

New Castle City Board of Adjustment Meeting Minutes
Town Hall
December 22, 2022 – 6:30 p.m.
1 Municipal Boulevard, New Castle, DE

Members Present: Mayor Michael J. Quaranta
Megan McClelland
Steve Zorrer
Robert Irwin
Dennis Anuszewski

Also Present: Jeff Bergstrom, City Building Official & Fire Marshall
Daniel R. Losco, Esq., City Solicitor
Chris Rogers, City Planner

Mayor Quaranta convened the meeting at 6:33 p.m. and introduced the Board members.

Mayor Quaranta read the Application:

An application has been filed by Battery Fee Owner, LLC, 1007 Orange Street Fl.4, Wilmington, Delaware 19081, (Applicant) and JAKSN, LLC, 427 W. Seventh Street, New Castle Delaware 19720, (Owner), for a property located at 427 W. Seventh Street, New Castle Delaware 19720, Tax Parcel No. 21-014.00-400, zoned 21DG – Downtown Gateway seeking:

- approval of a special exception to utilize the property as a mixed use multi-family residential – commercial development (§230-21.1B(2));
- a variance from the maximum building footprint of 40,000 square feet to permit a project containing two (2) buildings with a combined building footprint of 52,273 square feet (§230-21.1.C(1)(a));
- a variance from the minimum area for a parking space of 9'x18' to permit a project containing 55 (24%) compact parking spaces each having an area of 8'x16' (§230-1.B);
- a variance from the required 237 shared parking spaces to permit a project containing 228 shared parking spaces (§230-28.A(15)(a));
- a variance from the required one (1) off-street loading space to permit a project containing no off-street loading spaces (§230.28.C); and
- a variance from the permitted residential density of 10 residential units per acre within a mixed use project to permit a mixed use project having 36 residential units per acre - 152 total residential units (§230-21.1.B(2))

Mr. Losco confirmed that the Application was properly posted and advertised in the paper.

Mayor Quaranta explained the Board of Adjustment process for the hearing:

- Meeting called to order
- Confirmation of proper posting and advertising
- Presentation from the Applicant
- Public Comment

- Rebuttal from the Applicant
- Closing argument from the attorney for the Applicant
- Motion to adjourn the hearing and move to the business meeting (no further testimony)
- If a vote is taken, members must articulate their rationale for their vote
- Motion to adjourn the proceedings

John Tracey, Esquire, was invited to make a presentation as attorney for the Applicant. Mr. Losco stated that as a member of the Delaware Bar, it was not necessary to swear Mr. Tracey in.

Mr. Tracey introduced representatives of Ninth Street Development Company (9SDC) and William Wendling, Civil Engineer with MidAtlantic Engineering Partners. Mr. Tracey reiterated the Applicant is seeking a Special Exception for the purposes of constructing a 4-story mixed-use project on approximately 4.13 acres of land located in the 7th Street corridor in New Castle. A 3,500 square foot liquor store is currently on the property and the parcel is largely paved. Wetlands sit to the rear of the property, and Mr. Tracey testified that those wetlands would remain largely undisturbed. The site is bordered by a mix of industrial and high-density residential uses along with wetlands and other parcels exempt from development. Most of the area is zoned Downtown Gateway (DG) that permits, with a Special Exception, the type of use the Applicant is proposing.

Mr. Tracey paraphrased excerpts from the City of New Castle Comprehensive Plan (CP) that he felt were relevant to the Application:

Chapter 4, Page 38: The 7th Street corridor is “currently a mix of commercial and non-residential lands possessing dramatic vistas of the river.” It is an area that “adjoins the southern boundaries of the downtown area and Battery Park. While it is likely that the current land use pattern ...” which is more likely non-residential and industrial in this area “could continue indefinitely” the CP envisions “this area as a new residential neighborhood extending the built-form, character and scale of the historic district.” The CP notes that this area could become a “dynamic extension of downtown.”

