

BOROUGH OF MADISON  
ZONING BOARD OF ADJUSTMENT

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IN THE MATTER OF: :  
: TRANSCRIPT  
MADISON MOVIE : OF  
DEVELOPMENT, LLC, BLOCK : PROCEEDINGS  
2702, Lot 24, 14 LINCOLN :  
PLACE :  
:

Tuesday, March 12, 2020  
Madison Borough Hall  
50 Kings Road  
Madison, New Jersey  
Commencing at 7:50 p.m.

BOARD MEMBERS PRESENT:

JOSEPH SANTORO, Chairman  
MARY SUE SALKO  
ANTHONY DiIONNO  
ROGER PAETZELL  
TONI DEROSA  
TIMOTHY FITZSIMMONS  
DIANE DRISCOLL

ALSO PRESENT:

FRAN BOARDMAN, Secretary  
RUSSELL STERN, Planning Consultant

ALISON GULINO, CCR, RPR  
CERTIFIED COURT REPORTER

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1 A P P E A R A N C E S:

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3 GARY HALL, ESQ.  
Counsel for the Board

4

5 DAY PITNEY, LLP  
One Jefferson Road  
Parsippany, New Jersey 07054  
By: PETER J. WOLFSON, ESQ.  
Counsel for the Applicant

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1 I N D E X

2 (No Witnesses)

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5 EXHIBITS MARKED INTO EVIDENCE

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7 <u>NUMBER</u>	8 <u>DESCRIPTION</u>	9 <u>PAGE</u>
10	11 (No Exhibits Marked)	
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1 CHAIRMAN SANTORO: So first up is

2 going to be Madison Movie Development, LLC, Block

3 2702, Lot 24, 14 Lincoln Place.

4 Applicant is seeking an appeal of the

5 Administrative Officer decision for demolition and

6 new construction at 14 Lincoln Place.

7 Welcome.

8 MR. WOLFSON: Good evening, Mr.

9 Chairman, Board members, Board professionals.

10 Peter Wolfson of Day Pitney.

11 First, I'd like to thank you all for

12 assembling tonight and I wish you all good health to

13 you and your family.

14 My understanding is that two of the

15 members have chosen to recuse themselves from this

16 matter.

17 MR. HALL: Yeah. Mr. Foster and Ms.

18 Kaar.

19 MS. BOARDMAN: Mr. Wolfson, please

20 speak into the microphone.

21 MR. WOLFSON: I'm going to ask if I

22 can sit down and then I'll be right there.

23 Is it okay if I sit down, Mr.

24 Chairman?

25 CHAIRMAN SANTORO: Yes, it is. Sure.

5

1 Just pull that mic close.

2 MR. HALL: Well, I guess you ought to

3 start, and then, I -- I can give my views if you

4 want to talk first.

5 MR. WOLFSON: Whatever your pleasure.

6 MR. HALL: Why don't I give the

7 background so the Board can hear it, and certainly,

8 then, you can disagree.

9 I did do a memorandum that went to the

10 Board. It's in the public file. It's been

11 available for the past ten days, at least. I guess

12 Board members got it in their packet. I went

13 through; I spent a lot of time and what this is, is

14 an appeal, not a variance application. It's an

15 appeal specifically provided by under the Land Use

16 Law. The last one the Board had was a consent

17 order, was the Defense-1, if you recall. There's a

18 good side and a bad side I forget what the specific

19 language was. That was an appeal and the statute

20 does cite the Board of Adjustment has jurisdiction

21 to hear appeals of an administrative action taken

22 based upon the zoning ordinance, and in the case of

23 the historic preservation, there's a specific

24 provision in the statute and the town's ordinance

25 that says the Board of Adjustment is empowered and,

6

1 in fact, required to hear appeals if somebody  
2 chooses to.

3 My memo, I spent a lot of time and I  
4 quoted the ordinance and the statute in various  
5 places. I'm getting this ready.

6 The general authority is to hear and  
7 decide appeals; whereas, alleged by the appellant,  
8 that there's an error in any order, requirement,  
9 decision or a refusal by an Administrative Officer  
10 based on an enforcement in the zoning ordinance.

11 In this particular case, the Historic  
12 Preservation decision, both the statute and the town  
13 ordinance, make reference to hearing appeals of  
14 decisions. Once again, Administrative Officer  
15 enforcement; that's what it said.

16 Action error decision order decision  
17 requirement made by Administrative Officer pursuant  
18 to a report submitted by the Historic Preservation  
19 Commission so it's important that the -- the appeal  
20 is from the decision of the Administrative Officer,  
21 not the Historic Preservation Commission. The  
22 action by the Administrative Officer based on the  
23 report from the Historic Preservation Commission,  
24 and as, I think, I mentioned in the memo, the  
25 Historic Preservation Commission had a lot of

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1 hearings in the last year culminated in a resolution  
2 over demolition permit and there, initially, was a  
3 Notice of Appeal filed with the secretary of the  
4 resolution adopted by the Historic Preservation  
5 Commission.

6 At the time, I'd looked at the  
7 statute. I said, "Wait a minute. The appeal has to  
8 be for the Administrative Officer who hadn't done  
9 anything yet. In this case, it would be the  
10 Construction Official who issues demolition permits  
11 so they were going forward for a little while but to  
12 get -- apply for a demolition permit, which is under  
13 the State Uniform Construction Code, is a fairly  
14 simple process. If you want to tear down your  
15 house, you get a demo permit. To build, you get a  
16 building permit. The demolition permit and  
17 criteria, basically, you know, you got to disconnect  
18 utilities, give notice to the neighbors and have a  
19 rodent-control plan in place because, often, you  
20 demo something, you may have rats in it but anyway.

21 So as -- as I understand and I wasn't  
22 directly involved, the -- the Construction Official,  
23 was told by the State Department of Community  
24 Affairs, which has oversight over the Uniform  
25 Construction Code, Construction Officials, they're

8

1 appointed by the town, but, really, in one sense,  
2 they're paid officials, but apparently, somebody  
3 from the Department of Community Affairs told our --  
4 Madison's Construction official that he can't issue  
5 a demolition permit subject to conditions and that's  
6 what this was all about.

7 The -- the appeal, the -- back up.

8 The Historic Preservation Commission  
9 issued a resolution, rather detailed and lengthy,  
10 but at -- at the end of the day, said they could  
11 demolish the theater building on the other side of  
12 the train station up here. You can't see it but  
13 they said to be demolished subject to certain  
14 conditions. I think there were twelve conditions.  
15 The theater developer, owner sought to appeal three  
16 of those conditions and that's what's before you  
17 tonight.

18 But to back up, the -- so those  
19 conditions, supposedly, they -- they were --  
20 Construction Official was informed that he could not  
21 issue a demo permit subject to conditions, and so  
22 what wound up happening, the -- under the Historic  
23 Preservation ordinance of this town, the Borough  
24 engineer, Robert Vogel, is designated as the  
25 Administrative Official so Mr. Vogel and Russ Brown,

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1 Construction Official, jointly issued a letter  
2 saying you can't get a demolition permit because you  
3 haven't addressed all these conditions that are  
4 "prior approvals," which is a term of art. When you  
5 have a building permit, you need to have various  
6 approvals in place before you get a building permit.

7 MS. DRISCOLL: Right.

8 MR. HALL: Their called prior  
9 "approvals"; that's a term of art, so anyway, also,  
10 so they -- they -- the developer filed an appeal of  
11 that decision so it was a practical matter here.

12 What's before the Board is review of  
13 the three conditions that are being appealed, not  
14 all of them. The other ones are not being appealed.  
15 They're -- and they're not appealed and the Board is  
16 not charged on this appeal with determining whether  
17 the demolition should or shouldn't proceed. It's  
18 three conditions.

19 There's a fairly lengthy record of  
20 this. There were, I guess, four meetings that --  
21 where they heard evidence and testimony and one  
22 meeting where they hear the public, they argued the  
23 merits and decided and deliberated and, then, a  
24 sixth meeting where they talked about the resolution  
25 so they -- and I did go through that record. It's

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1 been available to everybody. It's all been filed.  
2 Fran's got boxes in her office, I think, but the --  
3 the focus was, I would say -- I went through the  
4 transcripts -- there's a large focus on whether the  
5 building could be rehabilitated and used as a  
6 theater and there were some dispute on that but I  
7 think, fundamentally, that was really no uncertainty  
8 on that point, if you ask me. I mean, there was the  
9 "Save the Theater" group. They their focus, really,  
10 their view, I would say, would be more of that, the  
11 record didn't show enough of an effort had been made  
12 to get somebody to step up and buy the theater use  
13 but the demolition was authorized by the HPC and the  
14 memo which I acceptability outline I quoted,  
15 specifically, that the three conditions here on Page  
16 2 of my -- 2 of my memo, are Conditions 4, 9 and 10  
17 that the -- that are being appealed. I think the  
18 focus is -- I tried to go through the statute, the  
19 ordinance. I tried to reconcile them as best I  
20 could in a memo, but having said that, I mean -- I  
21 -- I don't -- I think the focus is limited to those  
22 three conditions and whether they're permissible, I  
23 guess, or proper, appropriate, reasonable, whatever  
24 adjective that you want to apply, because that is  
25 what under the ordinance and, I guess, the statute,

11

1 you've been given the -- the assignment,  
2 jurisdiction and the duty to review that appeal and  
3 decide that appeal. It's not a variance. It's not  
4 whether you think it's good, bad or indifferent.  
5 It's what do you think is intended by the Board and  
6 it's in the statute in this case and that's the best  
7 way to put it and maybe now turn it over to Mr.  
8 Wolfson.

9 MR. WOLFSON: Sure.

10 MR. HALL: A little long-winded but  
11 hopefully -- and if you disagree, tell us. That's  
12 fine.

13 MR. WOLFSON: No. I appreciate it.  
14 Thank you, Mr. Hall.

15 Just some background. As Gary  
16 indicated, the property in question is the movie  
17 theater, has a street address of 14 Lincoln Place.  
18 It's designated as Block 2702, Lot 24 and it is  
19 located -- it's the last building at the edge of the  
20 Madison Civic Commercial Historic District, and in  
21 terms of the zoning map, it's located in the CBD1  
22 zone.

23 The applicant submitted an  
24 application, as Mr. Hall indicated, to the Planning  
25 Board for preliminary and final site plan approval

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1 on January 15, 2019. That application proposes to  
2 demolish the existing structure and construct a  
3 multi-family residential apartment building with  
4 ground-floor retail and underground parking. The  
5 project will contain a total of 24 residential units  
6 together with an associated common and amenity space  
7 and, approximately, 4526 square feet of retail space  
8 --

9 The applicant also proposed a small  
10 theater or, if the property owner could not secure a  
11 commercially reasonable theater lease, in the  
12 alternative, additional retail space. Included in  
13 the 24 residential units are four affordable units,  
14 which will help the borough meet its obligation  
15 under the Affordable Housing litigation.

