

**TOWN OF NEW BOSTON
NEW BOSTON ZONING BOARD OF ADJUSTMENT
Minutes of 2014
March 18, 2014**

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The meeting was called to order at 7:00 p.m. by Zoning Board of Adjustment Chairman David Craig. Present were regular members Greg Mattison, Robert Todd, Phil Consolini, Harry Piper, and alternate member Ken Clinton. Also present were Planning Coordinator Nic Strong and Zoning Board of Adjustment Clerk Valerie Diaz.

Present in the audience for all or part of the meeting were Benjamin Heselton, Daniel Muller, Esq., Richard Heselton, Dave Beasley, Jon Strong, Kim and Scott Neesen, Marie Heath, Jay Marden, Katie Napierkoski, Paula Murphy and Jay Webber.

**THIBEAULT SAND AND GRAVEL, LLC (OWNER)
BENJAMIN HESELTON (APPLICANT)**

Application for variance

Location: Parker Road

Tax Map/Lot #3/57

Residential-Agricultural "R-A" District

The Chairman noted that the above-captioned application had been scheduled for a hearing on February 18, 2014; however, due to snow the hearing was cancelled and rescheduled for this evening. He explained that an application for a variance had been submitted by Benjamin Heselton of Heselton's Outdoor Services. He noted that a letter from the owner, Thibeault Sand and Gravel, LLC, had been submitted with the application that gave the applicant permission to apply for a variance. He asked if a representative from Thibeault Sand and Gravel, LLC, was present; there were no representatives present.

The Chairman indicated that he would allow the applicant to present his application for variance and would then allow questions and/or comments from the Board and abutters. He asked that abutters direct their questions and/or comments to the Board and not to the applicant.

Harry Piper asked Nic Strong if there were any planning or zoning offenses related to the property. The Chairman indicated that the planning/zoning issues would be addressed later in the meeting.

Daniel Muller, Esq., of Cronin, Bisson & Zalinsky, P.C., was present to speak on behalf of the applicant. He stated that the applicant owned and operated Heselton Outdoor Services and noted that it was a one man operation. He explained that the applicant was looking to set up an operation where he could create bark mulch as well store screened loam and processed stone that could be sold to homeowners and local landscapers. He indicated that the proposed hours of operation for the tub grinder were 9:00 a.m. through 3:00 p.m., two to three days per week. He stated that deliveries would take place on Saturdays. He noted that nothing would be done onsite while the applicant was making deliveries as he was the only employee.

Daniel Muller, Esq., advised that the applicant was proposing to use three to five acres located at the front of the property. He noted that an existing gate was located at

**TOWN OF NEW BOSTON
NEW BOSTON ZONING BOARD OF ADJUSTMENT
Minutes of 2014
March 18, 2014**

DRAFT

the entrance of the property and pointed to the proposed location of a small trailer that would be used as an office space for the business. He indicated that the equipment that would be stored onsite included a loader, bobcat, tub grinder, small landscaping dump truck and one ten-wheeler truck. He explained that the ten-wheeler truck would be used for stone deliveries.

Daniel Muller, Esq., described the proposed location for the tub grinder. Harry Piper requested that a map of the property be displayed for the Board and audience; a map was displayed. The Chairman asked for Tax Map/Lot #3/57 and the proposed use area to be identified on the map. Daniel Muller, Esq., identified the 43 acres contained within Tax Map/Lot #3/57 and also pointed out the proposed use area. He noted the location of existing wetlands and advised that the terms of the applicant's lease would not permit use of that area. The Chairman asked if the lease delineated the proposed area for use. Benjamin Heselton answered that the lease allowed him to use three to five acres of the property. Harry Piper asked if the lease spelled out the proposed area for use in metes and bounds. Daniel Muller, Esq., answered no but stated that it could be added.

Daniel Muller, Esq., identified the proposed location for the office trailer. He explained that the trailer would not be a manufactured home and would be a very small construction trailer. He pointed to the locations where materials would be stored in piles as well as the proposed location of the tub grinder. He explained that the tub grinder would be surrounded by earthen embankments and berms. He noted that the embankments and berms provided sound mitigation. He indicated that none of the surrounding homes would be able to view the tub grinder in its proposed location. He pointed out the wooded areas on the map and stated that the only property that had a direct line of sight was the sand pit located across the street. The Chairman asked if the sand pit located across the street was also owned by Thibeault Sand and Gravel, LLC. Daniel Muller, Esq., answered yes.

