

**MINUTES OF MEETING**  
**WEST COUNTY BOARD OF ZONING ADJUSTMENTS**  
**NOVEMBER 4, 2009**  
**(APPROVED JANUARY 13, 2010)**

The Regular Meeting was held at the hour of 6:00 p.m. in the Alameda County Building, 224 West Winton Avenue, Hayward, California.

**FIELD TRIP: 3:30 p.m.**

**MEMBERS PRESENT:** Chair; Dawn Clark-Montenegro; Vice Chair, Kathy Gil; Members, Jewell Spalding, and Frank Peixoto.

**MEMBERS EXCUSED:** Ineda Adesanya.

**OTHERS PRESENT:** Phil Sawrey-Kubicek, Senior Planner.

**FIELD TRIP:** The meeting adjourned to the field and the following property was visited:

1. **T MOBILE CORPORATION / AMY MILLION / THE NEIGHBORHOOD CHURCH, PLN-2009-00048** – Application to allow continued operation of an existing telecommunication facility with a change of service provider from T Mobile to T Mobile West Corporation and to legalize an additional equipment cabinet, in an R-1-CSU-RV (Single Family Residential, Conditional Secondary Unit, Recreation Vehicle Parking Regulations) District, located at 20600 John Drive, north side, approximately 300 feet northwest of Castro Valley Boulevard, unincorporated Castro Valley area of Alameda County, designated Assessor's Parcel Numbers: 084A-0228-001-03; 084A-0235-001-07; 084A-0230-001-02; 084A-0230-003-03; 084A-0230-004-00; and 084A-0240-001-02.
2. **HAYWARD AREA RECREATION & PARK DISTRICT / T MOBILE USA / CHRIS COONES , PLN-2009-00089** – Conditional Use Application to allow the installation of a wireless telecommunications facility (monopine), in an "A" (Agricultural) District, located at 6132 Greenridge Road, west side, approximately 1,000 feet north of Mesa Verde Way, unincorporated Castro Valley area of Alameda County, designated Assessor's Parcel Number: 085-1600-003-02.
3. **MILLER / CRAWFORD – CONDITIONAL USE PERMIT, PLN-2009-00098** – Application to allow a community facility (outdoor recreational facility – batting cages), in an R-1-SU-RV (Single Family Residence, Secondary Unit permitted, Recreational Vehicle) District, located at 19829 Fern Way, west side, approximately 400 feet south of Edwards Lane, unincorporated Castro Valley area of Alameda County, designated Assessor's Parcel Number: 084C-0692-005-00.
4. **EDEN HOUSING, PERMIT PLN-2009-00131** – Variance Application to allow a nine foot tall fence where six feet is the maximum height allowed, and to allow an eight foot concrete wall where six feet is the maximum height allowed, in a PD-(Planned Development, ZU-1537<sup>th</sup> Zoning Unit) District, located at 1300 Kentwood Lane, east side, southwest of 165<sup>th</sup> Avenue in the unincorporated

Ashland area of Alameda County, designated Assessor's Parcel Number: 080B-0300-002-05.

**REGULAR MEETING: 6:00 p.m.**

**MEMBERS PRESENT:** Chair, Dawn Clark-Montenegro; Vice Chair, Kathy Gil; Members, Jewell Spalding, and Frank Peixoto.

**MEMBERS EXCUSED:** Ineda Adesanya.

**OTHERS PRESENT:** Phil Sawrey-Kubicek, Senior Planner; County Counsel, Brian Washington; Code Enforcement staff; and Yvonne Bea Grundy, Recording Secretary.

There were approximately 22 people in the audience.

**CALL TO ORDER:** The meeting was called to order by the Chair at 6:04 p.m.

**ANNOUNCEMENTS BY THE CHAIR:** The Chair made no special announcements.

**OPEN FORUM:** Open forum is provided for any members of the public wishing to speak on an item not listed on the agenda. Each speaker is limited to three (3) minutes. No one requested to be heard under open forum.

**Neighborhood Preservation Ordinance Abatement Hearing**

1. **State of California, 1424 A Street, Hayward CA 94546**  
In violation of the Alameda County Ordinance 6.65.030 A (1,4,11) and B (2,3,6).
  1. Unsecured dwelling
  2. Unsecured property
  3. Dilapidated wooden fence in front yard
  4. Debris

Member Spalding motioned to declare the property a public nuisance, and require abatement to be complete within 10 days, as opposed to the staff recommendation of 15 days. The Vice Chair seconded the motion. Motion carried 4/0.

2. **State of California, A Street, Hayward CA 94546**  
In violation of Alameda County Ordinance 6.65.030 A (8), A (1,4,11) and B (2,3,6).
  1. Unsecured dwelling
  2. Unsecured property
  3. Debris

Member Spalding motioned to adopt the staff recommendation. Declare the property a public nuisance, require abatement to be complete within 10 days. The Vice Chair seconded the motion. Motion carried 4/0.

3. **Diem Luong & Recontrust Company, Fairmont Drive, San Leandro, CA 94578**  
In violation of the Alameda County Ordinance 6.65.030 A (9&10).
  1. Overgrown weeds and vegetation.

Member Peixoto motioned to adopt the staff recommendation. Declare the property a public nuisance, require abatement to be complete within 10 days. Member Spalding seconded the motion. Motion carried 4/0.

**CONSENT CALENDAR:**

There were no items scheduled for the Consent Calendar.

**REGULAR CALENDAR**

1. **MILLER / CRAWFORD – CONDITIONAL USE PERMIT, PLN-2009-00098 –**  
Application to allow a community facility (outdoor recreational facility – batting cages), in an R-1-SU-RV (Single Family Residence, Secondary Unit permitted, Recreational Vehicle) District, located at 19829 Fern Way, west side, approximately 400 feet south of Edwards Lane, unincorporated Castro Valley area of Alameda County, designated Assessor's Parcel Number: 084C-0692-005-00.

