

ZONING BOARD OF ADJUSTMENT

MINUTES

MAY 28, 2008

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, May 28, 2008 at the Conway Town Office in Center Conway, NH, beginning at 7:30 pm. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Andrew Chalmers; Jeana Hale-DeWitt; Alternate, Cynthia Briggs; Alternate, Sheila Duane; Planning Director, Thomas Irving; and Planning Assistant, Holly Meserve.

APPOINTMENT OF ALTERNATE MEMBERS

Ms. Sherman appointed Ms. Duane as voting member.

PUBLIC HEARINGS

A public hearing was opened at 7:30 pm to consider a **VARIANCE** requested by **THOMAS KUGEL** in regard to §147.13.6.5 of the Conway Zoning Ordinance **to allow front windows to extend into the front setback** at 147 Main Street, Conway (PID 276-292). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, May 21, 2008.

Thomas Kugel appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Kugel stated that he received a building permit to do maintenance to the property and part of the permit was to replace the front windows. Mr. Kugel stated that the windows ended up projecting out approximately 23” more than the original windows, which only projected out approximately 9 inches. Mr. Kugel stated that he received a stop work order and was advised to obtain permission from the Zoning Board of Adjustment before completing the work.

Mr. Chalmers asked if the windows are under the existing overhang. Mr. Kugel answered in the affirmative. Mr. Chalmers asked if the Town measures from the drip line. Mr. Irving stated that several years ago the ZBA granted a variance for this site based on the fact that it was not to be enclosed space, but now there is enclosed space further into the setback. Ms. Sherman asked the reason the window space was increased. Mr. Kugel stated that the interior was cramped and this gives more room to move around the tables without having to ask patrons to move. Mr. Kugel stated that they are not increasing the number of seats.

Mr. Chalmers asked if this bump out was on the original building permit application. Mr. Kugel answered in the negative and stated that he thought since it was a bay window and under the overhang he would be all set, but he should have checked into it more. Ms. Sherman asked for Board comment; there was none. Ms. Sherman asked for public comment; there was none.

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Mr. Kugel stated that this helps to be competitive to have a dining room that is comfortable. Mr. Kugel requested that the Board allow this to happen for the sake of his business and for all the villages. Mr. Kugel stated that older buildings need special exceptions so they can flourish and stay useful. Ms. Briggs stated what bothers her is that the permit was obtained and then the specifics changed. Mr. Kugel stated when he received the stop work order, he stopped.

Ms. Sherman stated that a variance for the overhang was requested and permitted for over the front door. Mr. Kugel agreed. Ms. Sherman asked if the building permit was issued for what was constructed. Mr. Kugel answered in the negative. Ms. Duane stated that the windows do not go beyond the drip line and he stopped the work when told to stop. Ms. Duane stated that she does not see an issue with the addition of 15-inches.

Mr. Chalmers stated that he thought we measured the setback from the drip line. Mr. Chalmers stated that he is not further encroaching into the setback. Ms. Sherman stated that it was supposed to be a drip line and not enclosed. Ms. Sherman stated what bothers her is the permit was to replace the windows and then it was changed. Mr. Kugel stated that this Board works with the regulations so it is obvious to the Board, but it is not obvious to all of us.

Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Ms. Duane, that an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Colbath and Ms Sherman voting in the negative.** Ms. Sherman stated that the applicant should have investigated further before constructing.

Ms. Sherman read item 1.b. **Mr. Colbath made a motion, seconded by Ms. Duane, that the benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Colbath and Ms. Sherman voting in the negative.**

Mr. Colbath made a motion, seconded by Ms. Duane, that based on the findings of a and b above, denial of the variance would result in unnecessary hardship to the property owner seeking it. Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Colbath and Ms. Sherman voting in the negative.**

Ms. Sherman read item 2. **Ms. Hale made a motion, seconded by Ms. Duane, that there would not be a diminution in value of surrounding properties as a result of granting this variance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Duane, that the use contemplated by the petitioner as a result of obtaining this variance would not be contrary to the spirit and intent of the ordinance.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Colbath and Ms. Sherman voting in the negative.** Mr. Colbath stated that the ordinance is trying to protect the setback and this infringes on the setback.

