

NELSON COUNTY BOARD OF ZONING APPEALS
May 4, 2015
MEETING MINUTES

Present: Gifford Childs, Kim Cash, Goffrey Miles, Mary Kathryn Allen, and Ron Moyer

Absent: John Bradshaw

Staff: Tim Padalino, Director, Planning & Zoning, and Stormy Hopkins, Secretary

Call to Order: Mr. Childs called the meeting to order at 7:35 P. M. in the General District Courtroom, County Courthouse, Lovingson. There were five members present to establish a quorum.

Approval of Minutes: Mr. Childs asked for any corrections or comments on the minutes. Ms. Cash stated that she does not know if they are correct or not; receiving July 2014 minutes in May 2015, she does not know if the minutes correctly reflect what was said. She realizes that the Board has not had a meeting since July 2014, but would like to have received the minutes well before now. She said that she would have to defer to the tape.

Mr. Childs noted that there was a difference in setbacks on page two (2) of the minutes. The first paragraph indicates a fifty (50') setback and the fourth paragraph indicates a seventy-five (75') setback. Mr. Padalino noted that there are two separate criteria for the required setbacks; one is measured from the centerline and the other is from the edge of the right-of-way. Mr. Childs asked that it be checked and clarified.

Mr. Moyer made a motion that the Board approve the minutes for July 7, 2014 with the noted correction. Mr. Miles provided the second; the vote 3-2 in favor with Ms. Cash and Ms. Allen abstaining.

Mr. Childs welcomed everyone to the Board of Zoning Appeals (BZA) meeting, and noted that there were extra agendas available in the back of the room. He provided an overview of the meeting procedures for the public.

1. Zoning Interpretation Appeal #2015-01 (Shimp / Major Site Plan #2014-004 "Zenith Quest – Afton Mountain"

Mr. Padalino stated that County staff recently received a petition to the Nelson County Board of Zoning Appeals, regarding an administrative approval he granted in his role as Zoning Administrator. He further stated that Appeal #2015-01 was submitted on April 2nd by Mr. Justin Shimp of 148 Tanbark Drive. The appeal is related to Major Site Plan #2014-005 ("Zenith Quest – Afton Mountain"), which received conditional approval from the Nelson County Planning Commission (PC) on January 28th. More specifically, the appeal is focused on the Zoning Administrator's administrative action to accept and approve the final revised landscape plan, which was an action that was taken on March 4th in connection with one (1) of the PC's four (4) conditions of approval. That condition is as follows:

"Additional plantings to soften the overall impact must be provided. Final approval will rest with the Director of Planning & Zoning with advice from the Chairman of the Planning Commission. This should also include particular attention to heavy screening of the dumpster in the front of the warehouse."

Mr. Padalino noted that the petitioner has written that, "As a neighbor of this proposed development, and a citizen of the County, I am aggrieved by this decision," and that the appeal, "provides the facts which demonstrate that the landscape plan, as proposed and as approved by the Zoning Administrator, meets neither the conditions as imposed by the Planning Commission nor the Zoning Ordinance."

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Mr. Padalino then showed zoning maps for the subject property. The property is located in Afton in the North District; and is identified as Tax Map Parcel #4-A-44A, being a ten (10) acre parcel zoned Industrial (M-2). The parcel is located along a designated Virginia Scenic Byway.

Mr. Padalino then provided a chronological summary of the site plan application, review, revisions and resubmittals, and approval regarding the landscaping plan portion of the approved Major Site Plan for the Zenith Quest International facility.

Mr. Padalino stated that the County began communicating with Zenith Quest International at an August 13, 2014 Site Plan Review Committee meeting. He noted they came as pre-applicants before they officially submitted an application, or other materials, in order to discuss the details of the proposed project. Attendants included Mr. Peter Kaya and Mr. Ray Miles of Zenith Quest, and Ms. Ammy George, landscape architect with Roudabush, Gale and Associates, the consulting firm that prepared the Site Plan.