16 -- as provided for under the Madison  
17 Borough Code, the Planning Board application was  
18 referred to the Historic Preservation Commission for  
19 an advisory review, where the applicant also sought  
20 certificates of historic review for both the  
21 demolition and the new construction.

22 A. Throughout the six formal sessions on  
23 the application which were in addition to two  
24 informal sessions, all public, the applicant  
25 presented testimony from its structural engineer,

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1 Wayne Hostetler, it's historic preservation  
2 consultant, Robert Cornfeld, and it's project  
3 engineer, Jeffrey Gertler. It also submitted two  
4 structural engineering reports and a Historic  
5 Preservation report.

6 The applicant worked with the  
7 Commission and its professionals agreeing to  
8 preserve historical features of the existing  
9 building into the new building, designing the new  
10 building in accordance with the design guidelines in  
11 your ordinance and revised its plans several times  
12 based on input from the Commission and its  
13 professional.

14 The Historic Preservation Commission,  
15 as you heard, approved, actually, two certificates  
16 of historic review, one for the demolition and one  
17 for the new construction, and as you also heard,  
18 there was certain conditions attached to those  
19 certificates.

20 The resolution from the Historic  
21 Preservation Commission, which memorialized those  
22 certificates, concluded that the demolition of the  
23 existing building on the property was appropriate,  
24 and with the exception of its size, mass and height,  
25 the improvements in construction proposed on the

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1 property were also appropriate. The resolution, as  
 2 you heard included 13 conditions on the certificate,  
 3 some of which related to demolition and some of  
 4 which related to the proposed construction. In  
 5 accordance with the issuance of the certificate of  
 6 Historic Review for demolition. The applicant  
 7 submitted a complete demolition permit, application  
 8 to Board's Administrative Officer on December 3,  
 9 2019.

10 On December 11, 2019, as you heard,  
 11 the Administrative Officer and Construction Code  
 12 Official denied the applicant's demolition permit  
 13 application for failing to satisfy, quote, "a number  
 14 of those conditions," end quote, from the HPC  
 15 resolution as well as, quote, "statutory  
 16 requirements and prior approvals," end quote.

17 As you also heard, we have an appeal  
 18 pending in the Morris County Construction Board of  
 19 Appeals as to that decision.

20 We do appeal three of the conditions  
 21 which are critical to the client's ability to make  
 22 this project go. The client is approaching three  
 23 years of ownership as we sit here tonight.

24 Also, as noted, we do not appeal ten  
 25 of the conditions and we have no problem with those.

15

1 Specifically, the applicant appeals  
 2 the following three conditions:

3 Condition Number 4, quote, "Demolition  
 4 shall not commence until after all required state,  
 5 county and local land use approvals had been  
 6 secured. All building and soil permits have been  
 7 obtained and borough officials are fully that the  
 8 demolition and new construction is in full  
 9 compliance with all applicable laws," end of quote.

10 Condition 9, quote, "Continuation of  
 11 the theater is necessary, reasonable and in  
 12 furtherance of the public interest to preserve the  
 13 historical, cultural and social significance of the  
 14 Lyons Theater and the district as a whole. A  
 15 90-to-100-seat theater shall continue in active  
 16 operation on a portion of the Lyons Theater  
 17 property. A 90-to-100-seat theater shall be  
 18 included on the final design plans, and within a  
 19 portion of replacement building/structure to ensure  
 20 that the property can be continue to be used as a  
 21 theater for public access and entertainment.

22 The site shall be promoted and  
 23 marketed in a commercially reasonable manner for use  
 24 as a public movie theater and Saxum shall use  
 25 commercially reasonable efforts to secure a movie

16

1 operator tenant," end quote.  
 2 Finally, Condition Number 10, quote,  
 3 "All new construction on the site of the Lyons  
 4 Theater property shall be in the character of the  
 5 Madison Civic Commercial district such that the  
 6 scale, mass, size and height of the replacement  
 7 structure to be built at the Lyons Theater site  
 8 shall be kept in line with the character of the  
 9 Madison Civic Commercial District and shall not be  
 10 larger than three stories, paren, (45 feet) in  
 11 height as measured from," quote, "average grade,"  
 12 unquote," as per the borough's zoning ordinances and  
 13 Building Department regulations," end of quote.

14 We ask that you reverse those  
 15 conditions and -- and have them excised from the  
 16 certificates.

17 All the transcripts, expert reports,  
 18 exhibits and submission letters from the HPC process  
 19 were delivered to the Board connection with the  
 20 appeal. I also referenced a notice of appeal dated  
 21 December 23, 2019.

22 We agree with Mr. Hall that the Zoning  
 23 Board has the authority to consider each of the  
 24 conditions included in the HPC certificates de novo.  
 25 That means you have initial novel authority. The

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1 record that you based that decision -- those  
 2 decisions on is the record below:

3 Pursuant to Madison Borough Ordinance  
 4 Section 112-11, an appeal to the Zoning Board of  
 5 Adjustment can be taken by any interested party  
 6 affected by any order, requirement, decision,  
 7 refusal of the Administrative Officer pursuant to  
 8 the report submitted by the HPC or Planning Board,  
 9 including a denial of the certificate of historic  
 10 review.

11 As part of appealing to this Board,  
 12 under the Borough Code this Board may, quote,  
 13 "reverse or affirm, wholly or in part or may modify  
 14 the action or requirement, decision, interpretation  
 15 or determination appealed from and, to that end,  
 16 have all powers of the municipal official from whom  
 17 the appeal is taken."

18 Now, a few reasons that we ask for the  
 19 reversal of three conditions.

20 First, the condition on the time of  
 21 the demolition. Madison Borough Ordinance Section  
 22 112-8C6A3 provides, quote, "In the event that the  
 23 Commission disapproves an application to demolish a  
 24 historic building, place or structure, the owner  
 25 shall nevertheless, as a matter of right, be

18

1 entitled to the raises or demolish such building,  
2 place or structure provided that all the other  
3 demolition requirements of the borough have been  
4 fully met," end quote.  
5 This provision provides important  
6 context to the appeal. If an owner has a right to  
7 demolish the building in the face of a denial;  
8 surely, it must have the right to demolish the  
9 building in the case of an approval with conditions.  
10 The placement of this condition on the demolition of  
11 the existing structure serves as an essential denial  
12 of the applicant's right to demolish the existing  
13 building on the property.  
14 While the HPC approved the applicant's  
15 request for Certificate of Historic Review and  
16 demolition, this condition results in the delay of  
17 the demolition for an unknown period. The applicant  
18 has the right to demolish a building on its property  
19 despite receiving denial. This applicant must also  
20 have the right to demolish the building after  
21 receiving open-ended conditions on the demolition  
22 with no time frame imposed. Making the condition,  
23 in effect, a disapproval.  
24 As the approvals process continue on  
25 this project before the Planning Board and the

19

1 building remains standing, the applicant continues  
2 to pay taxes on assessed improvements that the MHPC  
3 has in, quotes, "structurally compromised," end  
4 quote, for which the Historic Preservation  
5 Commission agreed the demolition was, quote,  
6 "appropriate given its poor structural condition,"  
7 end quote.  
8 Additionally, an owner must demolish  
9 improvements by October 1 of the year or it will be  
10 assessed for those improvements for the entire next  
11 calendar year.  
12 Just a few notes from the hearing on  
13 this point: The applicant's structural engineer,  
14 David Bush, in his report entered into the record as  
15 Exhibit A-3, concluded that, quote, "The demolition  
16 of the existing building and construction of a new  
17 building is required for any project being  
18 considered," end quote.  
19 The applicant's second structural  
20 engineer, William Hostetler, in his report entered  
21 into the record as Exhibit A-2, concluded that,  
22 quote, "portions of existing building are  
23 structurally compromised," end quote. The HPC  
24 structural engineer, John McManus, in his report,  
25 entered into the record as Exhibit B-2, noted that

20

1 many portions of the building including the  
2 foundation and steel framing are in, quote, "poor  
3 condition," end quote. Chairwoman Lenahan stated  
4 that, quote, "given the testimony of all the  
5 experts, I'm confident that the demolition of the  
6 property is necessary in light of the circumstances  
7 expressed in the expert reports of Mr. McManus and  
8 Mr. Hatch." Those are the Board experts. That was  
9 the June 11th hearing transcript.  
10 Commissioner Luber stated that, quote,  
11 "With the exception of the engineer for Save the  
12 Madison Theater, all of the structural engineering  
13 consultants in all their reports and all their  
14 presentations observed that, and I'll use Mr.  
15 Hatch's words, "The building is significantly  
16 deteriorated and has some significant structural  
17 issues." Mr. Luber went on to say, quote, "It is  
18 certainly not desirable to have that building sit  
19 unoccupied in its concern state for another two or  
20 five or ten years. I think it is even less  
21 desirable for the continued vitality of this  
22 property and key buildings adjacent to the property  
23 and to the district as a whole, so based on all the  
24 criteria set forth until the district's demolition  
25 ordinance, I believe demolition is appropriate as I

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1 feel it has been shown the structural soundness and  
2 integrity of the building are major concerns to the  
3 district as a whole and the adjacent property, the  
4 Federal Post Office Building that could be adversely  
5 affected if the Lyons Theater continued to fell into  
6 disrepair."  
7 Next, the reasons we ask for the  
8 reversal of the public theater condition.  
9 CHAIRMAN SANTORO: Well, I'm thinking  
10 maybe we should take on the first one and then --  
11 because it's going to get kind of complex.  
12 MR. WOLFSON: Okay.  
13 CHAIRMAN SANTORO: It might be better  
14 to stop, address one and move to the next one if  
15 that's okay with you?  
16 MR. WOLFSON: Absolutely.  
17 CHAIRMAN SANTORO: Is that all right?  
18 MR. HALL: That makes sense, yeah.  
19 They should be dealt with separately.  
20 And one of the things I wanted to ask  
21 about but I forgot to say, and really, it's in my  
22 memo that, my reading of reconciling the ordinance  
23 and statute was that it's been stated; the HPC has  
24 two different roles under the statute and the  
25 ordinance.

