

BOROUGH OF MIDLAND PARK – ZONING BOARD OF ADJUSTMENT MINUTES

October 11, 2023

PLEASE TAKE NOTE:

ON WEDNESDAY, OCTOBER 11, 2023, THE ZONING BOARD OF ADJUSTMENT OF THE BOROUGH OF MIDLAND PARK HELD A REGULAR MEETING IN THE MIDLAND PARK COUNCIL CHAMBERS, 280 GODWIN AVE., MIDLAND PARK, NJ. THE FORMAL MEETING BEGAN AT 7:30 P.M

FORMAL MEETING

READING OF THE OPEN PUBLIC MEETINGS ACT

PLEDGE OF ALLEGIANCE

ROLL CALL:

Mr. Les Andersen	present	Mr. Mark Divak	absent
Mr. David Zuidema	present	Mr. William Placier	present
Mr. Richard Formicola	present	Mr. David Barlow	present
Mr. Nick Papapietro	present	Mr. Joseph Eliya, Alt #1	present
		Mr. James Capalbo, Alt #2	present

Attendance by Board Professionals: L. Herlihy, Esq., Attorney; R. Wostbrock, Engineer; D. Novak, Planner;

7:33:07 – 7:33:27 – recording was paused to adjust sound

Minutes of the 9/13/23 meeting – approved

PUBLIC HEARINGS

Jag-Tech LLC dba Midland Park Food Mart – 184 Godwin Avenue – BL 17 LT 9.01 – Application has been withdrawn by the applicant on 10/11/23.

MHF Midland Park LLC/Taco Bell – 80 Godwin Avenue – BL 6 LT 17.02 – see attached transcript.

Mr. Barlow has certified that he has read the transcripts and is eligible to vote. Motion to approve the use variance including the previously agreed to stipulations made by Mr. Formicola; seconded by Mr. Barlow. Mr. Formicola, Mr. Zuidema, Mr. Barlow, and Mr. Eliya voted yes. Mr. Papapietro, Mr. Placier, and Mr. Andersen voted no. Motion failed 4-3; application for use variance denied.

RESOLUTIONS:

Baumann, Ryan & Valerie – 217 Paterson Avenue – BL 26.01 LT 13 – Motion to approve the resolution made by Mr. Papapietro. Seconded by Mr. Formicola; all eligible members voted in favor.

Meeting Adjourned – 9:56 PM
Jessica Harmon

BOROUGH OF MIDLAND PARK
 ZONING BOARD OF ADJUSTMENT
 WEDNESDAY, OCTOBER 11, 2023
 7:30 P.M.

 IN THE MATTER OF:) TRANSCRIPT OF
)
 APPLICATION OF) PROCEEDING
 MHF MIDLAND PARK, LLC)
 TACO BELL -)
 80 GODWIN AVENUE,)
 BLOCK 6, LOT 17.02.)

B E F O R E:

LES ANDERSON, CHAIRMAN
 NICK PAPAPIETRO, VICE CHAIRMAN
 RICHARD FORMICOLA, SECRETARY
 DAVID BARLOW, MEMBER
 JAMES CAPALBO, MEMBER
 WILLIAM PLACIER, MEMBER
 MARK DIVAK, MEMBER (ABSENT)
 JOSEPH ELIYA, MEMBER
 DAVID ZUIDEMA, MEMBER

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

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 Counsel for the Objector, Burger Barn

A L S O P R E S E N T:

JESSICA HARMON, Board Secretary
 DAVID NOVAK, P.P., Board Planner
 RICHARD WOSTBROCK, P.E., Special Traffic Engineer

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CHAIRMAN ANDERSON: I call the meeting to order.

This is a meeting of the Zoning Board of Adjustment held on Wednesday, October 11, 2023.

Adequate notice of this meeting has been provided to the public by written notice of the time, date and place of this meeting, having been delivered to The Ridgewood News and The Record, and by posting a copy of the said notice on bulletin board at the Municipal Building, and by filing a copy of said notice with the Borough Clerk, all as required by the Open Public Meetings Act.

Please stand for the Flag Salute.

(Whereupon, all rise for a recitation of the Pledge of Allegiance.)

MS. HARMON: Mr. Zuidema?
 MR. ZUIDEMA: Here.
 MS. HARMON: Mr. Formicola?
 MR. FORMICOLA: Here.
 MS. HARMON: Mr. Papapietro?
 VICE CHAIRMAN PAPAPIETRO: Here.
 MS. HARMON: Mr. Placier?
 MR. PLACIER: Here.
 MS. HARMON: Mr. Barlow?
 MR. BARLOW: Here.

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1 MS. HARMON: Mr. Eliya?
 2 MR. ELIYA: Here.
 3 MS. HARMON: Mr. Capalbo?
 4 MR. CAPALBO: Here.
 5 MS. HARMON: Mr. Anderson?
 6 CHAIRMAN ANDERSON: Here.
 7 Public hearings, I'm advised Jag Tech
 8 has been withdrawn. Okay.
 9 So our only public hearing tonight is
 10 Taco Bell.
 11 Mr. Whitaker, do you want to enter your
 12 appearance?
 13 MR. WHITAKER: Certainly.
 14 Good evening, Mr. Chairman, Members of
 15 the Board, for the record, Bruce Whitaker from the
 16 firm of McDonnell & Whitaker representing the
 17 applicant, MHF Midland Park, LLC.
 18 CHAIRMAN ANDERSON: Yeah, go ahead.
 19 Enter your appearance.
 20 MS. RIZZUTO: Good evening, Anne Marie
 21 Rizzuto from Weiner Law Group on behalf of the
 22 objector, Burger Barn.
 23 CHAIRMAN ANDERSON: Okay.
 24 I know you're here to give us your
 25 summation.

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1 what need to consider.
 2 So just to refresh everybody's memory
 3 -- I'm sure you have not forgotten -- but this
 4 application is for use variance relief pursuant to
 5 N.J.S.A. 40:55D-70D(1) for a principal use not
 6 permitted in the zoning district.
 7 The application specifically is for a
 8 drive-through restaurant. So the use variance isn't
 9 for the drive-through and it isn't for the
 10 restaurant; it's for a combination thereof of a
 11 drive-through restaurant.
 12 In order to grant a D(1) use variance,
 13 the board needs to consider both the positive and the
 14 negative criteria.
 15 With the positive criteria, the
 16 applicant needs to demonstrate that there are special
 17 reasons which exist for the granting of the variance,
 18 and that the granting of the variance will further
 19 the purposes of Municipal Land Use Law.
 20 On the flip side of that with the
 21 negative criteria, the applicant needs to demonstrate
 22 there will be no substantial detriment to the public
 23 good and no substantial impairment to the intent of
 24 the zone plan.

Regardless of one's opinions on Taco
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1 MR. WHITAKER: That is correct.
 2 CHAIRMAN ANDERSON: Before you do that,
 3 though, I never gave an opportunity to our planner to
 4 give us his thoughts on the application, so I'd like
 5 to do him first.
 6 MR. WHITAKER: Certainly.
 7 He did give some testimony and he was
 8 sworn in at the last meeting, because I read the
 9 transcript of it.
 10 MR. NOVAK: I was going to ask if I was
 11 sworn in. I forgot.
 12 CHAIRMAN ANDERSON: Okay.
 13 But you're still sworn in.
 14 D A V I D N O V A K, PP, ACIP
 15 25 Westwood Avenue, Westwood, New Jersey, having
 16 been previously duly sworn, continues to
 17 testify as follows:
 18 MR. NOVAK: I'm still sworn in, and
 19 still David Novak, for the record. Last name is
 20 spelled N-O-V-A-K. With Burgis Associates. That's
 21 spelled B-U-R-G-I-S. And we are the board planning
 22 consultants.
 23 So I just want to provide the board a
 24 little bit of a recap and a background of what we're
 25 looking at essentially of what this variance is and

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1 Bell, I think we all agree this is not an inherently
 2 beneficial use, like a church, or a house of worship,
 3 or a hospital. Because it's not an inherently
 4 beneficial use, the applicant has an enhanced burden
 5 of proof where they need to demonstrate that the site
 6 is particularly suited for this use and that the use
 7 is not inconsistent with the intent of the Master
 8 Plan.
 9 To back up from there, because
 10 oftentimes when we talk about the statutory criteria
 11 you hear a bunch of buzz words, special reasons,
 12 particular suitability. So let's delve into a little
 13 bit of what that means.
 14 When we talk about special reasons,
 15 there's typically three types of categories for
 16 special reasons.
 17 There's a reason where the proposed use
 18 is something that inherently serves the public good.
 19 So, again, that would be more of an inherently
 20 beneficial use.
 21 One special reason could be where the
 22 property owner would suffer undue hardship if it was
 23 compelled to use the property for whatever the use
 24 is. Or another special reason is where the use would
 25 serve the general welfare because the proposed site

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1 is particularly suitable for that proposed use. And
 2 that's what we're really looking at with this
 3 application, particular suitability.
 4 And particular suitability you can
 5 think of as twofold. You can look at particular
 6 suitability as to why the location of the site within
 7 the borough is particularly suited to the use despite
 8 the underlying zoning. You can also look at what
 9 unique characteristics of the site make it
 10 particularly appropriate for that proposed use. And
 11 the site doesn't necessarily need to be uniquely
 12 suited for the use. That is to say, it does not need
 13 to be the only site available for that use. It needs
 14 to be particularly suited.

15 I want to take a step back even further
 16 a little bit to talk about planning and zoning in
 17 general.

18 Within the planning and zoning world,
 19 you typically have three bodies. You have the
 20 planning board; you have the zoning board; and you
 21 have the governing body.

22 The planning board, as its name
 23 implies, is responsible for establishing the planning
 24 vision through the development of a Master Plan,
 25 which is a comprehensive, long-term strategic

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1 clear that you should be making zoning decisions
 2 based on an ordinance rather than a variance.
 3 So when you examine the negative
 4 criteria, you need to carefully consider the extent
 5 to which granting the variance would constitute what
 6 they call an arrogation of the governing body. That
 7 is, are you usurping the power of the governing body?

8 That brings us to the question which
 9 has been discussed at the beginning of this hearing
 10 process and was discussed by both planners, Order
 11 Number 19:21, which was adopted by the Council on
 12 October 28, 2021, which specifically prohibited
 13 drive-through restaurants.

14 There was a lot of discussion by the
 15 board and by the planners as to why that ordinance
 16 was developed.

17 To me, the intent of the ordinance is
 18 inherent in the way the ordinance was written. It
 19 was intended to prohibit drive-through restaurants in
 20 your B-3 District, as well as your B-1 District. B-1
 21 District.

22 MS. RIZZUTO: B-1 and 3.

23 MR. NOVAK: B-1 and 3.

24 Thank you.

25 So there's been a lot of discussion
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1 development guide which is intended to guide the
 2 growth and development of the community. It's
 3 essentially a road map. It outlines where a
 4 municipality currently is and where it wishes to go
 5 in the future. And that Master Plan is supposed to
 6 develop the general parameters around what types of
 7 development are to occur and, basically, what types
 8 of development are to occur and where. That's the
 9 planning board.

10 The governing body, also known as the
 11 Mayor and Council, has a very important role to play
 12 in that as well. While the planning board prepares
 13 the Master Plan, the governing body is the sole
 14 entity responsible for adopting land use board
 15 regulations.

16 And then there's the zoning board, you
 17 guys. You have to deal with the work product of both
 18 the planning board and zoning board. You have the
 19 power to grant a D(1) use variance from zoning
 20 regulations, which are dealt by the governing body in
 21 consideration of a planning board's Master Plan. So
 22 you are essentially a very powerful entity.

23 When we look at the aspects of the
 24 negative criteria, and specifically the intent of the
 25 zone plan, the courts have typically made it very

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1 about what the rationale or the justification for
 2 that was, what the thought process was of the
 3 Council. It could be many things. There could be
 4 concerns about the number of drive-through
 5 restaurants. There could be concerns about the
 6 safety of drive-throughs. The fact of the matter is
 7 essentially that's no longer in the hands of this
 8 board. You have to just look at the intent.

9 So when you grant the use variance and
 10 you look at the impact on the negative criteria,
 11 there's a number of aspects that you, as the board,
 12 can consider. One of the items would be involving
 13 your new land use.

14 So a common example of that, I believe,
 15 was even used in Medici are health clubs. There's a
 16 proliferation of health clubs. A lot of older zoning
 17 ordinances did not envision health clubs popping up
 18 as a permitted use.

19 As a more recent example, we see in
 20 downtowns paint-and-sip uses, new uses that may not
 21 be anticipated or envisioned by an older zoning
 22 ordinance.

23 You can also look at whether there's
 24 been surrounding changes to the surrounding
 25 development pattern or the surrounding character of

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1 the neighborhood, since the adoption of the last
2 ordinance, or if there are needs or factors of the
3 community which changed since the ordinance was
4 adopted.

5 So to me, that's the most important
6 thing this board should focus on in their
7 deliberations, whether or not you feel that there's
8 been a factual justification for the granting of the
9 variance after the adoption of this ordinance.

10 That's an essential part to proving the negative
11 criteria with a D(1) use variance.

12 Does anybody have any questions for me?

13 CHAIRMAN ANDERSON: Yes, I do.

14 MR. NOVAK: Yes.

15 CHAIRMAN ANDERSON: What weight can we
16 attribute to the fact that this is not just a use
17 that was not included as permissible, but it was
18 actually specifically prohibited?

19 In other words, we often get use
20 variance requests where, as you say, use the health
21 one as an example, they come and it's not a permitted
22 use, so then automatically it's a prohibited use.

23 Can we establish any weight to the fact
24 that this is specifically prohibited as opposed to
25 not just not included?

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1 sure Mr. Whitaker probably has that in his summation
2 as well -- but I believe he brought up Purpose A,
3 which is what you brought up, general welfare. There
4 was also Purpose C, which is light, air and open
5 space, as well as Purpose I, which is promoting a
6 desirable visual element.

7 So there were other purposes of zoning
8 that were brought up for the special reasons by the
9 applicant's planner, not just the general welfare.

10 Your question as to how the approval of
11 a drive-through restaurant with -- fast food
12 drive-through restaurant essentially promotes the
13 general welfare.

14 Typically when we look at what promotes
15 the general welfare, one of the first things that I
16 do is look at what does your Master Plan say, what
17 does your re-examination report say.

18 The applicant's planner did discuss
19 some of the goals of the Master Plan Re-examination
20 Report. Goal 1 was to maintain the existing areas of
21 visibility; Goal 2, which was environmental
22 protection; and Goal 6, which was to reduce driveway
23 movements onto Godwin Avenue.

24 So there was some discussion of our
25 Master Plan and how the promotion of those Master

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1 MR. NOVAK: I think you can, yes, with
2 something that was specifically called within a
3 zoning ordinance as opposed to a use that was left
4 out by neglect or something that was not necessarily
5 envisioned at the time of the adoption of the
6 ordinance.

7 So I believe you have to weigh that and
8 you have to reconcile that with the intent of the
9 zone plan.

10 CHAIRMAN ANDERSON: Okay. As far as
11 the positive criteria, you were talking about
12 specific --

13 MR. NOVAK: Special reasons.

14 CHAIRMAN ANDERSON: All right. From
15 the testimony we've heard, I -- I have to hear from
16 other board members -- but for myself, I haven't
17 heard any particularly persuasive testimony from
18 either of the planners as far as how this approval of
19 this use will advance one of the purposes of zoning.

20 Have you thought about that at all, or
21 is there anything in the testimony maybe that I've
22 missed that you would see as a planner?

23 MR. NOVAK: The applicant's planner did
24 bring up other purposes of zoning.

25 So in looking through my notes -- I'm

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1 Plan -- really Re-examination Report goals are
2 furthered by this proposed use.

3 So there was some discussion of that,
4 but you have to weigh, as a board, whether or not you
5 buy that a drive-through restaurant specifically
6 promotes those goals.

7 CHAIRMAN ANDERSON: One last question,
8 I don't know if you remember, but I became somewhat
9 frustrated with each of the planners while they were
10 testifying over the fact that my understanding of the
11 particular suitability that there's -- there's two
12 aspects to that: One pertains to the negative
13 criteria; and one pertains to the positive criteria.

14 And as far as the positive criteria is,
15 my understanding always was that it has to be
16 particularly suited, in that there's a reason why
17 that particular location is suitable -- not suitable,
18 not uniquely, but there's something about that site
19 that makes it particularly suitable for this use.

20 So as an example I gave -- I'm not
21 going to do it again, but I gave the example of the
22 grocery stores.

23 But again say there's a -- again, this
24 is my understanding. There's a lot with severe steep
25 slope problems or something. And a use comes before

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1 the board that's not permitted, but whatever it is,
2 it -- the steep slope doesn't impact it, and it's
3 more suitable for that site than a permitted use.
4 Am I completely out of -- out of touch,
5 or is there any validity to that?

6 MR. NOVAK: I think we're saying the
7 same thing, that there needs to be something about
8 that site that is not necessarily solely unique.

9 It does not need to be solely unique.
10 That was something that was discussed in the Himeji
11 case. Something about that site that lends itself to
12 being suitable specifically for that type of use.

13 CHAIRMAN ANDERSON: Right.

14 I know I said that was the last
15 question, but now I have another one.

16 MR. NOVAK: Okay.

17 CHAIRMAN ANDERSON: Again, when the
18 applicant's planner was testifying, I was trying to
19 emphasize the fact that all of the testimony from the
20 planner and the engineer as far as how this site can
21 accommodate a drive-through, okay, was not to me
22 particularly important because a drive-through is
23 permitted. It's not the drive-through that's the
24 problem. The problem is it's a restaurant
25 drive-through that's not permitted.

