnson: Yes.

Speaking in opposition to the request:

Joseph Troy and Dorcus Nichols, 6750 E. Mexico Gravel Rd., Columbia.
Mr. Nichols stated that his property is directly to the west.

Ms. Nichols stated that they brought pictures of the area.

Ms. Nichols stated that they moved in July 2000. When they moved in to their house there was not anything going on in the building behind them. The previous owners had said when the Nichols' bought the property, that there was nothing going on in the building behind the Nichols property. It was about six months or so before there was anything going on back there. Ms. Nichols stated that she would like to say that the establishment behind her, when it is open, it is very sporadic, some weeks it is not open, some weeks it is only open one day out of the whole week whereas what you would consider a bar would be open on a nightly basis. There is no sign outside the establishment like at a regular established bar.

Ms. Nichols stated that just to back to some of the things that was said earlier when she talked to her neighbors they said originally when Lawrence was put in and there was five houses on the street they had as part of their subdivision they had lake rights just like if you lived at Hulen lake and never was it said that there was a building on the property that was used for anything besides that. The Nichols have a large building on their property which is kind of the same structure as the building in question and so do neighbors down the road so there are other large structures out there that we could have people over on a weekly basis and that wouldn't make it any more a night club. When Ms. Nichols talked to people around town they remember it as going out and swimming or listening to bands, not referring to it as a bar. There is also a trailer on the property, Ms. Nichols stated that she doesn't know if most established bars also have residential on their property and there is someone living there. When the Nichols bought their house and they had finished the basement they said they wanted the Nichols' to expand their lagoon also but that doesn't mean that we are running any sort of establishment out of our shop.

Ms. Nichols stated that she had a petition started of some of the neighbors that consider whatever they are doing back there that it is a nuisance to everyone in the neighborhood. When the applicants do have it opened it is a nuisance even though it is sporadic. We have had lots of problems with the noise.

Mr. Nichols stated that since they bought the house in 2000 their house has been shot with a shot gun. They went on vacation and came back and found the garage had been peppered with a shot gun blast from the bar parking lot. The Nichols' called the sheriffs department and made a police report to make a claim on the insurance. The siding on the house had to be replaced. We've had cars come through our fence in the front yard. A lot of the parties, when they had them, people would stay to 2 to 4:00 in the morning. Mr. Nichols stated that he didn't know too many bars or establishments that have parties until 4:00 a.m. There have been a couple of shootings in the parking lot, there has been a stabbing. It is not a very friendly environment where they are having these parties; it not safe for society. Mr. Nichols stated that their house is within 300 yards of the front door of the bar, there is a trailer park on the other side that is probably even closer.

Ms. Nichols stated that she found it strange that any legitimate bar wouldn't have a liquor license. Going back to the fact that they've changed their names several times, the fact that they don't have a liquor license, there is no sign. A legitimate business would have all of those things to be able to support themselves. Other than that it is pretty much a hobby.

Ms. Nichols stated that she and her husband both run businesses and most businesses are at least Monday through Friday and most bars are going to be open every night, especially Friday and Saturday nights.

Mr. Yonke: So would characterize the activity as being sporadic?

Ms. Nichols: It is very sporadic, some weekends they are open and some they are not. The days that they are open change. From the pictures we have a birds-eye view, we are always watching, cars pull in to see if the place is open.

Mr. Lemon: You said it was sporadic?

Ms. Nichols: Yes.

Mr. Lemon: But it hasn't ever stopped for more than a year has it?

Ms. Nichols: Well, it was not open when we bought the house and it was at least closed for six months after we bought the house.

Mr. Lemon: But it has never been more than a year.

Mr. Nichols: No.

Mr. Lemon: The things you are describing are irritations and problems; aren't they things you would expect probably that you would have if you were next to a night club or a bar.

Ms. Nichols: Well, I wouldn't consider it a night club because it is not run like a normal bar.

Mr. Lemon: I understand that you don't believe that it is a proper night club but my question to you was don't you think that noise and things like that are sometimes associated with a bar.

Mr. Nichols: Usually a lot of times they self contain the noise, you close the doors there is a large bar on Route B we don't hear problems about them.

Mr. Lemon: How close are they to you?

Mr. Nichols: They aren't close to us but they are in the middle of a residential neighborhood.