The Chairman referred to aerial photographs that had been submitted with the application and asked for confirmation that the area highlighted in green was a wooded area. Benjamin Heselton answered yes. The Chairman asked if there were two excavation areas located on the property. Harry Piper answered yes. Ken Clinton clarified that one of the excavation areas was in the process of re-growing. Benjamin Heselton added that the re-growing area was thick.

Daniel Muller, Esq., summarized that customers would stop at the trailer, drive to the material piles, load the material and leave the lot. He noted that the primary focus of the business was delivery of materials. The Chairman asked if the material would be generated onsite or if it would be delivered to the site. Daniel Muller, Esq., explained that material for the mulch would be brought onto the site to be ground and that the loam and stone would also be delivered to the site. He advised that the applicant would not be excavating or logging on the property. The Chairman asked how many truck loads would be delivered to the property. Benjamin Heselton answered that the deliveries varied with the season but estimated that ten to twenty truck loads would be average; he did not specify their frequency.

**TOWN OF NEW BOSTON
NEW BOSTON ZONING BOARD OF ADJUSTMENT
Minutes of 2014
March 18, 2014**

DRAFT

The Chairman asked for confirmation on the following proposed hours of operation:

- Monday through Friday, 7:00 a.m. -5:00 p.m.
- Tub Grinder only to be used Monday through Friday, 9:00 a.m. – 3:00 p.m.
- Saturdays, 8:00 a.m. – 12:00 p.m.

Daniel Muller, Esq., indicated that the proposed hours of operation listed by the Chairman were correct. He added that Saturdays would be a delivery/pick-up only day.

Daniel Muller, Esq., stated that the applicant was not looking to alter the property.

Harry Piper asked for the size of the trucks that would be delivering material onsite. Benjamin Heselton explained that he mostly dealt with tree companies delivering brush and most of the trucks used were one-ton trucks, landscaping trucks and homeowner pick-up trucks. He stated that he did not receive deliveries from gigantic trucks. The Chairman asked what type of material was ground in the tub grinder. Benjamin Heselton answered that tree brush and woodchips were ground in the tub grinder. He went on to say that following the grinding he would color the mulch and then sell the mulch. Harry Piper asked if the applicant would object to a limitation on the size of the trucks allowed to access the site. Benjamin Heselton stated that his answer depended upon the proposed limitations as he did not want to stay a small operation long-term. Daniel Muller, Esq., indicated that larger trucks would access the site to make limited stone deliveries. He noted that customers picking up the stone material would be using smaller trucks.

The Chairman asked if a cease and desist letter had been sent previously for this business. Daniel Muller, Esq., confirmed that a cease and desist letter had previously been sent for the business and was the reason the applicant was looking for a new site to run the business. The Chairman asked for the location of the previous site. Benjamin Heselton answered that he had previously operated the business on Riverdale Road. He explained that when he had started grinding the brush at his parents' property located on Riverdale Road he was unaware that it was not a permitted use. Harry Piper asked for the basis of the cease and desist letter. Benjamin Heselton answered that the use was not permitted in the Residential-Agricultural, "R-A" District. Richard Heselton added that the business had operated out of his property and he had foolishly believed that he could do what he wanted with his property. The Chairman asked for confirmation that the applicant had not been given a cease and desist letter for operating on the proposed property. Daniel Muller, Esq., confirmed that the cease and desist letter had not been issued for the proposed property.

Robert Todd asked which piece of the applicant's equipment would be the loudest. Benjamin Heselton answered that the loudest piece of equipment was the tub grinder. Robert Todd asked for the number of decibels that the tub grinder emitted. Daniel Muller, Esq., stated that he was unsure of the answer and would need to look it up. He indicated that the topography of the proposed tub grinder location was good for screening and absorbing the sound. Harry Piper asked for the current location of the tub grinder. Benjamin Heselton answered that the tub grinder was still located at his parents' property and was not being used. Harry Piper asked if the applicant was prepared to move the tub grinder to the proposed location and provide a demonstration of sound for

**TOWN OF NEW BOSTON
NEW BOSTON ZONING BOARD OF ADJUSTMENT
Minutes of 2014
March 18, 2014**

DRAFT

the neighbors. Daniel Muller, Esq., explained that the applicant was trying to get his business going and feared that if he did not receive a decision tonight his business would not move forward. He stated that the applicant did not have any stock as he was not been able to use the tub grinder. Harry Piper indicated that he was concerned with the Board making the wrong decision and it lasting forever since variances run with the land. Katie Napierkoski asked if Daniel Muller, Esq., had been able to locate that decibel information. The Chairman advised that he would allow questions and comments from the audience later in the meeting as he wanted to ensure that the applicant was able to speak to the variance criteria. He added that the decibel information could be discussed following the variance criteria discussion.