Staff recommended approval of the application. The Castro Valley Municipal Advisory Committee recommended approval as well. The following are proposed changes. Condition #20 shall now read: Children 13 years and older shall only use wooden bats. Initial Board questions were as follows:

- What changes in the application did the CVMAC recommend
- Is the pitching machine on site still in use
- Why is the omission of Condition # 24 recommended
- What are the costs to the County to review an application
- What is the definition of "development"
- In the event of non compliance who would conduct an investigation

Staff said the Castro Valley Municipal Advisory Committee wished to strike Condition #24 to prevent the Applicant from incurring review costs. CVMAC saw review expense as a burden. They also wanted to extend the permit length, to reduce costs. Staff clarified there are no costs to the Applicant, if it is not a new permit. The review can be done internally, at County discretion in one year, based upon complaints. Code Enforcement would investigate if a complaint were received at any point throughout the permit. In view of the staff explanation of the review process, Board Members believed Condition #24 could be modified to reflect the Applicant is not responsible for application review costs. Staff believes the batting machine is only used one day per week. Therefore the recommendation is one day per week maximum use, to reduce noise. Development is defined as the building of a physical structure. The proposed use is allowed with a conditional use permit. Public testimony was opened.

Mr. Mike Leo Grande requested that he be allowed to testify first due to a work conflict. The Applicant agreed. Mr. Leo Grande lives on Fern Way next door, on the south side of the Miller home. He submitted a letter included in the Staff report as Exhibit "B". It is not just kids hanging out and playing baseball. They are taught to be fair. On occasion he has made a request to the Miller's to shut down early on work days. The Miller's were agreeable. His bedroom is less than 150 feet from the use. Board Members asked the following:

- Is the use near his walkway
- Is Mr. Leo Grande home during the day

He confirmed the use is near his walk way. He does work during the day, and must get up at 1:00 a.m., as he is in the produce business. He leaves early, and returns between 1:00 and 3:00 p.m. Mr. Miller's

operation is conducive to compliance. No one at the site has ever been out of line with him; or one another. He can hear what goes on at the site. Mostly there is live ball toss. There is no cursing, and kids learn character building. Good things take place in addition to baseball. Children are being made into good people. The adults at the site volunteer. Mr. Leo Grande has never heard the pitching machine.

Mr. Marc Crawford was present, representing the Applicant, Mr. Miller. He submitted a petition of 27 people that state they have no problem with noise, parking or disruptions at the site. Virtually all of the residents on Fern Way have signed the petition with the exception of a vacant home. Several people on other streets have signed as well. Mr. Crawford is present as a volunteer. He enjoys staying busy. The children learn how to represent others, self esteem, and leadership skills. The service provided at Mr. Miller's is priceless. They fill a void the government cannot fill, and work to make the community better. Without community volunteers, the world would be a different place. Mr. Crawford realizes there is an impact resulting from the site. A number of concessions have been made. One concession is Hours of Operation. Historically during the summer, the facility opened at 8:00 am, and closed at 7:00 p.m. The facility was open 66 hours per week. The batting cages were available during those hours. The proposal now is Monday through Friday 4 hours per day, and 7 hours on Saturday. This is a total of 27 hours per week, a 60% reduction. The number of people will be reduced to one team. A team can have up to 15 persons. However they will try to limit the number to 12. There is a one to one ratio parents to children when all parents show up. This is not always the case but they would like to retain that capacity so parents and kids are not waiting in their cars. Instead of 4 kids in a batting cage at one time, now only 2 are allowed. Punching bags at the site were used to perfect swing techniques. Now bags can only be used with bare hands, not bats. The Millers will not use the parking space in their driveway during practice times. The space will be will open. Thus far Mr. Miller has spent \$3,000 dollars on planning fees. The cost could rise to \$4,000 dollars. To cost to rebuild the fence will be \$4,250 dollars; trees for the site, \$1,500 dollars. Planning is also asking for a landscaping and irrigation plan in addition to padding on all exposed metal. Mr. Crawford was in agreement with the Sound Reduction Plan, and signage recommended by CVMAC, also the restriction of children 13 years and older to wooden bats. This will reduce noise level. The Chair asked where the property owner will park if the not in the driveway. Mr. Crawford confirmed there is one parking spot inside of the garage. The other car can be parked on the street during practice. Member Spalding pointed said two visitors cars can be park on the driveway apron, if Applicant's car is not there.

Mr. Dean Nielsen a Member of the CVMAC Board was present. He clarified he was present representing himself. The process with this application was a bit unusual. The Applicant came before the CVMAC to discuss his concerns. The CVMAC recommended the Applicant go through the cup process. The process would allow neighbors to voice concerns about the noise factor. It could also perhaps legalize a use that has been on-going for over 30 years. The CVMAC questioned everyone extensively, and came to the conclusion there was a noise factor. The Applicant has agreed to mitigation, in order to reduce noise. Use of the pitching machine mentioned in Condition #8 is rare. The machine has two spinning wheels, and is not a pressurized system. The Applicant agreed to limit use to 1 time per week. Most pitching is done hand to hand or hit from a T. The CVMAC asked how long the neighbors who lodged complaints lived in the neighborhood, because the use has been ongoing for 30 years. The CVMAC normally does not conduct a yearly review. Permits are usually approved for a longer period of time. This conditional use permit is different in that, filing was as a result of complaint. One of the points that came out during the permit process is the use is a community service; or extended family service. CVMAC considered the possibility of the use being moved to a park. However the Miller's provide snacks from the fridge the purchase themselves. Based on testimony from the community and, young people that had been through the program, CVMAC voted unanimous approval.

