



# TOWN OF HUDSON

## Zoning Board of Adjustment



Maryellen Davis, Chairman

Marilyn McGrath, Selectmen Liaison

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### HUDSON ZONING BOARD OF ADJUSTMENT MEETING MINUTES January 28, 2016

#### I. CALL TO ORDER

The meeting was called to order at 7:30 PM on January 28, 2016. General announcements were made and requests on matters of protocol for presenting before the Board. The Deputy Chief of the Fire Department introduced Bruce Buttrick, the new Zoning Administrator, and a tribute was paid to Brad Seabury who is no longer on the Board.

#### Members

**Present:** Normand Martin, James Pacocha, Maryellen Davis, Donna Shuman, and Charles Brackett

#### Alternates

**Present:** Maurice Nolin, Kevin Houle and Gerald Dearborn

#### Selectman

**Liaison:** Marilyn McGrath

#### Staff

**Present:** Bruce Buttrick, Zoning Administrator

#### II. HEARINGS

**1) Case 175-018 (1-28-16): Edward Siperek, 12 Blue Jay Way, Litchfield, NH requests a Special Exception for an Accessory Living Unit (ALU) to be constructed within the addition attached to the existing single-family dwelling located at 75 Highland Street, Hudson, NH. [Map 175, Lot 018, Zoned TR; HZO Article XIII A §334-73.3, Accessory Living Unit.]**

A letter was read from the builder dated 1/25/16 reading: "Please make note that the ALU to be constructed at 75 Highland St. has been cancelled. We are no longer building." Received from Germaine Germain.

MOTION was made "to accept the withdrawal without prejudice" by Mr. Pacocha and seconded by Ms. Davis. All voting members voted to accept the withdrawal without prejudice. AFFIRMED.

**2) Case 199-004 (1-28-16): Don Dumont, 18 Hilindale Drive, Hudson, NH requests the following for the proposed three unit condominium site plan located on Pelham Road, Hudson, NH:**

- a) **A Variance to allow the frontage of the proposed site plan to have 82.48 feet, where a minimum of 150 feet is required. [Map 199, Lot 004, Zoned G; HZO Article VII §334-27, Table of Dimensional Requirements.]**
- b) **A Variance to allow a single private common access way to the proposed three units, which would encroach both side setbacks. [Map 199, Lot 004, Zoned G; HZO Article XI §334-55, Road Standards.]**

Frontage being requested in Part A is below minimum requirements. A supplemental handout was submitted from a prior subdivision application including a tax map card Map 199 Lot 004, a letter from Suellen Seabury dated January 28, 2016, an email from Jim Pacocha to Brooke Lambert, Meeting Agenda of October 12, 1995, Meeting Agenda of May 9, 1996, Meeting Agenda of June 12, 1996 and the map of the Joziatis Subdivision Pelham Road prepared by Maynard & Paquette, Inc. dated February 12, 1996. This is new information to the Board; it was sent in an email and only received today. Selectman McGrath commented that she was unsure if the applicant had this information and inquired as to who was representing the applicant at this time.

Thomas J. Leonard came forward on behalf of Don Dumont, the owner of the property. He stated that he had not seen the letter from Suellen and was unsure if he had the other information. Selectman McGrath provided a copy for him to quickly look through. Mr. Leonard then stated that he is aware of the information and could talk to that at this time.

Mr. Leonard proceeded to review the information with regard to this request and explained the parcel of land that is now 3 lots was originally one lot and was subdivided. They were initially proposed with separate access ways through Pelham Road, however a later variance was granted for common access from Hilindale Road and the Pelham Road access was abandoned.

Mr. Leonard reviewed the abutters list and that they had discussed this over the last several months with those abutters. Mr. Dumont would like to develop this property in a “less dense” manner than usual and take 7 to 10 acres of land and build 3 additional homes. He addressed discussions of the concerns with abutter Seabury and a lot line revision proposal to address her concerns. This lot line relocation is part of the reason for this presentation.

Mr. Leonard addressed that the ordinance works against the plans as they are today as the ordinance requires more frontage. The condominium is for 3 units on a private road. They understand they need approvals from the Planning Board. This request is for two lots, neither having approved frontage, on a private road, which is the preference of the abutters. They do not want a public road.