22

1 One is, on any application involving -- of any kind  
2 involving property in the Historic District and the  
3 Planning Board where, potentially, is needed a D  
4 variance to even come here. I doubt we'd ever get  
5 one that was not in the district, but the HPC is --  
6 they look at it. They can make advisory comments  
7 and recommendations to the Land Use Board. They  
8 can't tell the Land Use Board what to do, as I read  
9 the statute. It's clear; there's a dichotomy and if  
10 it -- you only need a permit, a demolition permit  
11 here or, hypothetically, a building permit but not  
12 -- you're not at a Land Use Board, they can impose  
13 mandatory conditions on the permit, I guess. I  
14 mean, if you are tearing down a house,  
15 hypothetically, in the district, you get demolition  
16 permit. They could comment on that and,  
17 potentially, would be binding on the Construction  
18 Official subject to the owner coming here but that's  
19 a dichotomy, and unfortunately, it's not a clear  
20 dichotomy because the Commission in discussion and  
21 it's sort of more back and forth between the two  
22 comments on the new development versus whether the  
23 old perm buildings can come down and that's the  
24 difficulty as -- as I read it. The comments on the  
25 new building are recommended to the Planning Board

23

1 because, obviously, and -- not "obviously."  
2 In this case, the theater owner, the  
3 developer, proposed to build a new building and  
4 there's a lot of discussion on how to make that fit  
5 in but I think those were matters -- and the -- the  
6 theater owner, as I understand it from the plans,  
7 contemplated, requested with the Planning Board, a  
8 height variance, which is a discretionary power of  
9 the Planning Board, not the HPC. They have no  
10 authority to grant or deny. They can say "We think  
11 you shouldn't do it." They can't say "You can't do  
12 it" and that's how the -- I -- I read this  
13 situation. The two morphed into each other because  
14 -- and that really applies with condition three.  
15 We'll get to that, the third one. That really deals  
16 with that but I wanted to throw that out because  
17 that's, really, you know -- and it's -- it's  
18 difficult because I understand how, you know,  
19 tearing down a -- a building in the district is one  
20 thing and you want to know what's going to happen  
21 next and is it going to happen right, but as I read  
22 the law, "is the next thing happening right" is for  
23 the Land Use Board subject to any and all input from  
24 the HPC on that topic; because otherwise, I don't  
25 know where you draw the line otherwise. You have a

24

1 site plan application and also Mr. Wolfson can jump  
2 in, but as I read the paperwork, one of their  
3 arguments was that, well, we need more height and  
4 more dwelling units to make it economic to keep a  
5 90-seat theater until the ground floor, which they  
6 did propose to do. It's in there and they're  
7 contesting the fact that it has no limits, the  
8 condition, as worded but they -- they acknowledge  
9 that they did -- that their plans did show that, but  
10 they -- as apartment of the mix of -- in order to do  
11 that, we need more -- a bigger building and that's  
12 an argument that should be made at the Planning  
13 Board, not the HPC, because the Planning Board is  
14 the one that has to -- they have to assess the  
15 variance and if it -- if it's what they want to do  
16 is deemed recommended to be harmful to the district,  
17 presuming -- the Planning Board, that goes to the  
18 negative criteria apartment of it. On the positive  
19 criteria, they can say it's a hardship or, "Hey,  
20 we'll give you this public benefit, but in order  
21 that do that, you need a variance" so I think that's  
22 how it complicates this. It's not a clear-cut  
23 difference so the only way I can reconcile that is  
24 the statute -- the ordinance is that's the  
25 difference. Certainly, the HPC has legitimate

25

1 interest in what happens with the new building, but  
2 as I read the statutes, that's by making  
3 recommendations and comments to the Planning Board.  
4 You can and should give due consideration to that  
5 but not us.  
6 MR. FITZSIMMONS: I think, Gary, just  
7 a question from me. Did they have to put a -- have  
8 to create a combined resolution around demolition  
9 and construction? These can't be segmented out in  
10 terms of two resolutions?  
11 MR. HALL: Well, I don't know why it  
12 couldn't be. They -- they -- they -- they were  
13 bound together and they morphed over each other. I  
14 went back just before I came here to see and I  
15 reread the discussion, and even in the discussion,  
16 there was a lack of clarity as to what was a  
17 recommendation versus a condition as far as dealing  
18 with the new building because, at times, the  
19 attorney representing the HPC was saying "That's a  
20 recommendation, right" and it wasn't. It was back  
21 and forth with that lack of clarity so you didn't  
22 have to but the end result, in my -- to me, was not  
23 clear -- clearly addressing that distinction.  
24 MR. FITZSIMMONS: They needed both.  
25 They didn't have to put them -- I mean...

26

1 MR. HALL: I don't think they had to  
2 but they didn't so that's up to them. I don't think  
3 it was required but...

4 MS. DRISCOLL: Okay. So on your  
5 Submission Number 4 --

6 MR. HALL: Clearly, this is on  
7 recommendations and conditions. That wasn't clear  
8 as I read the resolution.

9 MS. DRISCOLL: Number 4. Okay. What  
10 is it that is missing in order to issue a demolition  
11 permit? Is it satisfying the following two  
12 conditions? Is that what's missing?

13 MR. WOLFSON: So our position is that  
14 the demolition permit should have been issued with  
15 the HPC conditions on them. We did satisfy the UCC  
16 requirements that Mr. Hall referred to in terms of  
17 vermin, disconnecting utilities. We did all that so  
18 the denial sited these conditions, all of them as  
19 well as a failure to meet statutory code  
20 requirements.

21 MR. HALL: And I think, really, the  
22 question is: Of the thirteen conditions, some of  
23 them haven't been met because they are how you do  
24 the demolition so they're not objecting to doing  
25 that it's -- it's you really wouldn't do that before

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1 you get the permit anyway because it's how you do  
2 it.

3 MR. WOLFSON: Just by way of example,  
4 there's another condition related to demolition that  
5 requires us to file Secretary of Interior's  
6 protocol, which we will do. There's also a  
7 requirement that we contact, and we have, New Jersey  
8 Transit as to the train station and the postal  
9 service so we've already done that so that's just an  
10 example of another condition of the --

11 MS. DRISCOLL: I just don't  
12 understand. What is it that's missing that they  
13 can't issue this demolition permit? That's what I'm  
14 just not -- wrapping my head around with respect to  
15 Number 4.

16 MR. WOLFSON: Well, there are a number  
17 of approvals to be fair. With respect to Number 4,  
18 the way I read it, that would include the site plan  
19 approval, for instance, and we don't have that yet  
20 from the Planning Board.

21 MS. DRISCOLL: So you still don't have  
22 site plan approval?

23 MR. WOLFSON: No, and the reason we  
24 don't is because we spent a long time getting  
25 through the HPC. The HPC issued approvals for both

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1 demolition and construction and attached three  
2 conditions that bring us here.

3 MR. HALL: Yeah. The Planning Board  
4 Attorney, early on, I think he expressed that you  
5 should not track it together. Go to the HPC and  
6 hear what they say, then go to site plan. Of  
7 course, then, when that happened and they challenged  
8 -- wanted to appeal the three conditions, then I  
9 spoke to the Planning Board attorney and we sort of  
10 agreed -- not "sort of." We agreed that it didn't  
11 make sense to the Planning Board process to go ahead  
12 until this appeal got resolved. As I said, you got  
13 delayed for unusual reasons but that was -- that was  
14 the answer. Did it have go that way? I don't know  
15 but it seemed to make more sense not to resolve one  
16 before the other because --

17 MR. WOLFSON: Yeah. We don't want to  
18 be before the Planning Board and postured with the  
19 conditions that we are appealing. That's the point  
20 of us asking for relief from you.

21 MR. HALL: Right. Particularly, the  
22 condition, the one about bulks and size, which  
23 that's the one that was squarely.

24 CHAIRMAN SANTORO: Well, it's hard for  
25 me to envision that you would interpret Municipal

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1 Land Use Law and the H -- the HPC ordinance such  
2 that they can create a condition, mandatory  
3 condition, that infringes on the authority of a Land  
4 Use Board or prevents them from managing their  
5 process the way they -- we feel they should and  
6 that's a concern here, right?

7 MS. DRISCOLL: Yes. Absolutely.

8 CHAIRMAN SANTORO: On all of these.  
9 And with this one, I have concerns with each one of  
10 those. Some of them are unique but another concern  
11 I have here is that, under the -- the ordinance, the  
12 borough's ordinance, they need only satisfy the  
13 requirements -- the demolition requirements of the  
14 borough, and what the HPC has done, the resolution  
15 does is, it keeps on them additional criteria before  
16 they can go forward, and relating that to what we do  
17 here, my concern is that we're fair, and then, you  
18 don't -- you know, we have to be fair in what we do  
19 and not -- not create unreasonable practical  
20 difficulties for people, create burdens on  
21 applicants that aren't there, and so, my concern is  
22 that, to -- to put these additional requirements  
23 that are above and beyond what's in this -- what's  
24 in the ordinance is problematic so I'm sympathetic  
25 to what the applicant is saying about the kind of

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1 delays they that would -- they would incur.  
2 I also have some concerns about a  
3 mandatory condition associated with an application  
4 that requires approval of a Land Use Board, and  
5 that, I just don't see how you could do that. I'm  
6 still struggling with that when I read the Municipal  
7 Land Use Law and the powers of the Planning Board  
8 and the powers of the Board of Adjustment and the  
9 fact that they can't delegate those authorities to  
10 the other Boards and the ability to put -- put  
11 mandatory conditions and I can't find it in the  
12 Municipal Land Use Law, to be honest with you, so I  
13 have concerns about that. I think it should be  
14 recommendatory only if it were to stay.  
15 That's -- that's my meaning on it, unless we can  
16 debate this back and forth, but I've read all the  
17 provisions, applicable provisions, of the Municipal  
18 Land Use Law.  
19 I spent a lot of time on this HPC ordinance, spent a  
20 lot of time studying Gary's analysis as well as the  
21 record also the appellant's arguments and I just  
22 don't see how you could, again, keep this criteria  
23 on an applicant and think that it's fair.  
24 MS. DRISCOLL: I'm in agreement.  
25 MR. WOLFSON: Mr. Hall, I didn't know

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1 -- what -- what's the process going to be here in  
2 terms of -- I don't know if there's going to be  
3 consideration condition by condition; it sounds  
4 like. I don't know --  
5 MR. HALL: I guess we went -- wanted  
6 to, and then, I sort of -- we got off target so I  
7 don't know if...  
8 MS. WOLFF: And I didn't know whether  
9 you anticipated the public making statements or not.  
10 MR. HALL: Well, it's a public  
11 hearing. There's probably a public hearing at some  
12 point but I think that's -- I don't know.  
13 Mr. Chairman?  
14 CHAIRMAN SANTORO: I don't know.  
15 Maybe we wait on the public portion of it for a  
16 little bit later on, and then, we debate these three  
17 things, try to get a consensus around where the  
18 Board is on each one of these three things, and then  
19 -- then, we'll go to the public, get some info from  
20 the public, and then, we'd come back and probably  
21 deliberate a little bit more and then vote. Does  
22 that sound reasonable to you?  
23 MR. WOLFSON: Sounds great.  
24 CHAIRMAN SANTORO: Just to continue on  
25 with just the development approvals condition, I'm

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1 looking for input from the Board beyond what I've  
2 said, if you agree me or if you have other things to  
3 add but I'd like to move this along.  
4 MS. DEROSA: I definitely agree with  
5 you, Joe. The demand is that the HPC -- I can  
6 understand the HPC wanting to protect their part of  
7 this project. They want to be very careful to have  
8 the end product be what they -- what the applicant  
9 is envisioning but may not happen if all the -- all  
10 the conditions that the HPC has put in there has --  
11 has been identified, but in the same light, those  
12 conditions are going to create major stumbling  
13 blocks if they're held -- if they're held as they  
14 are, that -- this demolition permit won't be issued  
15 unless they agree to conditions.  
16 So where I'm at is similar to where  
17 you're at; this going to create a lot of problems  
18 and it's not really going to be beneficial to the  
19 development. It's going to prolong everything. To  
20 wait for some of these approvals and then try to get  
21 the demolition going, it's almost like putting --  
22 doing it backwards. I mean...  
23 MS. DRISCOLL: It's like a cart before  
24 the horse.  
25 MS. DEROSA: Yes. Thank you. Yes.