Mr. Joe Hendren lives on Fern Drive on the opposite side of the street, three homes from the Miller's. He has lived on Fern Way since 1978 prior to the Miller's moving in. His has experience as a coach of youth

sports for 27 years. He sees the value of the Miller's operation, opening his home and backyard to boys and girls of any age, to work on baseball skills. As a neighbor, he is sensitive of the noise. However there should be a sense of compromise. The facility should not be shut down. Kids need a place to go. Parents should have the ability to participate if they choose. Periodically Mr. Hendren hears batting. However traffic is never an issue. There are never more than 6 to 7 cars at time. There is also a little league field down the street. There is more disruption as a result of the little league field. He has coached for a long time, and knows what kids need. Mr. Miller tells kids to come on over. This is a value that should be continued, and important to kids. The yard should not be shut down, or taken away. The use has been on-going for a long time. The use is not an issue on the street. The Chair asked if he was bothered by freeway noise. Mr. Hendren responded freeway noise was only an issue at night, and he has gotten used to it.

Mr. Ricky Garcia lives on Jaydine Street, around the corner. He has played in the yard since he was 11 years old. He used to play for Castro Valley Little League, and was invited to the Miller's to hit balls. Ricky has also taken his younger brother since he was a small child. Over the years Mr. Miller has taught him to be a better son, brother, and citizen of the community. The alternative fields at Marshall Field and Creekside Middle School are not open to the public. They are reserved for Castro Valley Leagues. He has taken his brother to Marshall Field to hit balls, and was told they could not be there. Only coaches are allowed. Batting cages are accessed with keys held by team or league managers. Creekside School has the same rules. The cage style used at the schools is not safe. The cyclone fencing causes balls to rebound back, onto the player. He has been hit several times in the face. Ricky limits his time at the Miller's to half an hour. He only uses wooden bats, as well as his younger brother. They are conscious of noise issues. Once when a neighbor complained he was making too much noise. He stopped playing right away. The batting cage company in San Leandro, Triple Play cost \$35 per hour. He cannot afford to pay that price, as he plays often. Currently he plays on the Castro Valley High Baseball Ball Team. However they cannot use the batting cages or fields because they are reserved for Softball.

Mrs. Marj Perry has lived across the street on Fern Way for 32 years. The Miller's have been caring considerate, thoughtful neighbors. They have shaped many young minds. She is a widow and likes having cars parked in front of her home. She only hears noise from the Miller's when she goes outside. She does not hear anything when inside, or in her back yard. She hears more noise from Marshall School. Neither is an issue. Two of her grandsons practiced at the Miller's during the baseball season.

Ms. Elke Sommer lives on Alana Road. She pleaded with the BZA to help in this awful situation. She did not want to be in a disagreement with her neighbor. However the noise and increased stress has prompted her request for empathy, and help. The Board seems to believe the Miller's provide a community service. Community services should be provided on public not private property, if the purpose is to serve the public. If she purchased her home next to a school or park. She may have expected this type of use. She purposely did not buy, next to a park. Ms. Sommer did not expect this next to her home, in a quiet residential neighborhood. She has enjoyed the benefit of her home for years, and continued to reasonably expect the same to continue. Now she has been deprived the benefit of her own home. The use at the batting cages is going on 6 days a week. This is unconscionable. She is being deprived of her property, and civil rights. In testimony she has been portrayed as an uncaring citizen that does not like children. This is unfair, and untrue. When she raised her children she taught them character and morals. She also took them to public businesses, and did not burden the neighborhood with that responsibility. The application before the Board is not a popularity contest; or a debate about whether volunteerism is commendable; or who has better political connections. The issue should be strictly about maintaining the tone of the neighborhood, and preserving the ability for people to enjoy their properties. There is a daily assault of noise, and sleepless nights. She would like to return to calm. The CVMAC suggested she gave up her rights because the noise has been going so long. She did not complain in the past. However the noise went from annoying to unbearable, when new batting cages were constructed 3 years ago. The

Miller's confirmed this when they testified before the BZA, at a past meeting. Ms. Sommer has been working with Code Enforcement for a year and a half to bring Mr. Miller into compliance with the zoning ordinance. The CVMAC also told Ms. Sommer that if the permit is approved. To sell her home, a disclosure must reveal the facility next door. That means the Miller's have the right to reduce her property value. Several CVMAC Members stated out right, they would not like to live next to the Miller's, due to the noise. How can they justify, she endure the noise. Also if the permit were new construction, they would not be inclined to approve the application. This means property owners can bypass the permit process. This is not how zoning regulations should be applied. The CVMAC lightly passed over liability and safety issues. Ms. Sommers produced a news article stating aluminum bats increase baseball speed. A death was attributed to a base ball injury. The deceased family prevailed in a court judgment. It was determined the child was not able to get out of the path of the ball, due to its speed. Ms. Sommer then showed photographs of kids in the Miller's yard without helmets. CVMAC approved the same type of bat for use, at the site. Therefore a safety concern does exist. The Miller's contention school batting cages are dangerous is not true. She spoke to a local school administrator about their batting cages. The Administrator was very upset because the statement is not true. It is a mischaracterization the school district does not safeguard players. The Miller's have spent \$12,000 to keep the facility in his yard, but will not put money toward improving public batting facilities. When she was sick last spring which included a trip to the emergency room, she could not recover in her own bed. She was compelled to hide away in her home with windows and door shut, due to the noise. The Miller's propose 26 hours per week during the school year, more if there are teacher work days, and 36 hours during the summer. The hours are during the time she would like to enjoy dinner, and quite time. Ms. Sommer asked that if the Board approved the cup, use be limited to a maximum of 2 days per week, at any time. No more than 4 hours per day, no exceptions. All batting should take place within the recommended time. Ms. Sommer referred to the sound sample that was played at the June enforcement hearing. Board Members should put themselves in her shoes, and imagine that sound multiplied by 30 hours per week. Zoning rules are to keep peace in the neighborhood, and to keep peace between neighbors. She implored the BZA to seriously curb the use; or disallow the cup. Board questions for Ms. Sommer were as follows:

