

CONWAY PLANNING BOARD

MINUTES

JUNE 26, 2008

A meeting of the Conway Planning Board was held on Thursday, June 26, 2008 beginning at 7:00 pm at the Conway Town Office in Center Conway, NH. Those present were: Chair, Steven Porter; Selectmen's Representative, Robert Drinkhall; Vice Chair, Martha Tobin; Theodore Sares; Patricia Sell; Dana Hysten; Planning Director, Thomas Irving; and Planning Assistant, Holly Meserve.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Sares made a motion, seconded by Ms. Sell, to approve the Minutes of June 12, 2008 as written. Motion unanimously carried.

HAROLD WHITAKER AND THOMAS FADDEN – 33-LOT SUBDIVISION (PID 243-12) FILE #S08-05

Doug Burnell of H.E. Bergeron Engineers appeared before the Board. This is an application to subdivide 81.4 acres into 33-lots with associated road and infrastructure. Mr. Irving stated that the applicant was before the Zoning Board of Adjustment last night and the hearing was continued until July 23, 2008. **Mr. Drinkhall made a motion, seconded by Ms. Tobin, to accept the application of Harold Whitaker and Thomas Fadden for a Subdivision Review as complete.** Chris Meier of Cooper Cargill Chant representing Sharon Johnston stated that his client doesn't object to the continuance, but objects to the project. **Motion unanimously carried.**

Mr. Irving suggested continuing the public hearing until July 24, 2008 as the applicant needs the Zoning Board of Adjustment approval to move forward with the project. **Mr. Sares made a motion, seconded by Mr. Drinkhall, to continue the subdivision review for Harold Whitaker and Thomas Fadden until July 24, 2008. Motion unanimously carried.**

Harold Whitaker and Thomas Fadden (PID 243-12) – Extension of Conditional Approval (File #S07-04): Mr. Irving stated that this applicant has a conditional approval expiring today and asked if the Board would like to extend it or deny it. Mr. Burnell asked the Board to extend it while this application is before the Board. Mr. Meier stated that his client objects to both applications, but doesn't have a problem with continuance. **Mr. Drinkhall made a motion, seconded by Mr. Sares, to extend the conditional approval for Harold Whitaker and Thomas Fadden until December 18, 2008. Motion unanimously carried.**

OTHER BUSINESS

Red Jacket Mountain View Inn (PID 230-51) – Determination regarding sound and visual impact (File #MR08-01): Chris Meier of Cooper Cargill Chant representing the Red Jacket appeared before the Board. Mr. Meier stated the applicant was asked to look at reducing the sound at the property line and the visual impact to the Duprey Road abutter's. Mr. Meier stated

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as discussed at the previous meeting the aluminum pipes have been encased into a casing and painted red to match the roof and the lower portion of the unit was painted white to match the building. Mr. Meier submitted photographs of trees planted that would remain throughout the winter.

Ms. Sell stated she thought Dan Franz [of American Air Systems] stated the inside would be insulated. Mr. Meier stated the applicant did exactly what they said they would do. Mr. Sares stated at the beginning the applicant argued that there was no noise nuisance, but were still looking at it as if there was a noise nuisance as there was a vote taken determining that there was a noise nuisance. Mr. Sares stated the question is whether we have overcome the noise nuisance.

Ms. Tobin stated that she does not think the sound has been mitigated. Mr. Sares stated that he went up there drove by the unit and then went to Duprey Road and went back a couple of times. Mr. Sares stated that he would like to hear from the abutters before coming to a conclusion. Mr. Sares stated in the beginning the Attorney for the Red Jacket argued and was going back and forth stating they did not think there was a noise problem, but they'd be willing to work with the abutter's with the noise problem.

Mr. Meier stated that it was never represented that there was a noise problem, but agreed to work with the abutters. Ms. Sell stated that the Board did find at the February meeting that there was a noise nuisance and she still feels there is a noise problem. Mr. Drinkhall stated at the original meeting he did not think there was a noise problem. Mr. Drinkhall stated that he does, however, have a concern with the visual impact.

Mr. Hylen stated that he was not on the Board at the time of the application, but he has read all the minutes, he went to the Red Jacket and he heard a high pitch squealing and humming noise. Mr. Hylen stated that he went to Duprey Road and could still hear the high pitch noise. Mr. Hylen stated that the applicant was going to insulate the pipes anyway, as that work still needed to be done, and the buffer was planted, which was required. Mr. Hylen asked what other items have been done to mitigate the visual and noise nuisance as it still is a nuisance.

Mr. Sares stated that the issue remains and arborvitaes don't do anything. Ms. Sell stated at the last meeting Mr. Drinkhall stated that he was unable to determine if it was a nuisance because there was a truck there fueling. Mr. Drinkhall stated what he stated was that he was standing in the second row and a White Mountain Oil truck was louder than the unit itself and then there was a helicopter a great distance off that was louder than the unit itself.

Ms. Sell stated that there were 16- to 20-foot snow banks at the time which she thought absorbed the sound. Mr. Drinkhall stated there were snow banks, but not between where he was standing and the unit. Mr. Sares stated what Mr. Drinkhall observed were two intrusions that come and go. Mr. Drinkhall stated that the unit wasn't anything more than what else is in a commercial zone. Mr. Sares stated that it is a sustained noise that is continual 24-7, which is different from those two intrusions. Mr. Hylen stated while he was standing there last week there were a lot of motorcycles and a sprinkler and those items were louder than the unit, but found it annoying that it was still there after other noises went away.

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Mr. Porter stated as far as the unit itself it is his opinion that a home central air unit made the same sound as what he heard from the Red Jacket unit. Mr. Meier stated that the sound report submitted by the applicant confirms Mr. Porter's observation. Mr. Hylen stated that it does not make it better. Mr. Porter stated that he didn't say it would make it better, but he's also not inside the person's house next door. Mr. Porter stated if it is not obtrusive behind the Red Jacket then it shouldn't be obtrusive 20-feet further away. Mr. Porter stated it is what it is and you cannot shut the unit down. Mr. Sares stated that is not the issue; the issue is mitigating the noise so people can live with it. Mr. Sares stated shutting the unit down is not this Board's issue, but should listen to the abutters and then make a conclusion.

Mr. Hylen stated he would like to see the applicant do something else to mitigate the nuisance by either constructing a fence or some other barrier next to the unit. Mr. Hylen stated that he would like to see them do something that they were not already going to do and he would like to hear if the abutters can hear the unit from inside their homes. Ms. Sell stated that the Board did have a discussion regarding a wall, but a sound proof type wall would be more efficient. Mr. Drinkhall stated that he is sympathetic to the abutters, but also have to be realistic and he definitely thinks there is a visual problem. Mr. Drinkhall stated if you deal with the visual issue it'll probably take care of the audio as well.

Ms. Sell stated as far as she is concerned the abutters presented the burden of proof that there was a noise nuisance and this Board voted that a serious nuisance exists so we should try to reach a goal between the abutters and the applicant to mitigate the sound. Mr. Sares stated that this Board did determined last time by a vote that there was a noise nuisance, which is rare for a Planning Board to do, but it was done and we need to find out if the Red Jacket has mitigated the nuisance. Mr. Sares stated that the applicant did not do anything that they weren't going to do anyways.

Mr. Porter asked for public comment; Jim Kelly of Dewhurst Law Firm representing Catherine Reddington stated that his client still feels there is a nuisance and there is nothing that happened that was not part of the plan. Mr. Kelly stated that the applicant never established there were noises coming from the pipes that they wrapped and painted red. Mr. Kelly stated that the exhaust fan is where the noise is coming from and they have done nothing to mitigate that noise. Mr. Kelly stated that the applicant has never established the part of the unit that is making the noise.

Mr. Kelly stated that this is a commercial location that abuts a residential development and they need to live together. Mr. Kelly stated that this will affect the opportunity to sell their homes in the future. Mr. Kelly stated that you choose where you're going to live and this might affect his client's ability to sell her home. Mr. Kelly stated that this sound travels off the top of the unit and straight to her home. Mr. Kelly stated that the noise is still there and it is still annoying.

Ed Poliquin stated that the unit has been insulated with very expensive material and there is not much sound. Mr. Poliquin stated that everything above the roof line has been painted to match the roof. Mr. Poliquin stated that the Red Jacket has tried to mitigate.

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Catherine Reddington, an abutter, stated when you back up to commercial property you have to be considerate. Ms. Reddington stated she purchased the property in 1978 when it was the Birchmont and there were 100's of feet between her and them, but during the initial site plan review the applicant agreed to a site plan that met the letter of the law and they broke the law. Ms. Reddington stated that the applicant did not follow the law.

Ms. Reddington stated if the applicant had followed the site plan this unit would have been inside, but it is outside. Ms. Reddington stated her house is above the land of the parking lot and the noise travels in a straight line to her home. Ms. Reddington stated that she walked the property at 11:00 pm and it was loud; it has not changed except that it is louder now.

Ms. Reddington stated that the sound is traveling into her house and the spots the readings were taken are lower than her house. Ms. Reddington stated that the noise has not lessened at all and the trees and the venting were part of the approval. Ms. Reddington stated painting the unit was nice, but the noise is not less. Ms. Reddington asked why the abutter's should be penalized because the applicant did not follow their site plan.

Phil Bernaby, an abutter, stated an oil truck and a helicopter come and go. Mr. Bernaby stated that he purchased his home 14 years ago, but now he is in a different situation as he would not want to buy it today, which puts him in a difficult situation. Mr. Bernaby stated that he can hear the noise in his house and the high pitched piercing noise is not extremely loud, but it is consistent. Mr. Bernaby stated that there was a noise that was going off for four hours that they did not know about until he called the Red Jacket. Mr. Bernaby stated that he was told that a propane delivery had triggered the alarm and it was from the unit.

Mr. Bernaby stated that he doesn't have a problem with the visual. Mr. Bernaby stated that there is a noise from the pump house for the wave pool, which is consistent until they shut down. Mr. Bernaby stated that it runs for 10-minutes and then shuts down for 10-minutes. Mr. Bernaby played the noise that was sounding for four hours from his phone. Mr. Bernaby stated he thinks they would have been happy with a wall and it should include the wave machine. Mr. Porter asked if the noise [played on his cell phone] was a propane alarm. Mr. Bernaby stated that the Red Jacket didn't even know it was going off. Mr. Porter stated that the noise was a result of a propane delivery that triggered it.

Lynne Garafalo, an abutter, stated she has a constant hum for 24-hours in the back ground and it is extremely annoying. Ms. Garafalo stated even with an Acoustical Engineer they were standing 80-feet from their bedrooms, so we are much closer to that unit than what the report shows. Ms. Garafalo stated that a wall would be nice. Mr. Poliquin stated that the noise [played on Mr. Bernaby's cell phone] was not from the HRU, it was from the vent from the boiler, which was a propane problem. Mr. Garafalo stated no one at the Red Jacket heard it; no guests, no workers, no one.

Ed Furman, an abutter, stated Ms. Garafalo failed to mention that she is an Audiologist. Mr. Furman submitted information to the Board. Mr. Furman stated up until a couple of weeks ago he could hear a noise that wasn't tremendous, but now he can hear a drone inside his bedroom

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and it is coming from the unit. Mr. Furman stated that it can be heard steadily and it is a reasonably loud sound that has not been mitigated.

Mr. Furman read the commercial amusements section of Zoning Ordinance [one section being §147.13.8.12] and the verbiage is in every single zone for the Town of Conway. Mr. Furman read the notice of decision from the Zoning Board of Adjustment determining the tubes were a commercial amusement [File #06-62 and #06-63]. Mr. Furman stated that the unit should have been enclosed.

Mr. Furman stated that the arborvitaes have been planted and what is there is nice, but there are no arborvitaes behind Ms. Reddington's home or behind his house. Mr. Furman stated that there is also trash on all of our properties and believe it is from their guests. Mr. Furman stated that some trees are 3-feet, some are 4-feet and some are 6-feet apart. Mr. Furman stated that the reality is we appreciate the fact that they are a big employer, but we have our rights too, and a commercial amusement cannot disturb the abutter's.

Mr. Furman stated that the question was raised by Ms. Tobin regarding the mechanicals and it was told that they would be underground. Mr. Furman stated that Randy Cooper agreed to work with the abutters and mitigate the noise. Mr. Furman stated that the only person who talked to the abutters was Mr. Meier and he spoke to Ms. Reddington's tenants at 2:30 pm this afternoon. Mr. Furman stated in a few months we will be looking at the red pipes. Mr. Furman stated that the Red Jacket didn't play by the rules and they have tried to mislead this Board and the abutters shouldn't have to pay for their foolishness.

Mr. Irving stated that the heat recovery unit was not considered an amusement in itself, but rather considered accessory to the building. Mr. Irving stated that the abutters could appeal this decision to the Zoning Board of Adjustment as that was his decision, but the 30-days have since passed. Mr. Irving stated that the trees were just completed and he has not conducted his final site inspection, but they may not be 4-feet on center because you run into a light post and might find, which is not uncommon, one arborvitae is missing.

Ms. Reddington stated that the original plan did not show the unit outside the building and that was the plan that was approved, but when the building permit is denied they tried to say that it was there. Ms. Reddington stated that she doesn't understand, but the Planning Board determined there was a serious nuisance and it has not been mitigated. Mr. Furman stated that the tree plantings are spaced at various intervals through the parking lot not just for a light.

Jim Kelly stated that the applicant has not mitigated the noise and the Board has the ability to consider an approval if information was misrepresented or incorrect. Mr. Kelly stated the applicant should establish where the nuisance is coming from and determine how to mitigate that. Mr. Kelly stated that it becomes the burden of the Red Jacket to determine the solution. Mr. Kelly stated that they should find some way or be given criteria and asked that the Red Jacket fulfill the requirement to identify the noise and how to block it. Mr. Furman stated that there is still a visual issue.

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Ms. Sell stated that she does believe the Red Jacket tried to address the issue, but a problem still remains with the abutters and if it is injurious to the abutter's the applicant should try to do what is in the best interest of the abutters to mitigate the sound. Ms. Sell stated that a wall might be a solution and she believes the abutter's have spoken and the nuisance still exists.

Mr. Sares stated there is a noise issue, that's a fact. Mr. Sares stated what the Red Jacket has done has been in good faith and done in plain sight. Mr. Sares stated the best way to cut the noise decibel level is to move the island next the fire lane, then move the fire lane over to the location of the island and then build a wall to the specifications used on the turnpike; however, he would like to find out how much it would cost and weigh that cost against the public interest and make a decision based on that information.

Mr. Meier stated that he completely disagrees that the burden is on the Red Jacket. Mr. Meier stated that the Board again has to find that this is a serious nuisance to the abutter. Mr. Meier stated that this Board did not tell us what to do, but told us to minimize the impact. Mr. Meier stated that the abutter's have come back without a sound study. Mr. Meier stated that the Board cannot say that the applicant has not met the mitigation as they did what the Board told them to do and we now have the same complaints.

Mr. Meier stated that the applicant needs the Board to find that this is a serious nuisance and if you find that then you need to tell us what to do. Mr. Meier stated that their Sound Engineer tells them that this is not a problem so how do we fix something that we don't think is a problem.

Mr. Drinkhall stated that he does not believe there is a noise nuisance problem and his personal view is that there is a visual impact. Mr. Drinkhall stated if the visual impact is taken care of it would probably take care of the other issue. Mr. Sares stated to Mr. Meier that he might state that there is not a serious nuisance, but this Board determined there was a serious nuisance so build a wall.

Ms. Sell stated that this was originally a three part test; insulate the pipes, plant the trees and if that did not work, they were required to do more. Ms. Sell stated that a serious nuisance still exists and it needs to be addressed. Ms. Sell stated in the minutes a wall was recommended and that would be the next step. Mr. Meier stated that the Board has not told him that it still is a serious nuisance. Mr. Meier stated in regard to additional items done, the applicant planted taller arborvitaes and they painted the tubes to match the roof and the building.

Ms. Tobin made a motion, seconded by Mr. Drinkhall, that the serious sound nuisance has been mitigated to a point that it is no longer a serious nuisance. Motion defeated with Mr. Drinkhall and Mr. Porter voting in the affirmative and Ms. Tobin, Ms. Sell, Mr. Sares and Mr. Hylan voting in the negative.

Mr. Drinkhall made a motion, seconded by Ms. Tobin, that the serious visual impact has been mitigated to a point that it is no longer a serious nuisance. Mr. Sares stated that the two issues are tied together and the solution could resolve both. Ms. Sell asked if we vote in the negative then we can address the ability for a wall. Mr. Irving answered in the affirmative.

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Motion unanimously defeated. Mr. Irving stated that the Board has found that there still is a serious noise nuisance and a serious visual nuisance.

Mr. Sares made a motion, seconded by Mr. Drinkhall, that an evaluation be made to determine how much a barrier would cost to mitigate the sound and visual impact of the unit in question and determine if the cost would be out of line with the public interest.

Mr. Drinkhall stated that he doesn't think cost should be a factor and the wall should be aesthetically pleasing. Ms. Tobin stated that the cost does not have any bearing and if they had stuck with what they were supposed to do we wouldn't be here. Mr. Hylen stated he doesn't think money should be involved. Mr. Porter stated that he doesn't think cost should be taken into consideration.

Mr. Irving stated that the Board could require the applicant to prepare a design for a wood barrier that would mitigate the noise, prepare a cost estimate for installation of same and submit the design and estimate to the Town by August 1, 2008 to be considered at the August 14, 2008 Planning Board meeting.

Mr. Irving read §123-29 and stated that that section of the ordinance gives the abutter's their own opportunity to conduct a report if they wish. Ms. Sell stated that she agrees with Mr. Irving's suggestions, but she does not want to limit to a wood barrier as there are all sorts of sound proofing mechanisms. **Mr. Sares withdrew his motion. Mr. Drinkhall withdrew his second.**

Mr. Drinkhall made a motion, seconded by Ms. Tobin, for the applicant to prepare a design for a wood barrier, or something similar that would meet the exterior requirements, that would mitigate the noise, prepare a cost estimate for installation of same and submit the design and estimate to the Town by August 1, 2008 to be considered at the August 14, 2008 Planning Board meeting. Motion unanimously carried.

River Run Company (PID 215-56) – Conceptual Review (North Conway Gulf Station): Joe Berry and Sheila Duane of the River Run Company appeared before the Board. Mr. Berry stated that he is proposing to construct a 5,000 square foot building that would be associated with the Eastern Slope Inn and be vacation ownership.

Discussion of definition and regulation of a substance abuse facility: Mr. Drinkhall asked what the regulations currently are. Mr. Irving stated we don't have any, but asked why it wouldn't fall under medical facilities. Ms. Sell stated that she would like to add a definition and if we cannot prohibit it or if temporary zoning is not available to us, then she would like to come up with an agreed upon area in which these types of facilities should be banished to and suggested the industrial zone.

Mr. Porter stated the industrial area is two-thirds residential. Ms. Sell stated that she personally thinks the hospital is the best location. Mr. Hylen asked if it is possible for us to have some sort of wording where it must be in a hospital and if the hospital doesn't want to do it then they cannot come in here. Mr. Drinkhall asked if that would be legal.

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Mr. Irving stated what we are up against is that this is a very delicate matter and a fourth amendment issue for equal protection. Mr. Irving stated that we would need to demonstrate that it's the use you have the issue with and not the people using it. Mr. Irving stated that you would need to identify the aspects of the use that requires the government to regulate this type of facility under the Zoning Ordinance and then demonstrate how the regulations mitigate the impacts.

Mr. Irving stated that we regulate types of industrial uses for noise, density due to water and sewer and we would need to identify what your regulating and how the proposed regulations would mitigate that and not constitute a violation of rights. Ms. Sell asked if Mr. Irving could put that in writing and forward to her in an email. Mr. Irving stated that it would be in the Minutes.

Mr. Sares stated that it feels like we're doing someone else's dirty work that was already in the paper and he is not going to do their dirty work. Mr. Sares stated that we all know who wants this done and he is not going to let them tell him what to do. Ms. Sell stated that Crow Dickinson thinks he can deal with this issue. Mr. Sares stated that we shouldn't be using names.

Mr. Drinkhall asked what other Board in town should be dealing with this. Mr. Sares answered the Board of Selectmen. Mr. Drinkhall stated that they don't have the authority. Mr. Sares stated that we should let them work the issue. Mr. Drinkhall stated that they don't have the authority. Mr. Sares stated that we should kill the issue as from a Planning Board standpoint this is not what he was elected to do.

Mr. Drinkhall stated if one individual as a taxpayer wants to do that then let them. Mr. Hylen stated that we would be hard pressed to find a legitimate reason to not allow this use. Mr. Hylen stated that he cannot think of any reason why the use has to be regulated separately from other medical facilities and he doesn't want to discriminate. Ms. Sell stated that she is happy with the way the discussion went and she thinks it is now over, but she still thinks the Board of Selectmen should be addressing as, by law, they have the authority.

Discussion of increasing setbacks between commercial and residential properties: The Board agreed to discuss this issue another night.

Appointment of Alternate Member: Mr. Irving read a letter from John Edgerton expressing interest in being a member of the Planning Board. **Ms. Sell made a motion, seconded by Ms. Tobin, to appoint John Edgerton as alternate member of the Planning Board.** Mr. Drinkhall asked if the Board is going to completely disregard the policy for appointing members. Mr. Porter answered in the affirmative and stated that he would like to see an alternate on the Board. **Motion unanimously carried.**

Planning Board Policy for Appointing Members: Mr. Drinkhall stated if the Board is not going to follow its policy for appointing members, then the policy should be abolished. **Mr. Sares made a motion, seconded by Mr. Drinkhall, to abolish the Planning Board policy for appointing Planning Board members. Motion unanimously carried.**

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Committee Reports: There were no reports

Master Plan: There was no discussion.

Meeting adjourned at 9:30 pm.

Respectfully Submitted,

Holly L. Meserve
Planning Assistant