Mr. Lemon: You said there had been a shooting in the parking lot; you don't have personal knowledge about that do you?

Mr. Nichols: Sure. As a matter of fact there was two nights there when they had shootings.

Mr. Lemon: Were you there when the shooting happened.

Mr. Nichols: I was at my house.

Mr. Lemon: Did you see the shooting occur?

Mr. Nichols: No, but we did call the police and let them....

Mr. Lemon: You heard the gunshots.

Mr. Nichols: Yes.

Mr. Lemon: Did you see anyone get shot?

Mr. Nichols: I don't think you have to see it to hear it.

Mr. Lemon: You don't have to see it to hear it; did you see anyone get shot in that parking lot.

Mr. Nichols: No, I was not a witness to the shooting. But I was a witness to hearing the shooting.

Mr. Lemon: Do you have personal knowledge that any one was arrested.

Mr. Nichols: I don't know.

Mr. Lemon: In fact, no one was arrested in that incident.

Mr. Nichols: I know a man went to the hospital because he was shot in the back.

Mr. Lemon: The man claimed that he was shot on the property but you don't have personal knowledge that he was shot there do you?

Mr. Nichols: I don't have knowledge he was shot anywhere else either.

Mr. Lemon: Do you understand that this is not a request for a variance and whether or not this place is a nuisance is not necessarily relevant.

Mr. Nichols: Probably not.

Mr. Lemon: To the best of your knowledge these folks have never taken any permanent action to show that they were not in businesses. They haven't barred up the doors or put another business in there, they haven't done anything permanently to show that they are abandoning their use?

Mr. Nichols: No. Not since 2000.

Mr. Lemon: You don't have any knowledge of the property prior to 2000.

Mr. Nichols: No.

Also in opposition:

Ernest Gillow, 3000 Billy Jean Dr., Columbia.

Mr. Gillow stated he also has noticed much of a nuisance on Mexico Gravel Road. They've sent notices to us and they have put no parking signs up and down Mexico Gravel Road because of the parking problems out there. Cars have been up and down the street and now they have no parking signs there. I've tried to come home late at night and two police cars are sitting on Billy Jean side by side, Mr. Gillow stated that he had to go half way through the ditch with his jeep to get down in there because of the problems they have out there. I was at a neighbor's house in the trailer park that is just east of the Nichols' house on the opposite side and we too heard gun shots from over there and hit the floor because of gun fire. Mr. Gillow stated that he has come home at night and at least a half a dozen County police out there with people pulled over on the road. It is a terrible nuisance and the only other thing in the area is housing with people and kids. The type of crowd that comes out there, there are a lot of problems and most of the people who in that area because they want to be away from that. We don't want this in our back yard.

Mr. Lemon: You live in the neighborhood.

Mr. Gillow: I live down the street on Billy Jean.

Mr. Lemon: How close to the property.

Mr. Gillow: From there if you travel down Billy Jean, I'm a half mile down that road.

Mr. Lemon: So you are about a half mile away.

Mr. Gillow: The bar is probably a little bit closer.

Mr. Lemon: About how far?

Mr. Gillow: About 24 to 3/8.

Mr. Lemon: You indicated there are a lot of problems because people have been pulled over.

Mr. Gillow: Yes. Sometimes you can't hardly get through there because there are so many cars and so many police and when I'm trying to turn in on Billy Jean it crests the hill I am over on the wrong side of the road trying to get around all these cars trying to pull in and almost got hit head-on.

Mr. Lemon: How long have you lived there?

Mr. Gillow: Since March 2000.

Mr. Lemon: And you've seen the place really busy, lots of cars.

Mr. Gillow: I've seen the lot so full they were lined up and down on Mexico Gravel Road.

Mr. Lemon: So pretty busy?

Mr. Gillow: I don't know, I may be wrong but it seemed like too many people for an occupancy of that size of building.

Mr. Lemon: But your testimony is that you've seen this building operated as a night club with a lot of people there.

Mr. Gillow: Yes.

Member F. Thomas: Have you seen the building not being used on a regular basis as a night club.

Mr. Gillow: Yes, like the Nichols' testified it is very sporadic. When I first moved in there, no activity was there until the normal bars closed then the people would flood from the normal bars to there and fill that place up.

Mr. Lemon: You say the use is sporadic but it's never gone more than six months.

