

**CONWAY PLANNING BOARD**

**MINUTES**

**FEBRUARY 28, 2008**

A meeting of the Conway Planning Board was held on Thursday, February 28, 2008 beginning at 7:03 pm at the Conway Town Office in Center Conway, NH. Those present were: Chair, Robert Drinkhall; Selectmen's Representative, Larry Martin; Vice Chair, Martha Tobin; Secretary, Steven Porter; Sean McFeeley; Theodore Sares; Patricia Sell; Planning Director, Thomas Irving; and Planning Assistant, Holly Meserve.

**REVIEW AND ACCEPTANCE OF MINUTES**

**Mr. Sares made a motion, seconded by Ms. Tobin, to approve the Minutes of February 14, 2008 as written. Motion carried with Mr. Porter and Mr. McFeeley abstaining from voting.**

**RULES AND PROCEDURES FOR THIS EVENINGS MEETING**

Mr. Drinkhall stated since there are a few people here this evening he is going to set some rules. Mr. Drinkhall asked that everyone go through the Chair in order to speak, not to talk to one another, state your name, that he would allow everyone to speak at least once before he goes back to them to speak a second time, and to not waiver from the subject at hand. Mr. Drinkhall asked that side conversations be limited to the hallway if you want to talk amongst yourselves, to please shut off cell phones and anyone not complying with the rules will be asked to leave.

Mr. Drinkhall stated that the purpose of the major discussion tonight is for a Minor Site Plan Review only. Mr. Drinkhall stated that the Planning Board has nothing to do with enforcement, as this Board is not an enforcement entity. Mr. Drinkhall stated enforcement questions should be addressed at a Board of Selectmen meeting as it has absolutely nothing to do with tonight. Mr. Drinkhall thanked the Board of Selectmen, Earl Sires [Town Manger], the staff and the Court for keeping this Board a relevant committee.

**TAKE AGENDA ITEMS OUT OF ORDER**

**Mr. Martin made a motion, seconded by Mr. Sares, to take items 2 and 3 on the agenda out of order. Motion unanimously carried.**

**JOSEPH E SULLIVAN REVOCABLE TRUST OF 1998 AND SUMMIT HOTEL PROPERTIES INC – FULL SITE PLAN REVIEW CONTINUED (PID 235-76 & 77) FILE #FR07-18**

This is an application to construct a 79,452 square foot, 108 room hotel and associated infrastructure and improvements to 60-foot easement area. This application was accepted as complete on December 13, 2007. Mr. Irving stated that the applicant has requested a

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continuance. **Mr. Martin made a motion, seconded by Ms. Tobin, to continue the Full Site Plan Review for Joseph Sullivan Revocable Trust of 1998 and Summit Hotel Properties, Inc until March 27, 2008. Motion unanimously carried.**

**ROBERT AND EUNICE MCINTIRE – FULL SITE PLAN REVIEW CONTINUED (PID 253-42) FILE #FR07-16**

This is an application to construct a 2,100 square foot storage addition and associated infrastructure. This application was accepted as substantially complete on October 25, 2007. Mr. Irving stated that the applicant has requested a continuance. **Mr. Porter made a motion, seconded by Mr. McFeeley, to continue the Full Site Plan Review for Robert and Eunice McIntire until March 27, 2008. Motion unanimously carried.**

**RED JACKET MOUNTAIN VIEW – MINOR SITE PLAN REVIEW (PID 230-48 & 51) FILE #MR08-01**

Randy Cooper and Chris Meier of Cooper Cargill Chant appeared before the Board. This is an application to amend the approved site plan to include a 1,595 square foot air conditioning unit and associated site changes.

Mr. Cooper stated that that he does appreciate the comments by the Chair. Mr. Cooper stated that we should consider this site plan review whether it had occurred today or September 1<sup>st</sup> and it should not be treated any differently. Mr. Cooper stated that the enforcement issues are behind us and we comply with the Site Plan Review regulations to locate the cement pad and the HRU that was not shown on the original site plan. Mr. Cooper stated that they have provided on March 4<sup>th</sup> [February 4<sup>th</sup>] the required necessary plans to establish that we have met the Site Plan Review requirements. Mr. Cooper stated that it is his understanding from reading the Staff Report that the applicant has met all the requirements.

Mr. Cooper stated that the applicant has received approval from the Town Engineer and the North Conway Fire Chief. Mr. Cooper stated that Patrick Crimmins of Appledore Engineering is present this evening if there are any questions. Mr. Cooper stated that the application does comply with all the Site Plan Review requirements.

Mr. Cooper stated lastly, even though it is not the applicant's burden, an issue has come up, and raised by the Town Planner in his report, with respect to sound. Mr. Cooper stated the only place sound is covered in the Site Plan Review regulations is under the issue of whether it is a serious nuisance. Mr. Cooper stated that the complainant bringing that particular issue has the burden of documenting that it is a serious issue.

Mr. Cooper stated that the applicant has provided the Board with two different sound engineer reports; one of them took place during the day, but because of the ambient background noise of the traffic, the hotel, automobiles and everything else, it was impossible to differentiate what additional sound was created by the HRU. Mr. Cooper stated that another sound study was done at seven different locations. Mr. Cooper stated that there were sound measurements taken beside the unit, at the property line and at the driveways of the two closest abutters.

**Mr. Porter made a motion, seconded by Mr. McFeeley, to accept the application of the Red Jacket Mountain View for a Minor Site Plan review as complete. Motion unanimously carried.**

Mr. Irving stated that the pending items from the Staff Report were the Town Engineer approval, North Conway Fire Chief approval and NHDES Site Specific approval or confirmation that the original approval was still adequate. Mr. Irving stated on February 14, 2008 the Board determined that a Minor Site Plan review was necessary and the changes that necessitated by the location of the HRU and slab included not only the 1,590 square foot plus increase of impervious area from the slab, but also involved the narrowing of the loading access to 17-feet, which normally would be narrower than the Fire Chief would approve, as it is normally supposed to be 18 to 20 feet, but he has approved this design.

