

**Elk Township Planning and Zoning Board Meeting  
May 19, 2010**

**Minutes**

**Call to Order:** The Board Chairman called the meeting to order at 7:31 pm.

**Open Public Meeting Act:** read by the Board Secretary

**Roll Call:**

**Present:** Mr. Carter, Mr. Goss, Mr. McCreery, Mayor Barbaro, Mr. Nicholson, Mr. Shoultz, Mr. Swanson, Mrs. White, Mr. Yovnello, Mr. Pearson, Mr. Clark

**Flag Salute**

**Announcements:**

- Notice to Public and Applicants: Board policy is no new business will commence after 10:30 pm and all testimony will stop at 11:00 pm, except for individuals wishing to speak during the general public session.
- Committeemen Creta addressed the Planning Board members regarding the municipality's insurance requirement that all volunteer members view the two DVDs entitled, "Duties of a Volunteer in Local Government" and "No Tolerance" by June 16, 2010. The video's are available on line or see the Board Secretary for the DVDs. An informational handout was also distributed to the Board members.

➤ **Approval of minutes: April 21, 2010**

*Mayor Barbaro moved to approve the minutes of April 21, 2010. Seconded by Mr. Shoultz.*

With all members in favor, *the motion was carried.*

**Memorializing Resolutions:**

2010-21: to deem "complete" the application of Charles Frenzel for bulk variances to permit the conversion of an agricultural structure into a single family home on an undersized lot known as block 33 lot 12.06.

*Mr. McCreery moved to adopt resolution 2010-21, seconded by Shoultz.*

**Roll Call:**

*In favor: Carter, Goss, Barbaro, McCreery, Nicholson, Shoultz, Swanson, White, Yovnello*

*Against: None            Abstain: None            9-0-0*

2010-22: deeming "incomplete" the application of Zone Striping, Inc., for amended preliminary major and final site plan approval for the development of block 30, lots 14, 15, and 20 in Elk Township to applicant, Zone Striping Inc.

*Mr. Shoultz moved to adopt resolution 2010-22, seconded by Mr. McCreery.*

**Roll Call:**

*In favor: Carter, Goss, Barbaro, McCreery, Nicholson, Shoultz, Swanson, White, Yovnello*

*Against: None            Abstain: None            9-0-0*

2010-23: granting variances to permit the construction of an additional accessory building upon block 44, lot 5 commonly known as 732 Buck Road to applicants, John and Carla Hoffman.

*Mr. McCreery moved to adopt resolution 2010-23, seconded by Mr. Goss*

**Roll Call:**

*In favor: Carter, Goss, Barbaro, McCreery, Nicholson, Shoultz, Swanson, White*

*Against: None            Abstain: None            8-0-0*

2010-24: the grant of a use variance to permit the development of block 11 lot 5 as a commercial landscaping contractor's office and warehouse and bulk variances to permit a reduced residential and agricultural buffer and design waivers to applicant, TLT, LLC.

Chairman Yovnello announced resolution 2010-24 would be deferred to the June meeting to allow further review.

➤ Old Business

1) TLT, LLC, Minor Site Plan w/bulk variances for Lawn Doctor Business, block 11, lot 5

Michael Borelli, Esquire, 40 N. Woodbury-Glassboro Road, Pitman, NJ 08071

Harold Tamburro, Applicant, 516 Leonard Lane, Mullica Hill, NJ 08062, remaining under oath to testify.

Eric Raes, PE, JTS Engineers & Land Surveyors, Inc., 19 Stratford Ave., Stratford, NJ, remaining under oath to testify.

Mr. Borelli summarized that at their last hearing, they gave a full presentation covering the use variance and the minor site plan. Delay of the site plan approval at that time was for the following outstanding items:

- Proof of delivery truck turnaround on site
- Additional parking spaces as may be necessary to accommodate employees and vans.
- Recalculation of drainage based upon the driveway being an impervious surface and
- Confirmation of the flow between the applicant's lot and lot 6 and the possibility of a berm or swale installed between those lots

Revised plans were submitted. Mrs. Bruder referred to her recent review letter of May 11, 2010. The applicant's revised plan has removed the variance for driveway width. The following bulk variances are required: 1) Buffer from commercial to residential (lot 3) in addition to setbacks where 80 feet is required and 55 feet is proposed. 2) Agricultural buffer where 100 ft rear yard and 50 foot side yard in addition to setbacks w/vegetated buffer strip where 71 feet is proposed. 3) Paved parking area is required for commercial where a gravel parking area is proposed.