Daniel Muller, Esq., indicated that he would address the variance criteria and started with diminution of property values. He explained that the applicant proposed to use three to five acres of the lot, located at the front of the property. He further explained that the property had previously been used as a gravel pit and other gravel pits were located in the area. He stated that the proposed use was less intensive than the previous gravel pit. He noted that the vehicles and equipment on the site would be smaller than those used for the gravel pit. He pointed out that the hours of use for the tub grinder, Monday through Friday, 9:00 a.m. – 3:00 p.m., were more restrictive than the previous gravel pit's hours of operation. He stated that he did not believe there would be a diminution of value.

Daniel Muller, Esq., referenced the public interest element of the variance criteria and stated that he did not believe that the proposed use would alter the essential character of the area. He pointed out the locations of previous and current gravel pits in the surrounding area. He indicated that the proposed use was a smaller operation than what had previously existed in the same location.

Daniel Muller, Esq., referred to public health, safety and welfare and pointed out that natural noise mitigation existed on the property. He reiterated that the location of the tub grinder would be surrounded by earthen embankments. He referenced the Federal Highway Administration and stated that the earth barriers could be more effective than taller fences. He again stated that the tub grinder hours of operation would be limited to Monday through Friday, 9:00 a.m. – 3:00 p.m.

Daniel Muller, Esq., raised the issue of traffic and stated that between ten and twenty vehicles would visit the property at the business' peak. He noted that as the applicant was the sole employee and conducted all the deliveries the amount of traffic would be smaller at the start of the operation. He noted that large trucks currently traveled on the surrounding roads as two active gravel pits existed in the area.

Daniel Muller, Esq., referred to the variance criteria of unnecessary hardship. He explained that the special conditions of the property that made it appropriate for the proposed use was the topography. He reiterated that earthen embankments provided noise mitigation. He also noted that the higher areas of the property were forested and blocked view of the operation from surrounding properties. He added that the property had an existing gate and access as well as sufficient storage space. He stated that all of

**TOWN OF NEW BOSTON
NEW BOSTON ZONING BOARD OF ADJUSTMENT
Minutes of 2014
March 18, 2014**

DRAFT

the previously mentioned conditions made the proposed property a good property for the proposed use.

Daniel Muller, Esq., addressed the variance criteria in terms of reasonableness and stated that the Town's Zoning Ordinance allowed for a saw mill to be operated in the area by special exception.

Daniel Muller, Esq., referred to the variance criteria of substantial justice and stated that if the variance was denied the applicant would lose his business. He believed that the loss to the applicant outweighed any loss to public interest if the variance was granted.

Harry Piper asked for the closest residence to be identified on the map; Daniel Muller, Esq., pointed to the closest residence. Benjamin Heselton indicated that there was 650' between the driveway of the property and the nearest residence. Harry Piper asked for the distance between the tub grinder and the nearest residence. Daniel Muller, Esq., advised that there was over 900' between the tub grinder and the nearest residence. Benjamin Heselton added that the area between the tub grinder and the nearest residence was heavily wooded.

Greg Mattison asked for clarification on how many of the ten to twenty vehicle trips were going into the property and how many trips were leaving the property. Benjamin Heselton answered that he received between five and ten brush deliveries per day.

The Chairman asked if there were any factual questions from the Board with regard to the proposed use and/or if there any questions regarding the variance criteria. Robert Todd referenced an aerial photograph of the property and believed that there was the potential for two or three acres of land that had no vegetative cover. He believed that this issue would need to be addressed by the Planning Board should the variance be granted. Daniel Muller, Esq., asked if Robert Todd was referring to dust mitigation. Robert Todd answered yes. Daniel Muller, Esq., agreed with Robert Todd that the Planning Board would address dust mitigation.