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1 site, not only could it accommodate the shorter
2 drive-through bank queue or the shorter pharmacy bank
3 queue, it could also accommodate the longer
4 restaurant drive-through.

5 That's what I took away from that.

6 CHAIRMAN ANDERSON: I missed that.

7 MS. HERLIHY: That's how they tried to
8 do that.

9 MR. NOVAK: To add onto that too, there
10 was also a lot of discussion, especially at the last
11 meeting, regarding the menu board being a component
12 of a drive-through restaurant as well, and the
13 placement of that menu board, potential sites and
14 sounds.

15 So that would be another unique aspect.

16 MS. HERLIHY: The ordinance doesn't say
17 drive-through restaurants are prohibited because we
18 don't like longer queues, and menu boards, and
19 speakers, and lights and noise.

20 But Mr. Whitaker is trying to tell you
21 that that's what comes along with a drive-through
22 restaurant and that's what people find objectionable
23 about a drive-through restaurant. He's trying to
24 tell you why all of those things are not of concern
25 here, why this site can accommodate those things

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1 And so it appears to me what we have to
2 find is there's some special reason why a restaurant
3 drive-through as opposed to any other kind of
4 drive-through -- build a shoe repair or a Columbia
5 Bank or whatever, they wouldn't even be here. They'd
6 be at the planning board for a site plan, correct?

7 MR. NOVAK: Correct.

8 MS. HERLIHY: If I could?

9 CHAIRMAN ANDERSON: You may.

10 MS. HERLIHY: Just to shed a little
11 light on that, I think -- and not put words -- he'll
12 stop me if I'm putting words into his mouth.

13 CHAIRMAN ANDERSON: Oh, I'm sure he'll
14 stop you.

15 MS. HERLIHY: That the point -- so I
16 think they did do that, or they tried to do that.

17 In other words, they tried to point out
18 the difference or the distinction between a
19 drive-through associated with a restaurant and a
20 drive-through associated with a bank.

21 For example, it is typical that you
22 would have a longer queue at a drive-through
23 restaurant than you would at a drive-through bank.
24 And because of that, they attempted -- whether they
25 did or not, they attempted to show you that this

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1 better than, perhaps, other sites. That was my take
2 away. Maybe I missed it. I just caught up.

3 CHAIRMAN ANDERSON: Before you, unless
4 -- I was going to have other board members ask
5 questions, but do you have something you want to ask
6 first?

7 MR. WHITAKER: No.

8 I was being looked at.

9 But, no, I don't have anything to say.
10 I'll get my turn.

11 CHAIRMAN ANDERSON: Okay.

12 Anybody else have any questions for
13 Mr. Novak?

14 Go ahead, Rich.

15 MR. FORMICOLA: Are you done?
16 Are you all right?

17 CHAIRMAN ANDERSON: Yeah. I'm...

18 MR. FORMICOLA: For now?

19 Well, I'm going to ask him a question.

20 CHAIRMAN ANDERSON: No.

21 He's going to ask one question.

22 MR. FORMICOLA: He's not done yet?
23 I'm sorry.

24 So the question I have is, with the --
25 with the Master Plan, okay, it's my interpretation --

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1 and you can tell me if this is wrong when you've met
2 or when talked -- it's a general guideline, because
3 if it was set in stone, am I correct -- and this is
4 what they don't want, and really it should never be
5 here because it's like a done deal. That's what
6 they want.

7 Anything that we do, pretty much, this
8 board, it's always an exception because they make a
9 general assumption, we don't want something or we
10 don't want a fence over 6 foot, 7 foot, but if you
11 can show us a good reason, then you can that 10.
12 That's what we're here for.

13 MR. NOVAK: Yeah.

14 Two responses to that.

15 The first would be, you are correct.

16 While Master Plans can offer a lot of specificity --
17 and I've had to write some of those Master Plans with
18 excruciating specificity -- they are supposed to
19 serve as the basis for zoning. That means an
20 ordinance is supposed to coincide with the vision of
21 a Master Plan. And if it doesn't --

22 For example, say if a Master Plan makes
23 a recommendation that we don't want gas stations in a
24 residential zone, and the governing body decides we
25 want to adopt and introduce an ordinance that says we

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1 backyard -- I'm sorry -- 6 feet in a backyard, but
2 they could be 4 feet in a front yard.

3 But there may be some extenuating
4 circumstances where a property is a corner lot or a
5 property is right next to a commercial business where
6 a 6-foot fence in the front yard might help things.

7 So there may be unique aspects of a
8 specific piece of property which would or could
9 warrant the granting of a variance. And that's what
10 this board hears all the time, whether it's a D(1)
11 variance, or sometimes when it's something as simple
12 as a bulk variance for a fence.

13 MR. FORMICOLA: Okay, thank you.

14 VICE CHAIRMAN PAPAPIETRO: A question
15 for you?

16 MR. NOVAK: We're going down the line,
17 yes.

18 VICE CHAIRMAN PAPAPIETRO: Going down
19 the line, when this ordinance was passed back in
20 2021, was your firm involved in part of this
21 particular ordinance?

22 MR. NOVAK: We were not, no.

23 VICE CHAIRMAN PAPAPIETRO: And the
24 reason why I'm saying that, then, you talked about
25 the Master Plan for the town. And the way this is

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1 want to make gas stations permitted in residential
2 zones, that ordinance would get referred to the
3 planning board. The planning board would say, no,
4 this is inconsistent with our Master Plan. That goes
5 back to the Council.

6 While on a very theoretical basis, that
7 ordinance should complement the Master Plan, the
8 Municipal Land Use Law still gives the power to the
9 governing body to say, you know what -- even though
10 it doesn't match up and it's inconsistent, we're
11 still going to adopt this ordinance. Now, they would
12 have to do that with a full majority of their
13 membership.

14 But the governing body still has the
15 power to adopt ordinances which are inconsistent with
16 the Master Plan, provided those records -- reasons
17 are put in the record, that was the first -- I think
18 the first part of your question.

19 The second part was the granting of the
20 variance. And, yes, so the way zoning is typically
21 designed -- and you brought up the example of fences.
22 Zoning is designed usually generally for a whole
23 municipality, right.

24 So in a municipality, you might have a
25 regulation that says fences need to be 4 feet in a

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1 worded, the objective of this ordinance is to
2 eliminate drive-throughs for restaurants in general,
3 not other businesses.

4 So it specifically indicates
5 restaurants for this particular prohibition. And I'm
6 just curious if you guys were a part of that, but you
7 weren't.

8 MR. NOVAK: We were not, no.

9 VICE CHAIRMAN PAPAPIETRO: So this is
10 something that the governing body put into place and
11 then was approved, and that's why we're here now.

12 CHAIRMAN ANDERSON: Anybody else?

13 MR. FORMICOLA: Just to -- because that
14 -- I understand what you're saying about the
15 governing body, but the problem I have with that is,
16 when that went into play, we all know it's because of
17 Starbucks when Starbucks went in.

18 VICE CHAIRMAN PAPAPIETRO: We don't
19 know that for sure.

20 MR. FORMICOLA: You know, I'm just
21 saying there was a lot of complaints back and forth.
22 And they didn't have anything in the area.

23 But what I'm just saying is that they
24 put a lot of things in play. That's why we're here
25 because that doesn't necessarily mean all the time

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1 that, you know, okay, so there will never be any food
2 drive-in food places in any of those districts ever
3 again.

4 And, you know, it's not necessarily --
5 you know what I mean.

6 VICE CHAIRMAN PAPAPIETRO: Oh, yeah.

7 MR. FORMICOLA: I'm just -- I'm playing
8 the devil's advocate on that.

9 So I'm just saying each case is
10 different. If there was going to be some wild case
11 going in there, you know, crazy stuff, lights, disco,
12 whatever it may be, you'd be like, you know.

13 VICE CHAIRMAN PAPAPIETRO: A disco,
14 you're showing your age.

15 MR. FORMICOLA: You know, it would be
16 -- it would be crazy. You would say, well, it's
17 going to be a detriment to everybody for that. But
18 on this something like, you know -- I'm not saying
19 this particular, but in anything that -- whatever,
20 there might be an exception to that. So I'm just --
21 I'm just saying the Council put in a lot of things
22 they voted, whether it be unanimously or not. That's
23 another problem is that not everybody agrees with
24 everything at the time.

25 VICE CHAIRMAN PAPAPIETRO: I hear what
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1 MR. WHITAKER: One of the last
2 hypotheticals you used, you stated that the governing
3 body could create an ordinance that's contrary to the
4 Master Plan, and the planning board could tell them
5 that.

6 And on the basis of that, you stated
7 that the governing body could still pass it by a
8 super majority, and they would have to put their
9 reasons on the record, the purpose behind insisting
10 on that ordinance.

11 So I'm going to emphasize the word
12 "purpose," P-U-R-P-O-S-E, okay?

13 In your analysis and review as a
14 planner -- and you are very cognizant and familiar
15 with the Master Plan in Midland Park -- there is no
16 provision in the Master Plan that says drive-through
17 restaurants should not be encouraged or should not be
18 allowed?

19 MR. NOVAK: I would agree with that
20 statement.

21 MR. WHITAKER: In connection with --
22 and we talked about this briefly in your last
23 testimony, you've already confirmed that you were not
24 involved as a planner in looking at this ordinance
25 and maybe providing the purposes or reasons why for
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1 you're saying.

2 If this was part of multiple things
3 going through, this was a specific ordinance put in.
4 Nothing else attaches. Just focus on this.

5 CHAIRMAN ANDERSON: I'm not disagreeing
6 with you, Rich, but just as a note, whether it was
7 unanimous or not, whether it's reasonable or not,
8 that's beyond -- we have to assume the ordinance --

9 MR. FORMICOLA: Passed.

10 CHAIRMAN ANDERSON: Not that it passed,
11 but that it's reasonable. And that's what we have.

12 We cannot decide, well, the Council
13 voted 5/2 so it really wasn't that...

14 As far as we're concerned, the
15 ordinance is what it is. That's not our -- if
16 somebody had a question about the validity of the
17 ordinance, they would have to start a prerogative
18 writ action and take it from there.

19 MR. FORMICOLA: Okay, thank you.

20 CHAIRMAN ANDERSON: Anyone else before
21 Mr. Whitaker?

22 (No Response.)

23 MR. WHITAKER: So I have questions of
24 Mr. Novak.

25 CHAIRMAN ANDERSON: Sure.

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1 this ordinance.

2 MR. NOVAK: That is correct.

3 MR. WHITAKER: You stated earlier there
4 might, be is the word you used, reasons they gave,
5 but you were hypothesizing; you don't know of any
6 reasons for this ordinance.

7 MR. NOVAK: That is correct.

8 MR. WHITAKER: And you're also
9 familiar, in having created Master Plans and creating
10 ordinances, that many times there's an introduction
11 in an ordinance that says here's why we're doing
12 this, in so words, here is the purpose?

13 MR. NOVAK: Absolutely.

14 I would include that in the whereas
15 classes.

16 MR. WHITAKER: Now, you are familiar as
17 planner with the Medici case.

18 MR. NOVAK: Yes.

19 MR. WHITAKER: And you've used the
20 words already because you use them all the time, and
21 rightfully so.

22 The Medici case and the cases after
23 that, including the Himeji case, always goes back and
24 reflects that an applicant has to demonstrate that
25 the relief requested can be granted without

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1 substantial detriment to the intent and purpose of
 2 the zoning ordinance.
 3 The word "purpose" is in that sentence,
 4 which presupposes that there's a purpose to the
 5 zoning ordinance. So as a -- correct.
 6 MR. NOVAK: Yes.
 7 MR. WHITAKER: So as a planner, in your
 8 analysis of a use variance, or in your analysis of
 9 looking at an ordinance, you want to understand, do
 10 you not, what the underlying purpose is?
 11 MR. NOVAK: It is often helpful to
 12 understand what the underlying purpose of that zoning
 13 regulation is, yes.
 14 MR. WHITAKER: And in your analysis --
 15 and you've had the opportunity to review the
 16 background of this -- you haven't seen any empirical
 17 data, any written data, that indicates what the
 18 purpose was in the introduction and adoption of this
 19 ordinance?
 20 MR. NOVAK: That is correct.
 21 MR. WHITAKER: In fact, if you look at
 22 the Planning Board -- and this is not in criticism --
 23 but if you look at the Planning Board, it was
 24 basically a couple of comments made, hey, we have to
 25 pass this, let's adopt it, and we'll say that it

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1 MR. NOVAK: Nothing that I saw in the
 2 transcripts.
 3 I'm unaware if there was a letter that
 4 was later submitted, but nothing in the transcripts.
 5 MR. WHITAKER: And let's go before the
 6 Planning Board is out.
 7 You looked at the transcript regarding
 8 the introduction of this ordinance -- again, not in
 9 criticism of the Mayor and Council -- but that
 10 transcript and what went on.
 11 MR. NOVAK: Yes.
 12 MR. WHITAKER: You saw some people that
 13 night didn't even have it yet; they had to run out
 14 and photocopy it, when you read that transcript.
 15 MR. NOVAK: Yes.
 16 MR. WHITAKER: And you saw that when
 17 they got it, they weren't quite sure what it was all
 18 about.
 19 MR. NOVAK: Yes.
 20 MR. WHITAKER: And then you saw the
 21 minutes of the meeting in which that ordinance was
 22 then adopted?
 23 MR. NOVAK: Yes.
 24 MR. WHITAKER: The Mayor called the
 25 meeting to order for the adoption of the ordinance,

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1 meets the requirements of the Master Plan?
 2 MR. NOVAK: So that is based on the
 3 transcript that had been forwarded over.
 4 MR. WHITAKER: Right.
 5 MR. NOVAK: I had not listened to a
 6 recording of that meeting.
 7 MR. WHITAKER: But the transcript, but
 8 you rely on transcripts?
 9 MR. NOVAK: Oh, yeah, absolutely, yes.
 10 And the transcript was very short.
 11 MR. WHITAKER: No reasons or purposes
 12 given there.
 13 MR. NOVAK: I don't believe there was,
 14 no.
 15 It was mostly discussion on the B-1 and
 16 B-3 District. Some discussion about whether or not
 17 the ordinance should be expanded to the industrial
 18 district as well, but that was really the crux of
 19 that discussion.
 20 MR. WHITAKER: No reason from the
 21 Planning Board in preparing a resolution or a letter
 22 back to the Mayor and Council that says this meets
 23 the requirements or the terms of the Master Plan
 24 because, and recitation of some of the goals or the
 25 requirements in the Master Plan, correct?

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1 asked for any comments from the public.
 2 The minutes reflect there were none.
 3 But there was no comments at that point from any of
 4 the Council Members or Mayor saying we're passing
 5 this ordinance because.
 6 MR. NOVAK: Correct.
 7 MR. WHITAKER: The transcript of
 8 introduction, the transcript from the Planning Board,
 9 the minutes from the Mayor and Council, did you see
 10 in any of those documents the purpose behind passing
 11 this ordinance?
 12 MR. NOVAK: I did not.
 13 MS. HERLIHY: Mr. Whitaker, so you've
 14 asked the question and he's answered. He's aware of
 15 the transcripts and these minutes but -- and I know
 16 you've provided copies to the board secretary.
 17 MR. WHITAKER: To everyone.
 18 And to my adversary.
 19 MS. RIZZUTO: And I have an objection.
 20 MS. HERLIHY: But in order for the
 21 board to consider them as part of this application,
 22 they need to have been entered as part of your
 23 evidence.
 24 If you're going to rely upon them, if
 25 you're going to now --

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1 MR. WHITAKER: I want to move them into
 2 evidence, yes.
 3 MS. HERLIHY: Okay. So then you're
 4 going to then allow the objector's counsel --
 5 MR. WHITAKER: Yeah, of course.
 6 Absolutely. Yeah, we've opened it again. Okay.
 7 MS. HERLIHY: Okay.
 8 MR. WHITAKER: I want to just continue
 9 on this train of thought.
 10 CHAIRMAN ANDERSON: And I'll come back
 11 to it in just a minute.
 12 MS. RIZZUTO: Just for the record, I
 13 object to this questioning on the exhibits that have
 14 not been discussed yet as to whether they can be
 15 admitted at this time.
 16 CHAIRMAN ANDERSON: Your objection is
 17 on the record.
 18 MS. RIZZUTO: I was going to do it when
 19 he did his closing.
 20 Obviously they're going to stand.
 21 CHAIRMAN ANDERSON: Well, they're going
 22 to end up in the record.
 23 MS. RIZZUTO: Yes.
 24 CHAIRMAN ANDERSON: And he's seen them.
 25 MS. RIZZUTO: Yes, I understand.