Mr. Gillow: I don't believe so.

Also in opposition:

Lucy Nichols, 6880 E. Summers Ln., Columbia.

Ms. L. Nichols stated that she was here under three capacities. Ms. Nichols stated that she is Troy's mother and a real estate agent. Ms. Nichols had the property listed when they purchased it and one of the reasons they purchased it was because Rob and Mindy Johnson owned the property and could not sell it because of what had gone on out there and they too have children. The Johnson's are unable to be here due to a family situation. Ms. Nichols stated that she would provide the Board with their address and number if they want documentation from them; Ms. Nichols was just able to reach them yesterday. The Johnson's stated on the sellers disclosure when the property was listed that there had not been any activity in the last six to eight months out there. Then when Troy and Dorcas purchased it, as they stated, there was no activity for probably six or seven months and that is the basis that the neighbors feel that it was vacant with no activity.

Ms. L. Nichols stated that in defense of her children when their house, there are many police records the Board can review as they were leaving they found some guns and knives. Mr. Riley, based on my defending my children, filed a complaint against Ms. Nichols with the board of realtors which was reviewed and was denied and this has been a confrontation. They don't spend a lot of time out in the yard with their swing sets on two and a half acres because they don't know who is back there working. They also moved in last summer hundreds and hundreds of tires to build a buffer between this building and their home. We worked together with the DNR because of the west Nile virus, they did not get a permit to bring these tires in and they have had to remove those tires. It is a three bedroom home with a finished basement but their third baby is on the way and their desire is to sell their home and to build a home they would like to know the status of this before they put it on the market. When they purchased the home from Rob and Mindy they were able to get the house between \$25,000 and \$30,000 below market value. That is how much that affected that one property. There are records with the police department if the Board wants research of the activity out there. It got so bad when Dorcas was pregnant with Daniel that they had their driveway blocked when she needed to go to the hospital.

Member M. Thomas: Do you have a copy of the disclosure.

Ms. L. Nichols: I have one in my file and I didn't think to bring it until tonight when you were talking about the time. I also have Rob and Mindy to bring a letter notarized to the court or wherever we need. They built their home their and they were the only other owners of this property.

Mr. Yonke: You indicated you were the real estate agent listing this property for at least a period of time?

Ms. L. Nichols: Yes.

Mr. Yonke: When was that?

Ms. L. Nichols: A plaza agent had it listed six months prior to my getting it and I probably had it five months before it sold and Rob and Mindy had built another house and needed desperately to sell it. It was on the market for like 185 and they purchased it for 150.

Mr. Yonke: When was this?

Ms. L. Nichols: In 2000.

Mr. Lemon: I think I know where you are going with this. She is the real estate agent on the home where her son is.

Ms. L. Nichols: This house.

Mr. Lemon: But not the bar property.

Mr. Yonke: So this is on a house nearby.

Ms. L. Nichols: It is their house (Nichols'). Their fence backs up to this. Also they have built tarp fences, they've done everything out there that no body would like in their back yard.

Mr. Yonke: Ok.

Mr. Lemon: You talked about fences, they were putting the tires up because they were trying to protect your families property from noise, isn't that correct?

Ms. L. Nichols: Would you like 20-feet of tires in your backyard stacked?

Mr. Lemon: But the reason they did it was because they were trying to create a noise buffer.

Ms. L. Nichols: I don't know what tires will do, I guess that was their assumption, I don't know.

Mr. Lemon: You indicated you had your son's property listed and they were able to get this property for how much under?

Ms. L. Nichols: Probably 15 to 20,000 because Rob and Mindy could not sell it.

Mr. Lemon: It was discounted because there was a night club next to it.

Ms. L. Nichols: It was not a business at that time but the reputation was there. Rob and Mindy stated that it had no activity in several months; I don't know exactly what that is.

Mr. Lemon: So it did have activity for a while but the reason why it was down in value was because of this night club next to it.

Ms. L. Nichols: Have you seen the building?

Mr. Lemon: No.

Ms. L. Nichols: You should because when they purchased it, it has been cleaned up; someone has been out there working. There has been old cars sitting around the trailer, there have been weeds as tall as the car. The grass behind what fence was there was higher than the fence, it was noting attractive to add to this house. They have planted trees; they've worked very hard to get it ready to market when they needed to move.