He addressed common driveways on Pelham Road and that this request is unusual but not contrary to the zoning ordinance. Mr. Leonard addressed specific details in the application with regard to setbacks and frontage. The economics are a factor in private road opposed to public road. Mr. Burns expressed approval for the private road. Mr. Leonard believes they meet the public interest with this plan due to its low density impact. The bottom line is that in the end there will be 4 homes on 23 acres of land.

Mr. Leonard again mentioned that the Planning Board would have the final say on this project and they would, of course, abide by the decision the Planning Board makes.

With regard to substantial justice, the test is “does the strict application of these rules requiring a public road advance the purpose of the public ordinance.” He maintains that it does not and detailed his reasons.

Chair asked if there was anyone in favor of this application. He read a letter from abutter Suellen Seabury who is in agreement with the plan and detailed reasons. Selectman McGrath had a question about wells on the plan and asked for clarification. Mr. Leonard clarified and Selectman McGrath advised a correction to the Plan.

Richard Desmarais, an abutter, addressed his concern which is where his driveway is and the agreement between Ms. Seabury and Mr. Dumont. The driveway seems to be coming more his way. He would like to see the outline of it on the plan. Mr. Leonard addressed Mr. Desmarais’ concern by saying that his property / driveway is to the west. The answer is the road would be in the eight (8) foot strip there but it would not actually move closer to his land or driveway. They are looking at how to exactly construct the proposed driveway, just concepts at this time to address the concerns of Ms. Seabury and are willing to address the concerns of Mr. Desmarais. They will work with Mr. Desmarais to address his concerns.

Chair asked for Board member input and they asked questions for Mr. Leonard. Mr. Leonard noted the application in 1995 & 96, there were two (2); the first allowed access on Pelham Road. It was the second where they agreed to provide the common access off Hilindale but both of those applications related to a lot which was 23 acres. There is nothing to prevent Mr. Dumont from developing the land. It’s just that if he was just going to have one home and he wanted to build it at that point in time, he could only do it under those circumstances and he did that. If you read the Variance, it specifically notes if you’re going to have these two (2) lots then you have to access off Hilindale but there is nothing in it that notes that you can’t develop the property further. It simple notes to develop the property further you have to come back to this Board and have it consider the big picture.

Mr. Pacocha stated that was one of the stipulations, no further development. Mr. Leonard noted that you can’t restrict development of a 23 acre parcel. What you can do is restrict it under those particular circumstances of the proposed development. So if Mr. Dumont didn’t want to build anymore roads and he didn’t want to build any other access, then he was limited to that; but he’s willing to do other things here now. And now we’re at a point where he is allowed to abide by the Zoning Ordinance which would require him to build a public road but he certainly can do that. He doesn’t need any Variance for that but the other part of his comment is that this Board, if they did impose that restriction, can change it under the present circumstances. The present circumstance being that we want to develop the 23 acres and go beyond just the one home.

Mr. Brackett sat on the 1995 application and voted against it then and then the stipulation was agreed that no further development would be allowed. That was the whole issue – that a public access road was required. He addressed the issues in how they were similar now. Mr. Leonard addressed the differences with a private road maintained by a condominium association. He then addressed a statute that says road ownership (private vs public) should not impact a decision for a variance. There was discussion back and forth on this matter.

Chair asked if anyone cared to make a Motion; a Motion to Deny was made by Mr. Brackett and seconded by Ms. Davis. There was discussion on the Motion. Requested to combine and vote on both and agreed to by all members. All members voted and the decision was 5-0 not to grant this variance. A letter was promised to be sent within a week.

**3) Case 190:191 (1-28-16): Circle T Management Company, Inc., 65 Post Road, Hooksett, NH requests a Variance for the proposed drive through coffee shop and car wash site plan located at 48 Lowell Road, Hudson, NH to have 123 feet of frontage, where a minimum of 150 feet is required. [Map 190, Lot 191, Zoned B; HZO Article VII §334-27, Table of Dimensional Requirements.]**

Miss Shuman has stepped down for this matter and Mr. Houle has taken her place.

Attorney Andrew Prolman speaking for the applicant addressed the Board. Wayne Morrill of Jones & Beach and Tony Crawford and Steve McDonough, owners of the Circle T, have yet to go to the Planning Board on this project. This is an Aroma Joe's, 790 feet, primarily a drive-thru facility offering coffee and very limited food. Traffic report is available. Covered the samples of some existing Aroma Joe's and answered a question from the Board. These samples are not the proposed unit.