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Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Duane, that the granting of this variance will not be contrary the public interest.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Ms. Duane, that by granting this variance, substantial justice would be done.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Colbath and Ms. Sherman voting in the negative.**

Mr. Colbath made a motion, seconded by Ms. Duane, that, based on the forgoing findings of fact, the variance from §147.13.6.5 of the Town of Conway Zoning Ordinance to allow front windows to extend 23-inches into the front setback be granted. Motion unanimously carried.

A public hearing was opened at 7:52 pm to consider a **VARIANCE** requested by **THOMAS KUGEL** in regard to §147.13.6.7.10.1 of the Conway Zoning Ordinance **to allow flags to be located on the front of the building within the front setback** at 147 Main Street, Conway (PID 276-292). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, May 21, 2008.

Thomas Kugel appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Kugel submitted a photo of the front of the building showing two flags. Mr. Kugel stated for the past 23 years there have been two flags on the front of the building and a few months ago he received a letter from the town that flags are not allowed within 10-feet of the boundary line. Mr. Kugel stated that he added a third flag, a Valley Original Flag, as part of the sign structure, but that was not allowed. Mr. Kugel stated that he wanted to make it legal to be allowed to have three flags on the front of the building.

Mr. Colbath asked if the flags are taken in at night. Mr. Kugel answered in the affirmative. Mr. Colbath stated since the building is already within the setback there are no other locations. Mr. Irving stated that building front is not, but the overhang is within in the setback. Mr. Irving stated that the setback for flags is 10-feet, but the building setback in the village is 5-feet. Mr. Irving stated that there is a setback conflict within the villages. Mr. Colbath stated to have any type of flag he needs a variance. Mr. Irving agreed.

Ms. Sherman asked for public comment; there was none. Mr. Chalmers stated as long as it is at a 45-degree angle and not in the sidewalk. Mr. Chalmers asked if they would be in the same location as in the picture. Mr. Kugel answered in the affirmative and stated that they would be shortened a bit. The Board agreed that as long as none of the flags projected any further than what is shown in the picture submitted, they were okay with the location.

Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Ms. Duane, that an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Ms. Sherman read item 1.b. **Mr. Colbath made a motion, seconded by Ms. Duane, that the benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Ms. Duane, that based on the findings of a and b above, denial of the variance would result in unnecessary hardship to the property owner seeking it. Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Ms. Duane, that there would not be a diminution in value of surrounding properties as a result of granting this variance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Duane, that the use contemplated by the petitioner as a result of obtaining this variance would not be contrary to the spirit and intent of the ordinance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Duane, that the granting of this variance will not be contrary the public interest.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Ms. Duane, that by granting this variance, substantial justice would be done.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Ms. Duane, that, based on the forgoing findings of fact, the variance from §147.13.6.7.10.1 of the Town of Conway Zoning Ordinance to allow flags on the front of the building within the front setback be granted. Motion unanimously carried.

A public hearing was opened at 8:05 pm on Wednesday, May 28, 2008 to consider a **SPECIAL EXCEPTION** requested by **ROUTE 112 REALTY, LLC** in regard to §147.14.1.2 of the Conway Zoning Ordinance **to convert 1,573 square feet of industrial use to retail use** at 175 Kancamagus Highway, Conway (PID 264-35). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, May 21, 2008.

Mr. Chalmers stepped down at this time. Ms. Sherman appointed Ms. Briggs as a voting member for this application. Kim Frechette of Bergeron Technical Services appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Ms. Frechette stated that Habitat for Humanity is looking to resell materials and furniture.

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Ms. Hale-DeWitt asked if they would be open at night. Ms. Frechette stated that they would be open Friday and Saturday. Ms. Frechette stated that the machine shop is open Monday through Friday and they close at noon on Friday's. Ms. Briggs stated if they wanted to be retail seven days a week would they have to come back to this Board. Mr. Irving stated he would not recommend the Board granting an approval based on the hours.

Ms. Sherman stated that the Planning Board would have to address this. Mr. Irving agreed and stated that they needed approval from the ZBA first. Ms. Sherman asked who the abutters are. Ms. Frechette answered they are residential properties. Ms. Frechette stated that an industrial use could be used 24-hours a day where retail most likely would not be used 24-hours.