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1 chapter, are deemed to be prohibited."
 2 MR. WHITAKER: Then, as we did this
 3 exercise briefly the last time, if you go down to
 4 34-13.13, it says:
 5 "Drive-through, drive-up windows, and
 6 outdoor ordering locations."
 7 Do you see that?
 8 MR. NOVAK: Yes, I do.
 9 MR. WHITAKER: Okay. Do you see the
 10 conditions that are listed there: A, B and C.
 11 MR. NOVAK: Yes, I do.
 12 MR. WHITAKER: Okay.
 13 Does the applicant meet all those
 14 conditions?
 15 MR. NOVAK: Condition A is that the
 16 drive-through --
 17 MS. RIZZUTO: Objection.
 18 CHAIRMAN ANDERSON: Are you going to
 19 give a reason for your objection?
 20 MS. RIZZUTO: Yes. Objection.
 21 I don't know that the board planner
 22 should be testifying about what the applicant proved.
 23 That's for all of you to decide.
 24 The case is over. And the witness -- I
 25 mean, the attorney for the applicant has rested his

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1 MR. WHITAKER: The ZBA, a zoning board
 2 in any town has the ability in doing their analysis
 3 and deliberations to look back to try find out what
 4 the purpose was when they're trying to determine if a
 5 variance should be granted. Because in the Medici
 6 case in N.J.S.A. 40:55-70D, that word "purpose"
 7 constantly shows up, correct?
 8 MR. NOVAK: Yes.
 9 MR. WHITAKER: Now let's go look at the
 10 ordinance.
 11 Now you're going to pull it up on your
 12 screen.
 13 MR. NOVAK: All right.
 14 MR. WHITAKER: Okay. 19-21.
 15 MR. NOVAK: I am getting there,
 16 Mr. Whitaker.
 17 MR. WHITAKER: Yeah. Take your time.
 18 It's actually 34-9.1 has all the uses.
 19 MR. NOVAK: And the -- oh, 34-9.1, yes,
 20 I have that open.
 21 MR. WHITAKER: So Paragraph H, do you
 22 want to read that into the record.
 23 MR. NOVAK: Paragraph H states:
 24 "Restaurants: Provided, however, that
 25 drive-through restaurants, as defined in this

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1 case.
 2 MR. WHITAKER: But the planner is
 3 opened up tonight. And whether it's the planner or
 4 the engineer, they can always opine on do we meet the
 5 requirements of an ordinance. Okay?
 6 CHAIRMAN ANDERSON: We asked for his
 7 opinion.
 8 MS. RIZZUTO: I understand.
 9 CHAIRMAN ANDERSON: Okay.
 10 But your objection is on the record.
 11 MS. RIZZUTO: He's rested. He's rested
 12 his case.
 13 MR. WHITAKER: Mr. Novak?
 14 MR. NOVAK: Item A is that the
 15 drive-through be located a minimum of 75 feet from
 16 any residential zone.
 17 MR. WHITAKER: The drive-through,
 18 itself.
 19 MR. NOVAK: The drive-through, itself,
 20 is the lot -- I know it's immediately adjacent to a
 21 residential zone.
 22 So I'm not familiar if that standard is
 23 typically measured from the lot or from the
 24 drive-through. It's a little ambiguous.
 25 MR. WHITAKER: It's measured, from my

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1 experience, from a window, itself.
2 Let's move on. Hours of operation, we
3 stipulated would be code compliant?
4 MR. NOVAK: And that is, hours of
5 operation will be limited to 6 a.m. to 12 o'clock
6 midnight.

7 And then Item 3 -- pardon me -- Item C:
8 "Any drive-through or drive-up window
9 shall have a minimum queueing length of
10 180 feet from the service area".

11 MR. WHITAKER: One-hundred-fifty.

12 MR. NOVAK: Which I believe was --

13 MR. WHITAKER: One-hundred-fifty.

14 MR. NOVAK: What did I say?

15 MR. WHITAKER: One-hundred-eighty.

16 MR. NOVAK: One-hundred-fifty.

17 I believe the applicant is proposing

18 180.

19 MR. WHITAKER: One-hundred-fifty-three.

20 MR. NOVAK: One-hundred-fifty-three.

21 My apologies.

22 MR. WHITAKER: And that says:

23 "150 feet from the center of the first
24 service area."

25 Do you know what they mean by "first

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1 But that would typically be one service
2 window.

3 A pharmacy, that would typically have
4 one service window.

5 Without everybody laughing at me,
6 cannabis uses have been opening up with service
7 windows.

8 MR. WHITAKER: In banks, actually.

9 MR. NOVAK: Yes.

10 And I surprisingly can attest that I'm
11 not familiar with how that drive-through service
12 works, but those would be the three big ones that I
13 think you have now.

14 MR. WHITAKER: This ordinance is still
15 on the books?

16 MR. NOVAK: That is correct.

17 MS. RIZZUTO: I'm sorry. What is "this
18 ordinance"?

19 MR. WHITAKER: This ordinance,
20 34-13.13, the one he just read.

21 CHAIRMAN ANDERSON: The drive-through
22 ordinance.

23 MR. WHITAKER: Drive-through.

24 MS. HERLIHY: And it was -- it was

25 adopted 2021, prior to the adoption of the

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1 service area"?

2 MR. NOVAK: My interpretation would be,
3 essentially, where you're placing your order.

4 MR. WHITAKER: Or where the window is.

5 The service area is where the service is. That's the
6 way it's been interpreted for Dunkin' Donuts,
7 interpreted for Starbucks.

8 MR. NOVAK: I'll rely on that.

9 MS. RIZZUTO: Objection.

10 Unsupported in the record.

11 CHAIRMAN ANDERSON: I'm sorry?

12 MS. RIZZUTO: Dunkin' Donuts and some
13 other place that he just talked about, it's
14 unsupported in the record.

15 CHAIRMAN ANDERSON: Okay.

16 MR. WHITAKER: With that said, can you
17 think of a use that would have a service window,
18 other than a -- would have multiple service windows
19 other than a restaurant?

20 MR. NOVAK: Multiple service windows
21 other than a restaurant?

22 MR. WHITAKER: All in a row. Because
23 you're measuring from the closest one.

24 MR. NOVAK: Other uses that would
25 typically have service windows would be a bank.

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1 prohibition.

2 MR. WHITAKER: It wasn't modified when
3 the prohibition came into play.

4 MS. HERLIHY: It also wouldn't be the
5 first time that a governing body missed something
6 like that.

7 MR. WHITAKER: I don't know about that.

8 MS. HERLIHY: I'm just -- it wouldn't

9 be the first time that not everything in the
10 ordinance that applies to one action doesn't get --
11 you know, gets looked over, so to speak.

12 In other words, again, hypothecating,
13 if the intent -- if the intent was outlaw or to
14 prohibit all drive-up restaurants --

15 CHAIRMAN ANDERSON: Drive-throughs are
16 permitted.

17 MS. HERLIHY: Drive-through
18 restaurants, I just said, they believed potentially
19 that that's what they did by adopting that ordinance,
20 that they did not then have to go through the
21 remainder of the ordinance and say Section 34-13.13
22 does not apply to restaurants or somehow change that.

23 CHAIRMAN ANDERSON: Well, why would
24 they have to?

25 MS. HERLIHY: He's trying to say that

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1 --
 2 CHAIRMAN ANDERSON: This is for
 3 drive-throughs that are permitted, like a bank.
 4 MR. WHITAKER: Mr. Anderson, what I was
 5 saying is that the concept of where they say the
 6 first service area is probably -- I'm just laying
 7 this out -- that the first service area, probably any
 8 use other than a restaurant would only have one
 9 service area.
 10 That's all I'm saying. Let me just
 11 move on.
 12 CHAIRMAN ANDERSON: It's not uncommon
 13 for banks to have three drive-throughs.
 14 MR. WHITAKER: But they're always
 15 usually in a line.
 16 MS. HERLIHY: They're separate.
 17 MR. WHITAKER: They're separate.
 18 CHAIRMAN ANDERSON: Right.
 19 But you're measuring from the nearest
 20 one to the residential --
 21 MR. WHITAKER: Not from the
 22 residential, 150 is the queueing.
 23 CHAIRMAN ANDERSON: Yeah.
 24 But it could be different, depending
 25 where the queue is.

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1 premises."
 2 MR. WHITAKER: Okay.
 3 So we touched base at the last meeting
 4 about this. And you agreed with me that if I pulled
 5 up a restaurant and the owner was kind enough to
 6 bring the food out to me and I drove off with it,
 7 that that's something that violates the prohibition
 8 on a drive-through?
 9 MR. NOVAK: Yes.
 10 MR. WHITAKER: You confirmed at the
 11 last meeting that a drive-through restaurant does
 12 not, in fact, need to be a window?
 13 MR. NOVAK: Based on this definition,
 14 there is no reference of a window, yes.
 15 MR. WHITAKER: Correct.
 16 And based on the definition of
 17 drive-through that you read before, it says
 18 drive-through, drive-up windows; it also says outdoor
 19 ordering locations.
 20 MR. NOVAK: Yes.
 21 MR. WHITAKER: So now just to go
 22 through this definition so we understand, again,
 23 what's prohibited and what would be permitted.
 24 If I have an establishment in which
 25 food or drink is served to a customer and it's not

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1 Anyway, I'm not sure that -- I'm not
 2 getting the importance of it anyway. You're getting
 3 there, okay.
 4 MR. WHITAKER: Let's go to the
 5 definition of restaurant drive-through.
 6 We touched upon this before when you
 7 testified at the last meeting. That ordinance is
 8 still in the code.
 9 CHAIRMAN ANDERSON: Well, it's a
 10 definition.
 11 MR. NOVAK: That is correct, yes.
 12 MR. WHITAKER: Okay.
 13 Read that into the record for me.
 14 MR. NOVAK: Once I find it, I will.
 15 Sorry.
 16 Was that the definition of
 17 drive-through?
 18 MR. WHITAKER: Restaurants,
 19 drive-through.
 20 MR. NOVAK: Thank you.
 21 "An establishment in which food or
 22 drink is served to customers within
 23 automobiles outside of the confines of the
 24 building and where the consumption of such
 25 food or drink is intended to occur off the

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1 within an automobile --
 2 MR. NOVAK: As in a walk-up window?
 3 MR. WHITAKER: Well, it's a person on a
 4 motorcycle.
 5 MR. NOVAK: There's no definition of
 6 automobile, from what I'm aware of, in the zoning
 7 ordinance.
 8 I don't know what you would rely on
 9 then to define automobile or... A motorcycle would
 10 meet some sort of outside definition of automobile,
 11 but it certainly does say "automobiles" not vehicles.
 12 MR. WHITAKER: It doesn't say trucks?
 13 We might call a truck an automobile?
 14 MR. NOVAK: Yes.
 15 MR. WHITAKER: Let's move on.
 16 Again, I'll read it to you:
 17 "An establishment in which food or
 18 drink is served to customers within
 19 automobiles" -- my hypothetical was still an
 20 automobile -- "outside the confines of a
 21 building and where the consumption of such
 22 food or drink is intended to occur off the
 23 premises."
 24 If I pull up to the window in my
 25 automobile, and I get that bag of food, and I drive

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1 out that lane and stay on the premises and eat it in
2 the parking lot, I'm permitted to do that?
3 MR. NOVAK: Hm.
4 MS. HERLIHY: I would disagree.
5 MR. NOVAK: I think the intent -- the
6 language intended to occur off the premises separates
7 that possibility out from what's in -- from this
8 scenario.

9 MR. WHITAKER: It's nebulous, is it
10 not.

11 MR. NOVAK: Hm.

12 MR. WHITAKER: Nebulous? A little
13 confusing.

14 MR. NOVAK: It's a little confusing.
15 But, typically --

16 MR. WHITAKER: What I'm showing you,
17 basically, is that there's a question about the
18 purpose. That's what I'm trying to show.

19 And I think you see that this is not an
20 ordinance with clarity.

21 Wouldn't you agree?

22 MR. NOVAK: There are certain aspects
23 of this ordinance which could use clarification.

24 MR. WHITAKER: Thank you.

25 VICE CHAIRMAN PAPAPIETRO: Just to make

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1 It's to prohibit drive-through
2 restaurants. And all the rest of it is not for us to
3 determine what the Mayor and Council was thinking or
4 whatever.

5 We may -- we may think it's a silly
6 ordinance or whatever, but we're -- I'm going to ask
7 Linda to confirm -- but we're obligated to accept to
8 accept the ordinance the way it is.

9 MR. WHITAKER: I'd like to respond.
10 You're obligated to see as part of the Medici case as
11 to whether what we are seeking here violates the
12 purpose of the zoning ordinance. It presupposes
13 something.

14 CHAIRMAN ANDERSON: And the purpose is
15 to prohibit drive-through restaurants. That's the
16 purpose.

17 MR. WHITAKER: No.

18 The purpose from planning and zoning --
19 Mr. Novak would agree with you because he said it
20 already -- is to know what the purpose in passing the
21 ordinance was in the first place.

22 CHAIRMAN ANDERSON: Well, I disagree
23 with you.

24 MR. WHITAKER: Because -- because when
25 you don't know the purpose, you don't know how to

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1 a point you kind of the left open. The intent, the
2 way it was written, the interpretation is clear.
3 It's prohibited, drive-through restaurants.

4 MR. WHITAKER: Only if it's all -- all
5 these conditions have to be met in this ordinance.

6 CHAIRMAN ANDERSON: I didn't want to
7 interrupt you.

8 But along the same lines, we're all
9 agreed that the use that your applicant is proposing
10 is a prohibited use.

11 MR. WHITAKER: I am. I'm just -- I'm
12 going to purpose. Keep going.

13 CHAIRMAN ANDERSON: And I understand
14 what you're saying is either intentionally or
15 inadvertently there may be other uses that are now no
16 longer permitted.

17 But that doesn't change the fact that
18 the use you're proposing is strictly prohibited. And
19 I'm going to go back again to what I mentioned to
20 Rich.

21 The fact that the ordinance may be, to
22 use your term, lacks clarity or it's not clear why
23 the reasons they voted for it or whatever, as Nick
24 said, the purpose of the ordinance is clear on its
25 face.

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1 grant or not grant a use variance, if you know that
2 what my client is proposing to do violates the
3 purpose of the ordinance, then I lose. But here you
4 don't have a guideline to say here's why this should
5 not be here, because the ordinance says it's
6 prohibited, but why is it prohibited?

7 I'm saying my client's site is
8 particularly suited for what we're doing. And I show
9 all the reasons why it's particularly suited. And I
10 can't say that it violates a purpose of the ordinance
11 that we don't know about.

12 That's the picture I am painting.

13 CHAIRMAN ANDERSON: You can't show that
14 you can solve the reasons or the conditions that the
15 Mayor and Council was trying to -- was concerned
16 with.

17 But that's not the purpose of the
18 ordinance. The purpose of the ordinance is to
19 prohibit drive-through restaurants.

20 I understand what you're saying is
21 you're at a disadvantage because you have to show
22 special reasons why this is particularly suitable,
23 and without knowing what they were worried about, you
24 can't show that you can solve those issues.

25 To me, that doesn't impact the fact

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1 that the -- and the Medici language to me says it
 2 doesn't violate the purpose of the ordinance. The
 3 purpose of the ordinance is to prohibit drive-through
 4 restaurants.
 5 MR. WHITAKER: And the board needs to
 6 know why from a zoning --
 7 CHAIRMAN ANDERSON: No, we don't.
 8 MR. WHITAKER: Let me finish.
 9 The board needs to know why there's a
 10 prohibition, what is the zoning concern that the
 11 Mayor and Council had or the planning board had in
 12 referring it back to the Mayor and Council so that
 13 planners can look and say, okay, let's see how we can
 14 solve the problem that they think exists because of
 15 the prohibition that's in an ordinance.
 16 And that's my approach because I'm
 17 saying -- and I started out with this and said, the
 18 word "purpose" is throughout the statute. It's
 19 throughout Medici, Himeji, whatever else.
 20 You are at the same disadvantage that I
 21 am. And that is you're trying to apply an ordinance
 22 and say, well, what they're proposing here, how does
 23 this violate the reasons that ordinance was passed?
 24 We don't have any.

25 Sum and substance, that's my approach.

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1 some questions.
 2 MS. RIZZUTO: Thank you.
 3 Mr. Novak?
 4 MR. NOVAK: Yes.
 5 Easy one to start off with.
 6 MS. RIZZUTO: Have you seen other
 7 zoning ordinances where they're nowhere as close?
 8 MR. NOVAK: Yes.
 9 MS. RIZZUTO: Have you seen other
 10 zoning ordinances where the purpose is not
 11 specifically stated, either during the meeting or in
 12 the ordinance, itself?
 13 Purpose not stated, have you seen that?
 14 MR. NOVAK: Within the ordinance, I
 15 have.
 16 Typically in the -- within the meeting
 17 as well, I don't recall one way or the other, quite
 18 frankly.
 19 MS. RIZZUTO: Okay.
 20 So we established that you've looked at
 21 some of the things that Mr. Whitaker has not yet
 22 introduced into evidence.
 23 Did you look at the transcript of
 24 9/28/2021? That's the first one when it was
 25 introduced before the governing body.

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1 That's my argument.
 2 CHAIRMAN ANDERSON: Would you say that
 3 argument is similar, if not identical, to the
 4 argument in Saddle Brook Realty vs. The Saddle Brook
 5 Zoning Board of Adjustment? And is there a
 6 distinction with this application and that.
 7 MR. WHITAKER: Yes.
 8 And I'll go through it when I get to
 9 the summation.
 10 CHAIRMAN ANDERSON: All right.
 11 MS. RIZZUTO: Excuse me, Mr. Chairman?
 12 CHAIRMAN ANDERSON: I'm sorry.
 13 MS. RIZZUTO: Is he done with his
 14 questioning?
 15 Because I would like to question this
 16 witness as well.
 17 CHAIRMAN ANDERSON: Okay.
 18 I'm not sure that he's done with the
 19 questions.
 20 MS. RIZZUTO: Well, I think he said
 21 that he's done.
 22 MR. WHITAKER: You asked a question?
 23 MS. RIZZUTO: And then he went into his
 24 summation early.
 25 CHAIRMAN ANDERSON: Yeah, go ahead, ask

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1 MR. NOVAK: Yes.
 2 MS. RIZZUTO: Okay.
 3 Did you note that it is unsigned and
 4 uncertified?
 5 MR. NOVAK: I did not note that.
 6 But I don't believe it was signed.
 7 MS. RIZZUTO: Okay.
 8 And did you also note that Mr. Whitaker
 9 was present at the governing body meeting that day?
 10 MR. WHITAKER: No.
 11 That was Mr. Wostbrock. I haven't been
 12 to a governing body in Midland Park in at least ten
 13 years.
 14 MS. RIZZUTO: It says "Bruce Whitaker,
 15 Esquire" on the first page. On the first -- on page
 16 number 2 of the transcript --
 17 MR. WHITAKER: That's who ordered it.
 18 MS. RIZZUTO: -- where it says
 19 "Appearances," it says "Robert Reagan, Esq., Counsel
 20 to the Midland Park Mayor and Council," and "Bruce
 21 Whitaker, Esquire."
 22 MR. NOVAK: May I see it?
 23 MS. RIZZUTO: Sure.
 24 MR. WHITAKER: Evidently I wasn't
 25 there.

