I. Call to Order

A Regular Meeting of the Zoning Board of Appeals of the Town of Bethlehem was held on the above date at the Town Hall Auditorium, 445 Delaware Avenue, Delmar, NY. The Meeting was called to order at 6:00 PM.

<table>
<thead>
<tr>
<th>Attendee Name</th>
<th>Title</th>
<th>Status</th>
<th>Arrived</th>
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<tbody>
<tr>
<td>Dave Devaprasad</td>
<td>Chairman</td>
<td>Absent</td>
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<tr>
<td>Jane Barnes</td>
<td>Board Member</td>
<td>Absent</td>
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<tr>
<td>Joshua Beams</td>
<td>Board Member</td>
<td>Present</td>
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<tr>
<td>Donna Giliberto</td>
<td>Board Member</td>
<td>Present</td>
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<tr>
<td>Jeremy Martelle</td>
<td>Board Member</td>
<td>Present</td>
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<tr>
<td>Michael Moore</td>
<td>Planning/Zoning Board Counsel</td>
<td>Present</td>
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<tr>
<td>Mark Platel</td>
<td>Assistant Building Inspector</td>
<td>Present</td>
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<tr>
<td>Craig Yaiser</td>
<td>Assistant Building Inspector</td>
<td>Present</td>
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<tr>
<td>Kathleen Reid</td>
<td>Assistant to the Zoning Board of Appeals</td>
<td>Present</td>
<td></td>
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</tbody>
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A. Vote-Acting Chairman

Mr. Beams offered a motion to have Mr. Martelle preside as Acting Chairman in the absence of Chairman Devaprasad, the motion was seconded by Ms. Giliberto.

II. Public Hearings

A. Public Hearing continuation for an application submitted by Russ Hazen of Ray Sign Company on behalf of Subway, 380 Route 9W, Glenmont for an Area Variance under Article VI, Section 128-59 J, Signs (18-01000010)

The Application was first before the Board on July 18, 2018 since than ACPB found the proposed action would have no significant countywide or intermunicipal impact an deferred for local consideration.

Russ Hazen of Ray Sign Company was present on behalf of the applicant he provided the Board with a brief overview of the request.

There was no one present to speak in favor or in opposition to the request.

The Board voted to close the Public Hearing as follows:
RESULT: CLOSED [UNANIMOUS]
MOVER: Joshua Beams, Board Member
SECONDER: Donna Giliberto, Board Member
AYES: Joshua Beams, Donna Giliberto, Jeremy Martelle
ABSENT: Dave Devaprasad, Jane Barnes

B. Public Hearing continuation-Del Lanes - 4 Bethlehem Court, Delmar- for a Use Variance under Article XIII, Section 128-99 A. (18-01000009)

Our second Public Hearing is a continuation of an application submitted by Andrew Petersen of Monolith Solar on behalf of Del Lanes, 4 Bethlehem Court, Delmar. The application was last before the Board on July 18, 2018, since then the Board received a financial overview for the past three years of the business as requested.

On July 17, 2018 the Board received an email from Rob Leslie, Director of Planning, in support of the application for a use variance.

Mr. Petersen was present on behalf of Monolith Solar and gave a brief overview of the financial information submitted for Del Lanes along with the lease agreement that Monolith Solar has with the business.

The following items were discussed:

- Financial benefits awarded to Del Lanes if the request is approved
- If Del Lanes explored other options available for financial relief
- Direction of solar panels on roof
- Impact, visual or environmental that the solar panels will produce

There was no one present to speak in favor or opposed to the request.

The Board voted to close the Public Hearing as follows:

RESULT: CLOSED [UNANIMOUS]
MOVER: Joshua Beams, Board Member
SECONDER: Donna Giliberto, Board Member
AYES: Joshua Beams, Donna Giliberto, Jeremy Martelle
ABSENT: Dave Devaprasad, Jane Barnes

III. Applications - Review and Possible Public Hearing Scheduling

- ACCEPT APPLICATION AND SET PUBLIC HEARING FOR AN APPLICATION SUBMITTED BY SEAN AND GAIL STEWART-99 RETREAT HOUSE ROAD, GLENMONT FOR AN AREA VARIANCE UNDER ARTICLE VI, SECTION 128-47, FENCES (1) (18-01000011)