Mr. Lemon: Part of the problem with people not wanting to buy it was because there is all of this unnecessary activity.

Ms. L. Nichols: It was not a business back there, no. It may have been when the agent from plaza had it but the whole six months I had it there was nothing back there because we monitored it. Rob and Mindy can also bring pictures, they have plenty of pictures.

Mr. Lemon: But is it fair to say that there was a night club there and that is why the price was low.

Ms. L. Nichols: No sir, I am not going there because it was not a night club.

Mr. Lemon: I think you testified to that.

Ms. L. Nichols: No.

Mr. Lemon: You are a realtor with who?

Ms. L. Nichols: Remax.

Mr. Lemon: Do you know what company listed the bar?

Ms. L. Nichols: I don't know and do not care.

Mr. Lemon: Was it Remax that listed the property?

Ms. L. Nichols: I know she was the buyer's agent when they purchased it.

Mr. Lemon: So Remax represented them?

Ms. L. Nichols: We are independent contractors; we all run our own business under Remax.

Mr. Lemon: So you don't feel that you have a conflict of interest in this?

Ms. L. Nichols: With who?

Mr. Lemon: Your testimony is against the applicants when your company is the one listing the property.

Ms. L. Nichols: No, we did not have the property listed; I don't know that Carol had it listed. Carol was a selling agent; I don't know who had it listed.

Mr. Lemon: Remax was their agent?

Ms. L. Nichols: Carol, an independent contractor, you have to define.

Mr. Lemon: Do you have access to all the properties?

Ms. L. Nichols: No.

Mr. Lemon: They keep that confidential? You don't have access to other listings and prior sales?

Ms. L. Nichols: The prior sales are kept in Bill McCowan's office and anything beyond a year or so is taken to storage.

Mr. Lemon: But if you wanted to look, you could.

Ms. L. Nichols: If I request, but I haven't.

Mr. Lemon: But you could have looked at them.

Ms. L. Nichols: Could have looked at what?

Mr. Lemon: The listing on this property.

Ms. L. Nichols: If our office did not have the listing I would not have any privy to the listing documents.

Mr. Lemon: You noted that they have selling information.

Ms. L. Nichols: That is true but when you are discovering information buyers agency was not in force at that time as it has been now.

Mr. Riley: From what period to what period are you saying the property was vacant?

Ms. L. Nichols: I'll have to go back and look at the actual documents but Rob and Mindy Johnson, which I think that you met with on some occasions when they lived there. According to Rob, you had. I will get a documentation from them if it is requested.

Mr. Riley: We closed our outrage club in April 2000 due to competition and then we rented, and Outrage by the way never had any problem, we never called the Sheriff with problems, it was probably the mildest club around and we were open on Friday's and Saturday's. We did rent our facility for three months to a guy who ran a club the Aftersent; admittedly, there was a shooting and we rescinded his lease and that is the shooting that they are talking about which was in July. I was under the impression they didn't close on the property until August. That does show that obviously it is a negative article but in July 2000 Net Productions was renting our facility and we had a three month trial lease and that had to be rescinded and the building did sit from the time at the end of July until the beginning of 2001 when we opened.

Ms. L. Nichols: As a real estate agent we are supposed to have some knowledge of codes and occupancy permits and things. What my confusion is, is I can go out and claim I have any business but until I have an occupancy permit or merchants license and liquor license am I a real business or am I pretend? Because he just said we closed the bar, became a rental entity, then took it back.

Mr. Riley: I didn't say that, we owned it as landlords and we rented, we signed a lease with the fellow for three months trial, we had never been landlords, I didn't buy the building and run businesses, for three months we said we will try being a landlord and if we are happy we will continue along that line. After that particular incident we said no and we rescinded the lease and it sat vacant.

Ms. L. Nichols: I also have a question for the attorney, to the letters that were stating that this has been between businesses were from Mr. and Mrs. McCubbins.

Mr. Lemon: Yes.

Ms. L. Nichols: Do they not have a financial interest in this building still? Do they not carry the loan on this building?

Mr. Riley: Yes.

Closed to public hearing.

Mr. Lemon presented photos of the building.

Mr. Riley explained that these were the building when it was purchased.

Mr. Yonke: Are these pictures...

Mr. Lemon: Who took these pictures?

Mr. Riley: I took them.

Mr. Lemon: When did you take them?