Mr. Irving stated that a number of drainage structures, catch basins and pipes were relocated due to the conflict with the new HRU pad. Mr. Irving stated that these have been reviewed by the Town Engineer and have been approved as submitted. Mr. Irving stated in regard to the NHDES Site Specific approval, he did speak with NHDES today, and even though they have not yet submitted their approval or done a formal review of it, they did take a quick cursory look at the two page list submitted by Appledore Engineering and the State indicated to him that the State does not anticipate any problems with the proposed revision, but they would not issue an approval until there had been a formal review. Mr. Irving suggested that this could be an item that the Board could approve as a subsequent condition of final approval so we don't have to hold everything up waiting for the State when the State anticipates everything will work out.

Mr. Sares asked who is paying for the Court Reporter. Mr. Cooper answered the applicant. Mr. Irving stated the applicant has submitted a subsequent report that is more in depth than the original letter submitted at the meeting of the 14<sup>th</sup>, and also submitted to the Board of Selectmen at their meeting on the 5<sup>th</sup>. Mr. Irving stated before the Board is a number of waivers which address scale, driveway width of Locust Lane, intersection width for both driveways, curb flair radius, connecting driveways, parking spaces, buffer vegetation free of prohibited uses relative to the well house and same relative to the tennis court and driveways that cross the buffer that are not crossing at 90 degrees for Locust Lane and the applicant has submitted a single waiver asking to reaffirm these waivers in bulk.

Mr. Sares asked what the impact of reviewing the waivers bulk is. Mr. Irving stated if you review them in bulk you only have to go through the process once. Mr. Sares asked what the impact is as far as noise is concerned. Mr. Irving answered none. Mr. Sares asked in regard to noise, is the report on the 27<sup>th</sup> just been handed to the Board. Mr. Irving answered in the affirmative. Mr. Sares asked if that is the in depth report that Mr. Irving was referring to. Mr. Irving answered in the affirmative. Mr. Sares stated given that it is the detailed in depth report and the Board just received it, the Board should review it. Mr. Sares stated that he is not suggesting the Board should review it at another meeting, but it should be reviewed here and now, but he is not going to treat it on face value. Mr. Cooper stated that he understands that and he had planned on going through the report with the Board.

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Mr. Porter asked as far as the waivers are concerned, nothing has been done that has adjusted any of these waivers, correct. Mr. Irving stated that is correct. Mr. Porter asked if none of the waivers have been affected why Board is discussing them. Mr. Irving stated since this is a new application they need to be reaffirmed. Mr. Sares stated it's a process issue. Mr. Drinkhall agreed. **Mr. Sares made a motion, seconded by Ms. Sell, that the waivers be approved in bulk. Motion unanimously carried.**

Mr. Drinkhall read the requirements to grant a waiver. Mr. Drinkhall read the waiver request that addresses §123-6.B.2; §123-20.F/131-67.C.8.b [Route 16]; §123-20.F/131-67.C.8.b [Locust Lane]; §123-20.F/131-67.C.8.c; §123-20.F/131-67.C.8.f [Locust Lane]; §123-20.G; §123-21.A.; §123-29.A.2 & A.3 [Well House]; §123-29.A.2 & A.3 [Tennis Court]; and §123-29.A.4 [Locust Lane]. **Mr. Sares made a motion, seconded by Mr. Porter, to grant the waivers.** Mr. Drinkhall asked for Board comment; there was none. Mr. Drinkhall asked for public comment in regard to the waivers; there was none. **Motion unanimously carried.**

Mr. Irving stated that the only other item that was of any question had to do with sound. Mr. Drinkhall asked for Board comment; Mr. Martin stated that he just wanted the Board to be aware that the applicant did what the Board asked. Mr. Martin stated that the Board asked the applicant to provide us with a sound study and to bring it in this week. Mr. Martin stated that this is not something the applicant dumped on us and stated that he believes he requested it.

Mr. Sares asked if Mr. Martin meant the Board of Selectmen requested it. Mr. Martin answered in the negative and stated that he requested it at the last Planning Board Meeting. Mr. Sares stated that it was just presented to the Board tonight. Mr. Martin stated that he asked the applicant to bring it in. Mr. Sares stated that he had no problem with that, but he believes that Mr. Cooper was going to go through it. Mr. Sares stated we are at the sine qua non [the essence of] the issue.

Mr. Cooper stated there were two things the applicant did after the last meeting, one of them is that they reviewed the tape and saw where Ms. Sell had referred them to an EPA study. Ms. Sell stated nonoise.org. Mr. Cooper stated what has been submitted to the Board is a copy of that study and also what has come out of it is the basic typical noise levels that were in the nonoise.org study for the EPA.

Ms. Sell asked if all this information is from nonoise.org. Mr. Cooper answered in the affirmative. Ms. Sell stated one of the reasons she suggested the site was because there are hundreds of companies that specialize in soundproofing and silencing and she thought it would be helpful if it was found necessary.

Mr. Cooper stated what is good about this information is that it provides a chart of typical noise levels. Mr. Cooper reviewed the chart with the Board. Mr. Cooper stated that they went up there between midnight and 1:30 am on Tuesday and picked seven different locations. Mr. Cooper stated that they shut off the HRU and measured the sound levels without it on at all seven locations. Mr. Cooper stated they then measured the same with it on and that is the chart provided on page 2.

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Mr. Cooper stated at location one, which was beside the HRU it went from 36.7 dba to 62.6. Mr. Cooper stated if you are standing beside it and went to the chart it would be close to a window fan on high, which is probably exactly right because it is his understanding that the HRU is one big fan. Mr. Cooper stated in regard to locations, with the key ones here being 3, 4 and 5, which are along the boundary line and they are consistently 43 dba. Mr. Cooper stated that the highest one is 4 at 47 dba, which is along the boundary line. Mr. Cooper stated that a typical living room is 40 dba, a radio playing in the background is 45 to 50 dba, a forced hot air heating system is 42 to 52 dba and a common household refrigerator is 40 to 43 dba.

Mr. Cooper stated that the next two measurements, 6 and 7, are out at the end of the driveways of the two abutters, as they didn't have permission to go on their property, so they stood in the road and measured with the unit both on and off. Mr. Cooper stated in location 6 with the unit off the reading was 29.7; with the unit on it was 28.6. Mr. Cooper stated that the note states, "That at location 6 the unit level was slightly lower when the unit was shut off. This is a result of fluctuation of other noise sources and the units were inaudible at this location". Mr. Cooper stated that basically there was no difference.

Mr. Cooper stated that he would say you could extrapolate because sound is audio rhythmic. Mr. Cooper stated that you can extrapolate because if you say the houses are half way between the road and the boundary line you could split the difference. Mr. Cooper stated for instance if it is between 31 and 41 dba, the difference would be 34 dba. Mr. Cooper stated that 37 or 38 would be to the house, which would be a computer, a quiet room and less than the typical living room.