Chapter 4, Page 41: This section lists a number of aspirations or goals of what projects in the DG would have, seeking to “create a pedestrian-oriented neighborhood commercial district” while also “presenting a gateway worthy of the City of New Castle ... enhance the aesthetic appearance of the Downtown Gateway Districts; and improve the pedestrian environment along streets, parking lots and other pedestrian areas”.

Mr. Tracey stated that to his knowledge, one significant project has been approved since the adoption of this zoning category.

Chapter 4, Page 47 and 48: Among the goals is to seek to “encourage mixed residential / retail / office uses” and to “incentivize private investment in New Castle’s remaining undeveloped parcels, brownfields, and redevelopment areas harmoniously with nearby land uses”; and this includes identifying vacant or underutilized industrial lands that facilitate appropriate uses.

Chapter 10, Page 100: Provides that “former industrial sites and other brownfields represent an important redevelopment opportunity and should be brought back into productive reuse. Such sites may be opportunities to provide new neighborhood retail and mixed-use developments.”

Mr. Tracey stated that he feels that the provisions he quoted advance all of the intended goals, needs and desires of the CP. He reiterated that the Applicant seeks approval of a mixed-use project that retains the existing commercial use while incorporating two 4-story 43’ tall buildings containing 152 total apartments, consistent with the CP and the DG Zone. The parcel is a brownfield redevelopment site and the Applicant is obligated, as part of the Plan, to finish the remedy that was begun but never completed. The renderings show:

- First floor commercial, parking, and amenity space.
- Second, third and fourth floors would house 152 total apartments (three studio apartments, 78 1-bedroom apartments, 64 2-bedroom apartments and seven 3-bedroom apartments).

Mr. Tracey noted that the size of the parcel is 4+ acres, and stated the project stays within most of the bulk restrictions in the Code without the need for zoning relief; and much of the requested relief is triggered by the desire to maintain the mixed-use aspect of the project. The project is below the 45’ height restriction. The existing wetlands will be protected to a higher degree than required by the nationwide permitting process of the Army Corps of Engineers. The Applicant intends to place the wetland parcel onto a separately subdivided lot that would be owned and maintained by a preservation organization or other third-party steward. The site will be accessed off 7th Street via a DelDOT compliant access point.

Mr. Tracey also noted that stormwater quality features will be added to the site. The Applicant is incorporating a mix of brick and other materials as well as subtle modern finishes into the design. Mr. Tracey stated that 9SDC has experience in redeveloping distressed, problematic sites and bringing vibrancy to these areas.

Mr. Robert Snowberger, a principal of 9SCD, was sworn in by Mr. Losco to testify. Mr. Snowberger provided background on 9SDC’s involvement with the project, his background, and his experience redeveloping historic buildings and constructing new buildings. Mr. Snowberger also noted that the development team is very conscious of the importance of New Castle, and they want to give the City what has been asked for in the CP.

Mr. Snowberger added that the Applicant’s main request is for a Special Exception to build a mixed-use project.

Mr. Tracey reiterated that the project addresses the needs of the CP for more mixed use and residential units in this area.

Mr. Tracey submitted for the record:

Exhibit 1 – A market study to review the need for residential units in this area that came back with a demonstrated deficiency of 617 new units being available for rent. Exhibit 1 was accepted into the record by Mayor Quaranta.

Mr. Tracey reiterated that the Planning Commission (PC) found the project to be consistent with the CP and the DG Zone. He stated that in addition to the Special Exception, the Applicant is also seeking approval of five variances; many of which are tied to maintaining the commercial use on the property.