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1 Exactly. Thank you.  
2 So that's what's concerning me; that  
3 -- that's my thing.  
4 CHAIRMAN SANTORO: Thank you.  
5 MR. HALL: If I could throw one  
6 comment on there, I did -- the record that, as I  
7 understand the rationale for this -- for that is,  
8 well, we don't want you to tear down the building  
9 and have a vacant lot there if you never build. Of  
10 course, getting an approval doesn't mean you're  
11 going to build it either, and the converse is, there  
12 was some comments that the current situation of a  
13 vacant building sitting there is not a great thing  
14 either and I think Mr. Wolfson read a quotation from  
15 somebody who mentioned that along the way so it's  
16 plus or minus, I mean, but my view of the law is  
17 that, if -- if you conclude that the building can be  
18 demolished because of its physical condition, which  
19 is how I read their record here, the resolution,  
20 state, yeah, it -- you can't fix it but you can't  
21 tear it down yet and --  
22 MS. DRISCOLL: Which makes no sense.  
23 MR. HALL: -- somebody's property, it  
24 can't be saved, if converted, reused. An owner  
25 should have a right to tear their building down.

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1 MS. DRISCOLL: They certainly do and I  
 2 think there's adequate testimony in the record that  
 3 the building has to come down. It's not  
 4 structurally sound. It does not want make any sense  
 5 to try to make it structurally sound. It's vacant.  
 6 Has been vacant for a prolonged period of time.  
 7 You're not doing anybody any good by letting it sit  
 8 there.

9 MR. HALL: Yeah. And I don't see how  
 10 that determination, as I said, I didn't -- it seemed  
 11 pretty uncontested in the record that I read I don't  
 12 see how this changes said conclusion. Yeah, the  
 13 building can't be saved but you can't tear it down  
 14 yet and I don't know how you can -- that's -- that  
 15 strikes me as the error in our system of government  
 16 and private property and maybe I'm wrong --

17 CHAIRMAN SANTORO: No. I think -- I  
 18 think --

19 MR. HALL: But I don't see a rationale  
 20 because it cuts both ways and, the reality of it is,  
 21 people come here to this Board, to the Planning  
 22 Board, to get an approval on something. Getting an  
 23 approval doesn't mean you have to build it. The  
 24 owner can say, "Well, geez. I've changed my mind.  
 25 The -- the economy tanked and I'm not going build

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1 now," you know? There's --

2 MS. DRISCOLL: I'm going to quote some  
 3 of what you've already written in here.

4 MR. HALL: Excuse me?

5 MS. DRISCOLL: What you already wrote  
 6 in here, which I think is -- is really the whole  
 7 point here. "The evident purpose of Chapter 112 is  
 8 to advance historic preservation objectives. The  
 9 necessarily by doing so in a manner consistent with  
 10 due process and property rights, principals embodied  
 11 in the MLUL and other laws" so it makes sense that  
 12 this building has to come down.

13 MR. HALL: Right. And I agree that --  
 14 that, under the ordinance, if the building could  
 15 have been saved, if there's evidence or a question  
 16 whether it could have been saved, that would be a  
 17 different issue.

18 MS. DRISCOLL: Right. But we are  
 19 passed that.

20 MR. HALL: I believe the law is clear  
 21 that you can't make somebody keep it there, but if  
 22 it's economically not feasible, what do you do? I  
 23 mean, I -- I don't know. I -- I have a problem with  
 24 that, saying, "you -- yeah, but you can't do it"  
 25 because --

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1 And another thing, as Mr. Wolfson  
 2 mentioned, there's a separate provision in the  
 3 ordinance that says, even if they say you can't tear  
 4 it down, you can still demolish it. I don't know  
 5 what that means but it's in there. I've mentioned  
 6 it in my memo. I don't know what that's there so I  
 7 don't know, anyway.

8 I didn't mean to interrupt.

9 CHAIRMAN SANTORO: I was going to say  
 10 that, in reading the HPC ordinance, there is -- it  
 11 -- it conflicts with itself in certain sections and  
 12 it conflicts with the Municipal Land Use -- Use Law,  
 13 in my opinion, and that's, I think, where we need to  
 14 step up and try and apply to get some consistency  
 15 how to interpret this and when I -- when I looked at  
 16 this and I looked at 1125B it said on all matters  
 17 referred to the Commission which require approval by  
 18 the Planning Board or Zoning Board of Adjustment,  
 19 the decision of the Commission shall be  
 20 recommendation only" and that's clear, and then, in  
 21 the -- in the section immediately following is 1126  
 22 where it starts to talk about demolition, new -- new  
 23 -- new structures and so forth and that's not even  
 24 consistently written and I don't -- I don't see how  
 25 -- at least, the way I interpret that is, it would

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1 be applications that aren't coming before a Land Use  
 2 Board. That's where you have the ability to -- to  
 3 do what sets forth in that section so I don't know.

4 Anybody else want to comment on this?

5 I think we should hear from our Board people.

6 MS. SALKO: Yeah. I mean, the  
 7 question that I have, it's just the way it's  
 8 written, "demolition shall." I mean, if it was  
 9 "must" then, I don't think we would be able to argue  
 10 then but it says "shall," and to Tim's point, why  
 11 does this have to be so unilateral? Is it within  
 12 our purview as the Zoning Board to be able to split  
 13 this? You know, it refers to demolition versus  
 14 building part; would we be able to make that  
 15 decision?

16 MR. FITZSIMMONS: Well, I would go  
 17 further to say -- purviews, I mean, my question is:  
 18 Is the Officer's decision wrong in relying on some  
 19 of these construction conditions as opposed to the  
 20 ones that clearly delineate terms around demolition  
 21 so this is really an appeal of the Officer's  
 22 decision. I could -- I could see a case for saying  
 23 he's wrong in relying on two of these because  
 24 they're conditions around construction and not  
 25 demolition and the resolution itself is so confusing

1 and I think it -- that -- that's my question.  
 2 MR. WOLFSON: If I could speak to both  
 3 those comments, our take on it is that the proper  
 4 venue, unfortunately, for the appeal of the denial  
 5 of the permit is to the County Board of Construction  
 6 Appeals. They have jurisdiction to consider that  
 7 administrative act in terms of the permit itself.  
 8 You have jurisdiction, as we've established tonight,  
 9 to consider appeals of the conditions to it, the HPC  
 10 approvals.

11 MR. HALL: Yeah. And I've mentioned  
 12 that in my memo in the history that they did, I  
 13 think, the next day, almost the same day, filed an  
 14 appeal with the County Construction Board of  
 15 Appeals, which is required under the statute, to hear  
 16 and to deal with issues under the construction code  
 17 because you get the building permit and you say,  
 18 "Oh, you've got to do it this way and not that way,"  
 19 and you know, it's set up to deal with those issues.  
 20 It'll come up and that's zoned and they're code  
 21 issues, and for that reason, the demolition permit  
 22 should be the same and I -- frankly, when I saw it,  
 23 I said, "Great. Let them tell us" because there  
 24 seems to be a conflict with saying you can't have  
 25 conditions with, you know, saying you can have

1 conditions in one place and not the other but hey.  
 2 The Construction County Board said, "Well, there's  
 3 something at the Zoning Board. We'll wait and see  
 4 what they can do and that appeal was -- it's still,  
 5 technically --

6 MR. WOLFSON: It's being held pending  
 7 this -- for this process.

8 MR. HALL: They've put it on hold  
 9 until --

10 MR. WOLFSON: Correct. That's their  
 11 position, so again, we seek to have these three  
 12 positions deleted -- conditions deleted. Then, we  
 13 -- potentially, we'll go back there with these  
 14 deleted and ask that the demolition permit be  
 15 issued. It's fine to issue it with the other permit  
 16 -- or the other resolution conditions, which we are  
 17 not challenging.

18 CHAIRMAN SANTORO: I think that's  
 19 where we should focus, focus on these three, decide,  
 20 on each one of these, where it's -- where it's going  
 21 to go, and then, we'll either -- either go -- go to  
 22 the county or -- or we'll go to the Planning Board  
 23 and they'll resolve it and they'll have the  
 24 authority to -- to address each one of these and the  
 25 process starts anew there too. This is -- this is

1 not Normandy Beach where this went off, right? This  
 2 whole process is -- is going to go, from the start,  
 3 with a fresh record in front of the Planning Board  
 4 and everybody will be heard, a new record will be  
 5 created and they'll be able to address these  
 6 conditions so we're -- we're, in a sense, trying to  
 7 move this along.

8 MS. DRISCOLL: So the only thing we're  
 9 really worried about tonight is whether or not we  
 10 approve the demolition permit, whether the  
 11 conditions should be removed in order to allow a  
 12 demolition permit?

13 CHAIRMAN SANTORO: We have three  
 14 conditions that we need to evaluate as to whether  
 15 they should stand or not, and then, they end up on  
 16 the -- on the permit.

17 MS. DRISCOLL: Okay.

18 MR. HALL: Well, you're being asked to  
 19 excise those three conditions, presume that the  
 20 other ones -- as I said before, some of them control  
 21 how the process works. I don't know. They're  
 22 agreeing to do that; however, it's before or after  
 23 the permit issues, frankly. It's -- probably a lot  
 24 of it is after, actually.

25 MR. WOLFSON: By -- by definition, it

1 would be after and that's part of what we need to  
 2 discuss with the county.