Ken Clinton noted that the application was specifically for "wood recycling processing". He questioned if having material delivered to the property and then sold from the property was grandfathered as a pre-existing use. Daniel Muller, Esq., indicated that the applicant was not claiming that there was a pre-existing non-conforming use because the prior use was excavation and the proposed use was a new use. Ken Clinton asked if a separate variance was needed to address the receiving, managing and selling of materials from the property. Daniel Muller, Esq., answered no and noted that the letter of January 9, 2014, referenced the processed stone and loam as part of the application.

The Chairman referenced RSA 155-E, with regard to the Earth Removal Regulations. He advised that the Board had been advised by the Code Enforcement Officer that Tax Map/Lot #3/57 was in violation. He asked if the applicant was aware of the violation and if they had discussed the matter with Thibeault Sand and Gravel, LLC. Daniel Muller, Esq., stated that RSA 155-E, presented a separate issue from the variance issue. He believed that the issue was between the Town and Thibeault Sand and Gravel, LLC, and not this applicant. He noted that the Planning Board was the regulator of 155-E and enforcement was within the jurisdiction of the Code Enforcement Officer. He

**TOWN OF NEW BOSTON
NEW BOSTON ZONING BOARD OF ADJUSTMENT
Minutes of 2014
March 18, 2014**

DRAFT

explained that by statute the ZBA looked at variances, special exceptions, equitable waivers and administrative appeals. He stated that if the Town believed that there were issues they needed to be addressed with Thibeault Sand and Gravel, LLC. The Chairman asked if the applicant was aware that the Board had repeatedly requested the presence of a Thibeault Sand and Gravel, LLC, representative at this evening's meeting to discuss this matter, however, the requests were rebuffed. Daniel Muller, Esq., stated that the issue of enforcement was not an issue that generally belonged to the ZBA. He reiterated that he believed the violation issue and the variance were two separate issues. The Chairman stated that the Board had been informed that the lot was not in current compliance with Zoning and may have reclamation requirements that were not being met. He continued that the Board was being asked to grant a variance for a use that may be inconsistent with prior reclamation responsibilities of the landowner. He continued that the Board had been placed in a very awkward spot as the landowner did not attend the meeting to discuss the matter. Harry Piper believed that the statutes implied that the ZBA could grant variances and special exceptions on legal lots. He continued that a lot that was not in compliance with Zoning was not a legal lot. Daniel Muller, Esq., stated that he understood the Board's concerns; however, he believed that it was a jurisdictional matter. The Chairman disagreed with Daniel Muller, Esq., and stated that the Zoning Ordinance and variance law required the Board to look at substantial justice. He continued that the Board would be remiss if they looked at an application for a particular use in isolation and tried to separate it from the lot that the use was happening on. Harry Piper added that there was no justice if the Board granted Thibeault Sand and Gravel, LLC, the ability to make more money on a lot that was not in compliance. Daniel Muller, Esq., pointed out that the justice being addressed was the justice of the applicant. Harry Piper stated that the justice being addressed was that of the lot and not the applicant. He further stated that variances went with the land and not with the applicant. The Chairman added that the Board, by statute, had to look at spirit of the ordinance and substantial justice. He stated that he was not agreeable to allowing a landowner to duck their reclamation responsibilities by leasing their property to someone. Robert Todd agreed with the Chairman.

Ken Clinton asked the applicant if they would be agreeable to the variance being granted with the condition that the unused portions of the property would be subject to reclamation as directed by the Planning Board. The Chairman pointed out that the landowner could get around the condition by leasing the entire property.

The Chairman invited directly noticed abutters to make comments and/or ask questions. Dave Bealey of 54 Parker Road asked if a generator would be used to provide electrical power to the trailer or if electrical power would be installed. He further asked if there were plans to install after hours lighting that might be visible from his property. The Chairman asked Dave Bealey to identify his property on the map; Dave Bealey identified his property. The Chairman asked Dave Bealey if the existing gate on the Tax Map/Lot #3/57 was visible from his property. Dave Bealey answered no. Benjamin Heselton advised that he did not have plans to use a generator and would be running in power as soon it was financially feasible. He stated that he might use solar

**TOWN OF NEW BOSTON
NEW BOSTON ZONING BOARD OF ADJUSTMENT
Minutes of 2014
March 18, 2014**

DRAFT

panels for lighting in the trailer to start with. He added that he did intend on installing exterior lighting to prevent vandalism.