Mr. Riley: Today.

Mr. Riley stated that is what was in that building, we bought it from James Farrar, all of the fixtures, dance lighting, sound system, everything was still in it.

Mr. Lemon: Have you installed anything in these buildings that is shown in these pictures that you didn't purchase from Farrar?

Mr. Riley: If anything it would be some of the light fixtures.

Mr. Lemon: What were you saying about the pool tables?

Mr. Riley: We did not buy any of the pool tables.

Mr. Lemon: Was there anything else you installed?

Mr. Riley: No.

Mr. Lemon: And the other photographs are...

Mr. Riley: One of them is the property and the other, as mentioned we had brought in tires to, there is something called tyro block, it is a new sound barrier that is used on highways, they are right now in the process of getting a contract with the Department of Transportation so we decided to concrete in the tires to create a sound wall but before we even got to that point the neighbors had filed a complaint with DNR and they nixed that. So we put up a 14-foot tall fence and removed the tires.

Ms. Cox: We dispute any noise complaints.

Mr. Lemon: I wanted to point out that apparently in Boone County a nonconforming use has to be abandoned for a period of one year. Abandoned does not necessarily mean discontinuance of a nonconforming use. For example, if the business moves out and the building stays, a building that housed the nonconforming use is vacant for a year, that doesn't mean they lose nonconforming rights. There has to be some overt activity by the property owner to indicate that they intend to abandon that use. Simple discontinuance does not constitute abandonment. I was quoting planner, Bill Florea from the Boone County Board of Adjustment meeting on Thursday, April 26, 2001. That was in regard to Ward Trucking.

Mr. Florea: Yes, that was me, and I was incorrect and have since reread what the code says. It doesn't say the same thing.

Mr. Yonke: What it does say is whether or not the fixtures are removed.

Mr. Lemon: Can you site me to where that is in the zoning ordinance?

Mr. Florea: Under abandonment of nonconforming uses.

Mr. Lemon: What is the number?

Mr. Florea: Section 8.B.

Mr. Lemon: You are talking about where it says that a nonconforming use of land or of a building which has been abandoned for a continuous period of one year, whether or not the equipment or fixtures are removed, shall not again be used. I would argue to you that in fact you were correct as to what the law in Missouri is and that in fact in order for something to be abandoned that the case law does indicate that you have to take some overt activity and that you can not just, not lack of use does not translate in to true abandonment and I think that theory is very clear in the case law regarding easements, use, and grandfather rights.

Mr. Yonke: The word abandonment may be used in the document but the context is clearly a discontinuous standard; that is what we are saying it says.

Mr. Lemon: I would argue that I think you were correct when you made the statement and I think that is in compliance with Missouri case law would indicate as law in Missouri. I'm not sure that the context is absolutely clear from the ordinances would be my only point there. I think the ordinance sounds a little open ended and I think that the case law is pretty clear and that you were correct but you obviously disagree.

Mr. Florea: If you are holding to abandonment standard I would agree with you. But once again, on reading this while it does use the word abandonment the specific text of the section really describes a discontinuance standard and so in the context of Missouri case law I think I was correct in what I said in the context of Boone County zoning regulations I was incorrect.

Mr. Yonke: I would like to point out that neither one of us is an attorney.

Mr. Lemon: I know, I was just saying that I agree with what you said here, just not what you say now.

Mr. Yonke: The photographs that you (Mr. Riley) did, you said those were all taken yesterday.

Mr. Riley: No, today I took the inside photos.

Mr. Yonke: But they are recent photographs and all you are indicating is the state of the building currently?

Mr. Riley: Yes, and to show the equipment that was there when we purchased. It was all installed in there from James Farrar.

Mr. Yonke: Which was in 1998. But prior to that you have no idea when any of that particular equipment was or wasn't installed as your direct knowledge.

Mr. Riley: My direct knowledge no; just hearsay.

Member Rootes asked the rules concerning night clubs, bars, or taverns. Is there a closing time or a noise ordinance? Do the activities have to be kept inside?

Mr. Florea stated that he is not sure he can give a real clear answer and not because I am trying to be evasive but because there are different circumstances to which a night club or a bar and tavern might operate. If it was in a general commercial zone, an open zoning district that allowed it as a permitted use there would be no limitations on hours of operation. Any kind of noise complaints would be referred to the sheriff's office for response as a nuisance; there is nothing in the zoning regulations that addressed noise. If it were a nonconforming use then we would look to the hours that had been established at the time the use became nonconforming and that would be the intensity of the use that would be allowed by the certificate of

occupancy for nonconforming use. If it were a planned zoning district, like a planned general commercial then there may very well be limitations on hours, outside lighting, either for or against lighting, depending on security needs or needs of the general neighborhood. There might even be limitations on hours of operation. There is a whole range of conditions under which a bar or tavern or a nightclub could operate in the county depending on what the zoning district is or if it is a nonconforming use.

Mr. Riley stated that we had two strip clubs in town that stay open, one stays until 3:00 and one stays until 5 or 5:30 and they don't have liquor licenses also because there are some limitations in liquor licenses when it comes to that. We are not an anomaly if we stay open late or not have a liquor license, those are complete clear apparently what seems to be legal options but we are not a strip club. Those do come to mind then there was Good Time Country for years that was a bring your own place.

Member F. Thomas stated that he wanted clarification from staff. Ultimately what the Board is determining is what kind of activity took place in 1973. Or whether anything has abandoned according to section 8.B. since then.

Mr. Florea stated that is correct. The first decision is whether or not there is a nonconforming use on the property and it had to have existed on December 27, 1973. If you rule yes, then the second question is, has that been discontinued for more than a year, a year or more at any point since then and if you determine no, then you need to establish what the intensity of the use was so that we can determine approximately what other types of nonconforming uses it might qualify for under the county zoning regulations because as we have heard before you can change a nonconforming use to an equal or less intensive use.

Member F. Thomas stated that under our by-laws and different regulations if we can't indicate yes or no, like in the issue of, it is somewhat obvious that it has had a nonconforming use, but whether it has been continuous for the last 30 years there is really no way that we know that.

Mr. Yonke stated that under our regulations it is incumbent on the applicant to prove all of it. It is not required for staff to prove anything other than to show we have evidence.

Member F. Thomas stated that the applicant doesn't have anything to prove that there hasn't been less than 12 months of use since 1973.

Mr. Lemon stated we are back to my affidavits which are quite frankly our only full evidence in regard to the span of time and the use of the property. The only thing that I can suggest to you is that it is our belief that that's inferred, obviously staff disagrees. I believe that from the context of the affidavits that it does go towards proving it. I would state to you that you don't have to prove each element completely in a case. You are allowed to add everything up from the totality of the evidence you believe that this was the case. You have the right to find; you see on TV a lot of times they will say you can't use that, it is circumstantial evidence. You can make a decision based on circumstantial evidence. In other words someone does not have to state I was in that place everyday from 1973 until today and I know personally that it absolutely was operated everyday. You do have the right to take from the affidavits the applicants provided, the articles, the phone records; you do have the right to say that from a totality of the circumstances we have convinced you. You have the right to tell me from a totality of the circumstances we have not convinced you. Staff has absolutely stated correctly it is very clear in your ordinances that the burden of proof is on the applicants. I believe we have met that burden, we have provided you with affidavits from a lot of people that have had knowledge of this property. Not to beat a dead horse I keep going back to this, and maybe you guys can answer me a question because I am a little confused. I don't really understand how these folks were able to get business licenses and an occupancy permit and all these other things if this was a problem. I'm not trying to accuse, I just don't understand.

Mr. Yonke stated that you asked a question, do they have an occupancy permit for the building? I would bet that there is no occupancy permit in terms of building occupancy ever been issued.

Mr. Lemon asked if that is a requirement before they could get a business license though?

Mr. Yonke stated probably not because there is no cross check between the business licenses and the other permits, you can get a business license for a totally illegal business and they will keep issuing it to you so that has nothing to do with whether or not the business is legal. It just means you have a business license so if your business is legal you have a license for it. But it does not constitute a legal business in terms of the zoning or land use decisions. Similarly to your argument on the two cell lagoon. Just because DNR makes them upgrade a lagoon doesn't prove that it is a legitimate business either as a night club specifically, nor as any other. It just means it is a wastewater system that is not in compliance with the State regulations, it doesn't have anything to do with the local land use issues in terms of what is and isn't allowed or whether it has grandfather rights.