Mr. Prolman continued speaking. There are two neighbors primarily concerned; neighbor to the immediate south, Eversource, was asked to sell a portion of their property and refused due to a substation location. The Realty above has less frontage; however, he did talk to the property owner and he has no verbal objection to this application. Steve Pernau, licensed engineer, looked over the project regarding the Town and the impact and concluded that first, it would not have much impact on the traffic as it's a "capture" for impulse buyers in the area, the impact would "not be perceivable to traffic" in the area.

Turning to the variance application, Mr. Prolman covered the 5 points of law regarding this property and how this does not adversely affect the property. Mr. Prolman has visited the site and sees the variance as being an improvement over the current house that's in the center of this business district. This is an existing lot of record with no ability to add frontage.

The Chair asked if anyone in the audience would like to speak favorably to this application. Dan Zelonis represents the Trust who owns the property and pointed out that many businesses in the area have low frontages and cited some of them. The current occupied home has been there 50 years; the house is not desirable as a residence due to the busy traffic and noise hardship. There have been several businesses operating out of this house in the past. Removing the house and putting a business there would be beneficial to the area and to the Trust that owns the property.

The Chair asked if anyone cared to speak neutrally or in opposition to the application. Seeing none, he declared the matter to be before the Board. Mr. Pacocha expressed some confusion about whether it was one or two proposed owners. Attorney Prolman stated that Circle K owns and operates a number of car washes in NH; they would also be the proposed franchisee of the Aroma Joe's coffee shop, operating two businesses. It's not a lot of employees.

Ms. Davis had a question about the two uses to the Code Enforcement Officer and he concluded that this qualified as a single use facility within the Code. Both business types are qualified within the Code, as well and the Code Enforcement Officer sees no conflict or problem with this.

Ms. Davis also had a question about the public safety use of this and has a concern that they may not meet the conditions of the variance and that a car wash poses a problem during the winter because of the ice potential, which she sees as a hazard. The Chair agreed with her question and concern as he lives in the area.

Attorney Prolman addressed the hardship of an existing lot which is unable to expand this frontage. There is no ability to change that frontage. His feeling is that this is as good a hardship case as anyone could present. He also believes the car wash is back far enough that he doesn't have the water issue that the Board members are concerned about; however, he believes this lot has enough room to move the carwash further back to address the issue.

Mr. Prolman further stated that this has not been approved by the Planning Board and that they have the ability to relocate within the confines of the lot, if the Board deems that necessary. It may make more sense to the Planning Board to flip that driveway to the opposite side where the buffer zone with Eversource exists.

The Chair commented that the existing house has a business use already. Frontage is not an issue with the existing property usage as a tax preparer. He believes frontage should not be an issue.

Mr. Prolman stated that this is a change of use, from residential to business. That's the hardship issue.

The Board members discussed the Lowell Road traffic use and its history and current use. One member agreed with the hardship problem for the applicant. Ms. Davis maintains her difficulty with two businesses within that area and the public safety issue. Ms. Davis is prepared to make a Motion. Selectman McGrath had a question about the walk-up and a drive-thru and it appears to be a bit awkward. A question of the Aroma Joe's – is there a speaker box – no. They order at the window and get delivery there. Ms. Davis sees this as a backup potential. Ms. Davis made a Motion to Grant. Mr. Pacocha seconded. Ms. Davis said that both businesses are allowed; it's an oddly shaped lot and in existence before the zoning requirements; they've demonstrated effort to get more property; there is no further use for the property as it stands. Discussion among Board members on this and why to grant or not. The Board voted 4-1 to grant, Mr. Martin dissenting. The Board agreed to get a letter out in 7 – 10 days.

The Board declared a five minute recess at 9:14 PM. Called back into Order at 9:20 PM.

**4) Case 198-019 (01-28-16): T-Bone's Hudson, 77 Lowell Road, Hudson, NH requests a Variance to allow a seasonal outdoor patio area to encroach in the front yard setback. [Map 198, Lot 109, Zoned B, HZO Article VII §34-27, Table of Dimensional Requirements.]**

This case is before the Board because of a prior determination and is an encroachment on the front yard setback.