Jon Strong stated that he was present as an abutter and was also present on behalf of abutters George Strong and Bo Strong and HJG Brothers Gravel. He identified the location of his property as well as the properties owned by George Strong and Bo Strong. He stated that it was his understanding that the gravel pit located on Tax Map/Lot #3/57 had not been in operation for some years. He indicated that they did not have a problem with the proposed use operating at the proposed site. He believed that the proposed operation would produce less noise than the crusher that had previously been in operation at the site. He stated that the reclamation issues needed to be resolved and that the Town had an obligation to address the matter.

The Chairman asked Nic Strong for the status of the violation on Tax Map/Lot #3/57. Nic Strong advised that the gravel pit in question had not been permitted at the time the Planning Board took over as the Regulator. She noted that all of the other gravel pits in Town had followed through with the permitting process and were in compliance. She continued that there was no Earth Removal Permit for the property and subsequently the Code Enforcement Officer issued the first Notice of Violation. She explained that the landowner did not respond to the Notice of Violation and the Code Enforcement Officer sent a letter to the landowner advising that the gravel pit needed to be reclaimed in accordance with the plan on file if he chose not to submit an Earth Removal Permit application. She indicated that there was a plan for reclamation as well as a bond. She stated that over the years the landowner had removed just enough material from the gravel to keep it open and not allow the Town to declare it abandoned.

Harry Piper stated that if the Board granted the variance they would be putting the Board's decision as well as the applicant in jeopardy. The Chairman agreed and added that it could create potential legal problems for the Town with regard to the reclamation. Harry Piper indicated that he would love to see the applicant open a business but he did not believe that the proposed property was the right location. The Chairman noted that he did not have a problem with the proposed use but he did have a problem with the gravel pit not being in compliance.

Scott Neesen of 59 Parker Road pointed out the location of his property on the map. Kim Neesen expressed concern with regard to the mulch being dyed. She questioned what the dye was made of and if there would be any consequences to the soil and water supply as a result of it being used. She asked where the mulch was going to be stored and whether or not the soil would be tested. She questioned who would be responsible for paying for the testing of the soil and how often it would be tested. She advised that her property was directly on the other side of the wetlands and the area was not heavily wooded. Harry Piper pointed out that the issues being raised would be handled by the Planning Board. The Chairman stated that the issues of potential contamination could speak to the diminution property value. Kim Neesen indicated that she was concerned with mulch being stored in the heat as it was flammable. She asked if sprinkler systems would be used to keep the mulch cool and prevent fire. She stated that

**TOWN OF NEW BOSTON
NEW BOSTON ZONING BOARD OF ADJUSTMENT
Minutes of 2014
March 18, 2014**

DRAFT

the noise was a huge concern and that she was also concerned with increased traffic. She advised that she was home during the summer months with her children and she did not want to hear or smell the operation. She believed that the proposed use would devalue her property and quality of life.

Scott Neesen questioned if it could be guaranteed that the materials used to make the mulch originated in New Hampshire. He explained that there had been a long-horned beetle infestation in Massachusetts that caused significant damage to trees. The Chairman asked if there were current laws that regulated this matter. Robert Todd

answered yes. The Chairman stated that the applicant would have the responsibility to comply with the laws and regulations.

Kim Neesen referenced the Town of Goffstown Planning Board meeting minutes and noted that the applicant had previously operated his business out of an Industrial Zone. She questioned why he could not continue to operate his business out the Industrial Zone in Goffstown. The Chairman did not believe that the question was relevant for the Board. He welcomed abutters to submit questions and concerns in writing.

Marie Heath of 97 Riverdale Road advised that her property was located next to the applicant's parents' property. She indicated that when the applicant had operated the tub grinder there had not been any pollution that could be seen. She continued that there was not a lot of large or small truck traffic. She advised that the applicant had been very respectful with regard to his hours of operation.

Jon Strong pointed out that Thibeault Sand and Gravel, LLC, could submit an application for an Earth Removal Permit tomorrow and start operating in the pit again. He believed that the Board should consider that the applicant's proposal was a much smaller operation than the previous gravel pit operation. He reiterated that he did not have a problem with the applicant's proposal. He believed that the traffic and noise would be minimal. He stated that the applicant's proposal was a far better alternative than having Thibeault Sand and Gravel, LLC, run their crusher.