Mrs. Bruder referred to item #6 (Agricultural buffer) in her letter. She stated at the last hearing, the applicant agreed to supplement the buffer and had revised to plans to comply. It was her understanding the applicant agreed to provide a low berm as requested by the neighboring farmer. Mr. Raes responded that it was worked into the revised grading plan. Additional survey information was collected as Mr. Mood was concerned that water would flow onto his property, although that is not the case, a small berm is proposed. Mrs. Bruder stated that an agricultural buffer variance is still required even though Mr. Mood is not opposed it. Letter item #10 Architectural Elevations-at the prior hearing it was recommended that an additional window be added to the office building side elevation facing Lincoln Road and recommended this be a condition of any approval. The applicant agreed.

All other items in her letter had been addressed or the applicant had already agreed to comply.

Board Engineer, Carl Gaskill referred to his letter of May 14, 2010 and commented on the following items:

Item # 15 - stormwater management - upon approval, all engineering plans and all other documents be submitted in an electronic format. The applicant agreed.

Item #19 – run off volumes. As a condition of any approval, Hydrographs should be revised to use Delmarva hydrograph and resubmitted. The applicant agreed.

Further, Mr. Gaskill had no technical objection to the few outstanding items being addressed by the applicant as a condition of minor site plan approval. The revised plans adequately address turning radius and drainage.

Chairman Yovnello inquired about a maintenance plan regarding the gravel parking area.

Board Attorney, Gary Thompson responded that a maintenance plan for the gravel lot must be submitted to the board engineer for review and approval and the plan must be filed upon the land records of the County binding any future owner of this property to this obligation. The maintenance plan should be designed to insure the permeability of the area, preventing ruts and decay as well as controlling dust.

*Mr. McCreery moved to open to the public, seconded by Mr. Shoultz.*

Mr. Mood, Bridgeton Pike, Mullica Hill – reviewed the applicant’s display board, revised plan of 5/4/10 (labeled as applicants #3)

Mr. Borelli pointed out the small berm and swale. Mr. Mood had a concern about the buffer. He suggested that should his agreement to farm the applicant’s parcel cease, then the applicant should be required to install the buffer.

Mrs. Bruder added that should it become a non-farm use, it would most likely be because the applicant is expanding or a change in use, then they would be required to come back to the board which would trigger the buffer requirement anyway.

Mrs. White pointed out the resolution 2010-24 item #9, not acted on tonight, as written covers this situation. The entity that enforces the buffer installation in the future is the adjoining property owner not the township.

Mr. Mood requested the applicant set property markers. The applicant agreed.

*Mayor Barbaro moved to close to the public, seconded by Mrs. White.*

*Chairman Yovnello moved to grant the “c” variance as outlined in planner’s letter of May 11 2010, board engineer’s letter of May 14, 2010 as well as the representations of the applicant, the conditions set forth in the reports of the board professionals as discussed and the conditions set by the board during the public hearings on this matter. \*  
*Seconded by Mrs. White.*

Mr. Thompson confirmed with Mr. Borelli that he had reviewed draft resolution 2010-24 and agreed to the conditions set forth therein pertaining to the bulk variances. Mr. Thompson added that since this application was bifurcated, and prior testimony was given concerning the bulk variances, he recommends Mayor Barbaro and Committeemen Swanson not vote.

**Roll Call:**

*In favor: Carter, Goss, McCreery, Nicholson, Shoultz, White, Yovnello*

*Against: None            Abstain: None            7-0-0*

*Mr. Yovnello moved to grant minor site plan approval condition upon the applicant adding a window facing Lincoln Road, complying with board engineer’s letter of May 14, 2010 specifically items 15 & 19, the planner’s letter of May 11, 2010 as well as the representations of the applicant, the conditions set forth in the reports of the board professionals as discussed and the conditions set by the board during the public hearings on this matter and further condition upon all required outside agency approvals. Seconded by Mr. Nicholson*

**Roll Call:**

*In favor: Carter, Goss, McCreery, Nicholson, Shoultz, White, Yovnello*

*Against: None            Abstain: None            7-0-0*

**2) Richard & Cindy Hartline, Interpretation / Use Variance application**

The following members stepped down, Mr. McCreery, Mayor Barbaro and Committeemen Swanson.