The Chair recognizes that Ms. Shuman is back as a voting member and Mr. Houle has returned to non-voting alternate status.

Bob Clark presenting for T-Bone's Hudson. They have two front yards as they are a corner lot and wish to use a portion of one of those front yards, fronting on a side street. They have included sketches, eliminating some parking spaces and adding door and windows to the building. The buffer strip is going to be green with plantings for the season.

Granting will not be contrary to the public variance. Mark Fenske, owner of T-Bones, spoke to the owner of the parcel as there was some confusion listed on the tax card. Ronald Golub is the managing partner of CEA Group.

Mr. Clark continued his presentation, outlining again the green buffer area and stating it adds value to the area and observes the spirit of the ordinance. The dining is seasonal, many restaurants have outdoor dining and there is no other choice of where to locate this patio area. Justice would be served by granting this to the Owner who has been in business there for over 30 years and is a valued business in the community. They want to continue to successfully compete with other businesses in the area.

The hardship issue is having two front yards; typically on a side yard, one would have 15 feet rather than the 50 T-Bones has. The encroachment is only 5 feet into a typical side yard and includes the green buffer zone. The building has been in existence since 1965 and T-Bones in operation for 30 years.

Mr. Clark said at this point he would like to open up for questions. Mr. Pacocha had a question on type of construction and Mr. Clark responded concrete block siding and metal roof awning for the building revisions. There will be no footings as it's a patio, fence and green strip as the proposed addition. The fence will be a vinyl type and the patio a paving or concrete. It will be an open air concept with the trellis having plants growing on it and tables having umbrellas. Mr. Pacocha asked about seasonal use and Mr. Clark stated that it would be outdoor weather, not used in rain or cold weather conditions.

The Chair asked if anyone in the audience would like to speak favorably to this application. Seeing none, he asked if anyone cared to speak neutrally or in opposition to the application. Seeing none, he declared the matter to be before the Board.

Mr. Dearborn asked how many parking spots were being eliminated. Four spaces are being removed; they are going before the Planning Board for some additional parking requests. There is an existing easement on one side of the building for an additional 22 parking spaces.

Mr. Houle asked about customer safety with cars coming down the road, which is not a very busy traveled street, but wonders what kind of safety barriers would be in place for a car careening off the road. Mr. Clark said a vertical curb is being put into place for safety and the patio will be slightly elevated above that curb as well, and with the fence and the 10 foot buffer zone they believe the safety issue has been addressed.

Ms. Davis asked about the hardship and if the owner has sufficient use if the Board does not allow the variance. She doesn't see where the hardship is when they have reasonable use of the property without an outdoor patio. The Chair agrees that he sees the sketches as having reasonable use and he also does not see the hardship. Mr. Clark responded that the building has been there since 1965 and he's not sure about the road layout at that time. The hardship is having two front yards as opposed to a side yard and the variance is negligible with this extra front yard becoming a side yard on a side street. If this is a side yard, they have 30 feet to work with; as it stands now, they cannot expand the business and compete with the neighboring businesses that have put in exterior seating as well. In the summer months, the building is dark; there are no windows letting in light. The proposed changes will brighten the environment as well as offer more customer seating options.

Mr. Brackett asked if there were businesses in the area that had expanded outdoor seating and what they would be. The response was that Manny Sousa's place, Valentino's, has outside seating and came before the Town to put in a patio. The proposed Aroma Joe's is talking about outdoor dining. The owner of the business stated that it's an economic hardship as the building is older, doesn't look fresh, if it were re-built today it would have a small patio and additional green space, which is as much his goal as the additional seating. This would develop the property to a more current standard of what a building would do today. Mr. Brackett then asked if the setback was changed since the street was put in. It was believed that the

setback was originally 30 feet back when it was Giovanni's Pizza. Mr. Fenske stated that the parking spaces that are being eliminated currently are "back out" spaces that back directly out onto Birch Street. By eliminating those, they are gaining snow loading area, and improving safety, in his opinion. Mr. Brackett further commented that the trellis structure appears to make the structure of the building more intrusive, whereas just tables would not do that as they are more readily removable.

Mr. Pacocha asked about the patio and construction of concrete pouring. Mr. Fenske stated they use a stamped concrete to keep the area clean and a high quality decorative railing. The decorative lattice of the trellis gives a filtered buffering of the sun that's not as intrusive as loud colored umbrellas and gives the feeling of being in a side yard. This design has proved effective in Laconia where a customer can move his head slightly and be out of the direct glare of the sun.