There was discussion regarding a storage trailer and it was indicated that that the trailer was not noticed as part of this application. Ms. Sherman asked for public comment; there was none. Ms. Sherman asked for Board comment; there was none.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Ms. Briggs, that the proposed use is confined to the same lot to which the original nonconforming use would be confined.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Ms. Hale made a motion, seconded by Ms. Duane, that the proposed has the same or lesser impact on the neighborhood relative to public health, safety and/or welfare.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Duane, that the proposed use has the same or lesser impact on the neighborhood relative to impact on property values of adjacent properties.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Duane, that the proposed use has the same or lesser impact on the neighborhood relative to traffic.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Ms. Briggs, that the proposed use has the same or lesser impact on the neighborhood relative to nuisance to neighbors.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 6. **Mr. Colbath made a motion, seconded by Ms. Briggs, that the proposed use has the same or lesser impact on the neighborhood relative to nuisance to noise.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 7. **Mr. Colbath made a motion, seconded by Ms. Duane, that the proposed use has the same or lesser impact on the neighborhood relative to nuisance nighttime lighting.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Mr. Colbath made a motion, seconded by Ms. Duane, that, based on the forgoing findings of fact, the Special Exception pursuant to §147.14.1.2 of the Town of Conway Zoning Ordinance to convert 1,573 square feet of industrial use to retail use be granted. Motion unanimously carried.

A public hearing was opened at 8:25 pm on Wednesday, May 28, 2008 to consider an **EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENT** requested by **JOHN AND KATHLEEN CUDDY** in regard to §147.13.1.4 of the Conway Zoning Ordinance **to allow an existing structure to remain within the side setback** at 361 Kearsarge Road, North Conway (PID 214-96). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, May 21, 2008.

Mr. Chalmers rejoined the Board at this time. Ms. Briggs remained a voting member and Ms. Duane was no longer a voting member. Jac Cuddy appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Cuddy stated that he purchased the house in 1984 along with the garage and the driveway. Mr. Cuddy stated that stated that the garage was removed from the lot with a subdivision and the deed stated that the back property line was 212-feet in length.

Mr. Cuddy stated when he submitted a building permit for the addition in 2003 he went by the 212-feet. Mr. Cuddy stated that the back property line is actually only 176-feet in length so the front part of the addition is a foot or two in the buffer and the back of the building is 10-feet within the buffer. Mr. Cuddy stated that there are 30-feet of pavement between his property and the garage on the abutting property.

Ms. Sherman asked for public comment; Bob Tafuto of Ammonoosuc Survey Company stated that his boss, Jonathan Howe, owned land a few lots down and when they surveyed his property approximately 13 years ago they noticed there was a discrepancy, but the building was already built. Mr. Tafuto stated that Jean Fernandez, who owns the abutting property, was in his office on another matter just recently and he stated that he doesn't care about the addition.

Bill O'Meara stated that he lives across the street and sees the addition every day and it is an attractive addition and enhances the neighborhood. Ms. Sherman asked for Board comment; there was none.

Ms. Sherman read item. 1. **Ms. Hale made a motion, seconded by Mr. Colbath, that the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item. 2. **Ms. Hale made a motion, seconded by Mr. Colbath, that the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or**

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representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority. Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item. 3. The Board determined that item 3 was not applicable to this application.

Ms. Sherman read item. 4. **Ms. Hale made a motion, seconded by Mr. Colbath, that the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item. 5. **Ms. Hale made a motion, seconded by Mr. Colbath, that due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Hale made a motion, seconded by Mr. Colbath, that, based on the forgoing findings of fact, the equitable waiver from §147.13.1.4 of the Town of Conway Zoning Ordinance to allow an existing structure to remain within the side setback be granted. Motion unanimously carried.

A public hearing was opened at 8:40 pm on Wednesday, May 28, 2008 to consider a **VARIANCE** requested by **SETTLER'S R1, INC** in regard to §147.13.8.5.1 of the Conway Zoning Ordinance **to extend the existing wireless communication facility by eight feet for a total height of 64-feet** at 2 Common Court, North Conway (PID 235-99). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, May 21, 2008.

Mr. Chalmers stepped down at this time. Ms. Sherman appointed Ms. Duane as a voting member. Shawn Bergeron of Bergeron Technical Services appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance.