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1 It's evidently an error. I didn't even
 2 see that.
 3 MS. RIZZUTO: I understand.
 4 But it indicates that you're --
 5 MR. WHITAKER: Okay, yeah.
 6 MS. RIZZUTO: It's an uncertified
 7 transcript, so maybe there's a mistake because it's a
 8 noncertified transcript.
 9 MR. NOVAK: It does.
 10 MS. RIZZUTO: But regardless of that,
 11 let's move on.
 12 So besides the transcript of -- that we
 13 have here, there is also a set of minutes from the
 14 Mayor and Council meeting.
 15 Did you look at those?
 16 MR. NOVAK: Yes.
 17 MS. RIZZUTO: Okay. And were they
 18 different from this transcript? Because they're not
 19 -- they weren't provided by Mr. Whitaker. We don't
 20 have them in front of us.
 21 MR. WHITAKER: Well, the minutes are
 22 from a different meeting.
 23 MS. RIZZUTO: That's correct.
 24 You chose what you wanted to give to
 25 the board. I understand that.

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1 Yes. That was made on page 10 of that transcript.
 2 MR. WHITAKER: Why don't you read it
 3 into --
 4 MS. RIZZUTO: That's the Panning Board
 5 transcript of October -- this is my turn right now,
 6 right -- October 18th, 2021, they made a
 7 determination -- they stated it on the record -- that
 8 it was consistent.
 9 MR. NOVAK: The most -- yes.
 10 MS. RIZZUTO: Did the Planning Board --
 11 the Planning Board's main concern appeared to be that
 12 the governing body was prohibiting drive-through
 13 restaurants in B-1 and B-2, but --
 14 CHAIRMAN ANDERSON: Three.
 15 MS. RIZZUTO: B-3.
 16 But they felt it should also be
 17 prohibited in I-2, which is an industrial zone; that
 18 was the main gist of the Planning Board's review,
 19 correct?
 20 MR. NOVAK: Yes.
 21 MS. RIZZUTO: Okay.
 22 Are you familiar with the various
 23 statutes that exist around the giving of a
 24 recommendation and what the governing body can do if
 25 they decide to go with the recommendations of changes

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1 You did not give the minutes to the
 2 September 28th meeting when the -- when the -- when
 3 the ordinance was -- was adopted.
 4 So, sir, did you go look up those
 5 minutes separately? Because Mr. Whitaker did not
 6 provide them.
 7 MR. NOVAK: No. I looked at the
 8 October 20th.
 9 MS. RIZZUTO: Okay.
 10 That's for the second meeting. Did you
 11 look at the minutes of the Planning Board when they
 12 determined and made a recommendation that the
 13 ordinance was consistent with the Master Plan? They
 14 made that clear finding, correct?
 15 MR. NOVAK: I am not familiar with the
 16 minutes.
 17 MS. RIZZUTO: Okay.
 18 But in the transcript that is
 19 uncertified that Mr. Whitaker produced, they, in
 20 fact, made that finding in that uncertified
 21 transcript, correct?
 22 They say they're going to direct the
 23 Planning Board attorney to write a letter.
 24 MR. NOVAK: Yes.
 25 I'm just looking for the exact text.

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1 by the planning board, or modify them, or reject
 2 them?
 3 Are you familiar with all of the
 4 statutes that govern that decision process?
 5 MR. NOVAK: Yeah, I'm typically
 6 familiar.
 7 MS. RIZZUTO: Yeah.
 8 You stated earlier, they should be --
 9 if they are going to disagree with the Planning Board
 10 recommendation, they should put their reasons on the
 11 record, correct?
 12 MR. NOVAK: If the --
 13 MS. RIZZUTO: If the governing --
 14 MR. NOVAK: Yes.
 15 If the Planning Board finds that a
 16 provision of the ordinance is --
 17 MS. RIZZUTO: Inconsistent.
 18 MR. NOVAK: -- inconsistent with the
 19 Master Plan -- and the Municipal Land Use Law is very
 20 specific. It says inconsistent.
 21 MS. RIZZUTO: Right.
 22 MR. NOVAK: Then the governing body
 23 needs to put the rationale for the adoption of that
 24 ordinance on the record.
 25 MS. RIZZUTO: Right.

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1 But here that didn't exist. It doesn't
2 exist in any of these uncertified transcripts or
3 minutes. They found it to be consistent.
4 So the governing body then acted at the
5 second adoption meeting. We don't have a transcript,
6 but we do have the October 28 governing body minutes.
7 Can you take a look at that, page 4?

8 Page 4 is on the top.
9 MS. HERLIHY: I'm sorry.
10 We don't have a transcript of what did
11 you say.

12 MS. RIZZUTO: We don't -- we don't have
13 a transcript of the second reading and adoption.
14 No, we don't.

15 MR. WHITAKER: We couldn't get the
16 transcript.

17 MS. HERLIHY: The planning board and
18 the transcript.

19 Just so I can clarify. The transcript
20 of the September meeting, that was a transcript that
21 you had done of a recording.

22 MR. WHITAKER: I had any stenographer
23 get a transcript of the recording of that for the
24 Planning Board.

25 But my stenographer was unable to get
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1 It's called severability. No, not a
2 severability. It's called an inconsistency repealed?

3 MR. NOVAK: Yes.

4 MS. RIZZUTO: And that goes to what the
5 board attorney was saying earlier, that sometimes the
6 ordinances don't get directly repealed, but this
7 provision does in fact repeal inconsistent
8 ordinances, does it not?

9 MR. NOVAK: It would repeal a very
10 direct inconsistent ordinance.

11 So if there's something else in the
12 regulations that was discussing how drive-through
13 restaurants were a permitted use in the B-3, this
14 would in effect repeal that section.

15 MS. RIZZUTO: Right.

16 And judges struggle to figure out
17 what's inconsistent or not. But this board is not
18 the appellate board, right.

19 So, in addition, the applicant made you
20 read through the definition of restaurant
21 drive-through. You see that that's in Section 1.

22 Section 2, let's read Section 2, and
23 tell me if that has enough clarity. It says:

24 "Restaurants: Provided, however, that
25 drive-through restaurants as defined in this

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1 the one for the 28th, or whatever, the minutes.
2 MS. RIZZUTO: Just so you know, that
3 would be not be acceptable in a superior court
4 appeal. It has to be done by the municipal shorthand
5 reporter, not the applicant.

6 MS. HERLIHY: Was the recording not
7 available?

8 Why was --

9 MR. WHITAKER: I don't know. I don't
10 know. I'd have to check.

11 MS. RIZZUTO: So can I just direct your
12 attention to page 4 where the actual ordinance is
13 repeated, and I'm going to presume word-for-word.

14 Can you look at Section 5 of the
15 ordinance where it says:

16 "Inconsistent ordinances repealed. All
17 ordinances or parts of ordinances which are
18 inconsistent with the provisions of this
19 ordinance are hereby repealed, only to the
20 extent of such inconsistency."

21 Do you recognize that language having
22 seen it in other ordinances?

23 MR. NOVAK: Yes.

24 MS. RIZZUTO: It's typically found in
25 other ordinances.

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1 chapter are deemed to be prohibited."

2 So Section 1 needs to be read with
3 Section 2.

4 MR. NOVAK: Yes.

5 MS. RIZZUTO: Would you agree to that?

6 MR. NOVAK: Yes.

7 MS. RIZZUTO: Okay. Let me just -- I
8 think that was pretty much all I had.

9 Is the purpose of this ordinance to
10 prohibit restaurants with drive-through lanes?

11 MR. NOVAK: Yes.

12 MS. RIZZUTO: Thank you.

13 Nothing else.

14 VICE CHAIRMAN PAPAPIETRO: Can I ask a
15 question?

16 Can you, for the benefit of the board,
17 the section you were going through with the minutes,
18 Section 1, Section 2 and Section 3, can you just read
19 it out loud.

20 MS. RIZZUTO: Sure.

21 Of the ordinance?

22 VICE CHAIRMAN PAPAPIETRO: The
23 ordinance on final. Then the Section 1, 2, 3 and 4,
24 everything that ties into that particular ordinance
25 as part of these minutes.

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1 MS. RIZZUTO: Okay. So it's on page 4.
 2 Section 1 is a --
 3 VICE CHAIRMAN PAPAPIETRO: Actually,
 4 start with the ordinance on final with the actual
 5 wording of it.
 6 MR. WHITAKER: Which ordinance are you
 7 talking about?
 8 MS. RIZZUTO: The title? Page 4 of the
 9 October 28, 2021 minutes of the governing body.
 10 So the ordinance on final reading --
 11 VICE CHAIRMAN PAPAPIETRO: Yes.
 12 MS. RIZZUTO: -- is labeled
 13 Ordinance 19:21, an Ordinance to Amend 08-21,
 14 entitled "An Ordinance to Amend and Replace in its
 15 Entirety" -- in its entirety -- "Chapter 34 of the
 16 Code of the Borough of Midland Park entitled 'Zoning
 17 (Restaurants - Drive-Throughs)." That's the title.
 18 "Be it ordained," et cetera.
 19 Section 1 is in the -- from the
 20 definitions. It did not change that -- that
 21 definition. It repeated it.
 22 So the restaurant drive-through is the
 23 definition. It says:
 24 "An establishment in which food or
 25 drink is served to customers within
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1 And they use the word "amended."
 2 Permitted Uses, Paragraph H, Restaurant, is hereby
 3 amended to read as follows: "Restaurants" --
 4 permitted.
 5 "Restaurants: Provided, however, that
 6 drive-through restaurants as defined in this
 7 chapter are deemed to be prohibited."
 8 So they were clear, they allowed
 9 restaurants in the B-1 and in the B-3 but not if they
 10 have drive-throughs.
 11 Severability is a standard clause that
 12 writers of ordinances like myself include all the
 13 time.
 14 And it basically says if this goes to a
 15 court, and if a court finds that Section Z is
 16 improper or unconstitutional, that doesn't affect
 17 Section A, B and C.
 18 That's an example. That's what
 19 severability means. Cut out the bad part. Leave all
 20 of the rest of the law in place. That's what
 21 severability is.
 22 Inconsistent ordinances repealed. I
 23 already went over that. That's a standard clause
 24 that people who write ordinances, like borough
 25 attorneys and planning board attorneys, keep into
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1 automobiles outside of the confines of the
 2 building and where the consumption of such
 3 food or drink is intended to occur off the
 4 premises."
 5 Not that it's required to be off the
 6 premises. It's intended to give it to a window, that
 7 they're going to drive off with it.
 8 Okay. Then you want me to keep
 9 reading?
 10 VICE CHAIRMAN PAPAPIETRO: Yes.
 11 MS. RIZZUTO: Number 2, Section 2, this
 12 is an amendment of Section 47-71, Use Regulations.
 13 Paragraph --
 14 CHAIRMAN ANDERSON: Thirty-four.
 15 MS. RIZZUTO: Thirty-four -- sorry,
 16 -7.1, Use Regulation, Paragraph A-7, Restaurants.
 17 So they're amending a section of the
 18 ordinance, and they're saying restaurants is hereby
 19 amended to read as follows:
 20 "Restaurants: Provided, however, that
 21 drive-through restaurants as defined in this
 22 chapter are deemed to be prohibited."
 23 Section 3 -- that was for the B-1 Zone.
 24 Section 3 is for the B-3 Zone. And it is amending
 25 34-9.1.
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1 their ordinances.
 2 And then of course Section 6 is the
 3 effective date. And I'll note for the record that
 4 the governing body determined that it should take
 5 effect immediately. They didn't say six months from
 6 now, a year from now, whatever.
 7 They said October 28th.
 8 Now, are you familiar, Mr. Novak, with
 9 the -- with the time period required for filing a
 10 prerogative writ to oppose an ordinance; do you know
 11 the time period?
 12 MR. WHITAKER: That would be a legal
 13 question.
 14 MS. RIZZUTO: You asked him to do a lot
 15 of legal stuff.
 16 Is that objectionable?
 17 CHAIRMAN ANDERSON: First of all, are
 18 you qualified --
 19 MS. RIZZUTO: Do you know?
 20 CHAIRMAN ANDERSON: -- to answer that?
 21 MR. NOVAK: Can you repeat the
 22 question?
 23 MS. RIZZUTO: Do you know what the time
 24 frame to appeal an adoption of an ordinance is?
 25 After -- after the Council adopts it,
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1 what's the timeframe to appeal.
 2 MR. NOVAK: Is it 20 days or 45 days?
 3 MS. HERLIHY: It's really irrelevant to
 4 this board and what's before this board.
 5 MS. RIZZUTO: Right.
 6 But I'll note for the record that there
 7 was no appeal of this ordinance because we wouldn't
 8 be here if there was.
 9 We would have a decision from a judge,
 10 and maybe they would have overturned it, or maybe
 11 they wouldn't have.
 12 But it was never challenged.
 13 And 45 days from any municipal action
 14 is the appellate requirement. It's code of superior
 15 court.
 16 CHAIRMAN ANDERSON: But we know that.
 17 MS. RIZZUTO: Okay, I understand.
 18 I'm making a record.
 19 That's all I'm doing.
 20 MR. WHITAKER: Just so the record is
 21 clear, I haven't used the word "inconsistent" per se
 22 with your ordinance. I just said that the ordinance
 23 lacks clarity.
 24 And Mr. Novak agreed with me.
 25 MS. RIZZUTO: Yes, I understand.

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1 MR. CAPALBO: I don't know why she said
 2 nobody appealed it. They shouldn't be here because
 3 nobody appealed it.
 4 MS. RIZZUTO: No. That's not what I'm
 5 saying.
 6 MR. CAPALBO: That's what you meant.
 7 MR. WHITAKER: My client is not the
 8 property owner.
 9 My client wasn't aware of the
 10 ordinance.
 11 MS. RIZZUTO: According to this,
 12 Mr. Whitaker was there.
 13 CHAIRMAN ANDERSON: Do you recall
 14 whether you were there?
 15 MR. WHITAKER: I do not believe I was
 16 there. I did not have this at the time the ordinance
 17 got passed.
 18 MS. RIZZUTO: You didn't have Taco Bell
 19 as the client.
 20 MR. WHITAKER: I came in in January, as
 21 I recall.
 22 MS. HERLIHY: I understand what
 23 probably happened. The transcript was done from a
 24 recording.
 25 There wasn't somebody actually there at

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1 But you've also picked and
 2 cherry-picked sections of Chapter 34 and said, this
 3 applies and this doesn't, and this applies and this
 4 doesn't. That's not for this board. This board has
 5 an ordinance that prohibits -- very recently from the
 6 Mayor and Council prohibits this use.
 7 MR. WHITAKER: We all know that.
 8 CHAIRMAN ANDERSON: Are you finished
 9 with your questions for Mr. Novak?
 10 MS. RIZZUTO: I am, for Mr. Novak.
 11 CHAIRMAN ANDERSON: Do you have
 12 anything?
 13 MS. HERLIHY: No.
 14 CHAIRMAN ANDERSON: Jim?
 15 MR. CAPALBO: Question.
 16 If we understand your questioning,
 17 then, if nobody appealed any ordinance that was
 18 adopted, nobody would be allowed to come for a
 19 variance; is that what you're saying?
 20 MS. RIZZUTO: No.
 21 MR. CAPALBO: Well, that's the why I
 22 understood it.
 23 MS. RIZZUTO: No.
 24 That's not what I'm saying.
 25 CHAIRMAN ANDERSON: She's saying --

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1 the meeting.
 2 CHAIRMAN ANDERSON: Right, okay.
 3 Anything else for Mr. Novak? I guess
 4 since he testified, we have to open it to the public
 5 for him to ask questions of him.
 6 Right.
 7 So if nobody else has any questions
 8 from the board, can we have a motion?
 9 MR. CAPALBO: So moved.
 10 MR. PLACIER: Second.
 11 MS. HARMON: Mr. Formicola?
 12 MR. FORMICOLA: Yes.
 13 MS. HARMON: Mr. Zuidema?
 14 MR. ZUIDEMA: Yes.
 15 MS. HARMON: Mr. Papapietro?
 16 VICE CHAIRMAN PAPAPIETRO: Yes.
 17 MS. HARMON: Mr. Placier?
 18 MR. PLACIER: Yes.
 19 MS. HARMON: Mr. Barlow?
 20 MR. BARLOW: Yes.
 21 MS. HARMON: Mr. Capalbo?
 22 MR. CAPALBO: Yes.
 23 MS. HARMON: Mr. Anderson?
 24 CHAIRMAN ANDERSON: Yes.
 25 Does anybody in the public have any