This is a continuation of a hearing held on December 16, 2009. Members Jeanne White, Frank Goss & Robert Clark listened to the recording of the hearing and filed a certification with the Board Secretary.

Barry Lozuke, Attorney for applicant.

Explained a use variance was originally filed by his clients and has been followed by a subsequent amendment to the application which seeks an interpretation of the accessory use provision of the township’s zoning ordinance. This application involves an accessory building that was constructed over a period of more than four years. Permits were issued and at a time when the zoning ordinances had no size limitations on accessory buildings. The overall residential

property is 4.98 acres. The use variance application seeks the board's approval in support of that application to permit a partial use of the building for a non-business private, home audio video recording activity with suggested conditions.

The second part of his client's application relates to the ordinance interpretation. The applicant seeks an interpretation of ordinance section 96-71(B)(4). This ordinance in its operative language states, that you may, in addition to the permitted principal uses of your property such as a single family home, have "accessory uses, customarily incidental and subordinate to the above such as sheds, garages, pools, and the like are permitted uses. This type of accessory use language has been a very prominent and frequently appearing phrase in many zoning ordinances in the state of NJ over the course of many years. Mr. Lozuke is prepared to provide the interpretations of our courts (citing various court cases with their outcomes) and further that a "use" variance is not required in this instance under the strict application of the language of the township's ordinance, and that his client's intended use is a permissible one (accessory to the principle use as a residence).

Mr. Lozuke asked the board to consider that residential properties are not just for sleeping and eating. What is considered "customarily and incidental" to the principle use today, was not so 30 or 40 years ago. For example in today's world some common, and uncommon accessory uses may include, pool houses, ceramics classes, automobile collecting (restoration, clubs), model trains-collects, restores & displays to public at holidays, craft shops, playrooms, woodworking shops, horse barn. There are also instances where outbuildings are used by craftsmen who are the owners, such as a plumber, electrician, painter, chemist, amateur inventor, & a youth band.

Richard Hartline was sworn in and gave the following testimony regarding the type of activity within the building. Mr. Hartline has expertise in audio video recording. He owned & operated a business in Pitman NJ, Horizon Studios, in the mid 1980s. The business later transformed into a design and installation business as more people were using home recording facilities (home computers) and therefore there was less of a need for a professional recording studio. In a response to keep the business open they focused on audio video & sound design. The business eventually moved into a business park location in Pitman. Mr. Hartline further stated that in his retirement, since music is his passion particularly gospel music, he would like to produce music along with his wife who is a videographer. Their intended audio video recording activities are for personal use only. They will provide the recordings free of charge to the public. There will be no sale of recordings and no use whatsoever of the accessory building for any commercial, business or other for profit activities relating to the audio video recording studio. Everything is done on their own time, with their own resources and is distributed free of charge. Mr. Hartline also testified that when he began construction on this building, it was with the intent that a portion would be used for the audio video and that the building design and size was built to accommodate this type of activity. Mr. Hartline explained the layout of the building.

The building consists of an audio recording studio, video recording studio, bathroom, small kitchen, resource room, computer rooms and two small offices. Other individuals who would be present for the audio/video recording activities would be the individuals being recorded or helping with the technical aspects of the recording or observing the recording.

Mr. Lozuke provided a second rider to the application and confirmed with Mr. Hartline that he was familiar with the document. Mr. Lozuke explained the rider was an exchange of ideas of potential conditions associated with a use variance, in context, that was worked with a neighbor. The purpose of the rider submission is to properly characterize the type of activity. One of the reasons for the rider submission is to properly characterize this hobby use, recreational activity of Mr. & Mrs. Hartline's as something other than a professional, commercial or business type of use. The second purpose of the rider is to give assurances to the board and neighbors that there would never be a transformation from this private recreational use into a business use either by the Hartlines or any successors in title to the property. The Chairman confirmed that presently this activity has not taken place in the building. Mr. Lozuke confirmed that at this time, the Hartlines do not have a C.O. (Certificate of Occupancy) for the building and have used the building twice with special permission from the Construction Official who issued a TCO (Temporary Certificate of Occupancy) for two specific events (a wedding reception & a family party).