3 MR. HALL: Right. And I think you  
 4 said, for example -- I'm trying to think of the  
 5 conditions. One is save the box office or  
 6 something. Obviously, you're not going to do that  
 7 until you have a permit to demolish. As part of the  
 8 process, they agreed to do certain things so they're  
 9 really not prior approvals. These -- these are, I  
 10 suppose, prior approvals but that -- that was the  
 11 work around really and I don't know that we need to  
 12 go there. The idea is to move it forward and decide  
 13 whether those are appropriate conditions, and then,  
 14 what other people do is what other people do, and  
 15 then, as I said before, how they -- what gets built  
 16 there is -- still is up in the air. They need site  
 17 plan approval from the Planning Board.

18 MS. DRISCOLL: Right.

19 MR. HALL: And as part of that, they  
 20 -- the HPC recommendations will go there the way  
 21 it's -- that's what the statute says. The way it's  
 22 supposed to work, a representative of the HPC is  
 23 supposed to go to the Land Use Board meetings,  
 24 meeting, and present the HBC conditions so it's not  
 25 -- we're not saying ignore that. We're just saying

<p style="text-align: center;">46</p> <p>1 think that the nature of this particular condition  2 more closely fits the decision of a Land Use Board  3 and, so there forth, the HPC condition, if the  4 condition were just a recommendation, if it was  5 recast as a recommendation and it was "We suggested  6 this," then the Planning Board could decide what it  7 wants to do with that. It may want -- and -- and  8 also, they have to hear the application, and then,  9 decide, based upon the facts and circumstances on  10 the record, whether they want to have a condition  11 and what that condition should be, and if you're  12 going to have a condition, a condition needs to be  13 -- have a specific purpose or a goal. It needs to  14 be clear. It has to be measurable. It should have  15 a time frame attached to it so what does  16 "commercially reasonable" mean? How -- how does an  17 applicant know whether they whether they've --  18 whether they've -- you're in compliance with it or  19 not? How is it measured? But I think -- I think on  20 mental issues, it's closer to a land use -- it's  21 closer to -- it's an issue that, really, should be  22 -- be determined in the context of an application  23 before a Land Use Board, so if the applicant also --  24 if the applicant wanted to volunteer to do it,  25 that's a whole other thing, but to impose that on</p>	<p style="text-align: center;">48</p> <p>1 economically viable. It never gave a number but  2 that was sort of how they couched it and there was  3 no -- from what I saw on the record -- no -- no  4 conflicting evidence, and of course, the HPC heard  5 that all and they said, "Yeah, it can be  6 demolished." Now, to say "it can be demolished but  7 only if you do this," I don't know how you reconcile  8 that with the finding that it can be demolished  9 that's great. They want what's there next to fit  10 in. I understood that, but, that, in my mind, goes  11 over to the Land Use Board, as the Chairman said,  12 the Planning Board and they'll decide how that  13 works. The HPC can make all the recommendations  14 they want  15 and --  16           And hopefully, the Planning Board will  17 listen to the extent they find them reasonable but  18 that's their call, as I see it, under the statue,  19 not the HPC and they -- their core thing was  20 inability to demolish, and as I said, if there was  21 more conflicting evidence or testimony, maybe they'd  22 said "No. You got to keep it; fix it," but they  23 didn't say that and having said it can be demolished  24 because of the physician condition, I read and there  25 was a lot of testimony and reports on that in the</p>
<p style="text-align: center;">47</p> <p>1 somebody, I have -- I have real concern about that  2 so that could be recast as a recommendation or  3 deleted but I don't think it -- I don't think it  4 could be mandatory. I think -- I think it does  5 potentially impact the power of the Land -- of the  6 Land Use Board.  7           So what do you do guys think?  8           MS. DRISCOLL: I'm in agreement.  9           MR. FITZSIMMONS: I would agree.  10           MR. DiIONNO: Yeah. It seems like  11 this and the previous one it really just comes down  12 to the statutory authority of the Historic  13 Preservation Commission to act or to impose these  14 conditions.  15           So, Gary, I guess I was hoping you  16 might be able to speak to that authority because I  17 think it's, you know, kind of whether they're  18 exceeding the scope of their authority or not.  19           MR. HALL: Yeah. And I think I said  20 that already. This condition is saying what the new  21 building has to do. After you decided that the  22 building that's there now can be demolished because  23 of testimony, a finding that it would have been -- I  24 don't know what -- problematic to repair. You can  25 always -- anything is possible, of course, but not</p>	<p style="text-align: center;">49</p> <p>1 record so I can't reconcile the conditions. I know  2 they -- you know, the references that they want  3 what's there to fit in but I don't view that as a  4 mandatory right for them to tell you that and go to  5 the Planning Board because the condition, the third  6 condition, Number 9, which you haven't gotten to, I  7 mentioned at the outset that, basically, says you  8 can't have a variance. You can't apply for a  9 variance. I mean, that's clearly conflicting with  10 -- with what the statute says. You can't make it  11 bigger and they applied for a variance and the  12 Condition 3 says "shall be not larger than three  13 stories 45 feet and I think they were 48 or  14 something in the proposal and they wanted four  15 stories so how is that not encroachment on the  16 authority of the Planning Board? They're -- they're  17 entitled to ask for a variance and I don't see  18 anything that says that Historic Preservation  19 Commission, which can tell them you can't ask for a  20 variance. That's -- why can't you? And -- and --  21 maybe the -- the -- the Planning Board can be  22 convinced that they shouldn't give them a variance  23 unless they provide this benefit but that's a  24 different conversation.  25           CHAIRMAN SANTORO: And that's even --</p>

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1 that's even more clear in the ordinances, right,  
2 where -- where, if it's a matter that's going to be  
3 -- that's decided by the Planning Board, it can't be  
4 decided by the HPC, right? It's part of the role of  
5 the Planning Board.  
6 MR. HALL: So did I answer your  
7 question?  
8 MR. DiONNO: Yes. Thanks.  
9 CHAIRMAN SANTORO: Roger?  
10 MR. PAETZELL: I agree with all these.  
11 They're good recommendations but I don't see how  
12 someone could be forced to pay taxes on a property  
13 that really is beyond repair and not allowed to be  
14 taken down and I -- saving the movie theater it's a  
15 great recommendation for a 100-seat theater, but to  
16 have to be mandated for a certain use, it doesn't  
17 seem reasonable.  
18 MS. BOARDMAN: I hate to be consistent  
19 with this but you all need to speak --  
20 MR. HALL: Go over it again?  
21 MS. BOARDMAN: Yeah.  
22 CHAIRMAN SANTORO: My sense is --  
23 MR. WOLFSON: And -- and we'll supply  
24 a copy of the transcript, of course.  
25 MR. HALL: Yeah. I know. I'm just

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1 saying. It is important to get it all right.  
2 MR. WOLFSON: Of course.  
3 MR. HALL: If things aren't heard, we  
4 make sure people know they need to repeat it.  
5 CHAIRMAN SANTORO: So seeing we --  
6 we've just debated the last two at the same time --  
7 MS. DRISCOLL: Yes.  
8 MR. FITZSIMMONS: Yes.  
9 CHAIRMAN SANTORO: -- obviously, we're  
10 leaning towards removing those?  
11 MR. WOLFSON: Yeah. I have nothing to  
12 add on the third condition. I think it's been said.  
13 CHAIRMAN SANTORO: Right?  
14 I'm going go to the public if there's  
15 anybody on -- oh.  
16 Mr. Stern, would you like to make a  
17 comment about thus far? Would you like to wait.  
18 MR. STERN: I could wait.  
19 CHAIRMAN SANTORO: Okay. Very good.  
20 All right. So we'll go to the public.  
21 All right. Well, this is a -- a  
22 public meeting so I'm going to go to the public and  
23 see if anybody has any comments. You can have --  
24 you know, make a comment on it or in support or  
25 opposition to the appeal before us, but please keep

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1 in mind, it's these three conditions and we're  
2 debating matters of law on these three conditions,  
3 and if you'd try and -- try and focus on that, that  
4 would be good, so if anybody wants to the come up  
5 and make a statement, now would be the time.  
6 Would you like to come up, ma'am?  
7 MS. KOLAKOWSKI: Sure.  
8 CHAIRMAN SANTORO: So you'd like to  
9 come over here. The Board secretary will need to  
10 get your name and your address.  
11 MS. KOLAKOWSKI: Mr. Hall, I'm from  
12 Save Madison Theater. Am I allowed to speak? I  
13 don't have the Counsel.  
14 MR. HALL: She's not here and she sent  
15 a later that said she wasn't coming here, which we  
16 got at, like, 2:00 this afternoon and I meant to  
17 mention that. I'll mention it for the record.  
18 Michele Donato, who appeared before  
19 the HPC on behalf of Save the Theater Group, first,  
20 in February, she sent a letter saying we don't have  
21 standing. We're not going to cross appeal. We're  
22 not going to participate in it. That's what her  
23 letter said, and at 2:00 today, I got a letter by  
24 e-mail from her that went to the secretary saying --  
25 raising some procedural issues, which, in her

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1 absence, I'm not going to get into other than to say  
2 that, as far as I'm concerned, procedures were  
3 appropriate but she said she wouldn't be here  
4 tonight so I -- I guess, if members of the public  
5 want to talk, she's not here. I don't -- as long as  
6 it's on point to what was said. As I said at the  
7 outset, whether or not the theater should be  
8 demolished is not before this Board, the conditions.  
9 And, Mr. Wolfson, you're okay?  
10 MR. WOLFSON: Yeah. I think her  
11 concern but I did anticipate some discussion about  
12 this. The HPC, to the extent that it's -- it's an  
13 incorporated entity, whether she needs to be  
14 represented by an attorney but we have no objection  
15 if she wants to speak directly.  
16 CHAIRMAN SANTORO: Okay. Thank you.  
17 All right. So why don't you make your  
18 comment, please.  
19 MS. KOLAKOWSKI: Sandy Kolakowski,  
20 K-O-L-A-K-O-W-S-K-I, Save the Madison Theater.  
21 Hi. I wasn't really prepared to speak  
22 tonight but -- but the only thing that I did want to  
23 just point out is that, although the HPC did say  
24 about the demolition, one thing that you should know  
25 is that, in the engineering reports, both the

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1 developer's and --

2 MR. HALL: I'm afraid, if you're going

3 to say that, we need to swear in if you are going to

4 testify about what happened.

5 MR. WOLFSON: Well -- and -- and --

6 MR. HALL: I mean, I don't know, Mr.

7 Wolfson --

8 MR. WOLFSON: No, no. My request

9 would be that we not take new testimony.

10 MR. HALL: Yeah.

11 MR. WOLFSON: If she wanted to point

12 something out that she can document on the record --

13 MR. HALL: Well, she can say it for

14 the record. The Board has a record.

15 MR. WOLFSON: Right.

16 MS. KOLAKOWSKI: Oh. Okay.

17 MR. HALL: Well, go ahead.

18 MS. KOLAKOWSKI: All I wanted to point

19 out to whomever is that even the developers own

20 engineer, Mr. Hostetler from Thornton Tomasetti,

21 outlined, in 4.0, how the building could be saved.