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1 questions for Mr. Novak?
 2 (No Response.)
 3 CHAIRMAN ANDERSON: Seeing none,
 4 motion.
 5 MR. PLACIER: So moved.
 6 MR. CAPALBO: Second.
 7 MS. HARMON: Mr. Formicola?
 8 MR. FORMICOLA: Yes.
 9 MS. HARMON: Mr. Zuidema?
 10 MR. ZUIDEMA: Yes.
 11 MS. HARMON: Mr. Papapietro?
 12 VICE CHAIRMAN PAPAPIETRO: Yes.
 13 MS. HARMON: Mr. Placier?
 14 MR. PLACIER: Yes.
 15 MS. HARMON: Mr. Barlow?
 16 MR. BARLOW: Yes.
 17 MS. HARMON: Mr. Eliya?
 18 MR. ELIYA: Yes.
 19 MS. HARMON: Mr. Anderson?
 20 CHAIRMAN ANDERSON: Yes. Yes.
 21 VICE CHAIRMAN PAPAPIETRO: I have a
 22 question for our esteemed attorney.
 23 For the minutes that were just read on
 24 Ordinance 19-21, and the way it's worded on here, and
 25 saying an ordinance to amend or replace in its

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1 Chapter 34 of the Code of the Borough of Midland Park
 2 entitled -- okay. This particular Ordinance 19-21
 3 just amends that ordinance.
 4 I don't have in front of me
 5 Ordinance 08-21 to make a comparison.
 6 But this particular ordinance -- as I'm
 7 reading this, this particular Ordinance 19-21 is not
 8 an ordinance to amend and replace.
 9 MR. WHITAKER: Ordinance 08-21 -- I
 10 have it -- lists all the permitted uses.
 11 And this amends the permitted uses.
 12 And I've never said that these ordinances are
 13 inconsistent. I was just showing that there's a lack
 14 of clarity in looking at this as to what they
 15 attempted to do, and that there's ordinances here
 16 that don't really get to the finish line.
 17 VICE CHAIRMAN PAPAPIETRO: Okay, thank
 18 you.
 19 CHAIRMAN ANDERSON: Anybody else?
 20 Have we already done your summation?
 21 MR. WHITAKER: I didn't even start.
 22 Sorry, I'm going to hold you up, but a couple things.
 23 I'd like to move all the exhibits, including those
 24 transcripts. I will give you one, if they're not
 25 certified by the stenographer. They are a matter of

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1 entirety Chapter 34 of the board of restaurant
 2 drive-throughs.
 3 Earlier on Mr. Whitaker was talking
 4 about some items that still remained in the current
 5 laws of the town, but doesn't this supercede that if
 6 they weren't removed for whatever reason?
 7 CHAIRMAN ANDERSON: I think, if I
 8 understand your question, that's what Ms. Rizzuto was
 9 trying to establish, that any inconsistencies in
 10 those other -- and they're not really ordinances.
 11 They're definitions.
 12 MS. HERLIHY: But hold on.
 13 You've got to read the title right,
 14 it's wrong. So this is ordinance number -- and maybe
 15 I'm not -- this isn't the answer to the question.
 16 This is Ordinance Number 19-21. Okay?
 17 Ordinance 19-21 is an ordinance that
 18 amends a prior ordinance. Okay?
 19 So it doesn't -- this Ordinance 19-21
 20 isn't amending and replacing anything. It's amending
 21 something. It's amending an Ordinance 08-21 that was
 22 entitled "An Ordinance to Amend and Replace in its
 23 Entirety."
 24 So Ordinance Number 08-21 was an
 25 ordinance to amend and replace in its entirety

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1 record. They came from the Mayor and Council. And
 2 I've given them to the board and for everybody for
 3 the purposes of edification. We're here to try to
 4 determine what the purpose of an ordinance is. I
 5 honestly did some research that anybody on the board
 6 could also have asked for and have done. I would
 7 like to do that.
 8 There was an -- as exhibits. That
 9 would be, I think, A-15 of my exhibits, if my list is
 10 correct, collectively.
 11 I was asked to provide an outline. And
 12 I did that and sent it over. I'd like to make that
 13 A-16.
 14 One of the other things that was asked
 15 when I went through all the transcripts of all the
 16 meetings -- they go back to March of this year -- is
 17 that a couple of times I saw in the transcripts there
 18 was questions of me, can you provide us with
 19 stipulations that we put on the record.
 20 So I have gone through -- I had my
 21 list. I went through and verified it with the
 22 transcripts. And so I have provided a list called
 23 "Stipulations." I've given that to opposing counsel.
 24 I'd like to mark that A-17. It consists from
 25 stipulations from A to L.

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1 With that, I would move all the
2 exhibits from A-1 to A-17.
3 CHAIRMAN ANDERSON: Ms. Rizzuto, do you
4 have any objection to these exhibits going into
5 evidence?

6 MS. RIZZUTO: Yes.
7 Yes, I do. I'd just like to make a
8 record.

9 The objection is that these are not
10 properly transcribed materials because they are not
11 signed and certified.

12 And they are not done by the designated
13 required Certified Court Reporter that's required
14 under statute when we go on appeal to the Superior
15 Court.

16 For purposes of this board, this board
17 could take judicial notice of properly presented
18 documents. These are not properly presented because
19 they are not certified. They are, in fact,
20 uncertified.

21 In addition, the October 28 -- I've
22 done this many times. This is minutes. It looks
23 like minutes. It reads like minutes.

24 But the truth is, he could have had
25 these certified by the borough clerk that they are

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1 (Whereupon, Minutes of Mayor and
2 Council Dated October 28, 2021 are marked as
3 Exhibit A-17 for identification.)

4 (Whereupon, Outline is marked as
5 Exhibit A-18 for identification.)
6 (Whereupon, Stipulations are marked as
7 Exhibit A-19 for identification.)

8 MS. RIZZUTO: Okay. And there is also
9 correspondence from Mr. Whitaker sending these things
10 to the board dated October 3, 2023.

11 I'm just making that part of the
12 record.

13 Now, just briefly, Your Honor.

14 MR. WHITAKER: Your Honor?

15 CHAIRMAN ANDERSON: Your Honor?

16 Thank you.

17 MS. RIZZUTO: Oh, sorry.

18 MS. HERLIHY: Mr. Whitaker, any
19 objection to -- should the board vote in favor of the
20 application, should the board approve this

21 application tonight, or at some other point in time,
22 but should there be an approval, that it be
23 conditioned upon you providing properly certified
24 transcripts of both of these meetings as well as
25 certified minutes so that the certified transcripts

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1 official minutes. However -- so that's my objection.

2 I also think that, for the record,
3 because there may be an appeal from this case, I
4 think that the minutes -- the transcript of
5 September 23, 2021 should be its own exhibit.

6 The transcript of the Planning Board of
7 10-18-2021 should be its own exhibit.

8 And the minutes of the governing body
9 from October 28, 2021 should be its own exhibit. The
10 applicant asked for that to be all marked together.
11 I'm sorry, I don't know what the number was.

12 MR. WHITAKER: So for the first time in
13 my life, I'm not going to disagree.

14 A-15 will be the first one.

15 A-16 will be the second.

16 A-17 will be the third.

17 The outline will be A-18.

18 Just moving up the numbers.

19 And the stipulations will be A-19.

20 (Whereupon, Transcript Dated
21 September 23, 2021 is marked as Exhibit A-15,
22 for identification.)

23 (Whereupon, Transcript Dated October
24 18, 2021 is marked as Exhibit A-16 for
25 identification.)

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1 and minutes could be compared to what was submitted
2 as exhibits?

3 MR. WHITAKER: No objection.

4 MS. HERLIHY: As long as they are the
5 same.

6 MS. RIZZUTO: While I appreciate the
7 assistance suggested by the board attorney, what you
8 have before you is what I stated.

9 And I believe that you can give it what
10 -- excuse me -- whatever weight you want to give it,
11 uncertified, uncertified by the -- by the reporter
12 and uncertified by the clerk.

13 And, yes, you can ask for something
14 later. But if there's an appeal, you're just messing
15 up the record at this point by asking for something
16 after a decision is made. I understand.

17 I just do not think that that is the
18 proper procedure for what should be a final vote that
19 should be published in the newspaper within ten days,
20 et cetera.

21 Also, you're not giving me an
22 opportunity to state any objection I might have to
23 what he does.

24 So at this point --

25 MS. HERLIHY: I'm not sure what you

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1 mean by not giving you the opportunity -- hold on --
2 to state an objection.

3 And I did not make that request of
4 Mr. Whitaker for your benefit or for your client's
5 benefit. It was done for the benefit of the board.

6 The board, I believe, may want to take
7 notice of what he submitted, what's in those
8 transcripts, and vote accordingly.

9 And if they rely upon that, then I'm
10 just going to assure that are relying upon something
11 that's --

12 MS. RIZZUTO: But you can't.

13 MS. HERLIHY: I can. I can do that. I
14 just did.

15 MS. RIZZUTO: No, no, no.

16 But you can't change tonight what is
17 before the board that they can rely upon.

18 But listen, I only --

19 MS. HERLIHY: It's a condition of
20 approval.

21 MS. RIZZUTO: I'm only stating for the
22 record. And I don't need to belabor the point.

23 MR. WHITAKER: The Rules of Evidence,
24 we all recognize, are somewhat relaxed under the
25 Municipal Land Use Law.

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1 presenting new things, which is beyond what is
2 normally done.

3 And he is presenting an outline for the
4 zoning application.

5 Now, I read the transcript of the last
6 meeting. I wasn't here. And someone requested --
7 VICE CHAIRMAN PAPAPIETRO: I did.

8 MS. RIZZUTO: Yeah.

9 What is the list of -- you asked what
10 is the list of variances we're voting on. And we got
11 this. We got this.

12 And I object that it's expanding a
13 record on a case that he rested on the meeting
14 before. That's all I have to say about that.

15 And I don't know if it's accurate
16 either because I haven't looked. I got it tonight.

17 CHAIRMAN ANDERSON: Well, we asked him
18 for that. He got that for us as a favor for us.

19 MR. WHITAKER: I sent that to the
20 counsel that was here last time. I did not realize
21 that he didn't share it with her.

22 So I object to the concept that I
23 didn't give it to her until tonight.

24 VICE CHAIRMAN PAPAPIETRO: I
25 specifically asked for that because this meeting has

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1 MS. RIZZUTO: Right, of course.

2 And so I just want to move on to the
3 other two things.

4 CHAIRMAN ANDERSON: But before you do
5 that, I just want to make sure you didn't miss
6 something.

7 When Ms. Herlihy made that condition,
8 she specifically said that when they come back
9 certified or whatever, they are the same as what was
10 presented tonight.

11 MS. RIZZUTO: But they can't be the
12 same if they're certified, right.

13 CHAIRMAN ANDERSON: Why can't they?

14 MR. WHITAKER: They just have to be
15 signed at the bottom.

16 CHAIRMAN ANDERSON: Why can't they?

17 MS. RIZZUTO: It's okay. I don't need
18 to belabor the point, really. Your Honor. Your
19 Honor. I'm really sorry.

20 CHAIRMAN ANDERSON: All rise.

21 I'm usually on the other side when I do
22 boards and down here when I do court, so anyway.

23 Mr. Whitaker rested his case -- I don't
24 know -- several meetings ago. Not even last meeting
25 but the meeting before he rested. He's now

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1 gone on for a long time.

2 I wanted to make sure everything is
3 documented.

4 MR. WHITAKER: And the word you used
5 was "outline."

6 MS. RIZZUTO: I understand.

7 And I don't have -- all I'm doing is
8 making a record that his case was rested. He's
9 presenting new things.

10 And the board has to look at the record
11 in its entirety, not just what the applicant decides
12 to give you.

13 VICE CHAIRMAN PAPAPIETRO: Absolutely.

14 MS. RIZZUTO: Anyway, and with respect
15 to the last exhibit, I think, which is stipulations,
16 Mr. Whitaker and I talked about this beforehand, he
17 indicated that he went through the transcripts and
18 gathered these from the transcripts.

19 He did not put the references for the
20 transcripts, like what page and what date they were
21 made. Neither here nor there.

22 My objection is, I caution that it be
23 accurate and that something isn't missing from what
24 the board might want to impose as a condition should
25 you approve.

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1 MR. WHITAKER: Well, I would assume
2 that the board also has their own notes and can look
3 at it themselves. I was doing it as a matter of
4 courtesy.

5 I did not reflect the page number or
6 line number from the transcript because the language
7 there is not out of the transcript. I never said it
8 was. It was from my notes.

9 And from my notes, I went back and
10 looked at the transcripts to see that they matched
11 up, that there was none missing.

12 MS. RIZZUTO: Okay. So, you know,
13 again, conditions happen all through hearings. And
14 these are -- these are, he's saying, stipulations.
15 They're conditions that were agreed to, I suppose, by
16 the applicant during the numerous hearings.

17 That's not unusual.

18 What is unusual is getting the piece of
19 paper at the end from the applicant's counsel. But
20 it's not unusual that conditions are imposed and
21 stipulations are made.

22 MR. CAPALBO: Mr. Anderson, can I ask a
23 question? Counsel indicates that Mr. Whitaker rested
24 his case and he's going to do a summation.

25 But she said he introduced new
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1 first witness was Evers Santana, who testified that
2 he worked in the restaurant industry for over 30
3 years and with the applicant's restaurant group, and
4 is responsible for real estate development and
5 construction.

6 If you recall, he testified that he is
7 involved with the QSRs specifically for over 25
8 years.

9 If you recall, he actually worked for
10 Friendly's in Midland Park many years ago and
11 actually trained at Roy Rogers before it and became a
12 manager.

13 Now, he's done everything from
14 development through construction and operations. And
15 he's operated multiple locations for many years. Why
16 is that important?

17 Because he basically is an expert in
18 the field of QSR operations, because he was able to
19 explain all of the aspects of a QSR, specifically a
20 Taco Bell operation.

21 He testified that the site will
22 accommodate Taco Bell's needs. He testified that the
23 demographics in Midland Park with the surrounding
24 area show that a Taco Bell would be a successful
25 franchise at this location. He testified that they
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1 information. That was all based on testimony of the
2 planner. He didn't introduce it. He questioned the
3 planner.

4 CHAIRMAN ANDERSON: We know.

5 MR. CAPALBO: We should be aware of
6 that.

7 CHAIRMAN ANDERSON: Okay.

8 Anything else?

9 (No Response.)

10 CHAIRMAN ANDERSON: No?

11 Okay, Mr. Whitaker?

12 MR. WHITAKER: Thank you for your time.

13 And I would ask that you indulge me, because we've
14 been working on this since March, and there's a lot
15 of information that's been provided to you. If you
16 don't mind, I'm going to sit as I give the summation
17 and not walk around the room.

18 But there's a lot that we have to
19 review. And this is the type of case, and important
20 enough, and the considerations and the decisions you
21 have to make are that important that I am going to
22 walk you through what we presented, and then I want
23 to explain to you our position from a planning
24 perspective and from a legal perspective.

25 When we go back, you'll know that our
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1 would operate seven days a week, 8 a.m. to midnight.
2 And he testified that there are three shifts that
3 overlap, that they have a maximum of eight employees,
4 but they're not all there at the same time, they
5 don't come all at the same time, they don't leave all
6 at the same time.

7 He testified, and we stipulated, that
8 there are two deliveries per week, and the timing of
9 them are controlled by the owner. And he stipulated
10 that the distributor would be coming to this location
11 between 5 a.m. and 7 a.m. He testified, if you
12 recall, and it's important to know, that there's a
13 lock box there. They have a key. They enter the
14 facility. They drop off the merchandise. And the
15 driver does it all. There's no employee there at
16 that time. And that a typical delivery lasts about
17 45 minutes to an hour.

18 Remember, there's nothing in the
19 ordinance that regards the prohibition as to when
20 deliveries can be made; however, the applicant
21 provided a stipulation to allay the concerns that
22 were raised by board members during the course of the
23 hearing.

24 Mr. Santana testified to something that
25 was very important, something that was not news to us
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1 but something that was very important in
 2 understanding the drive-through QSR concept. And
 3 that he said for a freestanding QSR, a franchise only
 4 approves of it if it has a drive-through. You heard
 5 that testimony a number of times. You heard it also
 6 from Mr. Dean. Why? Because, as he testified, 70 to
 7 75 percent of the business post-pandemic, where
 8 people don't want to come face-to-face with a crew
 9 member, where people have gotten used to not having
 10 to get out of their car to get food, customers'
 11 habits have changed. So that 75 percent business
 12 aspect is for a drive-through.

13 So effectively when you have an
 14 ordinance that says no drive-through, and recognizing
 15 that the QSR basically requires a drive-through to
 16 have these type of franchises in a community, that
 17 ordinance effectively says that the QSR doesn't exist
 18 in this town. And that's an important aspect for you
 19 to think about, because I think we all expect or have
 20 an expectation in today's world that a business like
 21 that belongs in a community.

22 In addition, he talked about the
 23 walk-in traffic. He talked about how they
 24 accommodate DoorDash and the GrubHub operations in
 25 specific areas for pickup. He established through

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1 different than a drive-through bank. But at the same
 2 time, we acknowledged and showed you that this
 3 particular site -- and you'll hear this word -- I'm
 4 sorry -- a few times -- is particularly suited for
 5 the use.

6 He testified that there's sufficient
 7 parking for the customers that actually come into the
 8 facility. He stipulated, because this is what they
 9 do, employees would park farther away and would not
 10 be right next to the site, like any type of business,
 11 so that the customers are there to be accommodated
 12 first.

13 He had uncontroverted testimony that
 14 11-car stacking is more -- this is his words -- more
 15 than ample for his business at this location.

16 And at this point, you also may recall
 17 -- it was a long time ago -- he testified that they
 18 had two other locations, buildings similar to this,
 19 and they have looked at those facilities, and it's
 20 never queued up to be 11. It was typically at 8.

21 What's important for you to understand
 22 is that this person, knowing the operational aspects,
 23 is a designer, not on his own, but did the design
 24 with the engineer. And that was testified to. So
 25 there was an operational experience when this plan

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1 all of that testimony that the drive-through is
 2 essential for the viability of a QSR.