Mr. Cooper stated the bottom line, scientifically, or with objective data, there is no impact that would be a nuisance; no less a serious nuisance. Mr. Cooper stated subjectively he thinks most of the Board went up there and has come to a similar conclusion. Mr. Cooper stated that is why the applicant does not believe sound really is an issue and there is no way that it can be documented that it is a nuisance under §123-39.

Mr. Drinkhall stated that he went up unannounced and went to the last row of parked vehicles towards the abutters and it was not an annoying noise to him. Mr. Drinkhall stated he then went inside, introduced himself and was given the grand tour of the project. Mr. Drinkhall stated at that time when he came outside a White Mountain Oil truck was delivering and he stood basically in the same area at the abutter's boundary line and he could hear the truck and could not hear the unit itself.

Mr. Drinkhall stated that when he moved to the other end he could hear a helicopter in the distance nowhere nearby, he assumed it was a Memorial Hospital emergency flight, even though the helicopter was not loud it drowned out any sound coming from the unit itself. Mr. Drinkhall stated that he is curious if anyone has heard it any louder than what he did.

Ms. Sell stated that she did hear substantial noise from the ventilation unit as she walked the perimeter of the parking lot. Ms. Sell stated that she could hear the sound and it was continual. Ms. Sell stated that the typical noise levels indicated by this web site are common appliances around the house and she has another document on her laptop at home that has different criteria of measuring decibels from this type of equipment. Ms. Sell stated that she was wondering if

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there is a difference because she recently learned if noise is continual for over a period of ten to thirty minutes you add ten decibels and if it is continual for over two hours you continue to add decibels onto the length of time, which further contributes to the nuisance. Ms. Sell asked if they have stumbled across that and are there different criteria for different items.

Mr. Cooper stated that he has not, all he knows is that they hired a professional to come up here and try to measure sound. Mr. Cooper stated that he understands that Ms. Sell has her own issue because she lives beside the High School and sound is a problem for her. Mr. Cooper stated that he just wants to be clear that she can separate her issue with the High School with the issue at hand today.

Ms. Sell asked what issue that would be. Mr. Cooper stated that he has seen an email that Ms. Sell has had a particular problem herself with sound. Ms. Sell asked specifically what sound. Mr. Cooper stated to her own house. Ms. Sell asked how does that [relate to this issue]. Mr. Cooper stated it [might] affect her ability [to be objective]. Ms. Sell stated that this is not about her issue. Ms. Sell stated that she has done her homework, she can offer input and this is not going to create a problem for her. Mr. Drinkhall asked not to bring in [personal issues]. Mr. Cooper agreed.

Mr. Cooper stated that they don't think there is a sound issue. Mr. Cooper stated that they have tried to be able to answer the Board's questions regarding sound. Mr. Cooper stated that the applicant has provided the Board with a report and he is prepared to right now to say find him an abutter that has documented that there is a serious nuisance, because the Board has to find under §123-39 that the complainant has documented that there is a serious nuisance to do something about it.

Mr. Cooper stated that the applicant is not accepting that this is an issue. Mr. Cooper stated that he went there himself and what he heard was the fan from the restaurant. Mr. Cooper stated that the blower from the restaurant you might hear and it has been there for a long time. Mr. Cooper stated that you can hear it almost all the time. Mr. Sares stated that Mr. Cooper should address the Board and not Patricia as she is not on the witness stand. Mr. Sares stated that he thinks the fact that Mr. Cooper raised the email poured kerosene on the flame. Mr. Sares stated let's get back to the issue and stay with the issue.

Mr. Sares stated that Mr. Cooper keeps referring to §123-39 as the only basis an abutter can raise an issue. Mr. Sares asked if someone could read §123-39. Mr. Cooper read §123-39. Mr. Sares stated that he went to the site around 11:00 at night with his wife and they got out of the car and listened. Mr. Sares stated that he wasn't bothered by the noise and he didn't think it was excessive. Mr. Sares stated that it was ice cold that night and generally in cold weather noise will be more rather than less.

Mr. Sares stated that he did not go to the abutters as he couldn't imagine it going that far to be an issue, however, he didn't know there could be a sustained noise, which could add to the decibel level. Mr. Sares stated if that is true it is not our issue to come up with as much as the complainer. Mr. Sares stated that the case has now been made; the burden shifts and the abutters need to come back with that proof.

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Mr. Porter stated that he did a two phase observation as he went to Duprey Road and the Red Jacket. Mr. Porter stated that he wanted to see and hear the unit and he spent about 15 to 20 minutes at the Red Jacket. Mr. Porter stated that he did not tell them that he was there as he would rather do it on his own. Mr. Porter stated that he heard bucket loaders working in the distance and he heard other noises, but he really didn't hear the unit. Mr. Porter stated that he walked up Duprey Road to see if there was anything he could visually see and hear, and he really couldn't. Mr. Porter stated if it wasn't publicized as much as it was you really wouldn't know it was there. Mr. Porter stated he thinks as far as noise is concerned, he would agree with Mr. Sares, that the burden has shifted.

Mr. Porter stated if on day one when we gave the approval this particular piece of equipment was on the drawing we would still have gone the same route. Mr. Porter stated he thinks at this point in time if the Board can honestly say we would have approved it as it sits today then that is the route we need to go right now and put this matter to rest. Mr. Porter stated he doesn't think the Board has to particularly hash out the noise level until it becomes an issue down the road. Mr. Porter stated that it really is not an issue right now that we need to worry about.

Mr. Martin stated that he concurs with your findings, as he went up there a couple of times, various times unannounced. Mr. Martin stated that he was pleasantly surprised with the lack of noise. Mr. Martin stated that it wasn't nearly as loud as he thought it was going to be. Mr. Martin stated from Duprey Road it was like a moan, a constant droan sound that might be annoying, not saying it is not saying it isn't, but that would be about the only thing. Mr. Martin stated as far as being an overbearing decibel high, no, and he agrees with their find and what he's seeing here.

Mr. Martin stated that he would probably have to put the noise issue to bed, but this is the final issue and the big issue was the oversight of the unit itself not on the plans and that is why our heels were dug in. Mr. Martin stated that they just wanted everyone to know that we were just playing by the rules.