22 MR. HALL: Yeah. But the Board -- the

23 HPC did not agree with that so that's why I said

24 that's not before us. We're not asking --

25 MS. KOLAKOWSKI: I -- okay.

55

1 I understand.

2 MR. HALL: You follow that? They said

3 it could be demolished. If you wanted to address

4 these conditions and how they transcend that, that's

5 fine.

6 MS. KOLAKOWSKI: Well, it's just that

7 some of the Board members said that building can't

8 be saved that, you know -- that kind of entered in

9 your discussion.

10 MR. HALL: The resolution don't say

11 that and that's not before this Board.

12 MS. KOLAKOWSKI: Okay.

13 MR. HALL: You follow that? Now, I

14 know you disagree and you're entitled to disagree

15 you can make the same argument to the Planning Board

16 but this Board is not addressing that issue.

17 MS. KOLAKOWSKI: I understand.

18 MR. HALL: Okay.

19 CHAIRMAN SANTORO: Okay. Are there

20 any comments, then, from anyone else from the

21 public? Now would be the time.

22 MR. TESTA: Yes. Thank you.

23 Jonathan Testa from the law firm of

24 Dorsey & Semrau. I am actually designated as the

25 HBC's attorney and I have spoken to Mr. Hall off the

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1 record previously and I did want to quote a couple

2 things because I guess there was a question about

3 the Municipal Land Use Law, specifically, and the

4 law.

5 So I wanted to highlight to you NJSA

6 40:55D-65.1 that specifically says a zoning

7 ordinance may designate and regulate historic sites

8 or historic districts and provide design criteria

9 and guidelines; therefore, destination and

10 regulation pursuant to this section shall, shall be

11 in addition to such destination and regulation as a

12 zoning ordinance may otherwise require.

13 That statute is part of the Municipal

14 Land Use Law, number one, and number two, the

15 ordinances for the Historic Preservation Commission

16 were created pursuant to that. The purpose of a

17 historic designation and specifically this historic

18 designation of this district, specifically, in this

19 matter, is to preserve, preserve historic sites.

20 This site was designated as a historic landmark

21 nationally and state as well as in the township,

22 number one.

23 Number two --

24 MR. HALL: It's a borough, not a

25 township, by the way.

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1 MR. TESTA: I'm sorry?

2 MR. HALL: Madison is a borough.

3 MR. TESTA: I'm sorry. The borough,

4 the borough. I -- I appreciate that, Mr. Hall.

5 Thank you.

6 Number two, every plan that was

7 presented to the HPC included a condition of a

8 theater in it, every one of them. They did not

9 consider a plan that did not have a public theater

10 element to it whatsoever.

11 Number three, as to the height

12 restrictions, specifically, the HPC did not say

13 whether or not it was going to grant or deny a

14 variance. We understand, specifically, that that is

15 for the Planning Board in their realm.

16 MR. HALL: That's not what the

17 resolution says, though. It says a mandatory

18 condition. It shall be not higher than --

19 CHAIRMAN SANTORO: I didn't understand

20 that. What --

21 MR. HALL: And I know and I read that

22 you said or would call it a recommendation at the

23 meeting when it was discussed in the transcript, but

24 then, it comes out as a mandatory condition of a

25 demolition permit in the resolution.

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1 MS. DRISCOLL: Yeah. I --

2 MR. TESTA: And he can still seek a

3 variance.

4 CHAIRMAN SANTORO: When I was looking

5 at -- looking at the transcripts and I can pull it

6 out and quote you. There's pages where you're

7 saying -- you're saying "the recommendation," "is

8 there a recommendation?"

9 MS. BOARDMAN: Joe, I can't hear you.

10 CHAIRMAN SANTORO: "A recommend is" or

11 "a recommendation should be" so we're proposing a

12 recommendation on height. Throughout that, you're

13 -- you're in their saying "recommendation," but

14 then, when you drafted it, you drafted it in a

15 different way.

16 What happened?

17 MR. TESTA: The ordinance,

18 specifically, says that it shall meet with the

19 design guidelines of scale and mass, height and

20 volume for the district.

21 Now --

22 MR. HALL: And who determines that,

23 though, is the Planning Board, not this Board --

24 MR. TESTA: So --

25 MR. HALL: Not the HPC because who's

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1 the higher authority? You're not vested with that

2 power.

3 MR. TESTA: I understand but I did

4 quote the statute for you specifically which says,

5 and again, this is the Municipal Land Use Law I'm

6 going to read, 40:55D-65.1, a zoning ordinance may

7 designate and regulate historic sites or historic

8 districts and provide design criteria and

9 guidelines; therefore, designation and regulation

10 pursuant to this section shall be in addition to

11 such designation of regulation as the zoning

12 ordinance may otherwise require.

13 You have a zoning ordinance in the

14 town for height, right? And that's three, three

15 stories, 45 feet from grade, correct? So you would

16 also have an HPC ordinance that has design

17 guidelines in --

18 MR. HALL: It doesn't have a height

19 limit in it like the zoning does and you can't

20 deprive them of the right to ask for a variance.

21 MR. TESTA: I'm not -- we're not.

22 We're not; we're not.

23 MR. HALL: It says that it shall not

24 be more than 40 feet in height. What could be

25 clearer in the resolution?

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1 MR. TESTA: And if -- so if -- if --

2 if that is a concern, if the height is the concern,

3 then it can be considered recommendation.

4 Regardless, they still --

5 MR. HALL: That's not what you said

6 and --

7 MR. TESTA: -- go for a variance,

8 regardless.

9 MR. HALL: -- and you can make any

10 recommendations you want to the Planning Board. The

11 question here is: Can they put that as a condition?

12 I think what I'm hearing here is no.

13 One other thing I got -- and I'm sorry

14 I have to say this but --

15 MR. TESTA: Feel free, Mr. Hall.

16 MR. HALL: -- if you -- under the Land

17 Use Law 4055D-11, it says, if the ordinance

18 designates and regulates historic sites, "Body may

19 provide for referral for permits to somebody for a

20 written report on the application of zoning

21 ordinance provisions concerning preservation to any

22 of those aspects proposed which are not determined

23 by approval of an application for development" and

24 that's where I get that you can't have mandatory

25 conditions. The Planning Board -- you said the,

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1 ordinance reg, it has conditions. Fine. If those

2 design things apply, the HPC can come to the

3 Planning Board and say "Here's why they don't comply

4 or they do comply." That's for the Planning Board

5 to make the final judgment, not the HPC.

6 MR. TESTA: Understood, Mr. Hall, and

7 I just want to say the statute that you quoted the

8 Rule of General Application, this statute, under

9 65.1, is a specific statute regarding historic

10 designation in historic sites.

11 MR. HALL: No. That's what 111 is,

12 and by the way, I don't know that vague design

13 guidelines are appropriate in the zoning ordinance

14 anyway. I mean, they -- they -- they still have to

15 be objective and the Madison Land Use Ordinance --

16 what you're talking about is in a historic

17 preservation ordinance. The land use ordinance has

18 one single cross-reference to the historic

19 ordinance. I'm not sure that's land use ordinance,

20 frankly. I mean, that's --

21 CHAIRMAN SANTORO: I mean, even beyond

22 all that, 4055D20, "Exclusive authority of Planning

23 and Board of Adjustment: Any power expressly

24 authorized by this by this act shall be exercised

25 by, one, Planning Board, two, Boards of Adjustment,

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1 shall not be exercised by any other body.  
2 MR. TESTA: They're referring to  
3 governing body.  
4 CHAIRMAN SANTORO: That's clear.  
5 MR. HALL: Anyway, I interrupted you.  
6 I'm sorry but I feel --  
7 MR. TESTA: No. That's all right.  
8 MR. HALL: -- feel strongly about it.  
9 I do too that the law is the law, and you know, I  
10 appreciate the HPC. It's a great thing but make  
11 your pitch to the Planning Board. That's what the  
12 law contemplates, not -- you you're not cowboys.  
13 You can't tell people what to do. If -- they got to  
14 go to the Planning Board. Go there and make  
15 argument, make your recommendations, and if there's  
16 a good reason for it consistent with objectives of  
17 the Historic Preservation, hopefully, the Planning  
18 Board will agree if they're lawful, if there's a  
19 basis for them in the ordinance. That's all I'm  
20 saying.  
21 MR. TESTA: Right. And -- and I did  
22 provide those basis for you, and again, I've asked  
23 you to look again at the design guidelines, which  
24 are appropriate by reference, specifically, in the  
25 HPC ordinances.

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1 MR. HALL: Great. But that -- that  
2 doesn't change the fact who decides.  
3 MR. TESTA: Thank you.  
4 MR. HALL: The Planning Board, not the  
5 HPC.  
6 MR. WOLFSON: May I just make a few  
7 comments? Mr. Chairman, may I make a few comments?  
8 CHAIRMAN SANTORO: Yes, please.  
9 MS. WOLFF: Thank you.  
10 So the first -- the statement was  
11 made, by Mr. Testa, that this is a landmark  
12 property. In your destination which was filed, it  
13 is, specifically, not a key contributor, unlike many  
14 of the other buildings in the historic district.  
15 That was in the record and talked about at length.  
16 Secondly, on the design criteria, he  
17 cited 4055D65.1. There is no doubt that the  
18 municipality has the authority to adopt those design  
19 criteria. Your review of the record showed probably  
20 hours of testimony from Mr. Gertler how we complied  
21 with the design criteria and they are numerous  
22 exhibits showing how the height of this building was  
23 consistent with other buildings in the direct --  
24 directly surrounding area as well as throughout the  
25 historic district.

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1 And finally, whether the conditions  
2 are considered mandatory or advisory, we are before  
3 this Board either way asking to have those  
4 conditions deleted so that's where --  
5 MR. HALL: We're not ruling on the  
6 merits of those conditions. We're just saying  
7 they're not mandatory to get a demo permit. As I --  
8 I think it's clear that they can make whatever  
9 recommendation-ed they want to the Planning Board.  
10 That's not our business.  
11 MR. WOLFSON: Let me be clear: We are  
12 we're appealing those conditions and asking that the  
13 -- that the Zoning Board delete them.  
14 MR. HALL: And I think what I'm  
15 hearing and what I'm recommending is that, because  
16 they're not authorized by law, not because you think  
17 they're unreasonable or anybody does and that's a  
18 separate argument -- conversation with the Planning  
19 Board is how I view it. You know they can go make  
20 their pitch, say what should be this and should be  
21 that, and you know, as I've said before, if you want  
22 a height variance, make your argument at the  
23 Planning Board.  
24 MR. WOLFSON: And -- and we -- we  
25 agree with you on that specific point and that was

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1 our argument as to that condition, but again, the --  
2 the -- the appeal that we have filed here is for the  
3 deletion of those three conditions because it  
4 affects, not just the Planning Board process; it  
5 effects conditions that are being attached to a  
6 permit or denial of a permit. We have a whole other  
7 process that we have to go through there so the  
8 request is for the deletion.  
9 MR. HALL: Sir, would you like to  
10 introduce yourself?  
11 MR. FALCO: Sure would. Thank you,  
12 Mr. Chairman.  
13 Hello, Board members.  
14 Joseph Falco, "F" as in "philosophy"  
15 -- "Frank," F-A-L-C-O, Delwood Drive.  
16 You know the -- when the Historic  
17 Preservation Commission was set, we worked on it for  
18 a year with the then Mayor and all the underpinnings  
19 and it took many Mayors and many Councils and  
20 Planning Boards and Zoning Boards. It was a  
21 complete --  
22 MR. HALL: I think you're testifying.  
23 MR. FALCO: Hold on. Hold on, Mr.  
24 Hall.  
25 MR. HALL: Yeah.