Mr. Padalino explained that during this preliminary discussion, there were several site-specific issues that were brought up and discussed in detail, and which would need to be carefully considered and addressed by the applicant team. Mr. Padalino described those issues as follows:

1. The unusual zoning map patterns – the subject property is zoned Industrial (~~M-1~~) (M-2) and adjoins both Residential (R-1) and Agricultural (A-1) Districts. That issue gave rise to questions and concerns about project compatibility with existing land uses in the immediate area. There was specific discussion about how the project will address potential impacts on any changes to the character of the neighborhood and to the quality of life for nearby residents.
2. The project's location on a designated Virginia Scenic Byway and at a gateway entrance into the Rockfish Valley, which is the center of Nelson County's highly successful tourism industry. That issue gave rise to questions and discussions about the visual impacts to the scenic corridor and the tourism corridor. There were questions and concerns about traffic patterns, volumes, and road safety. And, there was specific discussion about how the project would address potential impacts related to safety and appearance.

Mr. Padalino further explained **stated** that from the earliest engagement with the pre-applicant team, staff emphasized to Zenith Quest the specific importance of developing a robust, high-quality landscape plan to minimize potential impacts of the issues described above.

Mr. Padalino stated that on August 28, 2014, he conducted a site visit with members of the PC, and with members of the applicant team, which led them to submit a Major Site Plan, and was reviewed by the PC on October 22nd. He highlighted a few elements from the staff report for that PC meeting, including specific review comments regarding the need to revise the landscape plan as it was originally submitted as follows:

1. Additional screening is needed along Route 151;
2. Screening is required adjacent to parking lot and loading area(s); and
3. Other general screening considerations, relative to the Ordinance sections.

Mr. Padalino noted after that meeting, the applicants began revising the Site Plan, and resubmitted a revised Site Plan on December 29, 2014. The revised plan went back before the Site Plan Review Committee. In connection with that second review, Mr. Padalino stated that he provided the applicant team with updated review comments on January 14, 2015. He indicated that the total review comments consisted of eight (8) pages, but the BZA was only given three (3) pages that pertain specifically to the landscape plan elements. Part of those review comments included revision comments from the applicant team (noted in bold black ink), addressing how the revisions incorporate their review comments. Mr. Padalino also noted that it included his updated comments (in bold blue ink). Mr. Padalino noted a few of the highlights from the applicant's revision comments:

1. The applicant's revision comments note that, on the revised landscape plan, a mix of predominately evergreen and deciduous shrubs were proposed along the fence line facing Route 151; and that 75% of the total length of the road frontage has been landscaped. Mr. Padalino noted this exceeded the minimum 50% requirement. He also noted that in response to that, he acknowledged that the additional landscaping materials are a significant positive improvement, and that the proposed revised landscape plan contains much more plant material, and is comprised of a very interesting and attractive plant palette. However, Mr. Padalino noted that the majority of the proposed canopy trees along Route 151 are deciduous, and will not provide effective screening for a large portion of the year. The review comments state that the applicants should revise that portion of the landscape plan to include additional evergreen trees, staggered behind the proposed deciduous trees and shrubs. Such revisions would provide greater depth of vegetation materials, with year-round foliage, and thereby provide effective screening.
2. The applicant's revision comments note that, on the revised landscape plan, the average full-grown height of the shrubs along the Route 151 is approximately 8-10', which will provide adequate screening for the parking and loading areas. The trees and shrubs have been located to maximize the screening of the loading and parking area. A portion of the site is located approximately eight 8-10' above Route 151, and for those areas, additional screening with landscaping was not needed. Mr. Padalino noted that his response comments state that the additional landscaping materials are a significant positive improvement; however, there are no landscaping materials to provide screening adjacent to the loading area or the parking area, and that the applicants should revise the plan to include landscaping in those areas.
3. Additional comments were provided to the applicants: the proposed project includes a very long façade to the warehouse, in excess of 375' in length, that must have some landscaping to provide better screening from Route 151 and from adjacent properties, and to reduce the visual impacts of the very large and long industrial building. A suggestion was made that such landscaping could be established in relatively thin landscaping areas or planting beds along the building, located along the façade in between the loading docks where they would not interfere with the loading operations.

Mr. Padalino noted that all of these review comments were provided in writing as well as in a graphic format; and he showed a slide to depict the graphic format view.