Ms. Sell stated Mr. Meier stated at the last meeting that there were different periods of time when the unit made more noise or less noise depending on the way they were dealing with the water. Mr. Meier stated he was speaking when the unit was being calibrated. Mr. Meier stated that the unit has been operational on the same pattern since the time they were here last. Mr. Meier stated that what he was saying was that the sound would be different when the unit was being calibrated, but once that was done it would never have to be done again.

Ms. Sell asked if the Acoustic Engineer that provided the study conducted the measurements while it was in full operation. Mr. Meier answered in the affirmative. Ms. Tobin asked if what Mr. Meier is saying is that the unit was in full operation on Tuesday, February 26<sup>th</sup> between 12:00 and 1:30 in the morning. Mr. Meier stated that it is always in full operation because it refreshes the air inside the building every two hours. Mr. Meier stated that they did shut it off for the study to be able to measure while the unit was off and then it was turned it back on. Mr. Meier stated that it is an on/off switch, so it's either on or off, there are not different levels. Ms. Sell asked if it continues 24 hours a day. Mr. Meier answered in the affirmative.

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Mr. Meier stated to address Ms. Sell's concern of noise over a period of time, the larger study presented by the applicant has different levels and referred to page 7. Ms. Sell asked Mr. Irving if this was brought before the Board before this happened would we take into account the noise; what we would have done. Mr. Irving stated that we would have gone through the exact same process were going through right now. Mr. Irving stated we did notice the abutters since the last round and we have addressed the issues since the last round. Mr. Irving stated if this had been raised as an issue at the last round, we would have treated it exactly the same as we are tonight.

Mr. Drinkhall stated that someone used the term backwashing. Mr. Meier stated that he did and stated when it was originally calibrated it had to be backwashed. Mr. Drinkhall asked if this is done on a regular basis or just that one time. Mr. Meier stated that he would have to refer to the Engineer, but he doesn't think so.

Mr. Cooper stated he doesn't want to say that they have an advantage, but if they had been dealing with this last May, we would have been dealing in the abstract. Mr. Cooper stated that we would have come in with some Engineer saying that it was 45 decibels at the property line and no one would have known what that meant. Mr. Cooper stated that the reality of it is, is you have been able to go up and hear it. Mr. Cooper stated that they still have the obligation under site plan to plant arborvitaes, so that is another layer of insulation.

Mr. Drinkhall stated that he would concur with Mr. Cooper and Mr. Irving that this would have been dealt with in a different manner. Mr. Sares stated that he disagrees with that. Mr. Sares stated that he was not on the Planning Board when the "abstract" would have been dealt with, but if dealt with on the original application he would have been on the issue of sound real fast. Mr. Cooper stated what he is saying is we couldn't have dealt with it any other way other than the abstract. Mr. Sares agreed and stated that he didn't understand Mr. Cooper was saying that. Mr. Cooper stated he wouldn't have been able to turn the unit on because it would have been on a plan.

Ms. Tobin stated that she understands that the noise level is not that bad and she did not find it to be that bad either, but she doesn't live next to it. Ms. Tobin stated that she has to go back to when this plan came before the Board when the Board was concerned about lights going onto the abutting properties. Ms. Tobin asked can the folks sitting here right now say that they would not have brought up a concern about sound on an outdoor mechanical unit.

Mr. Martin stated that he thinks the Board would have brought up the concern regarding sound, but what we cannot lose is that we would not have had the advantage of being physically able to go to the site and hear the unit. Mr. Martin stated that we would have had to have taken the report at face value based on an engineer layout, basically not based on reality. Mr. Martin stated it would not have been actual dba ratings, but projected.

Ms. Tobin stated that her whole thing is that the Board had asked about heating and ventilation and the Board were told it was going to be enclosed and this is not enclosed. Ms. Tobin stated that it is wide open and the Board fought to make sure the lights wouldn't go onto someone else's property and she cannot help but feel we would have required something to go around this unit to mitigate noise.



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Mr. Porter stated that we have to keep in mind that the landscaping has not been completed, which would have an impact on the noise level. Mr. Porter stated not having been here at the last meeting, did the Board take into consideration that the applicant had to hide the unit. Ms. Tobin answered in the negative. Mr. Porter stated he thinks when the landscaping is completed it will deaden the noise or what noise there would be. Mr. Porter stated he thinks the Board has to look at the overall picture and if the applicant has done everything the Board has asked from the beginning and with the landscaping that they are going to do, if the Board was content with that at the time and with the studies they have done then he thinks they have done everything to keep noise down to a dull roar.

Mr. Porter stated that it is not the Board's place to turn around when we have privy to look at it and worry about what the guests might think about the appearance of it. Mr. Porter stated that that is their issue and not anyone else's at this stage in the game. Mr. Porter stated that it gets down to what we did for landscaping does it take care of the noise and would we have approved the plans.

Mr. McFeeley stated that his biggest concern was noise and the applicant has presented here that it is not the issue that he thought it would be. Mr. McFeeley stated that he finds it clearly reprehensible that the applicant did not represent this on the plan when they came to us and he is very pleased that the staff and our Town representatives worked so hard to maintain the letter of the law even though they have been getting a very bad rap for it. Mr. McFeeley stated that he appreciates everything the hotel does for this community and its existence means a lot to the Town.

Mr. McFeeley stated every experience he has had with the Red Jacket he has been amazed at the high level of people they have working for them. Mr. McFeeley stated that he really feels it's important what they have here, but that does not mean that they can use rules as they like. Mr. McFeeley stated that he is pleased with how that Town acted and he is confident now that noise is not an issue. Mr. Drinkhall asked Mr. McFeeley if he had visited the site. Mr. McFeeley answered in the negative.

Mr. Drinkhall asked for public comment; Ned Sullivan stated that he is an abutter and he has tried to hear the noise, but he hasn't been able to hear the unit from his property. Mr. Sullivan stated that he cannot see anything either and he is pleased to live next door to the Red Jacket. Mr. Sullivan stated that he has found nothing offensive. Ms. Sell asked Mr. Sullivan how far he lives from the unit. Mr. Sullivan stated that he lives on Locust Lane.