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1 MR. FALCO: Yeah.  
2 There was a complete adherence to the  
3 law. You cannot start --  
4 MR. HALL: How can you say that?  
5 You're not -- are you a lawyer?  
6 MR. FALCO: Mr. Hall, Mr. Hall, just  
7 bear with me. I'm going to get to my point really  
8 quickly. If you don't interrupt me, I'd appreciate  
9 it. Thank you, sir.  
10 There --  
11 MR. HALL: I'll interrupt you if I  
12 think you're out of line, frankly, because my job on  
13 this Board is to tell them what's relevant and what  
14 isn't and I think --  
15 MR. FALCO: Right. But -- but they're  
16 all adhering to state law. I just want to put that.  
17 Nothing could operate. This Board, the Planning  
18 Board or Zoning Board, can't operate without  
19 adhering to the foundations of state law.  
20 Thank you, sir.  
21 You mentioned that the -- that there  
22 -- you know, if their appeal was an error, you know,  
23 from -- from Mr. Vogel. That -- that's like a  
24 separate issue and I think you're just going to be,  
25 like, muddying the waters here if you vote on this

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1 and these three things. They're allowed, by law,  
2 any Historic Preservation Commission in the State of  
3 New Jersey can do that. There's separate laws.  
4 It's not like a house. We heard many, many times,  
5 like, if you owned a house. This is a little bit  
6 different and it was set up that way to protect it  
7 and it is at the end of the historic district, which  
8 is actually, if you turn around, it's actually the  
9 beginning. It's called the "gateway." It's very,  
10 very important in any town, any street. It's the  
11 beginning of the district.  
12 So I think you should just push this  
13 down and just wrap -- roll this up. Voting on this  
14 is going to be more confusing and more harmful. Mr.  
15 Hall mentioned it so did Mr. Santoro, the Chair, you  
16 know, to let it go to the Planning Board. It is a  
17 Planning Board thing. Let it go there or let it go  
18 to Morris County, might be a little bit unbiased and  
19 not put you in such a tight spot.  
20 Thank you, all.  
21 MR. HALL: What I'm suggesting is that  
22 it goes to the Planning Board. I don't know. What  
23 the county does, I know, controls.  
24 MR. FALCO: You are going to make a  
25 mess.

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1 CHAIRMAN SANTORO: All right.  
2 Next, please?  
3 MS. WHITCOMB: Hi. I'll be super  
4 fast.  
5 My name is Clare Whitcomb. 12  
6 Fairwood Road.  
7 I don't know at what point this comes  
8 up but the Environmental Commission had -- the  
9 applicant, when we reviewed the site plan, wanted to  
10 waive the environmental checklist and the  
11 environmental impact assessment and we recommended  
12 that not be waived and I just wanted to -- I don't  
13 know at what point in what process but I -- I wanted  
14 to --  
15 MR. HALL: Has nothing to do with what  
16 we're doing here tonight.  
17 MS. WHITCOMB: That's all.  
18 MR. HALL: You can bring that to the  
19 Planning Board but it has nothing to do with this  
20 appeal.  
21 MS. WHITCOMB: I just wanted to make  
22 sure that was not a lost factor.  
23 MR. HALL: No. That's fine.  
24 MS. WHITCOMB: Thank you.  
25 CHAIRMAN SANTORO: Anyone else have a

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1 comment?  
2 Please introduce yourself.  
3 MS. O'BRIEN: Dorothy O'Brien,  
4 Thrushwood Drive.  
5 My concern is, the Historic  
6 preservation Committee, Item Number 4, until after  
7 -- "no demolition until after all permits have been  
8 granted." I mean, the point of that -- that  
9 resolution was that it's a building in a historic  
10 district and that, once it's torn down, it's down,  
11 you know? If they don't have all the permits to  
12 then build something in its place, what good does it  
13 do the town to have a building in the downtown  
14 historic district be demolished and what good does  
15 it do the town to have an empty lot in its place?  
16 I don't think the town's concern should be whether  
17 the applicant's tax bill would go higher or lower;  
18 it should be the concern of -- that a historic  
19 building should not be torn down until there's  
20 absolutely going to be something built in its -- in  
21 its place and that it can't be absolutely built  
22 until all the permits have been granted.  
23 And concerning the continuation of a  
24 public theater, all the application plans have  
25 stated that there would be a public theater in its

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1 place. Now, you know, residents of this town, we  
2 enjoy -- enjoy a theater in this town and there are  
3 interested party, the Save Madison Theater in -- in  
4 having a public theater in our downtown area so I  
5 think it's disingenuous to state that there's been  
6 no commercial -- no interest in a theater continuing  
7 in that spot.

8 And concerning Item 10, again, I guess  
9 that is a planning -- I -- I'm not going to comment  
10 on that, but again, the Historic Preservation  
11 Committee, it is their job to try to protect and,  
12 you know, a historic building from being demolished  
13 until there's absolutely -- until -- the historic  
14 building is not going to be replaced with something  
15 immediately after the fact of its demolition, then  
16 it shouldn't be demolished in the first place.

17 Thank you.

18 MR. WOLFSON: If I can just speak to  
19 that, Mr. Chairman, for one -- one second?

20 CHAIRMAN SANTORO: Why -- why don't we  
21 keep going.

22 Thank you.

23 Is there any other comments, please?

24 MR. MORRIS: John Morris, MORRIS, 27  
25 Bedford Court.

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1 I think that what I'm hearing from you  
2 folks tonight is -- is -- it's really about fairness  
3 and what's fair to the applicant. There are a lot  
4 of applicants --

5 CHAIRMAN SANTORO: To everybody, to  
6 everybody.

7 MR. MORRIS: I'm sorry?

8 CHAIRMAN SANTORO: Fairness to  
9 everybody.

10 MR. MORRIS: Yes. Exactly. I was  
11 just getting to that point. The applicant has been  
12 professional and showed that they are with us the  
13 entire process, like all applicants are, and I  
14 commend you folks for looking at the facts. What's  
15 landed in your lap, these three items under question  
16 are well- intended. They come from the right place  
17 but it's a matter of fairness and it's what the laws  
18 and ordinances of this state and Madison say and it  
19 must be upheld.

20 Thank you.

21 CHAIRMAN SANTORO: Thank you.

22 Are there any additional comments from  
23 the public? Now would be the time.

24 (No response)

25 CHAIRMAN SANTORO: Okay. We are going

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1 to close the public portion.

2 Did you want to make that additional  
3 comment?

4 MR. WOLFSON: I -- I just wanted to --  
5 to refer back to the long quote I read from  
6 Commissioner Luber about his concern relative to the  
7 condition of the property and also wanted to refer  
8 to those many references in the record to -- how,  
9 over time, prior to my client's ownership, the  
10 historic significance of the building had been  
11 significantly compromised. The theater had been  
12 chopped up. The original marquee had been replaces.  
13 The facade had been totally changed from two retail  
14 storefronts, all the on the record. I think that's  
15 relevant to your consideration of this as well.

16 CHAIRMAN SANTORO: Yes. We're aware  
17 of that.

18 MS. SALKO: Mr. Wolfson, can you  
19 address the concern that was raised by the public  
20 that, if, indeed, the building is demolished, what  
21 the contingency plan would be for building or sale?  
22 Can the applicant commit to something?

23 MR. WOLFSON: The applicant is  
24 committed to spending money three years ago to  
25 purchase the property. The applicant has spent a

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1 lot of funds to respect the Historic Preservation  
2 process and go through that. The applicant, as any  
3 property owner, is motivated to get a return on all  
4 that investment and their entire business approach  
5 consistent with everything they do is to get an  
6 approval and develop something that Madison will be  
7 as proud of as they can.

8 CHAIRMAN SANTORO: Okay.

9 Anything else you would like to wind  
10 up with?

11 MR. WOLFSON: No.

12 CHAIRMAN SANTORO: Okay. So we are  
13 going to open to deliberation. Unless -- well, why  
14 don't we -- there's three of them. There's three of  
15 them so we can address them individually during  
16 deliberation or do them all at one time. Why don't  
17 we talk about how we feel about these.

18 MR. FITZSIMMONS: Can we just -- I'm  
19 sorry. Can we just refer back again to what the  
20 request is here? It is a request to delete the  
21 conditions, not to -- not to resolve that the  
22 Administrative Officer's decision was incorrect in  
23 relying on those conditions.

24 MR. WOLFSON: Actually, I think the  
25 way you phrased it is technically correct because

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1 the jurisdiction comes from the action of the  
2 Administrative Officer but all that officer did was  
3 adopt the conditions, so for that reason, I think we  
4 also have jurisdiction under your ordinance and the  
5 statutes to bring an appeal independent of whether a  
6 permit was in play here or not.

7 MR. HALL: Yeah. I think the  
8 Administrative Officer read that prior approvals you  
9 can't get the permit. By doing that, he endorsed  
10 all these conditions, so technically, you're right.

11 MR. FITZSIMMONS: I got it.

12 MR. HALL: He was wrong to rely on  
13 this. What they are asking to excise, that's all  
14 they are asking.

15 MR. WOLFSON: Right. So it's -- it --  
16 it it's -- as much as we've discussed earlier, a de  
17 novo review of the process that led to the  
18 conditions, which is the record that we've discussed  
19 by the HPC.

20 MR. FITZSIMMONS: Because there's no  
21 mechanism to go back and say -- otherwise to say the  
22 approval must be or the permit must be given for  
23 demolition outside of actually removing those  
24 conditions from this resolution?

25 MR. WOLFSON: And that's the subject

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1 of the pending appeal with the county.