Mr. Hartline testified the equipment used in association with the activity in the building would include a computer(s) computer screen(s) microphones and a keyboard. This is the same activity that was previously conducted in their home and have since moved the equipment into the new building. Three color photos taken on May 18, 2010 of the property were submitted. One taken from the roadway (Unionville Road) looking onto the property, one from a right angle and

one from a left angle. For the file record, the photos were labeled as Applicants #1 dated May 19, 2010. The properties on either side of Hartlines are residential properties. Various decibel readings were taken inside and outside of the subject accessory building. An eleven page report of those readings were submitted and labeled as applicants #2. Mr. Hartline explained the reports were computer generated via an I-phone program that was calibrated and also included geometric coordinates. Mr. Lozuke confirmed with Mr. Hartline that he was qualified and had expertise to conduct sound reading reports. Mr. Hartline further stated he does it all the time in his audio video business and has the equipment to do so. Mr. Hartline explained each report page.

Referring to the decibel sound reading report pages, Mr. Clark confirmed with the applicant that the readings on the report were a snapshot in time. The device is recording cross time. The report printed is that snapshot. The max and peak sound readings are an average at that particular time.

Joshua Kell of 244 Unionville Road, Audio Engineer of Horizon, and is Mr. Hartline's son-law and also works for the company, was sworn in. Mr. Kell explained how the software worked and that Mr. Clark was correct about the sound reading averages. The max and peak averages are the average of that particular moment in time.

Mr. Lozuke asked Mr. Kell's to give his opinion of what the sound sampling process concludes about the possibility of sounds from activities within the building transporting themselves to adjoining properties.

Mr. Kell responded that it shows that at a certain foot range there will not be any noise factor. He added the building is designed with absorbing panels and acoustics built into the room so that sound leaving the building would quickly dissipate.

Board Engineer, Carl Gaskill, asked Mr. Kell if he was familiar with the NJ Health code that deals with noise as a nuisance and with the daytime and nighttime noise limits. Mr. Kell stated he was familiar with the code. The daytime limit would be less than the night time limit but he did not recall specific decimal numbers. In his work, in the commercial realm, the building is usually large and therefore the sound system inside would never penetrate to the outside and they must abide by all commercial state statutes.

Mr. Gaskill confirmed with Mr. Kell that he was aware of the two separate statutory limits, one for day, one for night. Both have specific hours and that the use in their building would be well under the parameters permitted and if there were a noise complaint, they would fall under those regulations.

Mr. Lozuke asked Mr. Hartline what business he was in now. Mr. Hartline responded he was in the sound & video design & integration sales and installation business. The business does not perform any recording, video or audio services. All work is done at the client's site. Nothing related to their business would be accommodated in the accessory building.

Chairman Yovnello commented his concern was with the scale & depth of the project for use as a home theater. Board member Pearson commented that the permit process asks the applicant to indicate the cost of the project. The Hartline's paperwork stated \$50,000 and at the last hearing, that amount had increased to \$200,000. What changed?

Mrs. Hartline testified and explained their original intent was to construct a pole barn and the price was around \$30,000. After completing the zoning application, she found out the building could not exceed a height of 17 feet. That particular pole barn was two floors (the recording studio would be on the second floor and computer rooms on the first) and would have exceeded the 17 foot height maximum. Mrs. Hartline returned to the construction office one week later to let them know they would not be getting that pole barn but instead would construct a "stick building (36 x 92)." The construction clerk at that time said she didn't know how to change it in the computer and she hand wrote the changes on the permits (size and building size). The applicant's original zoning application, page 1, was submitted and labeled as applicants #3 for the file record. Mr. Carter asked the applicants if they originally intended for the project to be this elaborate and they both stated "yes." Mrs. Hartline added they moved to Elk Twp. looking for land with the intention of building this building. Mrs. Hartline also has a background in music. Board member Carter commented the second building on their property is set up with the capacity for a completely separate use than what would be used in a home. It seemed to him the project morphed into something larger than what the township was lead to believe. Mr. Lozuke commented that Mr. Carter was commenting on the size or scale, but anyone could conduct the same activity in their basement. Mr. Lozuke added at the time the application was made, there was no size limitation on accessory buildings. Mr. Lozuke further made the board

aware of other permitted elaborate accessory uses such as an air stripe being approved as an accessory use on a residential property or a 100 foot ham operator tower that was permitted as an accessory use when the overall height limitation in that municipality was 35 feet. All of these examples are exceptional and that's why they come before zoning boards for approval.