Dan Franz of American Air Systems stated that he has 21 years of experience in the heating and cooling business and a decibel is a decibel. Mr. Franz stated that a decibel may affect others differently, but it doesn't change nor is it any different than what the decibel is rated at. Mr. Franz stated that the duct work would be insulated, so some of the noise is from turbulence, and it would be cut down when the duct work is finished. Mr. Franz stated that the unit removes moisture and allows some of the dry air to come in from outside through the louvers. Ms. Sell asked if Mr. Franz was a subcontractor. Mr. Franz answered in the negative. Ms. Sell asked when the insulation would be done. Mr. Franz answered when the weather cooperates.

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Todd Shires of Duprey Road stated that it is approximately 600 feet from the HRU to his driveway and he can hear snow plows, car doors closing, people working at the Red Jacket, but if he could hear the HRU he cannot distinguish it from anything else.

Jim Kelly stated that he is an attorney for abutter, Catherine Reddington, and at the last meeting they had submitted a letter raising the issue that this is a serious nuisance and we want to reiterate that and we want to continue to try to establish that this is a serious nuisance. Mr. Kelly stated that the chart is helpful and what he would like everyone to look at is the operating range for decibel levels and there is a great map that shows in the assessment report different spots where the assessor did recordings. Mr. Kelly stated as Mr. Cooper stated there was a significant spot where they did one of the recordings, which was at the edge of the parking lot and the edge of the backyard of one of the abutters and it happens to be one of the highest, loudest decibel levels recorded aside from right next to the unit.

Mr. Kelly stated that it is in the range of 47, which is a forced hot air system and is an unpleasant system to hear 24 hours a day. Mr. Kelly stated that a radio in the background, also in that same range, is not something you would want to hear 24 hours a day consistently. Mr. Kelly stated that that is the effect that this unit has, it is a constant decibel level at that specific spot, which happens to be a few feet from the fence which is where Ms. Reddington's property starts.

Mr. Kelly submitted a report to the Board. Mr. Kelly stated that the report talks about the effect that the ground has on sound and what the direct line of sight has on sound. Mr. Kelly stated that distance has an effect on sound. Mr. Kelly stated that different types of sounds make different types of waves and the way they go through the air is different. Mr. Kelly stated that moisture effects sound; all kinds of things effect sound.

Mr. Kelly stated that the report talks about absorption of sound. Mr. Kelly stated when the assessor went out to Duprey Road it was at the end of her driveway, which is at the other side of her property. Mr. Kelly did a demonstration indicating that Ms. Reddington's house sat higher than the HRU and stated that sound goes for the direct line of site. Mr. Kelly stated that this report discusses the effect that trees have on absorbing sound and they seem to say that there needs to be several hundred feet of rows of trees to really make a difference on absorbing sound.

Mr. Kelly stated that a mound of earth would make a bigger difference if the sound has to bounce off it and go somewhere else it is going to be heavily absorbed into that mound of earth. Mr. Kelly stated when the sound comes off of the unit it goes up to her house then goes over her house and down her driveway. Mr. Kelly stated that the measurement of sound is significantly lower at the end of her driveway than it was at the edge of the parking lot that Attorney Cooper mentioned as a significant point of reference making it 47 decibels.

Mr. Kelly stated that in illustrating it is a serious nuisance, it is our burden to do that and we didn't have the report and Ms. Reddington does not have the money to hire engineers so that is why we came to the Board. Mr. Kelly stated that we know that the Board cared about this issue and that the Board talked about it the first time around. Mr. Kelly stated that this was a major issue with regard to noise or any mechanical equipment that would be attached to this water park.

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Mr. Kelly stated that everything was supposed to be enclosed and that was one of the issues that came up. Mr. Kelly stated that we didn't have to worry too much about noise because the applicant told us that everything would be enclosed and now it is not. Mr. Kelly stated that the only way Ms. Reddington can get help with this is to come to the Planning Board and ask that the Red Jacket provide an assessment report, which they did and it is great. Mr. Kelly stated that the report illustrates everything we have asked them to do it. Mr. Kelly stated that they asked in their letter that they use different reference points and they did.

Mr. Kelley stated that the Red Jacket has been very kind to them and they have showed them around twice. Mr. Kelly stated that he listened to the unit and he did notice that there were other noises that were louder that come and go, but are going constantly. Mr. Kelly stated that there was a propane truck filling the propane right next to the unit and he couldn't hear it, but when that truck went away and he could hear the unit.

Mr. Kelly stated as you move around the parking lot you can hear different levels of this sound and it sounds different at different angles. Mr. Kelly stated that it is not a pleasant sound it is annoying. Mr. Kelly stated that it is a hum, sort of a high pitch that fluctuates. Mr. Kelly stated that they are asking that the Red Jacket continue to participate in the community and continue to treat its neighbors very well, which they seem to be taking everyone's concerns. Mr. Kelly stated that they are just asking that they build a barrier the same height or higher that the unit

Mr. Kelly stated that we would have been doing this in the abstract if it hadn't been built and operating so we wouldn't have a real gauge, but now we do and we know it makes noise. Mr. Kelly stated if it had been extremely noisy they would have fixed it on their own because their guests wouldn't want to hear it either. Mr. Kelly stated that the sound level is what it is, if one of the guests were to complain they would remedy it as they are paying guests. Mr. Kelly stated that they are asking that they treat their abutters like a paying guest and deal with the annoying consistent hum.

Mr. Drinkhall stated that the guests are closer than the abutter and if this doesn't bother their own guests don't see how it as more of a nuisance to the abutter. Mr. Kelly stated that he doesn't know it doesn't as he doesn't see any of the guests here and he doesn't know if anyone has complained. Mr. Kelly stated that there are significant factors in that the unit faces a couple of different directions and as your standing on each side of it you hear different noises from it and there are different levels of noises. Mr. Kelly stated that the majority of the rooms are blocked by ground or the level may go right over the roof of these units, but he imagines some noise can be heard inside.

Mr. Cooper stated that he does not want people to get the idea that the Red Jacket is not willing to work with their abutters. Mr. Cooper stated that their issue it trying to operate tomorrow. Mr. Cooper stated what terrifies his client is that this gets continued to another night over an issue that we can deal with. Mr. Cooper stated that they don't want anything noisy as they have clients and guests. Mr. Cooper stated that this thing needs to work itself out.