Mr. Tracey reiterated that a mixed-use project is permitted in the DG Zone with the receipt of a Special Exception and the Applicant has submitted the required data and is seeking approval under §230-57 B (2) of the City Code. Mr. Tracey stated and the Applicant believes it has satisfied each of the criteria for a Special Exception as set forth in the City Code:

- (a) Consider the suitability of the property for the use desired. Assure itself that the proposal is consistent with the spirit, purpose, and intent of this chapter, the Comprehensive Plan, and other relevant plans

Mr. Tracey stated the Applicant believes that the project is consistent with the goals of the CP and the DG Zone, The PC found the project to be consistent with the CP, and the Delaware State Housing Authority found it was a beneficial use in the area by bringing more rental housing to the area. He further stated that it is consistent with the CP's desire for mixed-use development within the DG District, while facilitating the redevelopment of a former industrial brownfield site.

- (b) Determine that the proposal will not substantially injure or detract from the use of neighboring property or from the character of the neighborhood and that the use of the adjacent property is adequately safeguarded

Mr. Tracey stated that the Applicant believes the project will have no impact on surrounding properties. There is a high-density residential community on one side and non-residential uses on the north side. Mr. Tracey opined that bringing a mixed-use project would not be detrimental to those uses.

- (c) Determine that the proposal will serve the best interests of the City, the convenience of the community, and benefit the public welfare.

Mr. Tracey stated that the project is consistent with the CP; it is consistent with neighboring uses; and it establishes the Gateway look that the City is seeking to create in the area.

- (d) Consider the effect of the proposal upon the public services and facilities, such as public water, sewers, police and fire protection, and public schools.

Mr. Tracey stated the Applicant is unaware of any negative impacts to City Services. Sewer and water are available and it is felt that because of the predominance of proposed studio and 1-bedroom apartments the project will generate little in the way of school children while generating significant school tax revenues.

Mr. Tracey submitted for the Record:

Exhibit 2 – A study from Long Island, New York, on the impact of apartments on school districts. Exhibit 2 was accepted into the record by Mayor Quaranta.

Mr. Tracey noted the study indicates apartments have very little impact on schools from an occupancy standpoint, and opined there will be no impact on municipal services.

- (e) Consider the probable effects upon highway traffic and pedestrian movements, and assure adequate access and circulation arrangements in order to protect major roads from undue congestion and hazard.

Mr. Tracey noted that the project meets the DelDOT Area Wide Study Fee standards. This would not exempt the project making or contributing to any DelDOT required improvements; it simply obviates the project from the need to conduct an actual traffic impact study. The Applicant has conducted a Traffic Operational Analysis of the 7th Street and Washington Avenue intersection consistent with DelDOT's regulations. Each analysis concluded the functionality of the intersection will remain the same, and when updating the study with December 2022 counts the numbers actually decreased from what was observed in the 2021 Intersection Analysis. Mr. Tracey added that higher background traffic numbers were added to the counts, and the Study shows that the Level of Service will not degrade to a failing level. The Applicant also analyzed other by-right development options in the DG District with a 40,000 square foot footprint to see what that would do from a traffic generation standpoint, and with the exception of an office use, the proposed use and scale has the least intensive use on the property. Mr. Rogers asked if the Study indicates that peaks will be higher or lower for those other uses. Mr. Tracey noted those other analysis were average daily trips generated by the project. In conclusion, Mr. Tracey stated that the Applicant does not believe there will be a detrimental impact on traffic in the area.

Mr. Tracey submitted for the Record:

Exhibit 3 – A Traffic Analysis Executive Summary from Traffic Planning and Design, Inc. Exhibit 3 was accepted into the Record by Mayor Quaranta.

Exhibit 4 – A letter from Traffic Planning and Design, Inc., to City Planner Christopher Rogers. Exhibit 4 was accepted into the Record by Mayor Quaranta.

- (f) Be guided in its decision by sound standards of subdivision and land development practice where applicable.

Mr. Tracey stated that the Applicant believes the project meets this requirement. They are largely avoiding impacts to protected resources; they are allowed to disturb up to one acre of

wetlands on the site with permit, and they will be disturbing about one-half acre. The project will be raised out of the wetlands to 2' above the flood plain. The first floor will be parking, commercial and amenity space.