Applicant's planner, Tiffany CuvIELLO, 359 Superior Road, Egg Harbor Twp., NJ was sworn and gave the following testimony:

Mrs. CuvIELLO had visited the property, reviewed the township's ordinances, master plan, application materials submitted and spoke with the Hartlines and Mr. Lozuke extensively.

She explained the parcel is an almost 5 acre area with a home which is setback considerably from the street. The accessory structure is set back 650 feet from the street to the left of the property and isn't very visible from the street (Mrs. CuvIELLO submitted photos demonstrating that you could not see the building from the roadway). The neighboring properties consist of large lot sizes and farms, typical of Elk Township. Mrs. CuvIELLO added the issue is not whether or not the building is permitted. The building without this use is permitted and can remain. The issue is the use that is proposed in the building and in her opinion as a planner; it is an accessory use permitted under Elk's ordinance.

She added, essentially, Mr. & Mrs. Hartline have an elaborate hobby. A hobby is an activity or interest that is pursued for relaxation or pleasure. It is not your main occupation, but rather something you enjoy doing. Some hobbies are more elaborate and costly than others. For example, classic car collectors or an airplane landing strip on your property. These are costly and large scale hobbies and have different ranges of scale. The focus is on the "use" not the size of the building. This sound studio/recording studio is an accessory use to the property. She added there is considerable case law and guidance for the board to consider and Mr. Lozuke had prepared an outline of some examples. She referenced and summarized one of the Supreme Court's decisions in State v. P.T. & L Construction Co., (1978) where it was decided that just because not everyone is doing it, doesn't mean it is not customary and incidental to a primary use of the property. The board should not consider this to be a large building with an elaborate use that the applicant spent a lot of money on, but rather that this is the Hartline's hobby, their love, their passion and what they chose to do in their spare time. It is not a business that they operate; it is distinct from their business. They are using a building that is permitted on their property to accommodate this use. A hobby is incidental to a residential use. The building is setback, it meets all the setback requirements, the closest structure to this building is over 250 feet away on the adjoining parcel with the next structure being approximately 450 feet away. Mrs. CuvIELLO submitted a work document of a Google aerial map, dated March 17, 2010 of the property that depicts the location of the buildings in a wooded area. It was labeled as Applicants #4.

Mr. Lozuke gave some summary remarks about the alternative of interpretation and referenced various court cases as cited in his amendment to this application that deal with the same or similar type of language as found in the accessory ordinance of Elk Township. The cases he highlighted were intended to characterize the broad array of what the potential uses could be.

The board will consider and vote on the testimony given regarding the ordinance interpretation. If the interpretation is denied, then further testimony would be given in support of a "use" variance would be required.

Chairman YovNELLO clarified with the Board attorney, that the board's interpretation for this application of the township's ordinance was specific to this application and is fact sensitive.

Chairman YovNELLO explained the board would open to the public for comments relating to the township's ordinance interpretation only.

***Mr. Pearson moved to open to the public, seconded by Mrs. White.***

***With all members in favor, the motion was carried.***

Lauren Kell, 244 Unionville Road, daughter of the applicants.

Spoke in support of her parents. The use in the new building will not be different than what was done in their home.

Tony Creta, 233 Unionville, NJ

Asked the board planner to clarify what is meant by "interpretation."

Mrs. Bruder explained Municipal Land Use Law says an applicant is permitted to ask for an interpretation of the ordinance if an ordinance isn't quite clear on a particular issue. Where the Zoning Officer determines something isn't permitted but the applicant believes that under the ordinance it is permitted, the applicant asks the Zoning Board to make the determination. In this case, is this use actually customary and incidental and therefore an accessory use. So if the board makes the interpretation that in fact the use being discussed is accessory to the residential dwelling, and then a variance is not required. If it's decided the use is not customary and incidental to the residential use, then they need the use variance and the hearing will proceed.

Mr. Creta added it's difficult for the neighbors to discuss interpretation if they don't understand. Mrs. Bruder commented that it has been her experience that normally there is not a lot of public comment on an interpretation.

Sam Ragonese, 254 Unionville, Road

Mr. Ragonese stated he does not agree that it is customary and incidental.

The applicant is correct, in that there was not a limitation of the square foot and that in terms of the square footage as being irrelevant to the use, is also correct. But when the two are combined, you have a different effect.

For customary and incidental - do you have a customary and incidental use that has to be regulated for noise (music) and the decibels that are involved with that? The board has not heard testimony that you should listen to it by decibels at all. The people that testified were not engineering experts on that point. They offered personal opinions. They haven't testified or been qualified on that point so the board should not rely on that testimony. Mr. Ragonese further stated he had no opposition to the board's interpretation in favor, given the greater limitations now in place with the second rider submission.

*Mr. Pearson moved to close to the public, Seconded by Mr. Shoultz.*

With all members in favor, *the motion was carried.*

Mr. Thompson responded to the court cases as cited in Mr. Lozuke's amendment document. Additional discussion followed.

*Mr. Pearson moved to interpret ordinance section 96-71(B)(4) of the Elk Twp. UDO that a private audio/video recording studio is a permitted use of the Hartline's accessory building subject to limiting conditions as set forth in the second rider to the application, Seconded by Mrs. White.*

**Roll Call:**

*Voting in favor: Goss, Shoultz, White, Pearson*

*Against: Carter, Nicholson, Yovnello                      Abstain    0*

*4-3-0                      approved.*

**General Public Portion:**

*Mr. Pearson moved to open to the public, Seconded by Mr. White.*

With all members in favor, *the motion was carried.*

With no comment from the public, *Mr. Pearson moved to close to the public, Seconded by Mr. White.*

With all members in favor, *the motion was carried.*

### **Proposed Commercial Solar Energy Ordinance, number O-35-2010**

The board had received O-35-2010 for review. Board Planner, Mrs. Bruder explained this ordinance has to do with permitting Solar Facilities as a principal use. This ordinance was created separately because it required a different set of considerations. The draft contains the necessary definitions and requirements for installing solar facilities as a principal use. This ordinance proposes that Commercial Solar Energy operations would be permitted as a conditional principal use

in the following 3 zones: R (Rural Residential), RE (Rural Environmental), and M-1 (light manufacturing). Recently N.J. passed legislation in support of these types of facilities to make sure that NJ can meet its Energy Master Plan goals.

This commercial solar ordinance, as opposed to the accessory solar ordinance, was crafted to make sure consideration was taken for other land use issues that are also a priority. Whereas with accessory solar, you are basically using solar to power your house or farm and a little goes back to grid. With a commercial facility, the purpose is to generate energy for sale. Right now a commercial solar facility cannot tie into transmission lines (overhead lines) but they can tie into the distribution lines on the streets, but that depends on how much the distribution lines can handle.

*Mr. Pearson moved to open to the public, Seconded by Mr. White.*  
With all members in favor, *the motion was carried.*

With no comment from the public, *Mr. Pearson moved to close to the public, Seconded by Mr. White.*  
With all members in favor, *the motion was carried.*

*Chairman Yovnello moved to recommend to Township Committee that it consider adoption of O-35-2010 as the Board has determined that these proposed changes to the ordinance are substantially consistent with the provisions of the December 2009 Master Plan of the Township. Seconded by Mr. Pearson.*

With all members in favor, *the motion was carried.*

#### **Correspondence:**

NJAPZA Newsletter- Article entitled "Time of Decision Rule- Possible Changes." Mr. Thompson made the Board aware that Senate Bill S-82 and Assembly Bill A-437 was passed and signed into law on May 5, 2010 and will go into effect one year from now (May 5, 2011)

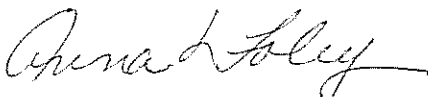
The board secretary handed out a revised Farmland Preservation Plan for the board to review and comment. A public hearing, to consider and adopt this plan as an element of the town's Master Plan will be held on June 16, 2010 at the board next scheduled meeting. Suzanne McCarthy of the DVRPC (Delaware Valley Regional Planning Commission) will give the presentation.

#### **➤ Adjournment:**

*Mrs. White moved to adjourn, Seconded by Mayor Barbaro.* With all members in favor, *the motion was carried.*

Adjournment time 10:59 pm

Respectfully submitted,



Anna Foley, Board Secretary