- Would the prevention of children at the fence line reduce the noise
- Does Ms. Sommer hear the batting noise from batting cage located down the street
- During what hours is Ms. Sommer home
- What Hours of Operation would Ms. Sommer suggest

Ms. Sommer said prevention of children gathering at the fence would help. However the elimination of multiple batters at the T would be more helpful. The parking situation is also unbearable when there are events at the school down the street. She does hear the cheering sound from the school, however not the batting noise. She works from home 1 day per week. Her husband is retired. She returns at 4:00 p.m. She would like to see the hours reduced, 12:00 Noon to 4:00 p.m. so the dinner hour is not constantly interrupted. Again reduction of the total number of days would be ideal.

Mr. Fred Davis lives on Alana Road across the road from Ms. Sommers. He hears the noise on a daily basis. He did not believe the operation should be taking place in a neighborhood. There is another facility (Head Start) down the road. The business is a legitimate baseball training facility, including a place to play. The business down the road has overhead and liability insurance. The neighbors pay the price by subsidizing the Miller's business. Legitimate businesses are struggling to survive. It is more difficult when they have to compete with a subsidized business. If neighbors were to sell their homes there must be a disclosure about the batting cages. The cages deprive neighbors from quiet time, at home. At the last meeting the Applicant said the \$300 per month in funds collected from the Legacy Team, are solely to pay costs. Originally this information was on the website. Since the code enforcement hearing, this

information has been removed. There are some underlying issues. If a complaint is filed who would investigate, and enforce. He did not have confidence the Miller's would respond, as it took months to apply for a cup. The neighbors should not be responsible for policing. Kids have been seen without helmets. There could be liability issues. Other cities would not allow this type of use. It should be restricted to use by friend, and family. Mr. Davis and the Miller's have the same insurance agent. The agent said Mr. Miller has \$330,000 dollars in household coverage. If there is an incident, the County could be liable. As a member of the community, he did not want to cover County liability costs. Other businesses are required to carry liability insurance. All standard use permits require insurance. The Applicant should be required to obtain one million in liability. The County should also be listed, as an additional insured. This is required by the School Districts and businesses. With all of the issues, including liability and enforcement, Mr. Davis did not believe the use was good for the neighborhood. Member Spalding clarified the BZA considers the question of the use. The Applicant receiving payment is not a factor considered.

Mrs. Jan Jung has lives on Sugar Hill Terrace. She has known the Millers for 21 years. Her son was invited into the backyard as a boy of eight. She watched him practice each time. She is a distraught over the characterization of the Millers. It is frustrating to see things brought up over time that are not true. She has seen the operation, and witnessed the values her son has taken with him. All of the neighbors present at the last BZA Hearing did not attend this time. They know the BZA got the message that Oscar Miller is a great guy. They wanted to respect the Board's time. Mrs. Jung was also at the CVMAC hearing. Regarding the person who said they would not like the use next to their home, also said if they had a pool, it would get more use than the Miller's yard. Another person acknowledged once they read the information. They discovered the hours are not that bad, one child for an hour and one half. Although the Hours of Operation are posted, this does not mean someone is actually using the yard, the entire time. She has worked with Mr. Miller over the years because he has touched many lives. Although they try to get into the community it is not unusual, if you have a large backyard, you do use it. That use may attract people. Although she does not live directly in the neighborhood, Mrs. Jung asked the BZA not to accept all of the information being presented as fact.

Mr. David Locey said he had major issues with what is going on at the site. He requested the Board give him more than 3 minutes to testify. The Chair asked Mr. Locey to try and adhere to the 3 minute testimony limit. He lives on Alana Road he indicated on a map, proximity to the Miller's. He then showed dimpled balls recovered from his yard. He has two wooden fences at his home. A six foot at the property line an eight foot behind that for privacy. If the Millers had been forth coming in 1987 when applying for a building permit, none of the issues would have occurred. At meetings with neighbors, Mr. Miller and Mr. Crawford were not present. The Applicant has only submitted an application and petition, thus far without supporting facts. The application was dated June 10, 2009 however nothing was received until July 22, 2009. As a result Mr. Locey believed the neighbors that came to testify should be considered. Mr. Locey then reviewed a submitted request to modify Conditions of Approval. Regarding Condition #24, the professional training facility at the Miller's is too close to the field at Marshall School. The use adds to noise and traffic congestion. The project description has expanded, and evolved since July 27, 2009. Sufficient time has not been allowed for evaluation and response. The original submission was for one team of 9 to 12 players, with 6 coaches or parents. The CVMAC made changes allowing 1 parent per child. Mr. Miller could carefully schedule two or more teams per day, resulting in the presence of 50 people on Saturdays, and Teacher Training days. This should be prevented in the 1:00 pm. to 7:00 p.m. time slot. Mr. Miller plans to bring beginners as young as 5, for T Ball teams. The CVMAC approved a 14 foot setback for the designated T ball area. The setback is not indicated on information submitted. Mr. Locey showed photos of a child 13 years of older using the area. The screening is visibly dimpled. Mr. Locey then submitted a dimpled ball recovered from his yard. All baseball use should be limited to the interior of batting cages. Mr. Miller has not shown proof that life lessons need to be taught from a batting cage. Nor has he made the case professional batting instruction can only be taught from a