3 He testified about the logistics of
 4 this. He testified, and it was confirmed later by
 5 Mr. Dean, and even you own traffic consultant, that
 6 perhaps as many of 7 to 8 would be the maximum that
 7 would ever be queued in this 153-foot queuing lane
 8 that we have that will accommodate 11 cars.

9 He testified that Taco Bell is very
 10 different from other franchises in how the product is
 11 served because it's not cooked per se. It's already
 12 prepared. It's warmed. And then in a typical, if
 13 you recall, transaction, it can run between a minute
 14 to 2.5 minutes, and you're in and out.

15 He talked about the uniqueness of this
 16 franchise. And he talked in terms of the ordinance
 17 that you have will more than accommodate this site.
 18 Remember, this is a site that has a drive-through.
 19 It's not something that's new to this site. There
 20 was a drive-through there first before this applicant
 21 knocked on your door.

22 Yes, it was a franchise -- a
 23 drive-through for a bank. And we acknowledged, and
 24 we had the testimony provided to you, acknowledging
 25 that the drive-through restaurant use will be

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1 was put together.

2 From there, you heard the testimony of
 3 Andrew Missey. You know Mr. Missey. He's a very
 4 well experienced civil engineer. He's been doing
 5 this in Bergen County for over 35 years. He does a
 6 lot of planning and development work and many
 7 projects in this municipality and others with Lapatka
 8 & Associates.

9 What did he testify to? That the
 10 current Columbia Bank, which is nonconforming, would
 11 be removed. It would be eliminating some of those
 12 nonconformities. That the site has a unique feature,
 13 and that its driveways exit on Erie and Rea and
 14 return you to Godwin.

15 So there's no driving through
 16 residential areas by this proposed tenant as well as
 17 the other tenants in this commercial area.

18 And he said that they were going to be
 19 increasing the greenery over what's there now by some
 20 1,500 square feet.

21 He testified as to the design of the
 22 drive-through, would be from an engineering aspect
 23 adequate.

24 And said -- and uncontroverted -- it
 25 meets all the requirements of your ordinance. Even

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1 your planner has said that.
2 It stacks 6 vehicles to the menu board,
3 which is an important number, because that permits
4 the applicant to have 153 feet of stack, which is
5 beyond the 150 feet required for a drive-through
6 facility.

7 The Godwin Avenue exit is eliminated,
8 which is a nonconforming condition.

9 The property is in a B-3 Zone. It has
10 a square footage of 154,555 square feet, where only
11 10,000 square feet is required in this zone to have a
12 commercial facility.

13 It's a width of 321 feet, where you
14 only need 100 feet.

15 It has a height of 25.6 feet, where the
16 height can be 36 feet and two stories.

17 The proposed coverage is going to be
18 reduced. The setback on Godwin Avenue and on Rea
19 Avenue will be conforming. The bank building's
20 nonconformity location is removed.

21 All of those aspects, when you can
22 remove nonconformities, I think we all understand,
23 you deal with this all the time, when you can remove
24 a nonconformity, that that is a very good, positive
25 element of planning.

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1 civil engineer, but his expertise is traffic
2 consultant and traffic engineering.

3 He testified that this is basically the
4 replacement of one drive-through use with a different
5 drive-through use. He acknowledged that QSRs will
6 generate more traffic, but he testified that it will
7 not have a traffic impact on the roadways themselves.

8 He recognized that a restaurant use is
9 a permitted use in the zone. So a restaurant use
10 being permitted there -- we don't know what the
11 purpose of the prohibition on a drive-through was,
12 but we certainly never heard or saw anything from the
13 Mayor and Council that said we want to eliminate the
14 drive-through use to eliminate traffic on the
15 roadways.

16 He provided a report that provides
17 industry standard trip generation rates, how much
18 this use would generate. And he stated that
19 basically this use will have a de minimis effect on
20 the overall traffic in the area. It was his opinion
21 that the impact would be small. And he used the
22 words "fairly innocuous."

23 And the roadway system, therefore, is
24 not being affected by the drive-through use.

25 He confirmed that the standards for a
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1 Parking requirements, we're proposing
2 170 spaces for the whole center, and only 167 are
3 needed.

4 The electric is going to now be put
5 underground, so you will not have the ugly telephone
6 poles and lines servicing this building.

7 The landscaping will be developed by
8 increasing the screening of the drive-through with
9 the yew hedge. The screening on the northeast corner
10 will have arborvitae. You're going to have holly
11 junipers.

12 And he also testified that he would be
13 putting in that fence to eliminate the concern that
14 your engineer had about what -- he used the word
15 "blinding" of headlights coming around on the -- on
16 the drive-through.

17 The parking setbacks are going to be
18 improved. And there will be plantings at the height
19 that will eliminate lights from the headlights. And
20 we have a stipulation for that that it would be
21 subject to the borough engineer's approval.

22 Then the next witness, who was here
23 twice, Gary Dean, a very well-recognized
24 transportation engineer. He's been doing this work,
25 as he testified, since 1988. And he is not only a

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1 fast food restaurant, a minimum of eight stacking in
2 a queue; we have 11, perhaps 12. He testified that
3 based upon the ITE standards, he found that the
4 Mexican-themed QSRs need less stacking because the
5 menu is limited.

6 If you remember he testified, as well
7 as the operational gentleman, that cooking per se is
8 not involved, and it's only warming of precooked
9 foods.

10 So service is quicker than the other
11 types of facilities that you might used to and seen
12 in cooking the hamburger or the chicken.

13 He distinguished the applicant's use
14 from Wendy's because of that, where at that point,
15 they would need more queueing because there's more
16 time to get from a reader board to the window.

17 He testified that the most significant
18 enhancement in terms of the overall safety
19 eliminating the curb cut on Godwin Avenue. I've said
20 it before. I have to say it again. Your engineer
21 concurred and suggested that we do that. And we did.
22 That, from a planning aspect, is a positive element.
23 He submitted a report that substantiated his
24 testimony.

25 Then you heard from your own traffic
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1 expert. I've been doing this for a number of years.
2 And many times I've listened to two traffic experts.
3 And the one thing that they can agree on is that they
4 disagree. That didn't happen here.

5 Your traffic expert stated that he
6 can't imagine anything that would be generated that
7 would make an accident history here. He checked the
8 accident history. He did more than we did. We
9 didn't check that. He said there's no accident
10 history here. He agreed with Mr. Dean that the
11 elimination of the drive-through on Godwin Avenue is
12 "a positive aspect" because it reduces the number of
13 conflict points.

14 He thinks, and he said, "I certainly
15 think that the application should be supported from a
16 traffic standpoint."

17 He concurred with Mr. Dean pertaining
18 to the pass-by traffic. And, in addition, he went
19 beyond what Mr. Dean did. He looked at the ITE
20 Manual. He looked at the NJ DOT numbers. And then
21 he also found, because he did a lot of research -- he
22 also found a periodical on a QSR report that
23 confirmed that a Mexican-style restaurant needs a
24 queuing of approximately seven.

25 And I don't have to read it into the
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1 safety aspect to be able to see a sign as they come
2 down the road.
3 But I will tell you that if you
4 disagree because we need a variance for that, that at
5 the end of the day, that would not be a reason to
6 deny the application. If you I believe that that
7 sign is not warranted or necessary, then the sign
8 goes away.

9 The lighting, he testified to, as well
10 as Mr. Missey, will be code compliant.

11 So then we got to the crux of matter
12 from a planning standpoint when we talk about the
13 ordinance, we talk about this particular property,
14 and we talk about the planning aspects. Matthew
15 Seckler, our planner. Been practicing for over 15
16 years. Been before more than 70 board. Serves as a
17 municipal planner as well as a planner for
18 applicants.

19 And he testified and confirmed that the
20 site 3.55 acres. It is 15 times more than a tract of
21 land is necessary for in B-3. And here's the
22 important part if you look at A-14 in your exhibits.
23 This property is the third largest out of 109.

24 He testified and confirmed that
25 restaurants are a permitted use, and QSRs are a
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1 record, but you have it.

2 Both his report and Mr. Dean's report
3 comes to the same conclusion. And that is that this
4 drive-through has no potential negative impact on
5 Godwin Avenue or the adjacent properties, and that
6 the site can accommodate the use. It's in his report
7 of June the 9th. It's in Mr. Dean's of June the 1st.
8 They both agree.

9 We had some brief testimony from the
10 architect, Mr. Liepins. He is an architect that is
11 familiar and does the Taco Bell facilities. He
12 prepared the plans for the location and he described
13 them to you. I don't need to go into any detail.

14 This is not a new aspect. This is a
15 prototype. This building works well for the use that
16 is intended.

17 He testified that all the signage is
18 compliant -- and we had an agreement with your
19 professionals that it is -- except for one.

20 And that the sign that faces the
21 drive-through. And that's because it's not on a --
22 facing a municipal parking lot, a public parking lot
23 or a roadway.

24 But he testified that the applicant
25 thought it was good for traffic and motorists from a
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1 permitted use. It's solely the drive-through aspect
2 that requires the D variance. And we know that.

3 And then he walked you through the
4 Medici standards. And I'm not going to belabor the
5 Medici standards right now tonight because you've
6 heard about it, we've talked about it, and we've
7 talked about the particularly suited aspect under
8 Medici.

9 With that, he took you through that
10 colored zoning map. He took you through all of the
11 planning aspects that he testified to. And then he
12 did a comparison. Because if you have in your mind
13 that the town wanted to eliminate drive-throughs
14 because of a traffic concern, because of stacking of
15 cars on roadways or whatever, both Mr. Missey, both
16 Mr. Seckler and Mr. Dean, as well as your engineer
17 for traffic consultant here showed and confirmed that
18 we don't have that problem here because additional
19 traffic beyond what we think would ever be in the
20 queue is internal. And what do I mean by that? It
21 stays on the property.

22 And he opined at this point that
23 perhaps the town had a concern about a drive-through
24 on one of the 109 lots in the B-1 and B-3 Zones that
25 is small enough that it would be overburdened.

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1 But maybe what the Mayor and Council
 2 could have done -- and I'm not criticizing -- is
 3 maybe they could have distinguished and said, well,
 4 if it's a piece of property over 2-and-a-half acres,
 5 then it would be permitted if it meets all the other
 6 requirements for queuing and ingress and egress, et
 7 cetera. If they had done something like that,
 8 there's probably three properties in the 109 where it
 9 would work. And it would be able to provide a QSR
 10 with a drive-through. Because otherwise there's no
 11 QSRs in Midland Park because the drive-through is an
 12 integral part of being a QSR.

13 He testified -- and Mr. Novak went
 14 through these already. He testified that it does
 15 meet certain requirements under the municipal --
 16 under your Master Plan. So let's walk back.

17 He showed you the first positive
 18 criteria in showing -- and he confirmed what we've
 19 already gone through ad nauseam, all of the reasons
 20 why this property is particularly suited for the use.
 21 And he then went and he testified to a number of the
 22 goals in the Master Plan that are being enhanced or
 23 being met, recognizing the Master Plan never said you
 24 can't have drive-throughs in Midland Park. No,
 25 there's not even anything in that Master Plan that

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1 safety benefit and would outweigh any detriment.
 2 But, again, if you didn't agree with
 3 that, that request for variance relief would be
 4 withdrawn.

5 I'll very briefly go over the testimony
 6 that was provided to you from the objector's planner,
 7 the person that didn't come to all the meetings and
 8 wasn't quite sure what meetings she came to, who
 9 started out by talking about the sign on the side of
 10 the building over the drive-through. That was the
 11 first thing that was objectionable.

12 As I just stated, if the board agrees
 13 with her, so be it, it's gone.

14 But in connection with her testimony
 15 pertaining to the use variance itself, with all due
 16 respect, I believe it was at best weak. I think one
 17 of the best examples of how unsubstantiated her
 18 testimony was, that at the beginning of the evening
 19 she believed the testimony that Taco Bell made was
 20 that they would be open 24 hours, seven days a week.
 21 I objected to that and said that's not the case. The
 22 Chairman said the same thing. Then I asked the next
 23 question: Were you even here? She wasn't sure and
 24 then she said no.

25 She had the chance to go back and look

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1 comes close to that.

2 And he was able to pick out goals in
 3 your Master Plan, including revitalization of a
 4 building that's vacant, a bank building. And we know
 5 they're tearing them down or leaving them vacant
 6 because they are anachronistic at this point. And he
 7 showed that it was viable for the business corridor
 8 on Godwin.

9 And I submit to you that in everything
 10 that we've done here, we haven't seen or heard the
 11 negatives from the Master Plan. We can't pick
 12 anything out of the Master Plan that says, oh, the
 13 Master Plan says this shouldn't happen because.
 14 Because, ladies and gentlemen, it's not there. It
 15 truly is not there.

16 So he testified that the goals are
 17 being complied with, but they are also being
 18 enhanced. So he testified and was able to prove the
 19 positive criteria. He proved the negative criteria.

20 He then opined also about the signage.
 21 And he talked and said that he thought from a
 22 planning perspective the one sign that we need to
 23 seek a variance for, not because of size but because
 24 of location, was appropriate and met the C(1) --
 25 excuse me -- the C(2) criteria. It was a substantial

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1 at transcripts. She had the chance to get a
 2 recording of this and listen to it. She didn't do
 3 her homework.

4 On the basis of that, I think it was
 5 very evident why she was here. Because I also asked
 6 her if she ever talked -- because the objector is
 7 another property owner in Midland Park. So did you
 8 talk to that objector and understand what your
 9 client's concerns were in connection with this
 10 application? And the answer was no. She only talked
 11 to the law firm.

12 And I think we can all see through the
 13 objections that were made there, that they were
 14 really not planning objections. They were the
 15 objections pertaining to trying to get this denied
 16 because of competition. That's that sum and
 17 substance of what we have from that planner. And I
 18 think without going -- belaboring it and going
 19 through all the various things that she couldn't say
 20 or do, I think we all recognized I asked a series of
 21 questions that she basically refused to answer
 22 because she didn't have the right answer for it.

23 She was basically given a job to come
 24 out and throw what she could from a planning
 25 perspective against the wall and see what would

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1 stick. I would say none of it really stuck.
2 I think from the standpoint from
3 Mr. Seckler, who gave much more extensive testimony
4 about the positive and negative criteria, that at the
5 end of the day, his planning testimony supports the
6 applicant's request.

7 So now, with that as a synopsis of the
8 overview of this application that started in March, I
9 want to walk you through what you're here to make a
10 determination on. I maybe gave some of it away
11 already when we had this further back-and-forth with
12 Mr. Novak earlier.

13 But what I've stated is that we have
14 stipulated to certain conditions. We have all
15 the engineers basically agreeing that this site can
16 work. We've had planners give you sufficient reasons
17 to support the positive and negative criteria of the
18 application. And beyond that, we've had even your
19 own professionals concur. We said we can meet all
20 the conditions your borough engineer provided.

21 We haven't heard -- not that it's his
22 place -- any objections from your planner saying this
23 violates this, this and this in the Master Plan,
24 because it doesn't. And of course your traffic
25 engineer went beyond what our traffic engineer said

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1 ordinance, you've got to look and say, okay, it's
2 prohibited. But did they ever take into
3 contemplation a piece of property that's 3-and-a-half
4 acres, that's six times the size of Wendy's, six
5 times the size of Dunkin' Donuts, six times the size
6 of Starbucks?

7 Was that ever thought of when they went
8 to introduce an ordinance, when they sent it to the
9 planning board, who had the right to say to their
10 planner, hey, take a look at this; do you think we
11 should just make it a carte blanche, or should we
12 just say one line, prohibited, and maybe get a report
13 back from the planner that says hey, you can tweak
14 this and do that? It didn't happen. And I'm not
15 criticizing anybody. It didn't happen. But I think
16 that has to go into your thought decision-making
17 process deliberation, if you will, in looking at this
18 and saying, we've got a site that's particularly
19 suited for it.

20 I think when you look and go through
21 all of the aspects of what we were able to show you
22 here, that we meet our burden of proof. This doesn't
23 open the door for every other property owner in the
24 B-1 and the B-3 to say, oh, my turn. I know that was
25 a concern that was raised here. But we all know that

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1 in supporting this application.

2 I know that as board members you have a
3 very hard task in being able to look at all this
4 testimony, evaluate the testimony, the exhibits, and
5 then at that point take that litmus test that's in
6 Section D of the Municipal Land Use Law, in
7 N.J.S.A. 40:55D-70, and you have to look at that and
8 you have to look at whether this site is particularly
9 suited. I've given you all the reasons why, and so
10 did our professional.

11 And to look at the negative criteria at
12 the same time and see that we've met our burden of
13 proof.

14 And I'm going to go back just to dwell
15 for a moment again. When you do that analysis from a
16 planning perspective, you have to put into your head,
17 why do I -- what is it in this ordinance of
18 prohibiting it, what is it that I'm going to latch on
19 to a deny for to say, oh, we can't do this because?
20 It is contrary to the purpose of the ordinance.

21 And I'm going to take you past the
22 purpose of the ordinance being, thou shall not have a
23 drive-through restaurant in Midland Park. I think
24 what you have to look at -- and I know what you have
25 to look at -- is when you don't have a purpose in the

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1 each piece of property is judged on its own merit.
2 And you're looking here at maybe three pieces of
3 property that would be large enough to accommodate a
4 drive-through. I don't know because you haven't seen
5 it. But that's not how you look at it either. You
6 look at this site. And if you say to yourself, you
7 know, the Mayor and Council really thought this was
8 going to be something that has to be prohibited
9 everywhere because they didn't want to fill up the
10 street with cars out of a queue, well, if that's what
11 you think is going on here, it's not happening here.
12 You've heard all the testimony.