The Board voted to accept the application and set the Public Hearing for August 15, 2018 at 6:00 PM.
RESULT: APPROVED [UNANIMOUS]
MOVER: Joshua Beams, Board Member
SECONDER: Donna Giliberto, Board Member
AYES: Joshua Beams, Donna Giliberto, Jeremy Martelle
ABSENT: Dave Devaprasad, Jane Barnes

IV. Resolutions

• ELMWOOD PARK FIRE DISTRICT-589 RUSSELL ROAD, ALBANY

RESOLUTION

* * *

* * *

WHEREAS, an application has been filed with the Zoning Board of Appeals of the Town of Bethlehem, Albany County, New York (“the Board”) seeking Variances under Article VI, Supplementary Regulations, Section 128-59 E (1), K and L (9) (Signs on non-residential premises in Residential districts, area and height; Non-conforming signs, alteration; and Prohibitions, “electronic message center-type” signs) requested by the Elmwood Park Fire District (North Bethlehem Fire Department) (“Owner/Applicant”) for property at 589 Russell Road, Albany, New York; and

WHEREAS, the Board, acting on said application, duly advertised in the Spotlight and sent written notice to all persons listed in the petition as owning property within 200 feet of the premises in question and held a public hearing on said application at the Town Hall, 445 Delaware Avenue, Delmar, New York on June 20, 2018 and July 18, 2018; and,

WHEREAS, Members of the Board are familiar with the area in which the proposed construction is to be done and the specific site of same; and,

WHEREAS, all those who desired to be heard were heard and their testimony duly recorded at the above hearing; now therefore,

BE IT RESOLVED, that the Zoning Board of Appeals makes the following
FINDINGS OF FACT

Applicant proposes to replace the existing non-conforming sign (size, internal illumination) at its fire house property in the Residential A District with a new sign. Town Code section 128-59 K requires that the new, altered sign fully conform to the applicable requirements of section 128-59. The proposed new sign does not so conform and would require three variances: 1) it would be 8.5’ high (Town Code limits height to 6’); 2) it would be 42 square feet in area (Town Code limits area to 10 square feet); and 3) it would be an “electronic-message-center type” sign (prohibited by the Town Code for all users).

John Mahoney, Chairman of the Applicant’s Board of Fire Commissioners, Commissioner William Morrow, Applicant’s attorney William Young, Esq., and members of the Applicant’s Ladies Auxiliary testified in support of the application. These parties asserted that the existing sign is old, and that changing the messages manually is difficult or unsafe in certain weather conditions. They also proposed that the Board interpret Section 128-59 to allow a “public service” exception to the prohibition on “electronic message” signs based on the content of the messages to be provided and their view that the proposed sign would enable the Applicant to reach a broader audience with these “public service” messages. Under questioning from the Board, Applicant’s representatives conceded that it had not considered other, possibly less costly, alternatives to the proposed large “electronic message” sign.

Applicant submitted photographic evidence that several other volunteer fire companies in the area have “electronic message center” type signage at their fire stations. No evidence was submitted to the Board on the terms of the municipal zoning code or sign code (if any) in the communities where these other signs are located.

At the June 18, 2018 public hearing, the Deputy Town Attorney (Board’s legal counsel) presented to the Board and the public a discussion of the pertinent legal issues related to the application: 1) signs as a form of constitutionally protected “free speech (First Amendment);” 2) the First Amendment case law establishing the Town’s authority to regulate only the “time, place and manner” of sign “speech,”
including its lawful power to ban altogether “electronic message” signage (Town Code section 128-59 L [9]), but its inability to regulate “signage/speech” based on its “content;” 3) that Applicant’s proposal to except its sign from Town Code section 128-59 L (9) based on so-called “public service” messaging would, in counsel’s opinion, be unlawful “content-based” regulation; and 4) the history of recent litigation involving another requested variance for an “electronic message center” type sign, in which the Board’s 2015 denial of a variance was upheld by the courts (Ravena-Coeymans-Selkirk Central School District v Town of Bethlehem, 156 AD3d 179 (3d Dept. 2017) (“RCS sign case”).