batting cage, in his back yard. The home occupation and commercial enterprise aspect is still an open question. There is nothing to prevent his ministry or the Legacy Team from using the facility. The ministry is tax exempt, and supports his teaching activities. Mr. Miller also uses his home for the activities, including the backyard to conduct business. The activities should not be conducted in an R-1 Zone. Nor have the Millers made a case there is a void of athletic activities in the community. Although they are not free, there are training facilities in the community. In addition there is no third party oversight. Most community facilities have this. There is no one to verify compliance, or enforce Conditions of Approval. Complaints go to the Sheriff's Department or Code Enforcement. Also there is no way to check the age of players, or access to the facility. There is no practical means to enforce Conditions. The community is stuck as long as the length of the permit. The County Noise Ordinance does not allow a cup without a means to control noise. The proposed Conditions do not require Mr. Miller to be present when using the yard. This should be a requirement of the cup. In addition Mr. Miller has not made a case as to why cages should be open all year. Use should be limited to October 1<sup>st</sup> through March 1<sup>st</sup>. The application does not protect the rights of all in the neighborhood. A permit should not be approved, without protection for everyone. Condition #3 should not allow use of the yard on National Holidays. The Condition should state clearly, the yard is closed October 1<sup>st</sup> through March 1<sup>st</sup>. Neighbors should be able to use their yards without noise. Although all of the hours may not be used, baseball should be allowed two days per week. No extended hours in the summer or on teacher work days. Use should be limited when there are events at Marshall Field to reduce congestion. In the summer hours should be from Noon to 4:00 pm. This allows neighbors to enjoy their dinners in peace. Condition #4 should clearly state the maximum number of adults allowed. Staff clarified, no more 4 adults are allowed in the yard at a time. Mr. Locey also coaches children. Typically there are 12 kids on a team, and their parents. He believed the maximum number of adults in the yard should be 20, however he will accept 24. The original plans submitted included a landscaping plan. The T area is part of the batting cage setback as show in the 2005 plan. This is not shown in the current submitted schematic. The set back area should not be used as part of the facility. All activity should be limited to the other side of the batting cages. He has only seen the pitching machine in use one time. The machine is getting on in years, and is not very quiet. Hitting should be into the net. Extra padding should be added to reduce the noise. He would also like the Applicant to explain the definition of a live batter. Padding should be added to all of the metal pipes in the back yard. Mr. Locey hears a ping sound currently when balls hit metal. Padding should reduce this sound. Regarding Condition #20, kids should be allowed to use rubber balls. The Condition now states hard balls can be used. Enforcement can be an issue. Who will be present to ensure the appropriate age will use the specified equipment. Mr. Locey also believed the staff recommendation of permit length should be re-instated. When he walks his dog a block and one half away, he can hear the sound from the yard. The Vice Chair asked if the sound was emanating from the other batting cage in the neighborhood. Mr. Locey confirmed that it was not. The Kent's have only lived in the neighborhood a few years. Mr. Kent's use is a true accessory use. This issue has been ongoing before their arrival. The testimony Mr. Miller provided at the last hearing that the noise is from the other batting cage, is not true. The Chair asked Mr. Locey the following questions:

- Was Mr. Locey home during the BZA's site visit
- Did he heard the Members voices when out in the yard
- Did he hear the sound of balls being hit
- Does he hear the freeway noise from his home
- Was Mr. Locey present at the meeting set up by the Supervisor

Mr. Locey confirmed that he was at home during that time. He did hear the Members talking but did not hear a specific ball noise. He does have double pane windows at his home. He can hear noise from the freeway, and BART. Mr. Locey was also in attendance at the meeting set by the Supervisor. Staff confirmed the Supervisor's meeting regarding the issue was held on September 14, 2009. The Vice Chair

told Mr. Locey she hit some rubber balls with a bat while in the yard. She did not hear any noise from the action.

Mr. Don Christiansen lives on Sheffield Road. He has taught and coached for 37 years. He has worked at Mt. Eden High School and Chabot College with young people for many years. He has also worked with young people at church. The environment at the Miller's is safe. Kids wear helmets, including when they do toss drills. This is not a requirement at other places, but one in the yard. Times are different now. Children cannot walk to local parks. Mostly when parents come to the Miller's they sit on the grass. If kids have homework or chores this must be done before they come to the yard. In the summer, 65 games are played. The fees that go to the tournament have nothing to do with the yard. The coaches are not paid. The coaches buy all of the uniforms. Athletes are made in the off season. If kids do not practice, they do not excel. Parents can come and help. If the parents are not there, follow through and further practice does not happen. A tremendous amount of kids from the yard have gotten into college. Mr. Christiansen has gotten a lot of enjoyment from his time at the yard. He does not know what he would do if he could not work with the kids. He does understand the Board must put a limit to the number of adults. There cannot be 100 people in the yard.

Mrs. Nancy Christiansen is a retired teacher. She is the wife of wife of Don Christiansen, a retired coach. She has been to Mr. Miller's place. It is a wonderful place for families and kids. This is why people have a yard. There is a neighbor with a pool, and they use it. Mrs. Christensen has seen mothers, daughters, fathers, and sons passing on skills. She would hate to see this stop. The opportunities are few and far between. This facility is about giving back. Baseball is played 12 months per year.