Mr. Bergeron stated the existing structure is just not as tall as it needs to be. Mr. Bergeron stated that it is operating at about 65% due to tree growth. Mr. Colbath asked if this has cell phone transmission as well. Ron Frizzell stated the only item on the additional height would be for the radio microwave transmission. Ms. Duane asked if the tower in Conway could be used for this. Mr. Frizzell answered in the negative. Mr. Colbath asked if the alternative is to move the location. Mr. Bergeron answered in the affirmative.

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Ms. Briggs asked if granted now would this be high enough in five to ten years. Mr. Frizzell stated that he cannot answer that as he is not sure. Ms. Sherman asked for Board comment; there was none. Ms. Sherman asked for public comment; there was none. Ms. Briggs asked if the hotel had any issues. Mr. Frizzell stated that he spoke with them last December and they did not have an issue. Mr. Frizzell stated that they also received a certified notice of the meeting.

Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Ms. Duane, that an area variance is needed to enable the applicant’s proposed use of the property given the special conditions of the property.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 1.b. **Mr. Colbath made a motion, seconded by Ms. Duane, that the benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Ms. Hale, that based on the findings of a and b above, denial of the variance would result in unnecessary hardship to the property owner seeking it. Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Ms. Briggs, that there would not be a diminution in value of surrounding properties as a result of granting this variance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Duane, that the use contemplated by the petitioner as a result of obtaining this variance would not be contrary to the spirit and intent of the ordinance.** Ms. Sherman asked for Board comment; there was one. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Briggs, that the granting of this variance will not be contrary the public interest.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Ms. Briggs, that by granting this variance, substantial justice would be done.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Ms. Duane, that, based on the forgoing findings of fact, the variance from §147.13.8.5.1 of the Town of Conway Zoning Ordinance to extend the existing wireless communication facility by eight feet for a total of 64-feet be granted. **Motion unanimously carried.**

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A public hearing was opened at 8:54 pm on Wednesday, May 28, 2008 to consider a **VARIANCE** requested by **3107 WHITE MOUNTAIN HIGHWAY REALTY TRUST/MICHELLE ROBER AND JEANNE DOHERTY** in regard to §147.12 of the Conway Zoning Ordinance **to install a pole for overhead electrical utilities** 3107 White Mountain Highway, North Conway (PID 215-60). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, May 21, 2008.

Bob Tafuto of Ammonoosuc Survey Company and Michelle Rober appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Tafuto stated that the existing poles along Route 16 are in a straight line so the electric company would like the pole to be more in the straight line. Mr. Tafuto stated that the electric company did not approve of the original location that was approved on April 23, 2008 [File #08-05].

Ms. Sherman read item 1.a. **Ms. Duane made a motion, seconded by Mr. Colbath, that the zoning restriction as applied interferes with a landowner's reasonable use of the property, considering the unique setting of the property in its environment.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 1.b. **Ms. Duane made a motion, seconded by Mr. Colbath, that no fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific restriction on this property.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 1.c. **Ms. Duane made a motion, seconded by Mr. Colbath, that the variance would not injure the public or private property rights of others.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Duane made a motion, seconded by Mr. Colbath, that based on the findings of a, b, and c above, denial of the variance would result in unnecessary hardship to the property owner seeking it. Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Ms. Duane made a motion, seconded by Mr. Colbath, that there would not be a diminution in value of surrounding properties as a result of granting this variance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Ms. Duane made a motion, seconded by Mr. Colbath, that the use contemplated by the petitioner as a result of obtaining this variance would not be contrary to the spirit and intent of the ordinance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Ms. Duane made a motion, seconded by Mr. Colbath, that the granting of this variance will not adversely affect the public interest.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Ms. Sherman read item 5. **Ms. Duane made a motion, seconded by Mr. Colbath, that by granting this variance, substantial justice would be done.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Duane made a motion, seconded by Ms. Hale, that, based on the forgoing findings of fact, the variance from §147.12 of the Town of Conway Zoning Ordinance to install a pole for overhead electrical utilities be granted to reflect the new location. Motion unanimously carried.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Colbath made a motion, seconded by Ms. Duane, to approve the Minutes of April 23, 2008 as written. Motion unanimously carried.

Meeting adjourned at 9:02 pm.

Respectfully Submitted,

Holly L. Meserve
Planning Assistant