Mr. Padalino noted that on January 28, 2015, the PC conducted a review of the revised landscape plan, the comments provided by Ms. Ammy George and himself, as well as the review comments sketch. He noted that the applicant team also presented a draft version of a newly revised landscape plan sketch, with proposed landscaping additions. Mr. Padalino noted that, at that meeting, the applicant team explained that some of the County's review comments could not be accommodated, due to the following: engineering limitations of compacted soil caused by delivery trucks within the loading area; and security concerns, related to trees or shrubs potentially being used as hiding areas near the warehouse and loading docks.

After concluding their review of the revised Site Plan; including the draft landscape plan sketch, the PC voted to provide Major Site Plan #2014-005 with conditional approval, citing four (4) pending issues that needed to be properly resolved prior to full and final County approval of the site plan. Mr. Padalino noted that the second condition, pertaining to the landscape plan, had been previously read at tonight's meeting.

Mr. Padalino noted that, following that conditional approval, the applicant team worked to incorporate some but not all of the County's review comments into a final revised landscaping plan which was submitted on February 12, 2015. They introduced six (6) Red Maples near the employee parking and loading areas; sixteen (16) White Pines and nine (9) Virginia Pines along the frontage of Route 151; and the addition of some low growing shrubs and ornamental grasses in between the loading area and the frontage of the property. Mr. Padalino then highlighted how

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the applicants explained that the plant materials near the loading area were selected with security concerns in mind. Specifically, low-growing thorny shrubs were proposed so that those areas could not be used for hiding. They used a plant palette of “dwarf” varieties, which included the Pyracantha (max height of 3’ to 4’) and Barberry (max height of 2’ to 3’) shrubs, and the Prairie Munchkin Dwarf Little Bluestem (max height of 2’) grasses. Mr. Padalino further noted that the applicant team did not include any landscaping islands for trees or other vegetation along the façade of the warehouse, due to the previously stated concerns (soil compaction and security concerns).

On March 4, 2015, Mr. Padalino stated that in his capacity as Zoning Administrator, and in accordance with the PC’s conditional approval, he accepted and approved the “final revised landscape plan”. He notified the applicant team on March 4th. He noted that his action to accept and approve the final revised landscape plan was based on the extensive review and revision process, which included a total of three (3) iterations or two (2) substantial revisions; and the testimony of the applicant team, which included public statements about the inability to accommodate all the County’s review comments, due to the design/engineering issues and security issues.

Mr. Padalino stated that he continued to work with the applicant team to address the remaining three (3) conditions. He noted that Major Site Plan #2014-005 eventually received final County approval on March 25th, at the PC meeting when they voted 5-1 to confirm that the final remaining condition of approval had been satisfied; and he provided his approval signature to the final revised site plans on March 26th.

Mr. Childs stated that he would like to address the issue brought forward by the County Attorney, Mr. Phillip Payne, to make everyone aware of it. He also noted that BZA members just received the correspondence today. Mr. Padalino apologized for that and noted staff received it Friday afternoon and, due to miscommunication, didn’t recognize that it was supposed to be mailed out by Planning & Zoning staff. Ms. Cash asked if the applicant received this in the same format. Mr. Padalino stated that the petitioner did and that he received it in the mail today as well.

Mr. Childs noted that this was Mr. Payne’s opinion, and is based ~~off of~~ on quite a bit of evidence from previous decisions. He also noted that the big issue for the BZA is what needs to be done: should they hear the case; should they dismiss it; and if they do hear the case and vote, what is the risk. Mr. Childs said he is unsure of the appropriate process. Mr. Padalino said the decision was up to the BZA to take action on how to respond to this legal concept of “standing.” He also noted that Mr. Payne provided a legal precedent to claim that there is a fairly high legal or technical threshold to meet, in order to be considered an aggrieved person with legal standing.

Ms. Cash asked if this was published as a public hearing. Mr. Padalino said it was. Ms. Cash stated that in her opinion, the BZA needs to hear from the applicant; open the public hearing; and then the BZA can decide what action to take. Mr. Moyer stated with the approvals from the PC, Mr. Padalino and a letter from Phil Payne (County Attorney), that it will be his way of voting. Ms. Cash stated there were two (2) options offered by Mr. Payne: the applicant by-right could have the opportunity to respond to the information; and if it was advertised as a public hearing, the BZA is legally bound to hold a public hearing.