The Chairman asked for further comments and/or questions from abutters. Jay Webber of the New Boston Conservation Commission indicated that he lived about one mile from Tax Map/Lot #3/57. He indicated that he was a former owner of an excavating company and had owned a tub grinder. He assured the Board that the tub grinder was extremely loud. He questioned if traffic studies, noise studies, air pollution studies and water pollution studies had been conducted or if they would be conducted. He advised that his family had been sued relative to aquifer issues in the State of Massachusetts as a result from the dye being used. He wished the applicant well but did not believe that the use should be permitted in a Residential-Agricultural District.

Jay Marden of Gregg Mill Road asked if the applicant would be prohibited from resubmitting a variance application for several years if they were denied a variance this evening. The Chairman answered no and stated that the applicant could submit a new application tomorrow. Jay Marden asked if the application could be temporarily withdrawn without prejudice and allow the applicant to resolve the problem with the

**TOWN OF NEW BOSTON
NEW BOSTON ZONING BOARD OF ADJUSTMENT
Minutes of 2014
March 18, 2014**

DRAFT

landowner. The Chairman answered yes. Harry Piper stated that he was going to suggest that the applicant consider withdrawing their application without prejudice.

Katie Napierkoski of 66 Parker Road asked what types of precautions could be put into place in support of the families that reside in the area; she noted that there were about twenty children that resided in the neighborhood. She advised that trucks that traveled on Parker Road had come close to rear-ending school buses more times than she liked to admit. She noted that the buses operated on Parker Road multiple times during the day between the proposed hours of 7:00 a.m. and 5:00 p.m. Harry Piper advised that traffic issues were Planning Board issues.

Harry Piper noted that it had previously been stated that if the applicant did not receive the variance this evening then he would run out of time and be out of business. He asked if the applicant was aware that he would be required to go to the Planning Board and that the process took a lot more time. Daniel Muller, Esq., answered that the applicant was aware that he needed to go to the Planning Board for a site plan review. Harry Piper stated that a lot of the issues raised this evening could be resolved prior to meeting with the Planning Board if the application was withdrawn this evening without prejudice. Daniel Muller, Esq., stated that some towns required that an applicant receive relief from the ZBA prior to meeting with the Planning Board. He believed that withdrawing the application this evening could present a procedural barrier. Harry Piper agreed that zoning issues had to be resolved before the Planning Board would officially accept a plan; however, applicants were permitted to go before the Planning Board on a preliminary basis.

Paula Murphy of 171 Riverdale Road expressed that she shared concerns that were previously stated with regard to traffic, sound and diminution of property value.

The Chairman advised that it was the applicant's burden to show that there was no diminution in property value if there was a reasonable dispute about it.

Phil Consolini asked if the applicant's proposed operation was similar to the Dodge Farm operation on Route 77. Benjamin Heselton confirmed that the proposed operation was similar to Dodge Farm; however, Dodge Farm did not produce bark mulch onsite.

The Board took a four minute recess while the applicant consulted with his attorney.

Daniel Muller, Esq., advised the Board that the applicant was withdrawing his application without prejudice because of the violation. The Chairman noted that the applicant could reapply once the issues with the landowner were resolved. Harry Piper stated that the Board would like to be able to approve the variance with limitations.

Harry Piper **MOVED** to accept the request to withdraw the application for variance without prejudice, for Benjamin Heselton, Tax Map/Lot #3/57, Parker Road, Residential-Agricultural "R-A" District. Phil Consolini seconded the motion and it **PASSED** unanimously.

**TOWN OF NEW BOSTON
NEW BOSTON ZONING BOARD OF ADJUSTMENT
Minutes of 2014
March 18, 2014**

DRAFT

Nic Strong asked that the Board discuss the proposed Rules of Procedure at the next meeting. The Chairman stated that the proposed Rules of Procedure could be discussed at the next meeting. Nic Strong indicated that she would email a copy of the proposal to the Board members.

Harry Piper **MOVED** to adjourn at 8:26 p.m. Phil Consolini seconded the motion and it **PASSED** unanimously.

Respectfully submitted,
Valerie Diaz, Clerk

Minutes Approved: