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July 29, 2019

**VIA E-MAIL AND HAND DELIVERY**

Historic Preservation Commission  
Borough of Madison  
50 Kings Road  
Madison, NJ 07940

Zoning Board of Adjustment  
Borough of Madison  
50 Kings Road  
Madison, NJ 07940

Re: Saxum Real Estate Group  
Decision of Madison Historic Preservation Commission  
**NOTICE OF APPEAL**

Dear Commissioners and Zoning Board of Adjustment Members:

As the Commissioners are aware, this firm represents Saxum Real Estate Group (the “**Applicant**”) in connection with its application for demolition and new construction on property located at 14 Lincoln Place in Madison Borough (the “**Property**”).

The Applicant submitted an application to the Planning Board for preliminary and final site plan approval on January 15, 2019. The application was then referred to the Madison Historic Preservation Commission (“**MHPC**”). After four formal hearings held on March 12, 2019, April 9, 2019, May 6, 2019, and May 28, 2019, the MHPC approved certificates of historic review for the demolition of the existing building and construction of a new building on the Property, with certain conditions attached to each of the certificates. The certificates of historic review were memorialized by Resolution 3-2019 of the MHPC dated July 9, 2019 (the “**Resolution**”), constituting a decision of the administrative officer on this application, a copy of which is enclosed herewith.

Pursuant to Madison Borough Ordinance Section 112-11, an appeal to the Zoning Board of Adjustment (“**ZBA**”) can be taken by any interested parties “affected by any order, requirement, decision or refusal of the administrative officer pursuant to a report submitted by the Historic Preservation Commission or Planning Board, including a denial of a certificate of

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historic review[.]” Please let this letter serve as a formal **NOTICE OF APPEAL** limited to three (3) conditions placed on the certificates of historic review.

Specifically, the Applicant appeals the following three conditions, as memorialized in the Resolution:

1. Condition #4: “Demolition shall not commence until after all required State, County, and local land use approvals have been secured; all building and soil permits have been obtained; and Borough Officials are fully satisfied that the demolition and new construction is in full compliance with all applicable laws.” (hereinafter referred to as the “**Development Approvals Condition**”).
2. Condition #9: “Continuation of a public theater is necessary, reasonable, and in furtherance of the public interest to preserve the historical, cultural, and social significance of the Lyons Theater and the District as a whole. A 90 to 100 seat theater shall continue in active operation on a portion of the Lyons Theater property. A 90 to 100 seat theater shall be included on the final design plans and within a portion of the replacement building/structure to ensure that the property can continue to be used as a theater for public access and entertainment. The site shall be promoted and marketed in a commercially reasonable manner for use as a public movie theater and Saxum shall use commercially reasonable efforts to secure a movie operator tenant.” (hereinafter referred to as the “**Public Theater Condition**”).
3. Condition #10: “All new construction on the site of the Lyons Theater property shall be in the character of the Madison Civic Commercial District such that the scale, mass, size and height of the replacement structure to be built at the Lyons Theater site shall be kept in line with the character of the Madison Civic Commercial District and shall not be larger than three stories (45 feet) in height as measured from “average grade” as per the Borough’s Zoning Ordinances and Building Department regulations.” (hereinafter referred to as the “**Height Restriction Condition**”).

The Applicant appeals each of the Development Approvals Condition, the Public Theater Condition, and the Height Restriction Condition for the following reasons:

Development Approvals Condition

Madison Borough Ordinance Section 112-8(C)(6)(a)(3) provides, “In the event that the Commission disapproves an application to demolish an historic building, place or structure, the owner shall, nevertheless, as a matter of right, be entitled to raze or demolish such building,

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place or structure, provided that all of the other demolition requirements of the Borough have been fully met.”

The placement of the Development Approvals Condition on the demolition of the existing structure serves as an essential denial of the Applicant’s right to demolish the existing building on the Property. While the MHPC did not outright deny the Applicant’s request for a certificate of historic review on demolition, this condition may result in the delay of the demolition for years to come. If an applicant has the right to demolish a building on its property despite receiving a denial from the MHPC, this Applicant must also have the right to demolish a building after receiving open-ended conditions on the demolition with no timeframe imposed, making the condition, in effect, a disapproval of the Applicant’s application for demolition.

As this process continues and the building remains, the Applicant continues to pay taxes on assessed improvements that the MHPC deemed “structurally compromised” and for which the MHPC agreed that demolition was “appropriate given its poor structural condition.”

For the foregoing reasons, the Applicant respectfully requests that the ZBA delete the Development Approvals Condition.

Public Theater Condition

The Applicant’s application materials submitted to the Planning Board and the MHPC provide that, “If the Applicant is unable to find a commercially acceptable tenant for the theater, the Applicant proposes to utilize the theater space as retail space.” The MHPC’s condition requiring a public theater space in the building is a restriction on the Applicant’s ability to effectively and responsibly construct and manage the building. As explained through testimony, the previous movie operator tenant in the existing building terminated its lease early due to a financial inability to maintain its operations. While the Applicant’s plans currently reflect a movie theater space with 90 to 100 seats, and the Applicant will use commercially reasonable efforts to locate a movie operator tenant, the Applicant should not be required to return to the MHPC to modify this condition should no economically viable and commercially reasonable option present itself. Such a requirement effectively puts in question the development of a new, vibrant building in Downtown Madison that would provide the Borough with affordable units, pending the ability of the Applicant to locate a movie operator, and restricts the Applicant from commencing construction until such a tenant is located.

For the foregoing reasons, the Applicant respectfully requests that the ZBA either delete the Public Theater Condition in its entirety or modify it to parallel the Applicant’s proposal that the Applicant use commercially reasonable efforts to find a commercially viable movie operator tenant, and if unable to do so, to permit the Applicant to utilize the space for retail.

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Height Restriction Condition

The powers of an historic preservation commission are distinct from the powers granted by statute to municipal planning boards, which are granted the power to (1) review and approve site plans and (2) grant variances. N.J.S.A. 40:55D-37, et seq.; N.J.S.A. 40:55D-60.

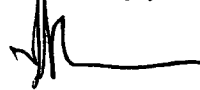
The Planning Board has ultimate jurisdiction over variances. Any conditions imposed by the MHPC are subject to the Planning Board's review of the application. This is supported by New Jersey statute, because once the Planning Board acts on a variance, the subject matter of that variance becomes "an aspect ... determined by approval of an application for development by a municipal agency." N.J.S.A. 40:55D-111. As part of its application for development, the Applicant requested variances, including for (1) maximum height, (2) minimum rear yard setback, and (3) maximum impervious coverage, which relate to the building's mass, height and scale. The Height Restriction Condition conflicts with the Planning Board's authority to grant variances for maximum height, minimum rear yard setback, and maximum impervious coverage. Any conditions from the MHPC relating to scale, massing, size and height should be recommendatory only. The Planning Board will listen to the testimony from a member of the MHPC, and ultimately make its own decision on whether to permit the building to be built as proposed.

For the foregoing reasons, the Applicant respectfully requests that the ZBA delete the Height Restriction Condition.

As required under the Borough Ordinance, the MHPC shall transmit "all the papers constituting the record" for this matter directly to the ZBA as soon as possible. The ZBA should then review the record and make an independent, de novo decision on this appeal based solely on the record below.

By copy of this letter, I am requesting that Gary Hall, attorney for the ZBA, please confirm the date that the appeal will be heard by the ZBA.

Very truly yours,



Peter J. Wolfson

Enclosure

cc: Saxum Real Estate Group  
Jonathan Testa, Esq.  
Gary Hall, Esq.  
Fran Boardman, Planning Board Administrative Official  
Russell Brown, Construction Official