Mr. Robert Cardenas said the facility provides an opportunity for kids. He is a President of a children's sports league. They operate a baseball, and football program at Marshall School. The facility at Marshall School is only available for elite teams. The kids have to pay to use the facility. The batting cages that remain at Castro Valley High School are only used for softball ball. The remaining baseball cages have been torn down. Other batting cages in the area are not very nice. However this is all the facilities can afford, they are not open for public use. The cost to mow and water the school facility is \$10,000 dollars. The batting cages at Mr. Miller's home provide a place to experience something worthwhile. Mr. Cardenas heard a phrase on the radio. Sportsmanship is something that is not taught it is revealed. He would like to see the opportunity to continue to exist at Mr. Miller's.

Mr. David Wilhite has lived on Crow Canyon Road for 38 years. He grew up with Mr. Miller on Greg Street. When Mr. Miller retired he made an investment of \$12,000 to purchase equipment. Mr. Miller request for a 5 year permit should be granted. The Miller's give from their hearts, and are honorable people. They will follow the Conditions of Approval to the best of their ability. The community has worked with staff, and the CVMAC came to a unanimous verdict.

Mr. Crawford returned to respond to comments. There had been a mix-up with the meeting. Mr. Crawford acknowledged he was human. When no one was present at the meeting at Mr. Miller's home, he called Mr. Christiansen. He was finally able to contact Christine to find the location. He was told the meeting was almost over. Mr. Crawford thought the meeting was to take place at the neighbor's home. This would give people a sense from their perspective. The Applicant never intended to have the batting cages open on Holidays. Member Peixoto asked Mr. Crawford to review the Hours of Operation using the visual display. Mr. Crawford explained that if the cages had to shut down at 4:00 p.m. there would not be sufficient time. Children do not get out of school until 3:00 p.m. The cages would have to shut down just after they arrived. Member Spalding asked what the hours would be in the summer time. Mr. Crawford said they would like to stay open until 7:00 p.m. Many parents work. It may take a parent until 6:00 p.m. to arrive. They can limit the number of adults in the yard to 12. With a shortened day, the facility would only have small children attend. They would also like to retain the ability to have the T

Ball rotation. This lets all of the children in the yard take a swing. He explained that a live batter is someone that has a ball thrown to them. If the T's are taken away, the rotation would take longer. Mr. Miller can institute the wearing of padding. They would like to retain the use of hard balls at the site. It gives the kids a realistic sense of the game. Aluminum bats are weighted for small children. Mr. Crawford believed the prospect of a 1 year permit review was akin to guilty until proven innocent. It has been very difficult getting Mr. Miller to apply for a use permit. The use has already been reduced by 90% percent. Many of the issues have been worked through, face to face. As far as the policing the site. Mr. Miller knows he is constantly being watched and filmed. He would not have gone through the permit process if he had no intention of complying. People using the site know violations will be reported to Code Enforcement. The Miller's will be vigilant. Member Spalding asked if the Applicant would be willing to cease use of the back area, at the rear of the site. It may allow some relaxation for the neighbors. The screening that is already present proves there is a need to provide the service.

Mr. Crawford explained the screening is to reduce the incidence of the children being filmed. A lot of money has been spent to mitigate issues. Member Spalding pointed out the owner voluntarily agreed to install the 8 foot fence requested by staff. In Mr. Crawford's opinion, if people go to the T instead of the cage, noise is reduced. There is no hitting toward the neighbor's house. Member Peixoto said noise is still generated. Also what happens when balls go over the fence? Mr. Crawford said he has never seen balls go over the fence. The neighbor of Mr. Miller interjected from the audience. He showed photos of balls that were hit into his yard, and the proximity to the fence. Mr. Crawford responded that it is extreme. Mr. Miller must spend \$6,000 to add noise mitigation to that section of the yard, and not be able to use the rear section. Member Peixoto asked if the Applicant was in favor of Condition #5 which addresses further screening. Mr. Crawford said netting is inexpensive, and can be added. However kids like hitting off of the T. It does not make the same amount of noise.

The Vice Chair was concerned with the use of the word "operation", the site is a home. For example if someone owns a pool. More mitigation should be used. Everyone needs to work together. She can offer suggestions. However it is not up to her, as she does not have to live in the neighborhood and endure the noise. Noise is an issue. Member Spalding said December was a fairly quiet time for baseball. There are 2 months without activities. Rainy weather should reduce activity.

The Applicant, Mr. Oscar Miller testified. He told the Board professional baseball starts the first week of February for pitchers and catcher. If training is delayed until spring, it is too late to modify a swing or prepare. The first day of training for college baseball practice is January 1<sup>st</sup>. This allows players to be effective. Players from the yard were drafted in the top 50 of the United States. Children that have trained at the facility have been drafted into the Major Leagues. This is attributed to the workouts. Little League tryouts are also in January. Players are drafted into independent league based on try-outs and sign-ups in the Castro Valley Little League. Children are not allowed to use slang language like, "hey dude" at his facility. There is not a lot of noise. Mr. Miller said a few years ago he had cancer. He has done baseball training for 27 years. He would like to continue until he dies. He was advised by his lawyer not to go court. However he has still spent \$12,000 dollars on this process. The CVMAC voted unanimously to approve the permit. The Vice Chair responded the CVMAC was an advisory committee. The BZA is not obligated to come to the same conclusion. Member Spalding added she was shocked by some of the comments made by CVMAC Members. For example they would not like to live next to the facility.

Board questions were as follows:

- Would the Applicant modify the Saturday Hours of Operation to 10 a.m. to 5 p.m.
- Is the Applicant willing to close the facility on Holidays
- Can the Applicant provide proof of insurance

- Are children required to sign an insurance waiver when using the site
- Are baseball facilities available at Marshall School

Mr. Marc Crawford returned to respond on behalf of the Applicant. Mr. Miller would like the facility to be open for more hours. However if the modification of the Saturday hours is what the Board proposes, Mr. Miller will accept 10:00 a.m. to 5:00 p.m. The facility is already closed on Sundays. Closure on Holidays would be acceptable as well. The Applicant is not required to obtain insurance, as this is not a business. This has been confirmed with his Insurance Agent. Therefore a waiver is not required. In addition Mr. Crawford did not believe Condition #24 requiring Mr. Miller to indemnify the County, and to bear costs in a law suit were fair. Mr. Crawford was unsure of the exact schedule of activities at Marshall School. However there are activities, all of the time, if the batting cages were required to shut down when school activities took place. The site would have to shut down. The Millers want to get along with their neighbors. However their statistics should not be used, as they can never be met. Mr. Crawford believed the application should be approved. There is another batting cage facility in the same area. Some of the noise is emanating from the other site. Mr. Miller is getting some of the blame for that site, too. The Code Enforcement Manager lives 5 doors up from the site. There has been observation of the Miller's home, violation notices, and a nuisance hearing. He was unsure the other property with a batting cage had been subjected to the same scrutiny. Code Enforcement should respond to the other site, too. If there are future issues at the Miller's, Code Enforcement can follow up. Member Spalding said it presumed that people will be reasonable regarding requests, and the permit process. She reminded Mr. Crawford the Applicant originally chose not to apply for a use permit. Had a use application been submitted, a hearing could have been avoided. Mr. Crawford told the Board he was not involved in the process at that time. However the Applicant was told that he would be treated fairly if he did submit. He had a very difficult time convincing Mr. Miller to apply. After discussion, the permit was filed with the Planning Director within the 30 day period.

Member Peixoto pointed out that if a zoning compliant is received, Code Enforcement will follow up. The Chair said a revocation hearing can also be scheduled, if there was non-compliance. The Board will discuss further options after public testimony is closed. Mr. Crawford again referred to Condition #23. If the Applicant were to agree to the terms, they would have no recourse. The County could revoke his permit for any reason. The County told Mr. Miller to file for a use permit. He should have a right to defend himself as anyone else, beyond a revocation hearing. Member Spalding did not like the Condition as proposed. Typically a clause such as this is intended to protect the County against claims. Not necessarily claims from the Applicant. Counsel said the clause generally means if the cup is granted and someone were to sue the County over the appropriateness of the cup, the Applicant has to bear the burden of defending that lawsuit. The Vice Chair commented, the Applicant use of the term "close the yard" is not accurate. The Applicant is making a voluntary effort in the process. However the neighbor is also tired of noise generated at the site. In her opinion when the word "operation" is used, that relates to a business. If the Applicant believes he is not getting a fair shake. He can dismantle the cages. Everyone is going to have to give a little. Public testimony was closed.

Member Peixoto said perhaps the Planning Director can conduct the compliance review. He is still in favor of a 5 year permit length. Member Spalding pointed out if the Applicant's car is parked on the street, only two net parking spaces are created. The Vice Chair agreed. Condition #12 should be stricken as nothing is gained. She then asked staff how Hours of Operation were determined, also if lighting will be provided in the Tee Ball area. Staff said the Applicant's requests were reviewed. Staff then tried to determine a compromise. Considerations such as the dinner hour were considered. As a result the hours of 12 Noon to 6:00 p.m. were selected. The CVMAC recommended Noon to 7:00 p.m. CVMAC wanted the same number of hours each day. However the Applicant requested more hours each week. Also during Teacher Training days when schools are closed. Member Spalding asked if the summer hours

would be extended since the days were longer. Light may still be necessary in the batting area and the cages, since there is a limitation to natural lighting.

The Vice Chair thought Condition #12 should be stricken. She believed Saturday hours should be from 10:00 a.m. to 5:00 p.m. The facility should be closed on Sundays and National Holidays.

Condition #4 should be modified to say adults.

Condition #5 should state that batters can only use whiffle type, or rubber balls in the warm up area with wooden bats. Member Peixoto pointed out younger children may not be able to hold wooden bat. Young children 12 years and younger should be allowed to use aluminum bats. Children Ages 13 years and up are limited to the use of wooden bats. This should also be applied to Condition #21

Condition #12 should be stricken

A Condition should be added that standard baseballs for hitting purposes are solely to be used inside of batting cages. Throwing hardballs is okay. Member Spalding said this Condition should be added to Conditions #8 and #9 as well.

Condition #24 should be re-instated.

The Vice Chair thought a 3 year permit length would be appropriate. Member Spalding said a 5 year permit might be acceptable with a review period. The Chair was of the opinion since the use was new, a 5 year permit with a 1 year review was appropriate. The other alternative would be a 3 year permit length.

Mr. Crawford said a 5 year permit length would be acceptable with a 1 year review. Ms. Sommer interjected, and asked if she could submit further comment. Member Peixoto confirmed public testimony was closed. Staff accepted the modifications proposed by the Board.

The Chair believed Condition #14 would help mitigate freeway noise. When she was at the site, freeway noise was a distraction. When she stood at the neighbor's fence, noise was dramatically reduced. Also within 25 feet of the fence, noise was more dramatically reduced. An 8 foot fence and added trees should further mitigate. Member Spalding said perhaps an 8 foot fence would not be necessary, if the use was limited to the paved portion of the rear yard. The Chair agreed with the Applicant, if they ceased to use that section of the site. The length of time necessary to rotate children through would be extended.

Member Spalding thought neighbors should be able to review the landscaping plan, in addition to the Planning Director. They have to look at the trees. A notice can be sent to the neighbors. Once notice is given, the 60 day time clock can begin. The Vice Chair pointed out specified trees are to be fast growing. The property owner should have the final say, since the trees will be in their yard. The Chair said she could appreciate the spirit however a condition requiring review by the neighbor did not seem to be appropriate. The neighbors can review a copy of landscape plan however a formal review should not be required. The Chair strongly urged an olive branch be extended. However in the end the property owner has to maintain the trees. Member Spalding still believed it was appropriate for the neighbors to weigh in. This process has been applied in other applications. Member Peixoto said that responsibility is usually given to the Planning Director.

Member Peixoto referred to Zoning Ordinance 17.08.040, and asked staff to explain the definition of a community facility, does that mean any neighbor has access to use, and participation at the facility. Staff said the definition had two components. A community facility is an outdoor recreation facility. An Outdoor recreation facility is a park, playing field for active games, a pool, a golf course, a camp or picnic

ground, a vacation resort or guest lodge or a neighborhood recreation area together with such buildings and the uses are accessory to the recreational use. This does not include a drive-in service, drive-in business circus, carnival or trampoline court. An outdoor facility does not have to be available to anyone in the community. For example Crow Canyon Park is a private outdoor facility. Member Spalding said a college is a good example of a facility that is private. Member Peixoto pointed out the application is in an R-1 District.

Member Peixoto motioned to uphold the staff recommendation of approval of PLN-2009-00098-with the following modifications to Conditions of Approval:

Condition #1, The second sentence shall be stricken: *No new construction is allowed without approval from the Planning Director.*

Condition #3 shall add:

Use of the facility is not permitted on National Holidays or Sundays.

The Hours of Operation on Saturdays shall be from 10:00 a.m. to 5:00 p.m.

Condition #4, The words *coaches and parents*, shall be stricken and replaced with the word adults.

Condition #5 shall include the language: *only whiffel or rubber ball use only is allowed in the Batting T area. Children ages 12 years and younger are allowed to use aluminum bats inside of the Batting T. Children ages 13 years and older are limited to use of wooden bats in the Batting T area.*

Condition #12, shall be stricken in its entirety.

Condition #20 shall have the phrase added: *Children ages 13 years and older are limited to use of wooden bats.*

Condition #24 shall be re-instated. The portion of the clause that requires the *cost of review to be borne by the permittee* shall be stricken.

The permit length shall be for a period of 5 years with a review required one year after approval.

A further Condition shall be added, Condition #25: *The batting of hard balls is limited to the interior of batting cages.*

The Vice Chair seconded the motion. The motion carried 4/0.

**APPROVAL OF MINUTES:** The Minutes of October 28, 2009 were continued to November 18, 2009.

**STAFF COMMENTS & CORRESPONDENCE:** Pending appeals being considered at the BOS are as follows:

PLN-2009-00056 Behzad Barfeei. The staff recommendation to the BOS will now reflect approval.

PLN-2009-00049, T Mobile / Million: The staff recommendation upholds the BZA decision to coordinate permit expiration with another carrier on the site, to facilitate future co-location.

COD-2009-1007, Cornejo: The staff recommendation upholds the BZA decision to abate recently installed concrete that exceeding the maximum 50% allowed.

**BOARD'S ANNOUNCEMENTS, COMMENTS AND REPORTS:** Member Spalding asked why the staff recommendation of denial had changed regarding, PLN2009-00056, Behzad Barfeei, County Counsel reviewed the application, after which it was determined there may not have been sufficient deference to

the established legal non-conforming use. There was a concern the Applicant had a right to the use that was not being recognized. This was not presented to the BZA. The board letter raises this point. Member Spalding responded there was a factual finding that the use ceased, which is a very important fact. The Applicant stated during testimony he did not have a tenant, and has not had one for a period of time. Counsel said the Ordinance acknowledges that a legal non-conforming is abandoned after a period of 6 months, of not being used. The board letter indicates there is not information confirming, the 6 month period has lapsed. Therefore staff is now recommending approval. The Vice Chair said information had arisen after the BZA rendered their decision that the Applicant is selling cars via the internet. Therefore the number of vehicles at the site would be limited. However this was not presented during the application process, nor presented to the BZA. Member Spalding pointed out that a period of 6 months had elapsed since the BZA rendered its decision. If the Applicant has not had a tenant, the 6 month time period has already elapsed. The Chair believes there is a stay in the process while the Applicant undergoes the appeals process. Member Spalding reiterated that the use has been discontinued for a period of 6 months. This is an important point to consider. The Vice Chair understands another factor under consideration is the Redevelopment Agency would like the use to continue. They believe the business is a good idea. Counsel said the staff recommendation is based on the point the 6 month period has not elapsed. Member Spalding said staff may still want to consider the 6 months since the BZA determination, and the 2 months in addition. During which time the use has lapsed. Originally the Redevelopment Agency recommended denial of the application. The Vice Chair said the Economic Development Director within the Redevelopment Agency reviewed the application, resulting in the revised recommendation. The Chair suggested if the application and use is to substantially change. The item should be referred back to the BZA. The Vice Chair added that if the Applicant had shared information about the internet component of the business. Perhaps there may have been a different outcome. Member Spalding was unsure if the outcome would have changed. Counsel said he was aware that Supervisor Miley was currently working with the Eden Area Livability Group considering a process for remand. Planning staff thought this application was a good example of how a remand process could be beneficial. Counsel said another method to phase out legal –nonconforming uses would be to adopt a more aggressive Zoning Ordinance. Under California law that is the more established way to address the phase out of legal non-conforming uses. Some Counties use a method to calculate a time period in which to allow a reasonable rate of return before the use is phased out. After the determined time frame, the use is phased out.

**ADJOURNMENT:** There being no further business, the hearing adjourned at 9:15 p.m.

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**ALBERT LOPEZ - SECRETARY**  
**WEST COUNTY BOARD OF ZONING ADJUSTMENTS**