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Mr. Cooper stated that the insulation still needs to be installed and the arborvitae planted. Mr. Cooper stated that it's not a big deal necessarily other than do we have to come back for a site plan review to install a sound barrier. Mr. Cooper stated that he thinks they could work with people about it, but don't want it be held up over an issue we cannot work with. Mr. Kelly stated that they agree and they don't want to stop them from opening tomorrow. Mr. Kelly stated that someone had suggested a subsequent condition where they could open today as long as this is done tomorrow.

Charles Allen stated to answer Ms. Sell's question the start up of the unit was at the end of January early February and they were very close to their calibration. Mr. Allen stated that the insulation of the duct work should be done in May. Mr. Allen stated that it is a part of the package as the unit will not work properly without it being done.

Catherine Reddington stated that she would love to see the Red Jacket be able to operate the pool, but it was an enforcement issue that closed it. Ms. Reddington stated that she is an abutter and cannot close it. Ms. Reddington stated that the proposed arborvitae are great and she looks forward to them, but the arborvitae are not going to remedy perceived noise and it is not going to cut it completely as it is a machine outdoors. Ms. Reddington stated that the whole indoor water park, as well as the hotel, is between Mr. Sullivan and the HRU and the other gentleman on Duprey Road is on the other side of the road.

Ms. Reddington stated to take the decibel level at the end of the driveway is not a clear picture as you can fit eight cars end to end in her driveway. Ms. Reddington stated if you go into the driveway and up onto the deck there is a hum. Ms. Reddington stated that she is glad to hear that there would be insulation in the ducts, it is a positive step; however, it may not do it completely. Ms. Reddington stated that she is a direct abutter and she is one person who does believe she has a voice. Ms. Reddington stated that the Board has been great. Ms. Reddington stated that things have changed and what is done is done, so let's look toward remediation.

Ms. Reddington stated that the responsibility is on her. Ms. Reddington stated that she has two emails from her tenants, which she received the first one out of the blue, as she did not get a notice [for the February 14<sup>th</sup> meeting]. Ms. Reddington stated that the email states that the unit runs constantly, is there anything we can do even though they don't own the house. Ms. Reddington stated that she asked her tenants the other day how is the noise and they wrote back stating that it runs 24-7 and it has a consistent hum.

Ms. Reddington stated that she does not want to shut down the Red Jacket over an annoying hum, but it would have been brought up at the initial site plan review if it were on the plans. Ms. Reddington stated that it should be considered the same way if it had been and she is looking for some sort of remediation. Ms. Reddington stated that she is directly in line with the unit, and she is only one person, but this is America and this is the Town Planning Board, and we have all followed proper procedure.

Frank Hastings stated that he selected his property for silence, and there are commercial areas and there are residential areas, and we choose where we want to live. Mr. Hastings stated in this community we have generator plants, sewer plants, so when you buy a piece of property you

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know the area when you move into it. Mr. Hastings stated we choose where we want to live and have to live with the environment we choose.

Ed Furman stated that he is the other abutter on Dupery Road and asked about the intake vents not being all the way open, if in the spring and the summer and fall when the weather is better will they be open and cause more noise. Mr. Franz stated they would be open less as the unit wants dry air and they are only open for dry cool air. Mr. Furman asked in respect to the facility, he was offered a tour and they did a nice job, it came out the way it was supposed to. Mr. Furman stated that the only problem he is really having is that everything was supposed to be enclosed.

Mr. Furman stated that he can see this silver thing from his home and it wasn't there when he purchased his home, and it also wasn't on the plan. Mr. Furman stated that he doesn't want to shut them down, but one year ago everything was going to be enclosed and that did not happen. Mr. Furman stated that they have done well so far, but they need to enclose the unit and get rid of the hum and the sight. Mr. Furman stated that he expected, as good neighbors, that they would take care of the abutters so not to look at the unit and provide further remediation for noise.

Phil Bernaby stated that he lives on Duprey road and to choose where you live doesn't mean things don't change and that we shouldn't have a say. Mr. Bernaby stated that we want them to have their permit, just want their help as it is a noisy piece of land in the summer and with this the property becomes even more noisy. Mr. Bernaby stated that he doesn't want to hear it or see and would just like them to enclose it.

Mr. McFeeley stated to be able to choose where you live would be a in a perfect world, but for most Americans it's a financial thing. Mr. McFeeley stated those who are unable to choose should not be penalized. Mr. Hastings stated that we choose where we live, but this main drag has been here forever and the Town creates their own noises.

Ms. Sell stated that some of the information is fair and Mr. Kelly has made a reasonable request. Ms. Sell stated that the snow banks that are located there now are pretty substantial and asked if in Mr. Kelly's opinion if it could cause an inaccurate measurement. Mr. Kelley stated based on the observations it seems the snow banks would absorb some of the noise and the readings would reflect that. Mr. Kelly stated that there is nothing to block the direct line of sight or line of noise. Ms. Sell asked if the Red Jacket would work cooperatively with the abutters for positive results. Mr. Cooper stated that the Red Jacket has said that they would always work with the abutters.

Mr. Cooper stated if you put a wall up and encloses it; it would only be getting one corner of it. Mr. Sares stated if there was one wall put up similar to what is on turnpikes it would do a great deal to buffer the sound. Mr. Sares stated that snow does absorb sound. Mr. Martin asked Mr. Franz if enclosing the unit would increase the sound or cause an echo. Mr. Franz stated that it goes in one side and out the other. Mr. Franz stated with leaves on the trees and the insulation in the duct work that would lower the decibel levels right there.

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Alex Dulease stated that he was out on the night that they shut them on and off and he asked if there had been any noise complaints from the guests and the answer was no. Mr. Dulease stated that when they were in the parking lot taking the readings a guest was going to his car and his feet on the ice was extremely noisy. Mr. Dulease stated that there have been no noise complaints and if they start to lose customers they will do something about it.

Ms. Reddington stated it would have to be quite loud for a guest to complain as they are there to have fun and they are on vacation. Ms. Reddington stated that a guest is a guest and is not comparable. Ms. Reddington stated that she chose to live on Duprey Road over 40 years ago and it was a residential area and businesses are prohibited on that street and zoning is in place to protect her. Mr. Furman stated that were missing part of the boat as it is about sound and a wall around that unit seems would solve both problems.

Mr. Sullivan stated that snow is a buffer and foliage on the trees would play a big part, as he can hear the cars in the winter and not in the summer. Mr. Allen stated what is being heard is the air through the ducts and there would be a reduction once they are insulated. Mr. Allen stated that it is the velocity of the air in the ducts, it is not the enclosure, it the air moving through the ducts.