The Board has reviewed the Findings and Conclusions in its Resolution of December 15, 2015 (AV-1523) in the RCS sign case. The Board has also reviewed the opinion of the Appellate Division, Third Department in the RCS sign case.

By Recommendation dated June 21, 2018 (Case No. 04-180603059) the Albany County Planning Board deferred to local consideration on the application.

Other than as noted above, the Board received no other written or oral testimony concerning the application.

CONCLUSIONS OF LAW and DETERMINATION

Based on the above Findings of Fact, and after reviewing the application, sketches and plans submitted, testimony at the hearings, and other documents submitted by the Applicant, the Board determines that the proposed variances (Signs on non-residential premises in Residential districts, area and height; Non-conforming signs, alteration; and Prohibitions, “electronic message center-type signs) will be denied.

The Board finds and determines that Applicant has failed to present any evidence as to why a large “electronic message” sign is required for its purposes, as opposed to a sign of a size and with a “messaging” system that complies with the Town Code. Given the location of the property, the Board is not persuaded that the proposed “electronic message” sign would, as suggested by Applicant, enable it to reach a broader segment of the community with its so-called “public service” messaging. As noted in the proceedings for the RCS sign case, other signs in the Town with “electronic message” systems are legally non-conforming. Since the adoption of Town Code sections 128-59 K and L in 2012 the Town has not issued a
permit or a variance for an “electronic message” sign. On the facts presented by this application, the Board declines to do so here.

The benefit sought by the Applicant with the subject sign (conveying messages to the community) could be achieved by smaller signage without the “electronic message” component, as allowed by the Town Code, and/or by the use of the Applicant’s website and social media.

The requested variances will have no adverse effect on the physical or environmental conditions in the neighborhood.

The alleged difficulty necessitating the requested variances has been created by the Applicant; which as noted has not considered alternative means of sign “messaging.”

The three requested variances are substantial both in terms of size (area, height) and for the proposed messaging system.

As was the case in its Resolution AV-1523 in the RCS sign case, the Board is concerned that granting the requested variances would set a precedent allowing similar large “electronic message” signs to other property owners in the Town. This concern is heightened by the Town’s recent victory in the litigation over the proposed RCS sign. The Board accepts the opinion of its counsel that the Applicant’s proposed “public interest” exception to Town Code section 128-59 L (9) would be unlawful “content-based” sign regulation; and declines to adopt this interpretation of the Town Code.

The requested variances (Signs on non-residential premises in Residential districts, area and height; Non-conforming signs, alteration; and Prohibitions, “electronic message center-type signs) are DENIED.

August 1, 2018

S. David Devaprasad
Chairman
Zoning Board of Appeals

The foregoing Resolution filed with the Clerk of the Town of Bethlehem, Albany County, New York, on August ___, 2018.
Zoning Board of Appeals

RESULT: APPROVED [UNANIMOUS]

MOVER: Joshua Beams, Board Member
SECONDER: Donna Giliberto, Board Member
AYES: Joshua Beams, Donna Giliberto
ABSENT: Dave Devaprasad, Jane Barnes, Jeremy Martelle

* KENNETH E. GONYEA-ADIRONDACK FPI, INC-1074 RIVER ROAD, SELKIRK

RESOLUTION

* * *

WHEREAS, an application has been filed with the Zoning Board of Appeals of the Town of Bethlehem, Albany County, New York (“the Board”) seeking a Variance under Article XIII, Use and Area Schedules, Section 128-99 (Attachment 1), Schedule of Uses (Rural Riverfront District, contractor’s yard not permitted use) requested by Kenneth Gonyea of Adirondack FPI, Inc. (“Owner”) for property at 1074 River Road, Selkirk, New York; and

WHEREAS, the Board, acting on said application, duly advertised in the Spotlight and sent written notice to all persons listed in the petition as owning property within 200 feet of the premises in question and held a public hearing on said application at the Town Hall, 445 Delaware Avenue, Delmar, New York on April 4, 2018 and July 18, 2018; and,

WHEREAS, Members of the Board are familiar with the area in which the proposed construction is to be done and the specific site of same; and,

WHEREAS, all those who desired to be heard were heard and their testimony duly recorded at the above hearing; now therefore,

BE IT RESOLVED, that the Zoning Board of Appeals makes the following Findings of Fact and Conclusions of Law in this matter:
FINDINGS OF FACT

Owner proposes to convert a partially renovated residential structure and property in the Rural Riverfront (RR) District for use as a contractor’s yard where he can relocate his business (Adirondack FPI). Per the Schedule of Uses in the Town Code, a contractor’s yard is not a permitted use in the RR District. Owner has applied to the Board for a use variance pursuant to Town Code Section 128-90 C (1)-(4).

Kenneth Gonyea and his attorney Alita Guida, Esq. testified in support of the application.

Owner purchased the 5.1-acre property and existing buildings in October 2013 for $50,000. This sum was well under the property’s appraised value (see below). At the time of the purchase Owner intended to renovate the main building and use it as his residence (a permitted use in the RR District).

Owner testified that he has been in the building construction/contracting business for 30 years and is experienced in building construction issues. He was aware at the time the property was purchased that the prior owners had allowed the buildings and property to deteriorate and that the purchase price reflected these condition issues.

Owner conceded at the public hearings that he performed only a limited inspection of the property and the residential structure prior to concluding the purchase. He did not retain the services of a professional home inspection contractor prior to purchasing the property.

Owner testified that he bought the property, in part, because he wanted better access to a public sewer system. He was aware at the time of purchase that a Town of Bethlehem sewer easement was located on the property. There is a vent located on the Town sewer easement (picture provided to the Board by the Owner). Owner, in support of his variance application, complained about odors from the sewer vent.

At or around the time of purchase, Owner was made aware that portions of the property were located in a floodplain as designated by the Federal Emergency Management Agency (FEMA). As such, development of the property is subject to regulatory requirements of both FEMA and the Town. Owner, in support of his
variance application, complained that the location in a floodplain limits the property’s development potential and marketability.

After concluding his purchase of the property, Owner sought bank financing to undertake the renovations to the residential structure. An appraisal of the property and buildings was prepared for the Owner’s bank in December 2013, and a copy provided to the Board. This 2013 appraisal notes the following: “the owner has indicated his intentions of utilizing the property in part for his contracting business and utilizing the house as an office. According to all available data [from the Town building department], neither of those uses would be allowed;” “residential occupancy is the Highest and Best Use of the property;” and the property in a renovated state would be worth approximately $200,000.

The renovations were begun, and Owner testified that he discovered additional flaws and damage in the residential structure. He continued to make repairs or replacements until his initial bank funding was exhausted. He was told that he could not obtain additional funding to use the property for residential purposes, as further financing would exceed the anticipated value of a residential property.

In March 2018, after denial of his application for a building permit, Owner applied to the Board for a use variance to allow him to operate a commercial use (contractor’s yard) on the property; a use for which additional financing would apparently be available.

With his initial application Owner submitted to the Board a second appraisal of the property (April 2018) which estimated its value as renovated residential property at $275,000.

Owner testified that, to date, he has spent, in addition to the initial purchase price, $285,000 in repairs and renovations on the property; and that an additional expenditure of $45,000 is reportedly needed, which, if completed, would bring his total expenditures on the property to $380,000.

Owner submitted to the Board in support of the variance application a Financial Analysis prepared by Camoin Associates (June 2018). As required by the Town Code, the Camoin analysis projected the Owner’s “anticipated return” on his investment for the uses permitted in the RR District. The Camoin analysis did not base its projections upon either the Owner’s “initial investment” in the property.
($50,000) or the property’s “present value” (appraised at either $200,000 or $275,000). Rather, the Camoin analysis primarily used as Owner’s alleged “investment” either the $335,000 invested to date, or the $380,000 allegedly needed to complete the renovations. Both these sums are significantly higher than the property’s appraised value as residential property.

Even so, the Camoin analysis also found that Owner could, with some additional investment in the property, realize a positive rate of return on four (4) so-called “renter-occupied” residential uses of the property allowed by the Town Code in the RR District, with projected returns ranging from 2.62% to 5.74%.

There was no evidence submitted to the Board of any effort by Owner to market the property for permitted residential uses.

There was no testimony of any kind by Owner or his representatives suggesting that changed conditions in the area had rendered residential uses of the property obsolete. To the contrary, Owner acquired the property in 2013 with the intention of using it for residential purposes.

There was no evidence submitted to the Board of any changes to the condition of the property or the residential structure between the time of Owner’s purchase and the time he applied to the Board for a use variance.

There were no changes to the provisions of the Town Code which apply to the property between the time of Owner’s purchase and the time he applied to the Board for a use variance.

At the public hearings Owner’s counsel testified that: he had “walked into a bad situation,” and had “made assumptions” about the condition of the residential structure and the property and alleged past uses of the property, which turned out not to be true. Owner’s application materials asserted that the property had allegedly been used in the past for “commercial” uses. This assertion was later conceded to be anecdotal only. The Town Assessor’s office has at all times listed the property as in “residential” use.

At the April 4, 2018 public hearing, two nearby residents testified with concerns regarding potential stormwater runoff from the property.

By Recommendation dated April 19, 2018 (Case No. 04-180403007) the Albany County Planning Board recommended that a local approval of the application
be modified to require review of any proposed new access to the State Highway (River Road).

CONCLUSIONS OF LAW and DETERMINATION

Based on the above Findings of Fact, and after reviewing the application, sketches and plans submitted, testimony at the hearings, and other documents submitted by the Owner, the Board determines that the proposed variance (Rural Riverfront District, contractor’s yard not permitted use) will be denied.

By law, the Board may not grant a use variance in this or any other case absent a showing by the applicant that four statutory criteria (Town Code section 128-90 C [1]-[4]) are each met, all amounting to a showing that the existing “zoning regulations and restrictions” of the Town Code have purportedly caused the applicant “unnecessary hardship.” At the outset, the Board notes that neither Owner nor his counsel identified any provisions of the Town Code (“zoning regulations and restrictions”) which allegedly impede Owner’s ability to make a permitted use of the property. Further, as detailed below, the Board has determined that the Owner’s application fails two of the required criteria (Town Code sections 128-90 C [1] and [4]), and the use variance application must therefore be denied. The Board, as also detailed below, rejects the Owner’s “hardship” argument based on alleged “unique conditions” of the property (Town Code 128-90 C [2]). The Board finds that these “conditions,” known to Owner at the time he purchased the property and unchanged from 2013-2018, are in fact part of the proof that his “hardship” is “self-created.”

1. “Reasonable Return,” Section 128-90 C (1). The law allows the Board to consider “all matters” that bear upon this question, including Owner’s “initial investment” ($50,000) and the “present” appraised value of the property (either $200,000 [2013] or $275,000 [2018]). Village Board of Fayetteville v Jarrold, 53 NY2d 254 (1981); Matter of Crossroads Recreation v Broz, 4 NY2d 39 (1958). The Camoin analysis, in considering the Owner’s possible “return” from permitted residential uses of the property starts, not with the above-quoted figures, but with a much higher figure, the amount invested or projected to be invested by Owner in the property to date ($380,000). However, this higher figure is significantly in excess of what Owner, based on his own two appraisals (2013 and 2018), could reasonably expect that the property was actually worth. The Board determines that it was imprudent for the Owner to continue to “invest” these significant sums of money well in excess of the
property’s known appraised value and then, as asserted by Camoin, expect a positive “return” on these imprudent investments (for so-called “owner-occupied” residential uses) or a return of nearly 9% (for so-called “renter-occupied” residential uses). Significantly, the Board notes again that, even with these investments well in excess of the property’s known appraised value, the Camoin analysis still projected that Owner could realize a positive return on his present or future additional investments under four (4) permitted “renter-occupied” uses, ranging from 2.62% to 5.74%. In sum, the Board determines that Owner has failed to show that he allegedly cannot realize a “reasonable return” under permitted uses of the property based on his initial investment or the property’s known appraised value; and the use variance application must therefore be denied. His “hardship” is not the result of any provisions of the Town Code but to his bad investments in the subject property. The Board further determines that a use variance is not intended as the means by which a property owner can relieve himself of the consequences of such bad investment choices.

2. “Self-Created Hardship,” Section 128-90 C (4). Given the very low purchase price of the property and his admittedly limited pre-purchase inspection, Owner was aware that there were “condition” issues in the residential structure, and perhaps on the property as well. But he did not undertake a thorough professional inspection of the property before he purchased it. Instead, he admitted to the Board that he made “assumptions” about the condition of the property, which turned out to be unfounded. Owner was aware that there was a Town sewer easement on the property. Indeed, the proximity of the sewer line may have a motivating factor in his decision to purchase the property. A cursory inspection of Town records or telephone call to Town officials would likely have revealed the presence of the sewer vent on the easement; yet Owner now complains of odors from this sewer vent to support his variance application. Similarly, Owner was aware at the time of purchase that portions of the property were in a regulated flood zone, but now asserts this condition as an element of his alleged “hardship” on the variance application. There was no change in these conditions from 2013, when the property was purchased, to 2018, when the present application for a use variance was made. To the extent that Owner bases his “hardship” application on these allegedly “unique” conditions of the property (Town Code section 128-90 C [2]), the Board rejects this argument and instead determines that they are proof of the Owner’s “self-created hardship.” Similarly, Owner bought the property with full knowledge of the Town Code use restrictions (contractor’s yard
prohibited) and intended to use the property for a permitted residential use (its “Highest and Best Use” according to the 2013 appraisal). Yet he now seeks relief from these use restrictions. The Board determines that this prior knowledge also makes Owner’s present alleged hardship self-imposed or “self-created.” *Citizens Savings Bank v Board of Zoning Appeals*, 238 AD2d 874 (3d Dept. 1997). Finally, as discussed more fully above under “Reasonable Return,” the Board determines that to the extent Owner now complains of an alleged “financial” hardship if he is relegated to permitted residential uses, this “hardship” is also “self-created.” Owner was told twice of the likely value of renovated residential property (between $200,000 and $275,000). Yet he invested sums of money significantly in excess of this appraised value (somewhere between $100,000 and $200,000 above the property’s value).

The application for a use variance (Rural Riverfront District, contractor’s yard not permitted use) is DENIED.

August 1, 2018

S. David Devaprasad

Chairman

Zoning Board of Appeals

- - -

The foregoing Resolution filed with the Clerk of the Town of Bethlehem, Albany County, New York, on August ___, 2018.

Kathleen Reid, Secretary

Zoning Board of Appeals

V. Discussion/Possible Action

• **SUBWAY, ROUTE 9W, GLENMONT**

The Board voted to APPROVE the application as follows:

Mr. Martelle-

• No visual impact
Mr. Beams
- No visual impact
- Not self-created
Ms. Giliberto-
- Variance is not substantial
- Not an undesirable change
- Benefit cannot be achieved by any other means
- Not an adverse environmental or physical impact

A Motion to approve the variance request was offered by Mr. Beams Seconded by Ms. Giliberto.

• **DEL LANES-4 BETHLEHEM COURT, DELMAR**

  The Board voted to APPROVE the application as follows:

  Mr. Martelle-
  - No visual impact
  - Good for the community and Del Lanes
  Ms. Giliberto-
  - For all reasons previously stated
  - Helps solar renewable goals
  - Not intrusive
  - Helps sustain business in town
  Mr. Beams-
  - Commended Monolith and Del Lanes for providing the requested information

  The Board will perform SEQR Part II, as required for approval of a Special Use Application at the August 15, 2018 meeting.

  This project will go before the Planning Board for Site Plan Review.

  A Motion to approve the variance request was offered by Mr. Beams Seconded by Ms. Giliberto.

VI. New Business

VII. Minutes Approval

A. Wednesday, July 18, 2018
RESULT: ACCEPTED [UNANIMOUS]
MOVER: Joshua Beams, Board Member
SECONDER: Donna Giliberto, Board Member
AYES: Joshua Beams, Donna Giliberto, Jeremy Martelle
ABSENT: Dave Devaprasad, Jane Barnes

VIII. Adjournment

Motion To: Adjourn

RESULT: ADJOURN [UNANIMOUS]
MOVER: Joshua Beams, Board Member
SECONDER: Donna Giliberto, Board Member
AYES: Joshua Beams, Donna Giliberto, Jeremy Martelle
ABSENT: Dave Devaprasad, Jane Barnes

The Meeting was adjourned at 6:32 PM

Next Regular Meeting August 15, 2018