Mr. Pacocha asked about what would be removed in the off season and Mr. Fenske stated that the tables and chairs would be removed. The lattice will have trumpet vines growing on it and will not be removable. Mr. Pacocha then asked if the lattice would have Plexiglas or anything to enclose it; Mr. Fenske stated some woven latticework at intervals but nothing solid. Mr. Pacocha stated that he is concerned that at a later time it would be enclosed as a roof and then it would be a different situation. Mr. Fenske stated that slab on grade would not meet conditions to close it in and become a structure. Mr. Clark stated that would require coming in and requesting a building permit, which Mr. Clark thinks would be denied.

Mr. Pacocha asked what the "season" would run; Mr. Fenske stated that while that was dependent upon weather, the normal season usage was generally from early June through September.

Mr. Brackett stated that the fence seems to line up with the existing fence; Mr. Fenske stated the outside edges of the green space line up with the fence so that he did not encroach onto the street right of way. That allows another 10 feet for the parked cars on the side street. Mr. Clark addressed the safety issues of the parked cars providing a further buffer zone.

Selectman McGrath noted that there is not supposed to be parking on that street, even though it is not being enforced at this time. Mr. Brackett noted that taking out parking on the premises could increase the on-street parking that is not allowed at this time and increase traffic violations. Ms. Davis asked if there was proposed piping of music for outside and what the plan is for abutters. It was also asked if the patio hours would be the same as for the restaurant. Mr. Fenske is willing to restrict hours for noise level purposes and the music will be low volume and the speakers will project back at the building.

Ms. Davis asked about the increased lighting and the effect it would have and commented that if she was driving by, she would be rubbernecking and believes that would increase traffic problems. Mr. Clark commented that this would all go before the Planning Board and be addressed further then. Mr. Fenske addressed the lighting and that it would be post mounted and projecting onto the floor or table and not overhead lights that affected the entire area. Selectman McGrath noted that there is a lounge or bar on that side of the building and she is concerned about spillover onto the patio. Mr. Fenske commented that the green space buffer wraps around that area and there will be trees there as well. Selectman McGrath commented that noisy drinking patrons would be undesirable to encroach on the neighborhood via an outdoor patio.

Mr. Pacocha asked if anyone knew whether there is any ordinance that prohibits outside consumption of alcohol. No one could answer that. Mr. Brown stated that this would need to be approved by the Health Department and the State Liquor Commission, as well as the Planning Board, who would all address these issues. Mr. Pacocha stated that he was pretty sure they'd like to serve liquor outside and for the record, what was the planned seating capacity? Mr. Fenske stated that it is configured right now for 30 seats and answered some further questions on details.

The Board members addressed their concerns with the proposals. Mr. Fenske addressed the issues of setback to the rear of the building remaining in compliance at 50 feet and the residential community that may be affected. Mr. Brown addressed that it's 30 feet to the property line and another 10 feet to the traffic lane. The proposed plan is still 10 feet within the property line and the patio is actually 20 feet from the traffic lane.

Mr. Pacocha asked how much the proposed grade raises the patio from street level. Mr. Fenske stated it would be about six inches above the curb. It is already a tapered slope out to the road. A question was asked about the small storage structures that are being removed and what is stored there; Mr. Fenske stated things like shovels that you would prefer not to keep in the building.

A question was asked about the size of the patio which is 20 feet wide by 50 feet long. The green strip curves to be on two sides of the patio. It was asked about reducing the size of the patio to 15 feet wide, and what impact that would make. Since there is a small plant area against the building and a 3 foot wide strip is required for an aisle that would reduce the number of tables and only provide one row of tables for diners. Additionally, there is a planned space for the lattice area and plants. They are also planning on using good sized street and shade trees; a comment from the Board was that those start small. Mr. Fenske commented that he's been there 30 years and hopes to be there another 30 years. Those trees will grow.

The Board members discussed safety concerns.