Bob Matthew an Albany Selectmen stated more traffic means more employees in the valley. Mr. Matthews stated that he certainly admires what the Board has been going through and he is impressed on how cool and calm they are. Mr. Matthew stated that Albany is the gateway to the valley and we are very pleased to see companies with good employment and he thinks this park would add additional jobs. Mr. Matthew stated shutting them down for a situation as sound and not allowing continuing would be devastating to their employment and it is a matter of working it out.

Mr. Kelly stated that the abutters are not asking to not grant the operating permit, they just want cooperation to live together. Mr. Kelly stated they're being told that insulation is going to reduce the noise and remedy the situation. Mr. Kelley asked if the Red Jacket would remedy if the Board cannot do that. Mr. Cooper answered in the affirmative. Mr. Sares stated that you have to be careful because if you say yes then you're admitting there is an issue, but coming from the report there is not an issue. Mr. Sares stated if there were based on your study then he would go with the insulation and a wall. Mr. Cooper stated in his mind there is not an issue for the site plan review, but have always said that the Red Jacket is prepared to work with their abutters.

Mr. Cooper stated let's see what the arborvitae and the duct work does and if that doesn't solve the problem then the applicant would we be willing to work with them and that doesn't have to involve the Board. Mr. Martin stated that the topic of sound generated by this unit has different opinions of what is acceptable and what is not acceptable. Mr. Martin stated that the abutters are concerned with visual and the lack of trees. Mr. Martin stated with insulation and the planting of the arborvitaes what guarantee of recourse, other than your word that you will work with them, do the abutters have.

Mr. Irving stated if it is the pleasure of the Board they may want to approve the application with the following subsequent conditions; that the applicant submits a NHDES approval within 90 days; surety be held until a suitable remedy is in place and to buffer from Duprey Road abutters;

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prior to release of surety the Board will reconvene on June 26 to determine if the items have been satisfied and if so the bonding could be released.

Mr. Cooper stated that we were going in a similar direction. Mr. Cooper stated that they don't disagree with looking at it at a point later to see what works. Mr. Cooper stated it is a question of what is the decibel level that it has to be reduced to. Mr. Cooper stated that he thinks if you put up one wall it will probably do the trick, but now we need determine how to locate the wall as there are other site issues. Mr. Cooper stated he would agree to come back at some date when they've been able to plant the arborvitae and install the insulation.

Mr. Furman stated as long as Mr. Cooper goes on record that his client will remediate visual and audio as Mr. Irving has proposed. Mr. Sares asked if the suggestion is predicated on visual issues. Mr. Irving answered in the negative. Mr. Sares asked if it is predicated on a noise issue. Mr. Irving answered in the negative.

Mr. Martin asked Mr. Malia if everything the Board has laid out this evening is being done by the letter of the law. Mr. Malia stated that he thinks what Mr. Irving has proposed is fine. Mr. Malia stated if the majority of the Board believes there is no sound issue then they may want to approve the minor site plan application without any conditions related to sound. Mr. Malia stated that the first threshold under §123-39 for the Board to determine as a Board is that those claiming a nuisance has adequately documented a serious nuisance.

Ms. Sell asked if it should be necessary for the Town Engineer to review the acoustic study at all. Mr. Irving stated that the Town Engineer is not an Acoustic Engineer. Mr. Sares stated what he believes Ms. Sell is asking is do you think it is necessary for the Town to sponsor an Acoustical study. Ms. Sell stated to be able to compare the analysis. Mr. Irving stated that that is up to the Board. Mr. Irving stated that he cannot refute anything in the study because he is not an expert on acoustics.

Mr. Furman stated to make his client's abutters happy does Mr. Cooper have a problem with going along with what Mr. Irving has proposed and, if not, we would appreciate the Board making that a motion and voting it in. Phil Gaines stated that the Red Jacket has been punished for not following the letter of the law, but know it seems were trying to skirt the letter of the law. Mr. Gaines stated that they should not be penalized anymore and we should move forward. Mr. Furman stated that he asked a question of Mr. Cooper and he never received an answer. Mr. Drinkhall stated that he would work on that after public comment is closed. Mr. Drinkhall closed public comment at 9:00 pm.

Mr. Irving stated that there is a question that Mr. Malia raised that the Board should act on. Mr. Irving stated based on the provisions of §123-39 does this Board find that this is a serious nuisance. Mr. Irving stated that is the question that is before the Board right now. Mr. Sares stated under the RSA a determination has not been made that a nuisance exists.

**Mr. Sares made a motion, seconded by Mr. McFeeley, based on the provisions of §123-39 the Board finds that this is a serious nuisance.**

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Mr. Martin stated that he is a bit concerned over nuisance, is it just a sound nuisance or visual nuisance also. Mr. Sares stated he read as noise because in the absent of a noise ordinance that is the only thing we can go to. Mr. Sares stated that the burden is on the petitioner who is complaining and so far that burden has not been met to his satisfaction. Mr. Sares stated that what has been met is a proposal that the petitioners are willing to cooperate with the Red Jacket on remediating this situation. Mr. Sares stated there is no study that counteracts the study done by the Red Jacket and there has been no nuisance proven at this time. Mr. Drinkhall asked if Mr. Sares wanted to take on the visual aspect. Mr. Sares answered in the negative.

Mr. McFeeley stated that we don't know if there will be a nuisance and there is no way to tell if this will be a nuisance, especially with the noise because they haven't insulated the ducts yet. Mr. McFeeley stated to be able to say this is a nuisance or this isn't a nuisance is impossible, but because we already have an applicant that has stated that they are willing to work with the abutters if the abutters feel there is a nuisance the he feels that is good enough right there. Mr. Drinkhall asked if that is leaving it too open ended. Mr. Porter stated he thinks it would.

Ms. Sell asked if the Board could grant a conditional approval this evening because the Red Jacket seems to be taking reasonable steps to remedy the nuisance and based upon those steps could that be incorporated into the conditional approval, the steps they are willing to take. Mr. Drinkhall stated they would have to be very well defined.

Mr. Malia stated that the Town does not have a noise ordinance with decibels, therefore, there is no threshold to decide those claiming a serious nuisance, but if a majority if the Board finds that there is a nuisance then you can go ahead and address those nuisances. Mr. Sares stated if he withdrew his motion then that opens the door for Mr. Furman, but if the Board votes on his motion then that closes the door to Mr. Furman and the three items he wants, so he may want to withdraw this motion.

Mr. Irving asked if Mr. Sares would be more inclined to amend his motion that the Board finds that there hasn't been a serious nuisance demonstrated relative to noise and that would leave it open to the other elements. Mr. Sares answered in the negative and stated that he would rather it be clean. Mr. Irving stated that the Board still needs to make a finding if there is a serious nuisance. **Mr. Sares withdrew his motion and Mr. McFeeley withdrew his second.**

**Mr. Porter made a motion, seconded by Ms. Tobin, that those claiming a nuisance have adequately documented that noise presents a serious nuisance.** Mr. Sares stated that he does not believe that a burden has been established that shows that there is a noise issue. Mr. Drinkhall agreed. Mr. Sares stated if he goes with that the possibility of a mitigated or mediated might be negated and he does not want that to happen as per Mr. Irving's three point suggestion, but you cannot have one without killing the other.

Mr. Sares stated that there has been no noise issue proven and there has been no nuisance proven. Mr. Sares stated that we are constructing that artificially so we can move to the nice feel good solution and that is wrong. Mr. Sares stated that it is up to the abutters to prove that there is a nuisance that we can put our teeth into. Mr. Sares stated that it is not up to them to come in and say we'll work with the Red Jacket if they work with us that is not proven. Mr. Martin stated



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that he sees it as a two part nuisance as he sees visual as well. Mr. Martin asked if the Board votes on sound do we get to deal with the visual. The Board agreed.

Mr. McFeeley stated that he feels that we have to give the abutters the benefit of the doubt because we don't know what the situation is going to be six months down the road. Mr. McFeeley stated we don't know what the sound will be after the ducts have been insulated and it is hard to prove when the project has not even been completed. Mr. McFeeley stated at this point in time they have given us enough to say there is a nuisance mainly based because the project isn't done and we should give them the benefit of the doubt.

Mr. Sares stated that the Board asked the Red Jacket to provide us with a report and they had submitted a one page document, which was lousy. Mr. Sares stated then they came in with a detailed report, which was pretty good. Mr. Sares stated in response to that the abutters gave verbal comments and their attorney made some comments, but nothing in the way of saying we feel there is a nuisance under the RSA. Mr. Sares stated there has been no nuisance established by the abutters. Mr. Sares stated to speculate 8 months down the road when you have facts in front of you doesn't do it for him. Mr. Sares stated its fact, not speculation. Mr. McFeeley stated that people have been complaining and that does it for him.

**Motion carried with Ms. Tobin, Ms. Sell, Mr. McFeeley and Mr. Martin voting in the affirmative and Mr. Sares, Mr. Porter and Mr. Drinkhall voting in the negative.**

**Ms. Tobin made a motion, seconded by Mr. McFeeley, that those claiming a nuisance have adequately documented that visual presents a serious nuisance.** Mr. Sares stated if we vote to enclose and put up a wall that will definitely take care of the noise. Mr. Martin stated that he voted in favor of the last motion because he is trying to get to the three point motion that Mr. Irving has to protect the abutters. **Motion unanimously carried.**

**Mr. Martin made a motion, seconded by Ms. Tobin, to approve the Minor Site Plan Application for the Red Jacket Mountain View with subsequent conditions that the applicant submit a NHDES Site Specific Approval within 90 days; provide surety in the amount of \$25,000 be held until suitable remedy is in place to reduce the sound at the property line and to buffer visual impact from Duprey Road abutters; and the Board will reconvene on June 26, 2008 to determine if the sound and visual impact issues have been satisfied.**

There was a brief discussion on whether to include the insulation of the duct work in the subsequent conditions. It was a consensus of the Board to not include the insulation of the duct work in the subsequent condition because it has to be done anyway.

Mr. Irving stated between now and the 26<sup>th</sup> of June the applicant will be thinking of how to do this and they may want to do it with a wall for the sound or the visual buffer. Mr. Irving stated that may require the applicant to come back to this board sometime between now and the 26<sup>th</sup> for the Board's approval of the remedy to be constructed. Mr. Sares asked if it would be based on a Minor Site Plan Review. Mr. Irving stated that the Board may find that it is insignificant to the rest of the development, a small undertaking or a Minor Site Plan review.

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Mr. Cooper stated before the Board votes on the motion, and he appreciates how they got there, the only troubling thing is now that the Board has found that there is a serious nuisance and it is a final approval, it places the applicant in the unenviable position of saying within thirty days of this filed decision do we have to appeal a decision of serious nuisance when we don't think one occurred.

Mr. Cooper stated we don't want to go there without really knowing what we have to do to satisfy the requirement. Mr. Cooper stated the Board voted that this is a serious nuisance, abate it, but the applicant does not know how to abate it and by the way you have 30 days to appeal if you don't like it. Mr. Cooper stated that it places the applicant in a difficult spot as they don't know what they are supposed to do here.

Mr. Malia agreed that it places the applicant in a difficult spot, but the applicant has also put this Board in a difficult spot because if this discussion was taking place last September or October we would be several months away from the opening of the water park. Mr. Malia stated that the Board is trying to come up with a solution that satisfies the abutters, but also allows the applicant to open tomorrow.

Mr. Malia stated that this is not easy because we don't have any corrective measures suggested by your experts, so we cannot say with any degree of certainty what type of wall could be built. Mr. Malia stated that we don't have any corrective measures on the table as of yet because they are trying to satisfy the abutters and get the applicant opened. Mr. Malia stated that it is a tough spot for everyone. Mr. Martin stated that the applicant and Mr. Cooper should be able to take what the intent was from the motion and don't think we need to muddy it up with specifics.

**Motion unanimously carried.**

#### **OTHER BUSINESS**

**David Rich and Tina Bellerose – Lot Merger (PID 276-147 & 192): Ms. Tobin made a motion, seconded by Mr. Sares, to sign the lot merger for David Rich and Tina Bellerose combining lots PID 276-147 & 192. Motion unanimously carried.**

**Richard Carruthers – Lot Merger (PID 251-137 & 138): Mr. Sares made a motion, seconded by Ms. Tobin, to sign the lot merger for Richard Carruthers combining lots PID 251-137 & 138. Motion unanimously carried.**

Meeting adjourned at 9:50 pm.

Respectfully Submitted,

Holly L. Meserve  
Planning Assistant