13 Any additional traffic beyond the
14 queuing where we have 11 cars we can queue, we need
15 it only for 7. Let's just say it happens. It's a
16 special day for Mexican food. Those cars are
17 internal on this site. Why? Because it's
18 3-and-a-half acres. It's not a half-acre. It's not
19 out in one of your streets.

20 You heard some borough residents that
21 that came in here. And I think it was nice they
22 came. It was encouraging to hear them say, hey, why
23 can't we have this in the town. I know they didn't
24 meet the standards of the Municipal Land Use Law.

25 But I think they paint a picture of
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1 saying, why is it that an objector can tell us what
 2 we can and not have in the town?
 3 Again, I think what they came and
 4 looked at and saw is that from a practical
 5 standpoint, this application as proposed works.
 6 The planner testified that it's unique.
 7 The planner testified it's viable. The traffic
 8 engineer testified it's viable. Our engineer
 9 testified it's viable.
 10 And on the basis of that, you've heard
 11 all the goals of the Master Plan that are being met.
 12 There's nothing here that said there's goals that
 13 have not been met. And that's what we really had to
 14 look at for the negative criteria.
 15 I think I've given you many reasons
 16 why. You only need one to approve an application
 17 like this. Each case is decided on its own merits.
 18 And I believe in this instance we've been able to
 19 provide you with all of the foundation basis
 20 requirements for the positive criteria and the
 21 negative criteria. And on the basis of that, I would
 22 respectfully request that you approve this
 23 application.
 24 And I thank you most sincerely for all
 25 the time you spent on it, including putting up with
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1 can't even get out of the lane because they don't
 2 provide the second bypass lane, which almost every
 3 QSR that I've ever seen has that second bypass lane.
 4 This was a bank site, a totally different use than
 5 what the QSR that is provided with Taco Bell is
 6 proposed for.
 7 The applicant's counsel raised Mr. Dean
 8 and indicated how several of the other witnesses
 9 complemented his testimony. I'll just ask you to
 10 take judicial notice of an Appellate Division
 11 decision A1563-20, Raritan Partners, LLC vs. Raritan
 12 Township Zoning Board in which Mr. Dean's testimony
 13 was found to be incredible by the board and backed up
 14 by an Appellate Division decision that supported the
 15 board in rejecting his testimony because it was not
 16 supported by evidence.
 17 So he's got a tarnished reputation that
 18 maybe this board isn't aware of.
 19 MR. WHITAKER: I'm going to object to
 20 that. One decision in the many that he's been
 21 involved with over the last 15 years --
 22 MS. RIZZUTO: I understand.
 23 MR. WHITAKER: -- doesn't mean that he
 24 has a tarnished reputation.
 25 That's insulting.
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1 me tonight.
 2 Thank you.
 3 CHAIRMAN ANDERSON: Ms. Rizzuto, did
 4 you have any final comments?
 5 MS. RIZZUTO: Just a few -- just
 6 briefly, Members of the board and Mr. Chair, thank
 7 you for having the objector -- allowing the objector
 8 to be present and to state our positions on the
 9 record, et cetera. We appreciate the opportunity to
 10 have worked with the board.
 11 I just would like to remind the board
 12 that with respect to the particular suitability, this
 13 site is not particularly suited to a drive-through
 14 for a QSR, merely because it has a singular
 15 drive-through lane. The site is overcrowded. There
 16 is no parking on that site. The people -- the
 17 parking for people who want to go inside is across a
 18 double lane main aisle in the back of the whole mall
 19 site. There is no parking around the restaurant
 20 itself. So people have to cross that main aisle.
 21 The one handicap space is crowded into an area that
 22 is also dangerous. These were all raised during the
 23 course of the hearing, so I won't belabor them.
 24 But there is -- there is something to
 25 be said for there is only one lane. You can't -- you
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1 MS. RIZZUTO: The board can take
 2 judicial notice.
 3 And if you want, I gave you the cite;
 4 you can go and read the decision. That's all I'm
 5 saying.
 6 Bottom line, and this is my point, and
 7 I know that several of you have made comments to
 8 this, but the governing body made a decision, and
 9 they made a clear decision. And they did it in a
 10 perfectly legal way. There is no requirement to go
 11 to the board -- to go to the town planner or the
 12 board planner or the engineer. There is no
 13 requirement to seek outside help when they want to
 14 pass a zoning ordinance. They have one requirement.
 15 They did it. They sent it to the Planning Board.
 16 And the Planning Board found that it was consistent
 17 with the Master Plan, and said so in the documents
 18 that you have and in the letter that the borough
 19 clerk wrote thereafter.
 20 So they did what they were required to
 21 do. No appeal was taken. The ordinance was not
 22 challenged. It stands on the books.
 23 That doesn't mean, to your point, sir,
 24 that you can't grant a variance. But you should be
 25 aware that there is case law about the fact that this
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1 is only two years old. And you have to take -- you
2 have to take into consideration and give weight to
3 the governing body knows what sites it has. The
4 governing body may have done it because of other
5 sites within, but this site existed exactly as it
6 was. If they wanted to exempt this site, they could
7 have. If they wanted a drive-through, they could
8 have, there. They didn't. They wanted no
9 drive-throughs in B-1 and B-3. And that's what this
10 property is. It's one of those zones. I apologize.

11 In any event, so I urge you to stick
12 with the ordinance. Your planner told you, you
13 should be paying attention to your code and your
14 Master Plan over the granting of a variance if in
15 fact this is a prohibited use and they have not made
16 their proofs as to particular suitability or any of
17 the other elements.

18 I think that you have plenty to show
19 you that the D(1) variance, the hardest variance that
20 you can get under the Municipal Land Use Law, is even
21 harder because of the youthfulness of this ordinance.
22 It just happened. By the time they came here, it was
23 only six months old. It's approximately two -- two
24 years old now, or whatever it is. And they didn't --
25 they haven't gone and repealed it. And they haven't

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1 transcripts.

2 MR. WHITAKER: We all agreed that the
3 ordinance does not require a bypass lane.

4 We all recognized that the bank didn't
5 have a bypass lane. It was passed by the Planning
6 Board when that was built for Atlantic Stewardship --
7 or Columbia, I believe, some time ago.

8 In connection with my approach as to
9 purpose, I stand by that. I believe that it's
10 necessary that you understand in any ordinance what's
11 the reason for it.

12 But putting aside for a moment and
13 disagree with me on that and look at the same
14 application and say, okay, it's prohibited, that
15 doesn't mean we can't grant a variance. That's been
16 said and agreed.

17 So let's just look at all the reasons
18 why this site works. And let's forget for the
19 moment, if you will -- I'm not putting aside my
20 argument, but just as an alternative, let's look and
21 say this site works. There's no prohibition to it in
22 the Master Plan. It's particularly suited. And make
23 that finding without alluding to the purpose. That's
24 your alternative here. I think either way the
25 concept is that this is a site that can accommodate

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1 done anything to change it. And I think they think
2 that there's plenty of QSRs already in town along
3 Godwin Road. And I don't foresee them changing this
4 anytime in the future.

5 MR. WHITAKER: Well, I think that's
6 truly speculative. Let the record reflect that.

7 MS. RIZZUTO: Okay, that's speculative.

8 But the point is, they just did it.
9 There's no reason for them to make any changes. And
10 there's no appeal of their -- it's too late for them
11 to appeal.

12 And for the applicant to say that you
13 can just grant this variance because there's no
14 purpose stated, it's a trick. That's a trick. There
15 doesn't -- there isn't a requirement for a purpose.
16 And I think you, Mr. Chair, said it -- said it
17 perfectly. The purpose is to prohibit drive-throughs
18 with a restaurant use in B-1 and B-3. That's what
19 the purpose is.

20 Thank you.

21 MR. WHITAKER: So just rebuttal very
22 quickly.

23 I know my adversary wasn't at all the
24 meetings.

25 MS. RIZZUTO: But I read the
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1 what the applicant is proposing.

2 Thank you.

3 CHAIRMAN ANDERSON: Before we discuss
4 this, since you have two different voting
5 requirements, I assume we would vote first on the use
6 and then --

7 MR. WHITAKER: It's a D variance.
8 First -- then you would go to the C variance
9 certainly. Bifurcated first, yes, Mr. Chairman.

10 CHAIRMAN ANDERSON: Just so everyone
11 understands what we're going to do is, because we
12 need five affirmative votes on the use variance,
13 first we'll consider the use variance. If the use
14 variance is approved, then we will vote again on the
15 C variances, the front yard and the buffering and
16 whatever.

17 If the D variance is not approved, then
18 we don't have to go to the C variance, right?

19 MS. HERLIHY: Correct.

20 CHAIRMAN ANDERSON: Okay.
21 Is there anything before we discuss
22 this that we need to know to not get in trouble?

23 I'm assuming there's a good chance that
24 we decide this may end up on appeal in court, but I
25 want to make sure we...

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1 MS. HERLIHY: The only thing I want to
2 add --
3 MR. CAPALBO: Open to public at all, or
4 no.

5 MS. HERLIHY: No.

6 MR. CAPALBO: We're done.

7 MS. HERLIHY: I'm not going to
8 reiterate this requirements, or the proofs, or the
9 statutes.

10 CHAIRMAN ANDERSON: Thank you.

11 MS. HERLIHY: Because I think it's been
12 covered in great detail and very well this evening by
13 everyone.

14 The only thing I wanted to add for the
15 board -- the board to think about is that they are
16 asking for a use variance tonight.

17 So you are well within your power to
18 impose reasonable conditions. I did not sit through
19 all of the meetings.

20 I did read all of the transcripts
21 probably one-and-a-half times. And I know -- saw all
22 the questions and the concerns of the board during
23 the course of the hearings. And I know that on a
24 number of occasions Mr. Whitaker, you know,
25 stipulated that his client would comply with the

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1 have something that's of concern to you, you may be
2 able to rectify or get over or get past it or satisfy
3 yourself by some sort of a reasonable condition.

4 I just want you to keep that in mind as
5 you're talking about and thinking about it.

6 CHAIRMAN ANDERSON: Well, I've had a
7 lot to say so I'd like to hear from other -- other
8 people.

9 VICE CHAIRMAN PAPAPIETRO: I just have
10 a question, though, of Mr. Whitaker.

11 In your summation, I believe you
12 indicated the bank did not have a bypass lane. I
13 believe there was two lanes in that bank.

14 MR. WHITAKER: No.

15 You could go out onto Godwin.

16 VICE CHAIRMAN PAPAPIETRO: I believe
17 there was two lanes. They also had the existing
18 structure.

19 MR. WHITAKER: Perhaps I misspoke. But
20 your ordinance does not require it. You've got --
21 you've got an ordinance that tells you what has to
22 be.

23 VICE CHAIRMAN PAPAPIETRO: I just
24 wanted to -- for the record.

25 MR. WHITAKER: Understood.

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1 ordinance or comply with the prior CVS approval. And
2 that's great because they have to do that. They have
3 to comply with ordinance and they have to comply with
4 the prior CVS approval.

5 But if you are -- if you're considering
6 the application and you are considering approving the
7 application and you're concerned about some of the
8 things that were discussed, you can, like I said,
9 impose reasonable -- we have to be reasonable --
10 reasonable conditions to address a concern that you
11 might have that might be swaying you one way or the
12 other.

13 So I didn't see that discussed before.
14 I didn't see that raised or mentioned. And I just
15 want everyone to know that if it does make a
16 difference to you and -- you know, an example -- I'm
17 not saying this is what came up -- but hours of
18 operation.

19 If the ordinance says that for a
20 drive-through it can be until midnight, and the
21 applicant has stipulated they'll comply with the
22 ordinance -- they have to comply with the ordinance
23 -- if you saw to condition an approval on closing at
24 11 o'clock, you could do that. I'm not saying you
25 should. I just wanted you to know that again, if you

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1 MS. HERLIHY: Was one a bypass lane, or
2 were they both --

3 VICE CHAIRMAN PAPAPIETRO: Well, no.
4 There's two lanes at the bank.

5 MS. HERLIHY: Right.

6 And you could get service -- maybe one
7 was like one of the tubes or something.

8 MR. WHITAKER: Yeah.

9 But if one is in front of both of them,
10 you couldn't get bypass.

11 MS. HERLIHY: Right.

12 I was going to say, a bypass lane is a
13 dedicated lane that you do not have service.

14 But if you're -- if you're on line, at
15 any given point while you're on line, you can change
16 your mind, you could decide you have an emergency,
17 and you could get out of the lane, as opposed to just
18 a two-lane drive-through. You could still be stuck
19 behind someone and not have to the ability to stay.

20 MR. WHITAKER: And the law is clear
21 that if you don't have a standard that requires a
22 bypass, you would have a problem saying, well, you
23 don't have a bypass and constitute a denial.

24 MR. NOVAK: And the outside lane was a
25 pneumatic tube.

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1 MR. WHITAKER: Yeah.
 2 MS. HERLIHY: Was it?
 3 MR. NOVAK: Yes.
 4 MS. HERLIHY: That might be accurate.
 5 I just qualify that by saying when you're requesting
 6 a use variance --
 7 MR. WHITAKER: Understood.
 8 VICE CHAIRMAN PAPAPIETRO: I just
 9 wanted to make a point there was two lanes.
 10 CHAIRMAN ANDERSON: So do you want to
 11 go around, or does somebody want to volunteer
 12 thoughts or opinions? Somebody other than me
 13 hopefully.
 14 VICE CHAIRMAN PAPAPIETRO: I have a lot
 15 of thoughts and opinions. You heard some of them
 16 during this thing. Mr. Whitaker did an excellent job
 17 with his testimony and representing his client with
 18 this application.
 19 And while the site may be well-suited
 20 for this, and given the testimony, I'm still going by
 21 that the Mayor and Council specifically passed an
 22 ordinance to prohibit this type of business. And it
 23 was only two years ago. I can see if it was
 24 something that's been in the books for years or
 25 decades. Times have changed and there's also
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1 that decision based on facts and information. Look,
 2 it works. Sometimes it doesn't work.
 3 You know, I think it would work in this
 4 particular form. That's just my opinion. I think it
 5 would work. I've been there. I live right down the
 6 block from there. I've seen the size. I know I see
 7 the traffic at Wendy's. This is going to be much
 8 better than Wendy's. It goes into the street.
 9 So, I mean, that's just me. That's
 10 just how I feel about it.
 11 CHAIRMAN ANDERSON: Anybody else?
 12 MR. CAPALBO: I agree with Rich. And I
 13 think Starbucks was the rush to judgment for making
 14 this ordinance.
 15 That's my personal opinion. I don't
 16 have anything factual. But I think the conditions
 17 that prevailed because of the approval of Starbucks,
 18 which really didn't have to come to the Zoning Board,
 19 correct? So I think that was a rush to judgment, and
 20 let's stop drive-ins because of the condition of
 21 Starbucks.
 22 CHAIRMAN ANDERSON: Well, actually, it
 23 was after Starbucks was Dunkin' Donuts came here.
 24 And then we decided -- they came here for a use
 25 variance because the zoning ordinance -- because the
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1 applications coming to the zoning looking for a
 2 variance for this type of use, but this is something
 3 that's new.
 4 And we've had cases here with people
 5 coming in for porticos and then the town changes
 6 because we're getting so many requests for that type.
 7 This is something that's brand-new. And, you know,
 8 I'm going by the law or the ordinance that was
 9 passed. And I can't agree to vote yes for this one.
 10 CHAIRMAN ANDERSON: How about you,
 11 Rich?
 12 I have a feeling you may feel
 13 differently.
 14 MR. FORMICOLA: No.
 15 Actually, I respect Nick's opinion. I
 16 fully understand. I think they both run excellent
 17 points on both of them.
 18 My problem is that I don't think that
 19 when the Council did this, regardless of if it was
 20 yesterday, that they can look at everything and say,
 21 oh, I've looked at the land, I've looked at, you
 22 know, the size of it and say, oh, no, we definitely
 23 don't think we have something here. I think that's
 24 why they come to us. They say, you know, we're going
 25 to make a blanket law, and you guys are going to make
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1 zoning officer, and I assume the Mayor and Council
 2 thought the same thing, that you needed a use
 3 variance to do a drive-in.
 4 So we decided no, you don't. The
 5 ordinance is clear, you don't need a use variance.
 6 It went to the Planning Board, which of course has
 7 the Mayor and a councilman on it. And almost
 8 immediately after that, after it went to the Planning
 9 Board, there is a new ordinance that --
 10 MR. CAPALBO: My first -- my biggest
 11 concern was the queueing. And I think Mr. Whitaker
 12 and his people have addressed that. I think with 11
 13 or 12 cars, I think it's doable.
 14 CHAIRMAN ANDERSON: For myself, I mean,
 15 I really have no problem with a Taco Bell there.
 16 I agree, I think it would work fine.
 17 But it may even be a better location than some of the
 18 others. But like Nick said, I just -- I can't get
 19 past the fact that the Mayor and Council specifically
 20 prohibited this two years ago. And the fact that the
 21 site works for it, to me it doesn't -- it just
 22 doesn't come up to the level of that necessary for
 23 special reasons.
 24 And also, it's a case where it's
 25 specifically prohibited. As when I was talking to
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1 David, it's not that it's an use that they didn't
2 anticipate. And as Rich was saying, or one of them,
3 that times change and there's a new type of use that
4 the ordinance didn't -- didn't anticipate. They
5 certainly anticipated it. It was in direct response
6 to Dunkin' Donuts. We're not going to have any more
7 -- and, I mean, I'm not saying it's a good thing, or
8 that I agree with the ordinance or whatever. But
9 from my point of view, that's not for me to decide as
10 a member of this board.

