

**Town of Chatham
Minutes April 23, 2015**

**Zoning Board of Appeals Meeting
Draft Copy**

Members Present:

David Everett, Chairman
Mitchell Khosrova, Deputy Chairman
Robert Leary
Jeffrey Lick
JP Henkel
Kary Jablonka
Adrian Ooms

Public Present: Nicholas Vamvas, PE Crawford & Assoc., David Kahn, MaryBeth Slevin, Judy Grunberg, Evan Stoller, Terry Lasky, Tricia Lasky, Kimberly Costigan, Mark Jackson

Tal Rappleyea, Town Attorney
Marilyn Cohen, Planning Board Chairman

Brenda Mareello, Stenographer for Crawford & Assoc.

Chairman Everett led the Pledge of Allegiance at 7:00 PM. He then called the meeting to order at 7:02 PM. First order of business was to approve the minutes from the March 30, 2015 meeting. Bob Leary made a motion to approve them with a second from Kary Jablonka. All board members were in favor and the motion to approve the March 30, 2015 meeting minutes was moved.

Item #1 Questaterra/PS21 Application for Amended Use

Chairman Everett asked that all members of the audience sign in on the attendance sheet. The Chairman explained that the ZBA had closed the public hearing for PS 21 at the last meeting. He asked if the consultants on the project had anything to say. Mary Beth Slevin, PS 21 Counsel, wanted to review what the commissioning process for the noise testing is, how it works, how they will implement it and how the town will be involved in it and compliance of it. Chairman Everett asked if she had spoken Paul McCreary of Crawford & Associates and her reply was yes. He then asked them if they had all come to an agreement. Mr. McCreary responded that the sound expert, David Kahn, had put together a draft and that he, Mr. McCreary had quickly reviewed it but would like to hear more about it.

Mr. Kahn distributed copies of the Schedule "B" Noise/Sound Testing Protocol. He explained the idea of testing the sound system with a test referred to as "pink noise". This is used because it is always at the same level and has the same amount of energy at every single frequency band. It will have the same constant level no matter what the type of music or drums are being played (Please refer to pages 8 thru 11 of the M-F Reporting Transcript 042315 ChathamZBA.txt for a detailed explanation.)

Mr. Vamvas presented a diagram/map that had been submitted in February showing several locations where they will check sound level at the worst case scenarios. Mr. Kahn explained they will check from the compass lines. He believes that the worst case is probably to the east and to the north. The sound system will be off and they will measure the ambient levels, which are dynamic and go up and down so these will be measured at a fairly long period of time. Once this is done, the sound system will be turned on knowing that it's measuring 85 decibels, 10 feet from the pavilion and they will measure the levels again. Their expectation is that those levels will not go up, but if there is an increase in the level that is greater than 6 decibels, which is exceeding the DEC guideline, they will turn the sound system down below 85. Mr. Kahn went on to say they will turn it down as much as they need to so that they know the worst case anywhere along the property line, when that system is up as loud as the limiter will let it go,

they are never going to be more than 6 dB above the ambient anywhere along the property line. Chairman Everett then asked what time of day the tests would be conducted assuming that the ambient noise level will change throughout the day. Mr. Kahn replied that judgement would be used in determining in finding the times to test.

Mr. Khosrova asked for clarification again of the 85 dBA and the 6dBA level, referring that he missed last month's meeting. Mr. Khan explained that if for some reason, they have it wrong in their expectation that the sound won't exceed the ambient level, they are trying to have a process in place that will guarantee this won't happen. Mr. Khosrova then asked if it makes sense to test at 11:29 PM when the music could be played till 11:30 PM. Mr. Khan replied that they would need to be careful in this due to tree frog, crickets and things like that that can get really loud at night. The testing should be done at the quieter times of night. Mr. Khosrova then asked Mr. McCreary if it is unreasonable for him to think the testing should be done between 11:00 PM and 11:30 PM, while we are trying to guarantee the public that the noise will not be above ambient. Mr. McCreary responded that he didn't believe it unreasonable for the ZBA to ask this, however, there are times during the day that it might be quieter than at 11:30 at night. Chairman Everett inquired as to why there would be testing at just one time and asked if the testing should be done at multiple times during the day to try to determine what the quiet ambient noise level is throughout one day or multiple days. Mr. McCreary agreed with this. Mr. Khosrova was still troubled by the times in the evening, understanding that that the application has gone to enormous length to try to assure the sound limits. He understands why, though, the public has doubts based on the history in this location. He went on to say that if he is going to approve this, he wants to make sure there are no doubts. He would like to agree that the times of testing expand especially during the times requested of 9 AM to 11:30 PM on Fridays and Saturdays. (Please refer to pages 15 through 33 of the M-F Reporting Transcript 042315 ChathamZBA.txt for entire dialogue.)