2 MR. FITZSIMMONS: Okay.

3 CHAIRMAN SANTORO: Well, how do you  
4 feel about these three conditions?

5 MR. FITZSIMMONS: Look, I think they  
6 are -- they're -- they're -- I think the resolution  
7 itself is -- is too broad in the terms of a  
8 resolution around both demolition and construction,  
9 which has led to a situation that has conditions  
10 that conflict with Land Use Law and the roles and  
11 responsibilities of the Land Use Board here in  
12 Madison, so from that perspective, I'm struggling to  
13 see how we can resolve the issue of the applicant's  
14 right to demolish the existing property without  
15 deleting those provisions as requested.

16 CHAIRMAN SANTORO: Diane?

17 MS. DRISCOLL: I'm in agreement with  
18 Tim. Regardless of how you feel about whether this  
19 should or shouldn't be a theater and regardless of  
20 how you feel about the mass, size or scale of the  
21 building, that should be part of the site plan  
22 approval, not part of the demolition so I think it's  
23 time for the demolition permit to be approved.

24 CHAIRMAN SANTORO: Toni?

25 MS. DEROSA: Okay. So Number 9 and

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1 Number 10, we've already pretty much agreed, as we  
2 listened to various opinions here, that they really  
3 before the Planning Board, but in addition to that,  
4 I find that the Historic Preservation Commission  
5 has, more or less, overstepped its authority in --  
6 in -- in just making the demands rather than a  
7 recommendation.

8 So we'll go with Number 4 and how I  
9 feel about that one. I -- I mentioned it before  
10 that it will create a lot of difficulty. If we read  
11 that and try to carry out the message that it's  
12 giving for this structurally-compromised building,  
13 to me, that structurally-compromised building is a  
14 problem. Whether it's in the historic district or  
15 not, it's a danger. It's going to be there even  
16 longer if -- if we were to, say, keep those  
17 conditions, so yeah, I feel that those conditions  
18 need to be deleted.

19 And I also have a strong reservation  
20 about these others, but before they go before the  
21 Planning Board, we'll let the Planning Board decide  
22 whether, a public movie theater, having that  
23 continue is very important to the Historic  
24 Preservation Commission but does it represent what  
25 the entire town wants? We don't know that. We know

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1 that it's -- a segment of the population wants to  
2 keep a public theater there, a small public theater  
3 at that, and that, I find difficult because we have  
4 -- for years, we had a larger one but it was never  
5 filled, hardly ever filled, as we got into more  
6 types of movie theaters in the area and different  
7 types of media via our television, so imposing a  
8 public movie theater there as a demand, not a  
9 suggestion, if these were all suggestions, I don't  
10 think we'd be here. I find that tough, you know?  
11 How do you do that to a buyer? How much government  
12 has to apply to a property owner's privilege?

13 The maximum height, I believe you said  
14 that the area calls for 45 feet. They are looking  
15 for 48. That is not astronomical. In my years here  
16 on the Board, we also have been very reasonable with  
17 certain types of requests because we know it's for  
18 the betterment of that particular -- let say's it  
19 was a home that was before us or a commercial  
20 property, we look at them closely and we scrutinize  
21 closely. 3 feet? I -- I ask all of you. I don't  
22 think anyone would say that that's a tremendous  
23 amount of difference so that's from coming from --  
24 I'll leave the rest.

25 That is my opinion.

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1 CHAIRMAN SANTORO: Thank you.  
2 Roger?  
3 MR. PAETZELL: I really agree with  
4 what everybody said. I do think the process has to  
5 move forward, and by having these conditions on, I  
6 don't think you can. I do think they are really  
7 good recommendations and all.  
8 The theater as is was it can run.  
9 It's in terrible condition. There's nobody having  
10 -- I think, having a little theater there would be  
11 wonderful but I don't see a condition that it has to  
12 be there so I --  
13 Again, I agree with everybody else  
14 that has spoken so far.  
15 CHAIRMAN SANTORO: Okay. Thank you.  
16 Anthony?  
17 MR. DIIONNO: To me, it's just a  
18 matter of law and procedures, you know? I think the  
19 argument is sound, that, if the Historic  
20 Preservation Commission denies demolition, well, the  
21 owner can go ahead with it anyway. Well, how can  
22 they make these conditions if, you know, they've  
23 flat out denied it, you could still go ahead with it  
24 anyway? So -- and you know, it's -- I --  
25 I definitely have reservations about

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1 the lot being demolished and sitting there for an  
2 extended period of time, but if, you know, under the  
3 Land Use Laws, that's the procedure, then that's the  
4 procedure.  
5 And I think, for Conditions 9 and 10,  
6 I think that, you know, I would be okay to see them  
7 stay as recommendations but I think, you know, based  
8 on the law, as a condition, it is exceeding the  
9 scope of the HPC's authority.  
10 CHAIRMAN SANTORO: Thank you.  
11 Mary Sue?  
12 MS. SALKO: Thanks.  
13 You know, 9 and 10, I won't quite  
14 comment on because I think some of the members were  
15 aligned that it needs to go to the Planning Board  
16 there before it goes.  
17 As far as Condition 4 goes, just to  
18 echo some of the conditions by Anthony, you know,  
19 I'm sympathetic for the applicant paying for an  
20 improved lot for three years. I mean that's really  
21 -- that's egregious but further to that I am hearing  
22 concerned how we discuss how plans change and  
23 financial challenges. What if they get demolished,  
24 and then, again, the plan just isn't feasible  
25 anymore? Does the planning board have the permit to

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1 not issue the permit until they have an approved  
2 plan?  
3 MR. HALL: The Planning Board doesn't  
4 issue a demo permit, the Construction Official does.  
5 They are there for purely the demolition permit.  
6 They can have reasonable conditions, but the extent  
7 that the conditions here seem to cross over into the  
8 Planning Board territory, I don't think they can do  
9 that.  
10 That's all I'm saying and I don't condition for the  
11 timing one. I just don't know. I'm not clear on  
12 the authority for that because, if I'm back to  
13 saying --  
14 Well, first of all, as a practical  
15 matter, I'm not sure I see the difference between an  
16 empty building and a vacant lot. As a legal matter,  
17 if the building was saveable, they could make them  
18 -- the law would allow you to make them keep a  
19 theater, but if you say the building is beyond --  
20 not feasibility or whatever way you couch it, I'm  
21 not aware of any authority that -- that it gives  
22 them any authority to say "but you can't do it right  
23 away" either. If you can demolish it; you can  
24 demolish it. I'm not aware of any timing  
25 constraints because that's the same thing.

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1 If a building burned down, what? You could tell him  
2 he has to build another building right away?  
3 MS. SALKO: Right.  
4 MR. HALL: I'm just giving a  
5 hypothetical, off the top of my head. It's -- if it  
6 burned down, you have to demolish what's left. I'm  
7 not aware of any authority to say, well, because  
8 it's a social focal point of the town, that's the  
9 finding. You have to build something else and put a  
10 theater in it. I'm not aware of that because that's  
11 a public use. If it's there and it's used, then  
12 there's some theory to allow that, but the theory of  
13 the law is that -- I think there's a Superior Court  
14 case involved in the Penn Central Railroad. I think  
15 it was the Grand Central Terminal, that they wanted  
16 to preserve it and they said well you can but as  
17 long as the developer get their reasonable  
18 investment back. The idea is there is an economic  
19 rights here but you can't make somebody do something  
20 that costs them money. Now, if they were reusing  
21 it, you can still get some use of that property or,  
22 in a viable way, repair it, then -- but that is not  
23 going to happen here.  
24 MS. SALKO: Right.  
25 MR. HALL: Because at the outset, as I

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1 read everything, there's a finding that the theater  
2 is not really viable to fix it and to say, then,  
3 "But you can't tear it down now without building  
4 another theater," I'm not sure I understand the  
5 legal basis or that linkage.  
6 So that is my response.  
7 CHAIRMAN SANTORO: Anything else?  
8 MS. SALKO: No.  
9 CHAIRMAN SANTORO: Yeah. I'm in favor  
10 of deleting all three of them.  
11 As to Condition 9 and 10, I believe  
12 that those are really the purview of the Planning  
13 Board and they should be handled in the context of  
14 the application before the Planning Board and so I  
15 don't -- I don't think that it's also fair to the  
16 applicant in terms of continuation of a public movie  
17 theater is the best use of that property and I can  
18 say that, in terms of this Board and the 12 years I  
19 have been on it, we have not gone to that level with  
20 any applicant to say "You must do this with that  
21 use." The closest we've ever come was to limit  
22 certain types of businesses in -- in an area or on a  
23 property where there was, clearly, insufficient  
24 parking and it would result in parking overflow into  
25 a residential district; there was no other thing --

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1 no other way to go other than with -- it would be a  
2 detriment to the character and integrity to the  
3 residential zone. That is the only time we've done  
4 anything like that so it would be hard for me to  
5 imagine that the Planning Board would require that  
6 so it's another thing if the applicant wants to  
7 volunteer it and set up a condition about that and  
8 work cooperatively; that's fine but I just don't see  
9 it being imposed as a mandatory condition.  
10 And as I said earlier, I think, on  
11 Condition 4, about the development approvals, I  
12 think it exceeds what is in the borough ordinance,  
13 and therefore, I feel that it's too much.  
14 So I'm going to ask for a motion  
15 unless you want to break this up into separate votes  
16 but I ask for a motion to delete all three.  
17 MS. DRISCOLL: So moved.  
18 MR. FITZSIMMONS: Second.  
19 CHAIRMAN SANTORO: Can we get a roll  
20 call?  
21 So this is a motion to delete all  
22 three conditions...  
23 MS. BOARDMAN: Mrs. DeRosa?  
24 MS. DEROSA: Yes.  
25 MS. BOARDMAN: Mrs. Driscoll?

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1 MS. DRISCOLL: Yes.  
2 MS. BOARDMAN: Mr. Fitzsimmons?  
3 MR. FITZSIMMONS: Yes.  
4 MS. BOARDMAN: Mr. Paetzell?  
5 MR. PAETZELL: Yes.  
6 MS. BOARDMAN: Ms. Salko?  
7 MS. SALKO: Yes.  
8 MS. BOARDMAN: Mr. Santoro?  
9 CHAIRMAN SANTORO: Yes.  
10 MS. BOARDMAN: Mr. DiIonna?  
11 MR. DiIONNO: Yes.  
12 MR. HALL: At the outset, there will  
13 be a resolution to memorialize that decision at the  
14 next meeting the statute requires with the reasons  
15 that have been said on the record.  
16 MR. WOLFSON: I'd like to thank you  
17 for your time and consideration and hope that you  
18 are all safe.  
19 CHAIRMAN SANTORO: Thank you. Good  
20 luck.  
21 (The hearing concluded at 9:28 p.m.)  
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C E R T I F I C A T E

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10 transcript of my stenographic notes of the within  
11 proceedings, to the best of my ability.  
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