Mr. Childs stated that he BZA would hear the appeal. He asked that the applicant come forward.

Mr. Justin Shimp of 148 Tanbark Road, Afton: Mr. Shimp was sworn in by Mr. Childs before the Board and signed the oath. Mr. Shimp stated that he is very close to this proposed facility and is aggrieved. He stated that he received a memo from the County and feels the timing could have been better. He also noted that he does not think it is a complete opinion as to whether he has standing or not. He added, that if there is a question on the standing of this, and if the opinion of the Board is that he does not have standing, that there be a delay until next month ~~to allow~~ so it could be presented more thoroughly. He stated that given the late timing of the memo, he feels that would be fair.

Mr. Shimp talked about the nature of the appeal and why he has made the appeal. He stated that one thing that he’s found in this process and dealing with the Planning Commission’s approvals, is that there is not a whole lot of opportunity for public input. He noted that he was disappointed by that, and that he had to file a BZA appeal in order for his concerns to be heard. He also noted that he had been communicating with Mr. Padalino some during

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the course of this project; but, at the end of the day, there were statements made about what could and could not be done (based on the applicant's claim of inconvenience or a safety concern). He stated that those may be concerns for the folks carrying out the project, but that is not an excuse to ignore the rules. The burden, when it comes to following the Ordinance, is on those proposing the facility.

Mr. Shimp stated that he lives about 5,000 feet or less from this facility, and drives past the site every day. He stated that he's more or less a life-long Nelson person and tends to stay in Nelson. He stated when things like this come up, it affects your neighbor and property values. He indicated that he's made some big investments in his property and will continue to do so by building a new house. He stated that the landscaping ordinances are created to protect neighbors and businesses around a property, and that they need to be followed.

Mr. Shimp noted the following specifics of his appeal: shrubs are very short; they do not hide large trucks; they should be evergreens; there is an area that is facing an Agricultural property that does not have any landscaping; and a big structure along a Scenic Byway (that the County should protect) has a negative visual impact.

Mr. Shimp noted that he is a Civil Engineering in Charlottesville that and designs lots of warehouse type buildings and knows that trees can be planted in loading areas, but it does take some consideration. He indicated that landscape islands could be done.

Mr. Childs swore in Mr. Daniel Rutherford, attorney for Mr. Shimp: Mr. Rutherford stated that he was there for the standing issues. He said, "*a big study of the authority suggests that, to follow the proper analysis of applying whether a party has standing as an aggrieved party, with respect to appearing before the Board of Zoning Appeals: the first determination has to be ascertained if the petitioner is directly involved or is an adjoining property owner; but that is not the end all. If the petitioner is not directly involved in the controversy and is not an adjoining owner, then the inquiry is whether the landowner may potentially be within the third class of an aggrieved persons. And, the resolution of the landowners' aggrieved status is a two-fold inquiry. The first step is to determine whether the landowner owns property within close proximity to the zoning district of where the challenged use. To determine if the landowner is in close proximity is, a whole bunch of cases, a whole bunch of tests, and a lot of what you have is kind of limited and not detailed. You don't need to be an adjoining landowner to be an aggrieved person; you can show I have indirect harm. Indirect harm can be any value on property (appraisals or things like that). So, to say that he is not a landowner or that here is the very vague, broad, determination of an aggrieved person wasn't the whole analysis that needs to be before the Board of Zoning Appeals. So, to let you know, there are three (3) classes of aggrieved persons, and I believe my client, Mr. Justin Shimp, is in that third class. He is in close proximity and still being damaged, unlike individuals in my district Faber, Gladstone, and other places, who would be general public aggrieved. My client is in close proximity to less than 5,000 feet away from this 80,000 SF building. Other Circuit Courts within this Commonwealth has agreed to such, and is what I have before me; is what other Circuit Courts have ruled as well.*"

Mr. Childs asked if there were any questions for Mr. Rutherford. No questions were asked. Mr. Childs opened the public hearing at 8:09 p.m.

Mr. Ray Miles, Project Manager for Zenith Quest International: Mr. Miles stated that from the beginning, now, and continually, they are eager to work with the County to make sure their landscaping plan is in line with the code and expectations. They went through several revisions and thought they had arrived at a very good landscaping plan. It was their understanding that the Site Plan was approved and still is. He noted that if the County concludes that other features must be added in order to meet code; they are willing to do that. He indicated that he has comments from his attorney, Valerie Long with Williams-Mullen that he would like to submit. He stated that Ms. Long's conclusion was very similar to the County's Attorney's in that there is no standing.

Mr. Miles stated that Ms. Ammy George, engineer with Roudabush, Gale & Associates, was there to explain the screening issue. He stated that it was his understanding as a layman (he worked in landscaping for five years) not only passerby's along the road, but neighbors across the street, (at relatively the same height and level as the property) will have virtually complete screening from the warehouse when all the landscaping along the road has

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grown the way it should. The extra landscaping added along the perimeter of the turnaround and the loading area (short shrubs and trees) were added in addition to that screening to break up the loading and parking area. He noted that it was their understanding that the revised landscaping around the loading area, parking area, Scenic Byway and neighbors was very adequate. As for the landscaping along the facade of the building; it is his understanding that trees planted there won't get the sun or water that is needed for adequate growth. The root structure won't take for them to grow tall enough to provide much screening. Those are the reasons that focus was placed on screening along the road as well as extra screening alongside the turnaround areas.

Mr. Miles further noted that they are in the import/export business, which imports ammunition. They are beginning to import firearms, and they might do light manufacturing on firearms in the facility. He noted that their security officers got together and decided that for security reasons, they didn't want anything alongside the building that could be a security hazard for the loading and unloading of delivery vehicles, and for staff going to and from the parking lot.

Ammy George, Rodabush, Gail & Associates: Ms. George stated that she was the landscape architect for this project. She noted that security was always first in mind during the process. She stated that they didn't want anyone to have access to the loading doors; they wanted a clear view of parking and loading areas.

Regarding the compaction of the soil in the loading area, she noted that there is a gravel parking lot, it is not asphalt. She noted that, as Mr. Justin Shimp stated, landscaping could be done up close to the building, but one thing with a gravel parking lot is that tree roots will follow the water, and eventually the surface or tree roots will be compromised. In order to have a healthy tree, you need to have healthy roots. Usually the tree roots are the same area as the canopy extends out; so that could be a large area that is either pushed up to create damage to the loading area surface, or impeded the root system of the tree, which would need to be replaced within ten (10) to fifteen (15) years. An unhealthy tree would create more of an eye sore than an open wall space. Those are the reasons they chose not to put landscaping in the loading areas. They also felt that the buffer along Route 151, with evergreen shrubs/trees that are behind it, along with the deciduous trees, would provide adequate screening. The eye is naturally drawn up sixty degrees, which would catch the top of the trees, if not the middle of the canopy.

Mr. Childs asked Ms. George to address Mr. Shimp's comment regarding the adjacent property. Ms. George stated that from Mount Armour, they did try to save as many trees along the property line and within the setback as possible. One of the things that was discussed with the PC (on public record) was that anytime that trees on adjacent property fell below ten (10) feet in width, landscaping would be added; and they did, along the Stormwater Management pond. Mr. Childs asked if there were more trees in that direction and Ms. George stated that there is an existing tree line that follows the property line.

Sharron Harris: Ms. Harris stated that she lives on Family Lane and asked about the road at the back of the warehouse on Family Lane. Mr. Padalino stated that is where the project team has designed a secondary emergency access. He stated that it would be a gravel road, with a gate, in case an emergency access vehicle needs to access this end of the building to fight fire. Ms. Harris asked if the landowners/homeowners needed to give them permission. Mr. Padalino stated that was a topic that was discussed during the whole Site Plan Review Committee process, and which is a primary focus of Mr. Shimp's second appeal. That appeal will be heard by the BZA on Monday, June 1st. Mr. Childs wanted to clarify that Family Lane was not part of the issue tonight since it is not a part of the landscape plan. Mr. Padalino stated that was correct and said it was Appeal #2015-02.

No further comments were made and the public hearing was closed at 8:20 p.m.

Ms. Cash stated that the first order of business is to determine if Mr. Shimp has standing. If he does, the BZA moves forward and discusses the issue of landscaping; if he does not, it goes no further. Mr. Moyer stated that he feels the BZA needs to rely a lot of Mr. Payne's recommendation.

Mr. Childs asked about the point made of asking for a delay. Mr. Moyer stated that he does not feel that it should be delayed. Mr. Childs agreed and stated that he feels it would be unfair to the original applicant. Ms. Cash stated

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that a similar issue had been dealt with before regarding standing and referenced the coffee roastery at the Rockfish Valley Community Center; where a nearby property owner contested the decision. It was the Board's determination that the property owner did not have standing to do so. Ms. Cash stated that she is very comfortable in agreeing with Mr. Payne's determination and does not believe Mr. Shimp has standing to file this appeal. Mr. Moyer and Mr. Miles agreed with Ms. Cash.

Ms. Cash made the following motion:

I move that the Board of Zoning Appeals, relative to Appeal #2015-01, finds that Mr. Justin Shimp has no standing to file an appeal of the Zoning Administrator's approval of the landscape plan for Major Site Plan 2014-005 for Zenith Quest-Afton Mountain as:

-the petitioner, Mr. Shimp's appeal seeks to redress some anticipated injury that is not based in current fact and,

-the petitioner has no direct interest in the matter hence is not "aggrieved" as defined by the VA Supreme Court, by the Zoning Administrator's approval of the landscape plan.

Therefore, Mr. Shimp does not have standing to appeal the Zoning Administrator's determination.

Ms. Allen provided the second; the vote 5-0.

Other Business:

Curro Case: Ms. Cash asked for an update on the case. Mr. Padalino stated that he has spoken with Mr. Payne and the last update was that the Circuit Court judge upheld the BZA's ruling, and that the parking platform structure had to be removed within a certain time frame – but that time has passed. There has been no further action because it has been tied up in proceedings between the two party's parties' attorneys and the Courts. He stated that as of this past Friday, Mr. Payne has set a hearing for seeking to seek a court-ordered injunction to have the structure removed, pursuant to the BZA's original determination and the Circuit Court's ruling to uphold that determination. Ms. Cash asked ~~to~~ Mr. Padalino to get another update, if there is one, before the next meeting.

Chad Artz Case: Ms. Cash asked Mr. Padalino if the Board of Zoning Appeals is completely done with Mr. Artz. Mr. Padalino said yes, that Mr. Artz was determined to be in full compliance with applicable Ordinances, BZA findings, and court rulings.

Meeting Procedures: Mr. Childs noted that Ms. Cash raised a good point, regarding only the applicant taking the oath. Mr. Childs said that ~~was~~ those were his thoughts as well, but at the last meeting, everyone took the oath. Ms. Cash stated that is what happened. It is her understanding that anyone giving testimony that could be used in court, such as the applicant, petitioner or their representatives, would be sworn in; but members of the public, who are speaking during the public hearing, are simply giving opinions, it is not testimony and is not something that would be called into court. Mr. Moyer stated that ~~is~~ if someone was called into Circuit Court, they would have to be under oath anyway, so it doesn't make a difference.

Ms. Cash asked if the BZA is going to develop an outline for motions. Mr. Childs said he thinks so. They asked Mr. Padalino if he would provide a draft of what specific information a motion should contain. Mr. Padalino said he would.

Mr. Childs asked if minutes could be provided by email earlier. Mr. Padalino confirmed that once the minutes are drafted, Planning & Zoning staff would send them by email as quickly as possible.

Ms. Allen asked if Mr. Payne issues something regarding the next meeting, could it be provided a week or two in advance. It will give everyone more time to read through it, and ask questions if there are any. Mr. Padalino said the BZA could request Mr. Payne be in attendance at the meeting, if he's available.

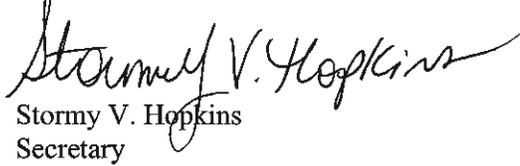
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Ms. Cash said the PC has dealt with an issue regarding legal access before with Shannon Farms, and asked if they could get copies of the minutes from that meeting.

Adjournment:

Mr. Childs adjourned the meeting at 8:37 P.M.

Respectfully submitted,



Stormy V. Hopkins
Secretary