Chairman Everett confirmed with Ms. Slevin that the key point is that their commitment will be to turn the sound down if this doesn't work and that the applicant can live with the final numbers once established. Mr. McCreary added some additional information. He stated that one of the things the applicant will do even before the environmental testing, is that they will set up their sound system inside the building that is constructed and basically finished. They will set up their sound system, do testing, tweak that, get that all set up the way they think they want it so that it sounds just the way they would like it then they will move outside to do the testing. He wanted to be sure everyone is clear about this, so that if they see folks doing things at the building, they might be setting up the sound system, and then they will move to dealing with environmental noise beyond the building. Chairman Everett said that he thinks one of the conditions that have to be included in this is that the certificate of occupancy really can't be issued, in his mind, until this issue is settled. Mr. McCreary agreed with this. Ms. Slevin understood this and until the commissioning is completed and they talk about it, it includes making sure the limiter is operating within the parameters that it's supposed to, that there won't be performances. She stated that the tent performances are going to continue until the permanent facility is able to be used, but there is some overlap there. Mr. Khosrova asked if Mr. McCreary would be present when the testing was done. His reply was that there would be representation there. Mr. Khosrova asked if Ms. Slevin would be notifying the neighbors. She responded the plan is to work through the town and to work through the town engineer to get the commissioning completed. Mr. Khosrova asked if it would be valuable for us to somehow let people know when this is happening so they can be in their homes to listen for the noise. Ms. Slevin replied that the goal is to ensure that the levels that they have said they are going to accomplish can be accomplished. If they tell folks to listen for it, they will hear what they listen to.

Chairman Everett asked if they will be testing the sound from neighbor's properties making reference to the testing done from the Behrens house back in 2003 and if they were planning on getting permission

from the property owners to do so. Mr. Vamvas responded that they are not necessarily going to be testing on anyone else's property and that they would expect that all the testing would be done right at their property line. He believes that to the west based on the shape of the building there's not going to be enough leakage of sound to warrant testing on the west end. Mr. Everett believed the testing should still be done. He and Mr. Vamvas reviewed the property line access on the map.

Chairman Everett then asked Mr. McCreary if we would set this up so it will be "self-executing" so that there is no need to come back to the board during this process. This would mean that there is a protocol set up that is going to be a road map for the consultants to follow to get to whatever the limit is so there would be no need to go back to the ZBA when they are done for further discussion. Mr. McCreary replied that they could set it up this way as a condition of the certificate of occupancy. A letter can go to the building inspector saying the sound testing was good, and the board will get a copy for the record. Mr. McCreary went on to state that he looks at this as a mitigative action for sound for this application. Chairman Everett then asked that there be some type of certification for the board as to the agreed limiter level based upon the protocol and that this number ultimately gets incorporated into the final approval. He wants to know what the number is on the limiter so that the code enforcement officer (CEO) is going to be the one responsible for enforcing that number. He would like to believe that a self-executing document would be an easier way to proceed.

With regard to the limiter, Mr. McCreary stated that he knows they exist, but he believes them to be a solid state device, so he doesn't think that there is going to be a visible thing that one can see, "You can turn the sound system up to 10, but the limiter says no, no, seven it is." Ms. Slevin then spoke. She stated that what is contemplated as well, and it is part of the protocol, is that there will be a confirmation of the calibration annually. They are suggesting that should be done at the beginning of each season so that was agreed upon and that was tuned in for the first season, each year that will be confirmed that the same limit is in place. Chairman Everett asked if the calibration process was set forth in the Schedule "B" handout and Mr. Kahn replied yes. Attorney Rappleyea then spoke that the self-executing style that has been talked about is kind of what they have been aiming for. He and Ms. Slevin have been working on conditions and language to address the testing and that it would continue until they reach that ambient level at the property lines. Attorney Rappleyea did state that he hadn't put that the CEO contingency in there but said it can be easily changed. Chairman Everett then asked the town attorney if he and Ms. Slevin were going to revise the document together and then send the ZBA a red line of it so they can see what the changes are given the fact that the document had only been received that evening. Attorney Rappleyea apologized for the delay in not sending the document ahead of time. Mr. Khosrova stated that it wouldn't have mattered since they had to make changes anyway. Mr. Everett confirmed again with Mr. McCreary and the town attorney that the board would receive the red line document of the commissioning protocol.

Mr. Leary asked for further clarification on the limiter and how it will work regardless of the type of performance going on. Mr. Kahn confirmed that it will keep to the level once the level is established. Chairman Everett asked if there are performances they anticipate occurring that would be non-amplified that would be higher than 85 outside of the building. Mr. Kahn replied no. Mr. Khosrova asked if a movie playing would be amplified and the reply was yes. Questions ensued about non-amplified performances such as many drums, etc. (Please refer to pages 47 through 53 of the M-F Reporting Transcript 042315 ChathamZBA.txt for entire dialogue.)

Mr. Kahn ended up explaining that there are so many variables and this was how they came up with the protocol that they did because they can control that. They are trying to create something that is enforceable, that's measurable and repeatable. Ms. Slevin stated that this also covers a vast majority of

the events that would happen at PS21. Whether it's movies or some other amplified event, those are the things that are really the norm. Those are going to be the average type of performance that you're going to have control over. She went on to say that noise is not a constant, and there may be unamplified events. There's a chance that noise could be higher, but it's not likely. She hopes that the board recognizes that PS 21 has met the standards and that it's certainly better than the tent that exists now. Ms. Slevin stated that everything that they do at this point is an improvement from what the existing conditions are.

Chairman Everett asked for questions or comments. Mr. Leary asked for the protocol if the neighbors call in a complaint, referring to the past when they have called the Town Hall and no one has gotten back to them. Chairman Everett deferred to the town attorney. He replied that the board should ask the CEO, Mr. Simonsmeier for input because he will be the point person on these things. Mr. Khosrova then asked what can be done if a performance is later than 11 PM or before 9 AM and the reply was they should call the CEO. Mr. Khosrova wanted to know what happens with the permit, if there is accountability. Mr. Rappleyea replied yes, there is and the language in those conditions goes back 10 or 15 years. It says if there is determined to be a violation, potentially that is one of the punishments of violation, and that is the special use permit can be revoked. Mr. Khosrova asked how this gets initiated and Chairman Everett inquired if this is the normal enforcement process of the town. Mr. Rappleyea replied that is correct. Mr. Khosrova continued. "If we put in conditions like the doors have to be closed, what happens if there is a violation of one of the conditions, it has to be adjudicated?" Atty. Rappleyea's reply was they would have to go to court. The complainant calls the CEO or whoever is set up to be the traffic cop, they make the observation and then they would go to the town board and say what they have witnessed and ask if we commence this enforcement. Mr. Henkel inquired if the CEO is on duty 24/7 and the answer was no he is part time.

Ms. Slevin stated that PS 21 has been operating for years now and it hasn't been a problem. Chairman Everett disagreed with that statement and said it has been a problem. Based on the past and neighbors who have called the police, it basically gets turned over to the town and because the town doesn't have a noise ordinance there is nothing official for the record. Chairman Everett asked if there is any way that this can be made part of anything state police or county sheriff would be able to enforce. Mr. Rappleyea replied probably not. Mr. Everett replied that there is not a law. Atty. Rappleyea agreed stating it's not even a regulation or DEC allegation regulation of that nature. They will have to speak with the Town Board to make sure that they have the appropriate coverage for these kinds of conditions. Mr. Khosrova asked if they could contract with a policing agency, like the Village of Chatham Police who are the closest to the property. He is concerned about accountability. There needs to be an adjudication process. Atty. Rappleyea will talk to the town board. Ms. Slevin then asked what the current process is and the board replied there is none. She says in reviewing the last transcripts a minor violation could put their project at risk and with all the time and investment they have put into the project they can't be in a position to risk such an investment if there is an occasion where they run ten minutes late. Chairman Everett agreed with this but stated that the saving grace in this is the limiter and if the sound goes over the limit it can be turned down. Mr. Khosrova disagreed saying that 11:30 PM is the issue. The can be in complete control over the time. He wants a commitment from PS21 that they will stay within the allotted hours. Chairman Everett stated that these hours would be part of the conditions for approval.

Mr. Khosrova then asked Ms. Slevin what she considered not to be substantial that would be feared to have the permit revoked. She replied she couldn't come up with one but did say they are concerned that one violation could put their permit at risk. Atty. Rappleyea then spoke to what is currently on the books in the Town. "If we get a violation, or at least a complaint and Walt (Simonsmeier) goes and finds a violation, he sends a letter that says, hey, you've got a violation, you've got to remedy this within 10 days.

If that's not done, at 30 days he then refers it to me. And then I send the same letter saying, you've got 10 days to clean it up. And if you don't, then we're going to bring it to the town board and we're going to bring you into court. So you basically get two warnings before it gets to the town board, and then they say okay." Mr. Khosrova asked for clarification and Atty. Rappleyea replied that the CEO will issue a warning the first time there is a violation, the second time it gets referred to the town attorney who will send a letter and then it will go to the town board. Mr. Khosrova confirmed with him that this is a "leeway" and there is nothing that can really be done about it with Atty. Rappleyea stating that they are not "really an enforcement board."

Chairman Everett asked that when they figure what the dB level is for the limiter would it be possible for the town board to develop this level on this property as a law, which then would be subject to the enforcement by the sheriff or state police. Atty. Rappleyea replied they could. Ms. Slevin wondered why this was necessary. Chairman Everett replied that the police response is instantaneous enforcement and they are witnessing it, whereas the CEO won't typically respond for three or four days. Mr. Khosrova addressed Ms. Slevin that there have been complaints from the public but that there hasn't been to confirm that these complaints were valid, so we are trying to find a way to confirm it.

Chairman Everett asked the town attorney if the town has a reasonable noise standard. Atty. Rappleyea replied that there is but it is quite vague. The town is currently working on a new zoning law that will include a noise law but it's a lengthy process. He said that if the ZBA feels there should be a law that is specific to a parcel or parcels or a particular project then they should send that to the town board to get it to that committee to get it into law. He also stated that it will take a while, it's not instantaneous. Mr. Khosrova asked the town attorney if there was a dBA level in a residential area and someone who comes for a special permit would have to get a variance or if the ZBA was even allowed to issue one. Atty. Rappleyea replied that it could probably be a use variance, it wouldn't be an area variance.

Ms. Slevin spoke that with respect to enforcement, they would suggest to the board that the system that is in place for warnings are appropriate...beyond that it is treating the project in a way that is really significantly different than any other project and they would strongly object to implementing that kind of process. Chairman Everett responded that the town doesn't have any other projects like this which is why they are kind of treating this differently based on the history of it. Mr. Khosrova stated that hoped the town could check into PS 21 paying the Village whatever it would cost to hire their police as enforcement. Chairman Everett asked if there had to be a law for this to happen and Mr. Khosrova responded not if the town hires them. Ms. Slevin responded that they have come a long way to accommodate the board's requests especially by reducing the dBA to 85. They believe that we will be able to comply with the standards they have agreed to as the board has asked and would hope that the board would have the same level of trust in the project. She went on to say that if there are instances of violation, then it should be treated the same way as other applicants within the town. Mr. Khosrova said if the shows go later than 11:30 PM there's not going to be any instances in the town or anywhere else because no one else has been allowed to go that late in a residential area. Mr. Henkel stated that it's to PS21's advantage to have this process in place referring that they have been before the ZBA many times and it's been a "he said she said" scenario. To have a documented process in place is to everybody's advantage. Mr. Leary believes they should adjust the time level if there are legitimate complaints. Mr. Jablonka stated there has to be clearly fined mechanisms to investigate the complaints in a timely fashion. Attorney Rappleyea responded that if we get to a point and we are in front of that judge and the permit gets revoked, the applicant goes back to the ZBA and modifies the application. (Please refer to pages 70 through 80 of the M-F Reporting Transcript 042315 ChathamZBA.txt for entire dialogue.)

Mr. Khosrova stated that the only way to prove that it is not below ambient at a certain point would be to have the tester out there during a performance. He asked if the town had a noise monitor to test performances and Mr. McCreary replied yes. Ms. Slevin stated that the conditions they had proposed earlier included the opportunity for the town to go on the property and monitor as the town sees fit. Atty. Rappleyea stated that the CEO is trained to use the monitor. It's a 10 year old monitor and it is assumed to be calibrated. Chairman Everett asked if should still be effective based on its age in carrying out its intended purpose and Mr. McCreary responded yes because of the type that it is.

Mrs. Lasky asked for a point of clarification with Chairman Everett responding yes, but the public hearing was closed and the board is still trying to deliberate. She stated that at the last meeting she was asked what hours she would be happy with and she declined to answer. She asked at what point was a vote taken to approve the hours PS 21 is requesting and the chairman responded that nothing has been approved yet.

Chairman Everett then stated that they have talked about a lot of different issues and asked the town attorney about what they should do with regard to the enforcement issue. (Please refer to pages 82 through 85 of the M-F Reporting Transcript 042315 ChathamZBA.txt for entire dialogue.) Atty. Rappleyea said it would be a good idea for one or two ZBA members attend the next town board meeting on May 21st regarding the enforcement issue.

Chairman Everett then asked if the board wanted to review the potential conditions. Mr. Leary said he has no problem with the hours that are there now as long as the building is enclosed, but in the summer months he would like to see the hours until 10 or 10:30. Ms. Slevin responded that they are requesting those those hours in order to be able to provide the program they want and have had historically. She explained that one of the reasons we agreed to reduce the limiter was to address the concern of the later hours and we agreed to this for the board. Mr. Leary stated if it is proved that there are complaints than those hours those should be adjusted. Ms. Slevin responded by saying a complaint doesn't mean it's legitimate one. Noise is such that it will be consistent with the ambient levels. Mr. Khosrova addressed Mr. Leary saying he is satisfied with what the commissioning will be based on Mr. McCreary's expertise that there will be less than ambient noise. He believes if this is right then there won't be anything above ambient. They will have to lower it to make sure it meets ambient. Mr. Khosrova went on to say that as much as he dislikes the 11:30 PM time, Judy Grunberg (the applicant) has stated publically that she doesn't intend for the performances to go that late, that they are more worried if something runs over so they want to be careful. He went on to say they shouldn't hear it and if the science is wrong, one person complaining won't make a difference. It means the whole thing is wrong. Mr. Khosrova says he is confident to let the noise expert and engineer go through with that.

Atty. Rappleyea then asked about ambient and audibility...if it comes in at ambient levels doesn't mean it will be audible. (Please refer to pages 92 through 94 of the M-F Reporting Transcript 042315 ChathamZBA.txt for entire dialogue.)

The chairman then asked Atty. Rappleyea if he had any conditions to discuss. The attorney distributed a rough draft with changes he made of "Schedule A, Conditions of Approval" that was originally drafted in 2005. He said there is a lot of redlining in it of what is proposed now. Mr. Khosrova asked if the stage door would be closed during performances and if that was a condition in the document. He stated that should be added and the town attorney agreed. Mr. Khosrova went on to say that it is important that there is a limit of people sitting and no people outside the walls during performances. Chairman Everett then asked to review condition #20. Ms. Slevin spoke up at that moment and stated that they can't make

people stay in their seats. (Please refer to pages 96 through 98 of the M-F Reporting Transcript 042315 ChathamZBA.txt for entire dialogue.)

Chairman Everett decided that it would be beneficial to go through each item on the conditions draft to discuss potential changes as necessary. (Please refer to pages 99 through 139 of the M-F Reporting Transcript 042315 ChathamZBA.txt for entire dialogue.)

Chairman Everett summed up the proposed document by stating that it sounds like they have tried to memorialize from all prior approvals the conditions in there. He asked if they can add sort of a final condition that basically says, this approval super cedes any and all prior approvals and just have one document that they can work off of. Atty. Rappleyea replied yes. The chairman asked if the town engineer or attorney had anything else to add. The response was no. Mr. Henkel inquired as to when the new version of the document would be ready and the response was ten days. Chairman Everett then stated they are waiting on county approval, so they should have that before the next meeting and this is the only thing preventing them from moving forward at this point.

Chairman Everett then allowed Mr. Lasky and other neighbors to speak. (Please refer to pages 140 through 177 of the M-F Reporting Transcript 042315 ChathamZBA.txt for entire dialogue.) At the end of comments, Mr. Khosrova stressed to the town attorney that some kind of enforcement is important. He would try to make the next town meeting. Atty. Rappleyea replied he would do his best.

At this point, Chairman Everett offered his viewpoint on the SEQRA. He feels that the applicant has addressed all the environmental issues. He doesn't think there are any potentially significant environmental issues that haven't been addressed and mitigated. He is in favor of issuing a negative declaration on this. He stated he didn't know how the other board members felt, but if they want to go in that direction, then he would say that they need to give some direction to either Mr. McCreary or Atty. Rappleyea to actually prepare a draft of that document so they can review it at the next meeting. All members were in agreement with this. Chairman Everett asked the town attorney to work it out with the town engineer.

Chairman Everett asked for a motion to adjourn the meeting. Mr. Leary made the motion with a second from Mr. Jablonka. All were in favor and the meeting was adjourned at 9:13 PM.

May 15, 2015

David Everett, ZBA Chairman

Shari Franks, ZBA Clerk