Mr. Lemon stated wouldn't you say though that if they've got a business license and they've complied with DNR they probably are a legal business but they are possibly in violation of zoning ordinances?

Mr. Yonke stated that in the context of our zoning ordinances it would not be a legal use of land.

Mr. Lemon stated that it wouldn't be an authorized use of land under the zoning ordinances.

Mr. Yonke stated it would not be a legal use of land under the zoning ordinances nor would it be a nonconforming use until such time as it had it established.

Mr. Lemon stated that certificate. I think we have established that but I guess I was just taking issue with the statement that it was an illegal business and I think my point was that if they've got a business license, if they've complied with DNR that they probably are a legal business but they are not occupying the property they are located in legally.

Mr. Yonke stated that he would find it hard to try to say that it is a legal business if it has not established that the land in which it is occupying is legally able to be done that way.

Mr. Lemon stated that he understands the point.

Mr. Riley stated that he went to Boone Electric and got connect and disconnect dates for utilities. Utilities are really expensive on that building. When we bought it in 1998 we ended up re-insulating the building which saved us tremendously. It saves us anywhere from \$400 to \$600 a month. A lot of those records would be prior to that when there wasn't good up to date insulation in the building. Common sense would say that anybody who isn't using that building to net them money is not going to keep the utilities and the phone service at the rate at which they would have been paying. Right now it runs around \$200 a month to leave the building sitting.

Mr. Yonke stated he had two questions. Mr. Riley indicated that he did insulation, a remodeling of the structure?

Mr. Riley stated that the applicants just took out the insulation, there was no insulation above the ceiling tiles so we put insulation above the ceiling tiles and then we sealed and caulked. It has a ship lap is what I have heard it called, wooden interior, we went through and any spot that had a hole or cracks we sealed and insulated the ceiling and put new ceiling tiles in. Some of the ceiling tiles were pretty old.

Mr. Yonke stated that it had a suspended ceiling already in the building?

Mr. Riley stated yes.

Mr. Yonke stated that all you did was put insulation over that and basically repaired the walls?

Mr. Riley stated pretty much, nothing invasive.

Mr. Yonke stated that staff does not dispute that the power was turned on in 1964 for the building because we agree the building was there. However, power indications since then regardless of power usage does not indicate necessarily that it was a night club it just indicates that there has been power there.

Mr. Riley stated he understood. If we are talking about any issues of it sitting, if I let something sit I am not going to pay utilities and keep the phone on; that is my only point. Boone Electric shows that we had one disconnect in 1999 for non payment, I had forgotten about the bill and went there on Thursday and found out it was disconnected and we were able to get them out before the weekend.

Mr. Yonke stated that staff would like to say in summary that our basis is on our official map, which if common knowledge was that this was a bar or night club which seems to be the predominate argument of the applicant, it would be highly unlikely that the building would not be marked with a commercial land use when so many specific other ones are.

Member Rootes stated that she would like to make a motion and asked staff if the motion needed to be in the form of certifying a certain use?

Mr. Yonke stated that procedurally you should probably follow what Bill indicated and that is one, do you believe based on the evidence presented and all the information presented here tonight, that you've weighed any which way, do you all believe that first of all, they had a legal use when the regulations went in to effect. Secondly, after you determined that to a certain extent you believe there was some legal use that would be a night club there, what level that use would be and whether or not it was discontinued, you really want to go step by step. If they have not compelled you to believe that it absolutely is or was a night club in 1973 then there isn't any point to deal with the rest of it because it doesn't matter whether it was used after that if the Board hasn't been convinced that it was a nightclub. If you have been convinced that it is then we need to work toward has it ever been discontinued, have they presented enough to make you feel that it had not been discontinued for a year and then beyond that if the board feels that it hasn't discontinued then to what level and what extent was that activity so that it can be specified in the certificate of occupancy.

Mr. Lemon asked what the standard of review is on that. Mr. Yonke had stated "absolutely". Is the standard of review beyond a reasonable doubt or is the standard of review more likely than not, there are three or four standards of review?

Mr. Yonke stated that the standard of review according to the by-laws as far as I can tell is in their opinion. It says that they weigh whatever evidence is presented.

Mr. Lemon stated that there is nothing that says that they have to believe it beyond a reasonable doubt? They could use a standard of more likely than not.

Mr. Yonke stated that they have to believe that you have proved...