11 As a resident of Midland Park, I don't
12 see any problem with a Taco Bell there. I mean, I
13 don't see a problem. But as a member of this board,
14 I just can't get past the fact that the Mayor and
15 Council has specifically prohibited it.

16 So anyone else for or against? Go
17 ahead.

18 Well, Dave or David?

19 MR. BARLOW: David.

20 CHAIRMAN ANDERSON: No. I thought --
21 I'm just --

22 MR. BARLOW: He's Dave.

23 I'm David.

24 CHAIRMAN ANDERSON: I know that.

25 Which one of you is going to talk?

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1 just my opinion.

2 CHAIRMAN ANDERSON: Go ahead, Dave.

3 MR. ZUIDEMA: Well, I just wanted to
4 address the board attorney, is that it keeps being
5 referred to as 3-and-a-half acres. And obviously
6 this is one corner of it.

7 But they always go back to 3-and-a-half
8 acres, 3-and-a-half acres.

9 MS. HERLIHY: I think that the site is
10 3-and-a-half acres.

11 MR. ZUIDEMA: I get it.

12 So my question is that, I would -- my
13 vote would be predicated a bit that we have a
14 building on those 3-and-a-half acres that has a
15 plastic sheet in front of it for the last three years
16 unfinished on the 3-and-a-half acres.

17 CHAIRMAN ANDERSON: He's talking about

18 --

19 MS. HERLIHY: Yeah, no, understood.

20 MR. ZUIDEMA: There's rodents in there.

21 And there's construction vehicles there. There's
22 construction materials in the back.

23 My vote would be -- could go either
24 way. But I don't think I would vote for this because

25 of the disrepair of the -- of the site. Because

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1 MR. BARLOW: Should I defer to my
2 eldest?

3 MS. HERLIHY: Who decided that they
4 should sit next to each other?

5 That's the problem.

6 MR. BARLOW: This is what I would say,
7 all right, both attorneys did very well. All right.

8 But Mr. Whitaker's point of view, all
9 right, as far as the positive criteria, all right --

10 all right, the world has changed right now. All
11 right. He to me has proven his point. We have a lot
12 of kids in Midland Park. Everyone likes Taco Bell.

13 It's not like we're having a Chick-Fil-A here. All
14 right. Because you can get chicken at Wendy's. You
15 can also get chicken at Burger King. All right.

16 So I think it's a good idea. And I
17 think with the stipulations, they have met
18 everything. And especially with the construction
19 materials, it has been removed, been completed.

20 So, you know, for me, I'm just looking
21 here. It says has been completed.

22 CHAIRMAN ANDERSON: Let me ask Dave
23 because he's our monitor.

24 MR. BARLOW: Well, he could be. He's
25 in the construction business. All right. So that's

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1 we're -- Mr. Whitaker, and rightfully so, we're going
2 to 3-and-a-half acres. I think it could accommodate
3 it because they're including all of, you know, right
4 over to Erie Ave.

5 But I don't think going Ridgewood
6 Heights or Midland Park Heights, how many more years
7 do we go by this? We have Dunkin' Donuts empty. We
8 have the dry cleaners that are empty. We have
9 potentially another store that's empty there. And
10 there hasn't -- nothing has been done.

11 So if somebody were to say to me --
12 now, I don't know -- that's why I have to ask you.
13 If somebody were to say to me --

14 MS. HERLIHY: Yeah, I know where you're
15 going.

16 MR. ZUIDEMA: -- yes, this will be -- I
17 don't think we can. So my vote would probably go not
18 bigger.

19 MS. HERLIHY: So to the extent that
20 anything that's happening on the site is a violation
21 or is contrary to a prior approval, you can condition
22 any further -- so it's one site. So this approval
23 affects it. You can condition this approval on this
24 property on any open or outstanding violations or
25 issues being taken care of.

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1 So, again, I don't know if -- I hear
 2 what -- listen, I live here too so I know what you're
 3 saying. I don't know if they are again in violation
 4 of a permit or if they're just failing to do -- I
 5 don't know what the issues are.
 6 But you can condition an approval on
 7 the property owner correcting any outstanding -- any
 8 outstanding issues or violations.
 9 CHAIRMAN ANDERSON: Mr. Whitaker has
 10 already agreed that they're going to stipulate that
 11 they're not going to --
 12 MS. HERLIHY: Right.
 13 And cleaning up -- again, cleaning up
 14 the property.
 15 Anything that they're required to do
 16 that they're not in compliance with, you can
 17 condition that on that. You can condition a CO. You
 18 can condition a building permit. You can say that
 19 you will not -- that the town will not sign a site
 20 plan, enter into a developer's agreement and allow
 21 them to get started with construction, let alone get
 22 to construction and not get a CO. They can't put a
 23 shovel in the ground until this is taken care of.
 24 MR. WHITAKER: I have no trouble with
 25 that.

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1 with something.
 2 MR. CAPALBO: Does the same person own
 3 all of that.
 4 MS. HERLIHY: Yes.
 5 MR. ZUIDEMA: Yeah.
 6 That man owns it.
 7 MR. CAPALBO: That entities owns all,
 8 the whole --
 9 MS. HERLIHY: The whole shopping
 10 center, yes. They would be using a portion of the
 11 shopping center.
 12 MR. ZUIDEMA: They keep telling us it's
 13 3-and-a-half acres.
 14 MR. CAPALBO: Who is actually the
 15 applicant, the property owner.
 16 MS. HERLIHY: The applicant is the Taco
 17 Bell entity. And the owner -- in order to come
 18 before the board, the owner has to consent to the
 19 application.
 20 So the owner -- the potential landlord
 21 knows that the applicant is here and is doing this.
 22 MR. WOSTBROCK: Linda.
 23 MS. HERLIHY: Yes.
 24 MR. FORMICOLA: I'm sorry. You go
 25 ahead, sir.

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1 MS. HERLIHY: Yeah.
 2 With respect, you know, stores being
 3 empty --
 4 MR. ZUIDEMA: No, I get it.
 5 MS. HERLIHY: Yeah. If anything, you
 6 know, having this -- having Taco Bell there
 7 generating traffic and people onsite may make it more
 8 attractive for leases for other people to want to be
 9 in that -- you know, in that area.
 10 MR. ZUIDEMA: I get it.
 11 And the building -- see, I would be --
 12 if I'm understanding you correctly, I would be
 13 favorable then.
 14 But having to put a timeline on that
 15 building there that's been sitting vacant and
 16 half-built basically, we've got to put a time on that
 17 that that has to be finished. Okay?
 18 Tell me legally, what do we do about
 19 that? Because I would vote then no, because that
 20 building will remain that way for another three
 21 years.
 22 MS. HERLIHY: I'm not familiar enough
 23 with our building code as to whether or not there's a
 24 particular period of time that they -- they get a
 25 building permit. They have to -- they may come up

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1 MR. WOSTBROCK: Could the condition be
 2 that the site is completed, the site work is
 3 completed and the building is shelled in?
 4 Certainly if they don't have a tenant
 5 there, the interior tenant fit-out isn't going to be
 6 completed.
 7 But the exterior wholeness of the
 8 building, you know, the windows are in, the roof is
 9 on, the tarps are off, whatever the conditions are.
 10 You know, how granular could that condition be,
 11 condition of approval.
 12 MS. HERLIHY: Yeah.
 13 It has to finish the building. I mean,
 14 I know that they have building permits. I think
 15 their building permits were...
 16 MR. FORMICOLA: They've been pulled.
 17 MS. HERLIHY: They've been pulled.
 18 MR. WHITAKER: I'm told there is a
 19 reapplication for the permits now. Then when permits
 20 are issued, it will be taken care of in six months.
 21 I'm also told that they have a prospective tenant for
 22 the building. I got that just now from the owner.
 23 MS. HERLIHY: So would you agree --
 24 MR. WHITAKER: Six-month timeframe from
 25 when the permits are issued?

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1 MS. HERLIHY: Six months from when the
 2 permits are issued to complete.
 3 MR. WHITAKER: To complete, that's
 4 right.
 5 CHAIRMAN ANDERSON: When can they
 6 begin?
 7 MS. HERLIHY: When?
 8 CHAIRMAN ANDERSON: Taco Bell. He's
 9 just saying that's when --
 10 MR. WHITAKER: We could begin, but we
 11 don't get a CO until that time.
 12 MS. HERLIHY: I'm just taking a note
 13 here.
 14 MR. CAPALBO: You would agree to that
 15 stipulation.
 16 MR. WHITAKER: Yes.
 17 CHAIRMAN ANDERSON: Dave? Dave, what's
 18 your -- you're the one with the main concern.
 19 MR. CAPALBO: They have to abide by it.
 20 MR. PLACIER: You would think
 21 somebody's in the old Dunkin' Donuts.
 22 MR. WHITAKER: They have a Wonder
 23 tenant I'm told. I don't represent the tenant, but I
 24 was told that.
 25 VICE CHAIRMAN PAPAPIETRO: With the

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1 CHAIRMAN ANDERSON: He doesn't get a
 2 building -- Taco Bell doesn't get a building permit
 3 --
 4 MR. WHITAKER: Until the other building
 5 is done.
 6 CHAIRMAN ANDERSON: But what do you
 7 mean by "done".
 8 MS. HERLIHY: It has a CO.
 9 MR. WHITAKER: A CO.
 10 MR. FORMICOLA: Fixed.
 11 Everything is ready to go.
 12 CHAIRMAN ANDERSON: All right. That
 13 should --
 14 MR. ZUIDEMA: I wanted to hear his
 15 question.
 16 CHAIRMAN ANDERSON: Oh, yeah, yeah.
 17 MR. ELIYA: So if that was an
 18 agreed-upon stipulation, would that then be a
 19 positive criteria that you can take into
 20 consideration for the use variance?
 21 MR. FORMICOLA: It's up to the
 22 individual how you interpret it.
 23 CHAIRMAN ANDERSON: That's correct. I
 24 don't know.
 25 MR. ELIYA: I would see it, but I don't

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1 other building that's been under construction for
 2 three years, if you get new permits and you start
 3 again, based upon the history, who's to say the same
 4 thing won't happen again?
 5 In the meantime, you'll have a Taco
 6 Bell under construction again.
 7 MR. WHITAKER: Wait one second.
 8 MS. HERLIHY: Well, it might be under
 9 construction, but they certainly -- they wouldn't get
 10 a Certificate of Occupancy. So they would be -- they
 11 would have a Taco Bell potentially complete and
 12 closed.
 13 MR. ZUIDEMA: Let the landlord go
 14 against our applicant then instead we wouldn't be the
 15 guy calling the shot on that.
 16 MS. HERLIHY: So it would be no CO
 17 until it's finished.
 18 CHAIRMAN ANDERSON: It sounds like
 19 something's brewing. Let's wait a minute.
 20 MR. ELIYA: Would we be able to take
 21 that push of construction, would that be a positive
 22 criteria that you could take into consideration?
 23 MR. WHITAKER: I have it solved. He
 24 doesn't start and get a permit until the other
 25 building is done.

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1 know if it's technical.
 2 MS. HERLIHY: It's something that they
 3 have to do anyway. We're just giving them a hook.
 4 In other words, we're making it --
 5 giving them an incentive, but if, you know, if...
 6 CHAIRMAN ANDERSON: Does it justify --
 7 MS. HERLIHY: You know, promote a
 8 purpose of zoning?
 9 Again, that's a --
 10 CHAIRMAN ANDERSON: That's why you get
 11 the medium bucks.
 12 MS. HERLIHY: Well, listen, it's not my
 13 place to say what someone thinks is going to promote
 14 a purpose of zoning or not.
 15 You could find potentially that it
 16 promotes the purpose of zoning. I'm trying to think
 17 which purpose of zoning.
 18 MR. NOVAK: I mean that --
 19 MS. HERLIHY: Promotion of the general
 20 welfare, health, safety. I mean, it's an unsafe
 21 condition.
 22 MR. NOVAK: Potentially yes.
 23 I would slightly disagree, though. I
 24 mean, there's the Burbridge case which is about an
 25 extension of a nonconforming use.

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1 The board and court tied that to the
 2 beautification of the site.
 3 This is not quite the same because it's
 4 not the redevelopment of the whole site. So if
 5 they're catching up to the site to where it needs to
 6 be -- again, I know this is technical for us to give
 7 testimony. I don't know if I would necessarily
 8 consider that part of the special reasons myself
 9 but...

10 MR. ELIYA: It's not development of the
 11 whole site.

12 But they continually use the whole site
 13 as, you know, a basis that it is particularly suited
 14 for the variance.

15 So if they're going to take everything
 16 in its entirety, then I would presume that you should
 17 probably take the entire site in its entirety.

18 MS. HERLIHY: Yes, that is correct.
 19 The point here is that whether the Taco Bell
 20 application is approved or not, ultimately they're
 21 required to do certain things onsite. That would be
 22 required.

23 MR. NOVAK: If they were tearing the
 24 whole thing and it was a Taco Bell with a new
 25 shopping center, removing blight, promoting a visual

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1 CHAIRMAN ANDERSON: Ms. Herlihy can
 2 figure it out.

3 MS. HERLIHY: I got it.
 4 CHAIRMAN ANDERSON: Is there a second?

5 MR. BARLOW: Second. I second it.

6 CHAIRMAN ANDERSON: David. He said he
 7 --

8 MR. BARLOW: Yeah, I second.

9 CHAIRMAN ANDERSON: No.
 10 But you have listened to all the tapes?

11 MR. BARLOW: Yes.

12 MS. HARMON: Mr. Formicola?

13 MR. FORMICOLA: Yes.

14 MR. CAPALBO: Excuse me a minute.

15 CHAIRMAN ANDERSON: Discussion on the
 16 motion?

17 MR. CAPALBO: Pardon?

18 CHAIRMAN ANDERSON: Discussion on the
 19 motion, yeah.

20 MR. CAPALBO: Am I allowed to vote?

21 CHAIRMAN ANDERSON: No. Wait.

22 Do we have -- one, two, three, four,
 23 five, six, seven. No. Sorry.

24 MR. CAPALBO: I was just wondering
 25 about that.

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1 element, then potentially it's something you can
 2 consider a little bit more.

3 CHAIRMAN ANDERSON: Does anybody else
 4 have anything to say before I beg someone for a
 5 resolution, either -- a motion either for or against,
 6 approve or deny?

7 (No Response.)

8 CHAIRMAN ANDERSON: No? Nothing?

9 Does somebody want to make a motion one
 10 way or the other?

11 MR. FORMICOLA: Yeah, I'll make a
 12 motion. I'll make a motion.

13 CHAIRMAN ANDERSON: This is on the use
 14 variance.

15 MR. FORMICOLA: Yes. Just the use
 16 only. This is for the D(1) variance.

17 CHAIRMAN ANDERSON: Correct.

18 MR. FORMICOLA: So I'll make a motion
 19 for it with the stipulations that we've got in front
 20 of us, plus with the window what you just asked about
 21 and agreed to. And Joe said as well with the site,
 22 you can't get a CO unless everything is taken care
 23 of. You know, everything that was in that
 24 conversation. I'm sorry. There was so much, I can't
 25 even...

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1 Everybody has caught up on all the
 2 meetings and everything.

3 CHAIRMAN ANDERSON: Yes.

4 MR. CAPALBO: Okay. You know, I didn't
 5 want to -- I didn't want to screw anything up by
 6 voting.

7 CHAIRMAN ANDERSON: Well, she wasn't
 8 going to call your name.

9 MR. CAPALBO: Oh, good.

10 The other question, did we ever approve
 11 the minutes from the last meeting?

12 MS. HERLIHY: Not yet.

13 MR. CAPALBO: Okay. So I'll be quiet.

14 CHAIRMAN ANDERSON: Should I have done
 15 that in the beginning? I missed it.

16 MS. HERLIHY: It's all right.

17 CHAIRMAN ANDERSON: All right. We'll
 18 do it with the resolution. You can do the roll call
 19 now.

20 MS. HARMON: Mr. Formicola?

21 MR. FORMICOLA: Yes.

22 MS. HARMON: Mr. Zuidema?

23 MR. ZUIDEMA: Yes.

24 MS. HARMON: Mr. Papapietro?

25 VICE CHAIRMAN PAPAPIETRO: No.

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1 MS. HARMON: Mr. Placier?
 2 MR. PLACIER: No.
 3 MS. HARMON: Mr. Barlow?
 4 MR. BARLOW: Yes.
 5 MS. HARMON: Mr. Eliya?
 6 MR. ELIYA: Yes.
 7 MS. HARMON: Mr. Anderson?
 8 CHAIRMAN ANDERSON: No. Four/three,
 9 right?
 10 So we don't have to go to the Cs.
 11 All right, it's four/three against.
 12 The application is denied.
 13 MR. WHITAKER: Thank you for your time.
 14 (Whereupon, this matter is concluded.
 15 Time noted: 9:52 p.m.)

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C E R T I F I C A T E

1
2
3 I, RONDA L. REINSTEIN, a Certified Court
 4 Reporter of the State of New Jersey, authorized to
 5 administer oaths pursuant to R.S.41:2-2, do hereby
 6 certify that the foregoing is a true and accurate
 7 transcript of the testimony as taken stenographically
 8 by and before me at the time, place and on the date
 9 herein before set forth, to the best of my ability.
 10 I DO FURTHER CERTIFY that I am neither a
 11 relative nor employee nor attorney nor counsel of any
 12 of the parties to this action, and that I am neither
 13 a relative nor employee of such attorney or counsel,
 14 and that I am not financially interested in the
 15 action.

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 RONDA L. REINSTEIN, CCR No. 30X100217800

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