Ms. Davis made a Motion to Deny; seconded by Mr. Brackett. Ms. Davis stated that it did not meet the criteria, that it sets up conditions for endangerment to the general public; there aren't valid reasons to grant the Variance and by creating an outside space, the Applicant is creating their own hardship on the property. Mr. Brackett thinks it's too wide and looks too permanent. Other places remove the tables and their dining is clearly temporary. He also feels the claim to hardship is questionable as it's a corner lot. Ms. Davis commented that she loves the plan but feels it's too intrusive to the neighborhood. Mr. Fenske stated that if it will help the Board, he will shrink the plan, put bollards up and continue the fence line.

Mr. Clark stated that the fact that the setback was changed from 30 to 50 is what creates the hardship for this location. He further stated that if Mr. Fenske is willing to shrink the patio width, that it would handle the safety issue.

The Board decided to go through the vote on the proposal as is and see what happens. The Vote was 2 – 3 in favor of the Motion to Deny, with Ms. Davis and Mr. Brackett being against the grant. Therefore, there was no decision reached and the plan can be re-addressed with changes. Mr. Fenske is willing to change the width of the patio to remove the green strip against the building and reduce the width to 17 feet. If he moves the fencing into the edge of the planting bed, he will shrink the width another foot.

Motion to Grant by Mr. Pacocha with the following stipulations: Stipulation #1 for bollards and obstructions per Planning Board approval; Stipulation #2 for patio size to be reduced to 15 feet by 50 feet. Seconded by Mr. Martin. Discussion on the Motion: Mr. Pacocha states that it's a temporary structure that could be removed without substantial cost to the Applicant; the hardship is there is no other practical place to put the patio and the area is a nice change to the blank wall. Justice would be done and no general harm to the public in his opinion. Three votes to grant with 2 stipulations; Ms. Davis and Mr. Brackett.

### **III. REVIEW OF MINUTES**

The Board next addressed the Minutes of December 10, 2015. Mr. Martin asked if there were any changes to page 1. Ms. Davis asked that the recorder review all the minutes and redo them and re-submit them as



there is a lot of missing data and a lot of the lines make no sense whatsoever. She stated that it appears as though there was a problem with the computer as the lines just didn't print. That had been an issue before and it makes sense to request they be re-done. Ms. Davis made a Motion to ask the recorder to redo the minutes and resubmit them and we will correct them at the next meeting. Ms. Shuman seconded. Mr. Martin asked for a vote; all in favor of the Motion unanimously.

Selectman McGrath notes the recorder is not present at this meeting and what the reason is. Someone heard it was going to be her last night; the Board needs to look into that. It was suggested that they may want to hire a member of Staff who might be willing to be recorder. Selectman McGrath stated she would follow up on that.

#### **IV. REQUEST FOR REHEARING**

Next on the Agenda, the re-hearing requests. Mr. Martin will step down for this and turn proceedings over to Mr. Pacocha.

Request for Rehearing: 22 Brady Drive filed by Normand Martin. Discussion about rehearing by a Board Member; a letter from the Attorney was read, a member is denied from participation or rehearing if they are a member of Town government. Statutes and rules were quoted substantiating the denial. Motion made not to rehear by Mr. Brackett; Motion seconded by Ms. Shuman. Both commented upon their reasons for that. It was noted that another voting member should be chosen to vote and Mr. Houle filled in the vacant spot. The Board was polled and the decision was unanimous not to rehear this request.

Mr. Martin returned to the Board as an active member.

#### **V. OTHER BUSINESS**

Election of Officers was next on the Agenda. Chair was nominated – Ms. Davis and Mr. Martin. Mr. Brackett and Mr. Pacocha voted yes – Mr. Martin withdrew his nomination. Motion to close nominations was unanimously approved.

VOTED: Ms. Davis as Chairman – unanimous.

Vice Chairman – Mr. Pacocha nominated Mr. Brackett and Mr. Brackett nominated Mr. Pacocha. Motion to close nominations was unanimously approved. Mr. Pacocha was voted by a margin of 4-1.

Mr. Houle has expressed his willingness to serve as Clerk and the current Clerk has expressed his wish to step down. Are there any other nominations? There being none, Motion was made to close the nominations. Members voted unanimously to accept Mr. Houle as Clerk.

Discussions on vacant positions on the Board. There was no other business before the Board, and a Motion was made by Ms. Shuman to close the meeting; seconded by Ms. Davis. All in favor, and Mr. Martin declared the meeting closed at 10:39 PM.

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Maryellen Davis, Chairman