Mr. Florea stated that there is no standard set in the by-laws.

Mr. Lemon stated that is the question that I had because there is various levels of a standard review. The burden of proof doesn't necessarily state what the trier of fact has to decide, whether they believe it is more likely than not would be the lowest level, the highest level would be beyond a reasonable doubt.

Mr. Yonke stated that it doesn't specify so it falls back again to in their opinion have they been convinced.

Mr. Florea stated to the Board that he thinks depending on your intent with your motion we either need one motion or a series of motion at your discretion. But all three points should be covered if necessary.

Member Rootes made a motion that a nonconforming use be established in 1973 the property was being used as basically as an outdoor recreation facility and I understand that is a nonconforming use. It was being used primarily for outdoor concerts and related activities and the building was built in the 1960's to support that activity so that there would be indoor activity.

Mr. Yonke stated that his understanding of that is if you do not believe it was a night club; that's what they are asking for, so you would have to affirm that you think it is a night club in order for them to get the relief that they want. If you believe that the level of activity and what was going on at the property was a privately operated recreational facility at that time with some form of incidental other use then they are not eligible for any form of grandfather rights to begin with because of what we laid out at the very beginning. If you believe it was a recreational use it would have required a conditional use permit, the conditional use permit was not applied for within the time that was eligible which made it an illegal use by the time the zoning ordinance changed again, and that was a 12 year period in there that they could have applied for the conditional use permit in addition to the six months that was established initially. Then at that point it was no longer a legal use therefore if it wasn't a legal use it could then not get nonconforming use rights once the specific specified use was no longer in the ordinance is the problem here. Essentially it is either, if that is what you believe then it seems that you would need to indicate that it is not a night club or it is because that is what the applicants have requested. If you say yes it is some form of night club then we have to figure out the level of use or if you certify a use that you believe it is from the testimony that it is not a night club but is also not something listed as a conditional use originally in the ordinance from that time then I suppose you could establish that level that you have understood and from what you've done you've determined it is actually a different use that seems to fit in there. But such use can't be a conditional use or else we run in to a problem with the way it works.

Member Rootes stated that her motion would be then that it was not a nonconforming use?

Mr. Yonke stated that he is not going to tell Member Rootes what her motion is I'm just indicating that it can't be an outdoor recreational facility as a nonconforming use based on the ordinance of the time.

Member Rootes stated that her belief after the testimony is that it is an outdoor recreational facility the building was built to support and that sometime after 1973 when it was changed to Sheila's is when it took on the use as a night club. That is my belief.

Mr. Yonke stated that Member Rootes is not indicating that she believes the building was built after 1973?

Member Rootes stated no, the building was built before 1973 but I don't believe...

Mr. Yonke stated that you believe the character of a night club was after 1973, that they have not established that the character was a night club and that it was more in keeping with a recreational facility.

Member Rootes asked how her motion should be. Member Rootes made a motion that a nonconforming status be denied.

Mr. Yonke asked for what use.

Member Rootes stated an affirmative motion in order to get...

Mr. Florea stated that the motion could be phrased either in the positive or the negative either to approve or deny. If in fact you believe a nonconforming use existed then you would make a motion to that effect, if you believe the opposite then you would make a motion to that effect.

Member Rootes made a motion to deny nonconforming use.

Mr. Yonke asked for a specific use, not just in general but for a nightclub as that is what they applied for or are you just denying that they had any nonconforming use rights as it has been established to you.

Member F. Thomas seconded the motion.

Discussion on the motion.

Member Rootes stated that she believes it became used as a night club at some point but doesn't feel that she has been shown that it was a night club in 1973.

Member F. Thomas stated that he agreed.

Member Rootes made and Member F. Thomas seconded a motion to **deny** a request by Zackary M. Riley and Autumn J. Cox to certify a nonconforming use for a nightclub located at 6870 E Mexico Gravel Rd., Columbia (Corn's Lake). **Zoning Regulations, Section 8. F.**

Member M. Thomas	Yes	Member Rootes	Yes
Member F. Thomas	Yes		

Motion to approve request carries.	3 Yes	0 No
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OLD BUSINESS

None.

NEW BUSINESS

None.

ADJOURN

Meeting adjourned at 9:55 p.m.

Respectfully Submitted,

Paula L Evans
Secretary

Minutes approved this 4th day of December 2003.