Mr. Tracey stated that the Applicant does not believe it is impacting the level of service in the area; they have responded to comments from the PC and those responses have been submitted to the City; they believe it is an attractive and beneficial project that meets the requirements of the Special Exception; and they are hopeful that the Board of Adjustment will endorse the Applicant's request for a Special Exception.

Mr. Tracey stated that five Variances are being sought that they feel are minor in nature and internal to the site.

Three of the Variances are driven by the desire to maintain a mixed-use component to the project as noted in the CP goals for the DG District, comments from the PC and from discussions with the City. Mr. Tracey reiterated that without the retail component, these three Variances would not be required.

- A variance from the required one (1) off-street loading space to permit a project containing no off-street loading spaces (§230.28.C).

Mr. Tracey stated the Applicant does not believe there will any impact with no off-street loading spaces. In response to a question from Mr. Anuszewski, Mr. Tracey stated signs would be installed in front of the retail space that would allow parking for loading/unloading; and deliveries can be controlled so they are done when parking demand is at its lowest.

- A variance from the required 237 shared parking spaces to permit a project containing 228 shared parking spaces (§230-28.A (15) (a)).

Mr. Tracey stated that a Parking Analysis was done looking at neighboring apartment communities and that because of the number of studio and 1-bedroom apartments proposed for the project, the site is probably over-parked at 237 spaces. Mr. Tracey reiterated that without the retail component of the project, a Variance would not be required.

Mr. Tracey submitted for the Record:

Exhibit 5 – A Parking Study prepared by MidAtlantic Engineering Partners. Exhibit 5 was accepted into the record by Mayor Quaranta.

- A variance from the permitted residential density of 10 residential units per acre within a mixed use project to permit a mixed use project having 36 residential units per acre - 152 total residential units (§230-21.1.B (2)).

Mr. Tracey stated that if the project were purely residential there would not be a density cap.

- A variance from the minimum area for a parking space of 9'x18' to permit a project containing 55 (24%) compact parking spaces each having an area of 8'x16' (§230-1.B).

Mr. Tracey noted this variance is not driven by the mixed-use aspect of the project. Mr. Tracey stated that the City of Wilmington Code (§48-447) and New Castle County (§40.22.612) create the opportunity to have reduce-size parking spaces (Wilmington – 30% / New Castle County – 25%). The Applicant incorporated the New Castle County model and the project is designed with just less than 25% reduce-size spaces. The reduce-size space handles sub-compact, compact, and most mid-size vehicles. The Study includes four apartment communities and shows that when the study was done, 45%-55% of the vehicles observed were sub-compact or compact; which indicates there would be well in excess of 25% of vehicles in the proposed project that would fit in the reduce-size space. Mr. Tracey stated that the Applicant does not believe there will be any impact by incorporating reduce-size spaces into the project.

- A variance from the maximum building footprint of 40,000 square feet to permit a project containing two (2) buildings with a combined building footprint of 52,273 square feet (§230-21.1.C (1) (a)).

Mr. Tracey noted that he could not explain the rationale for the 40,000 square foot limitation; and he noted that most of the properties within the DG zoning classification could not accommodate 40,000 square feet because they are all less than one acre.

Mr. Tracey submitted for the record:

Exhibit 5 – Aerial photos of the DG zone area. Exhibit 5 was accepted into the record by Mayor Quaranta.

Exhibit 6 – A breakdown of Tax Parcels and the sizes of the various lots. Exhibit 6 was accepted into the record by Mayor Quaranta.

Mr. Tracey noted the subject parcel can accommodate the square footage on the parcel without relief and most of the variances being sought are as the result of the mixed use aspect of the project.

The Applicant is not conceding that the 40,000 square foot requirement for footprint applies to the project in the manner in which it has been suggested that it does because:

First, the Code is inconsistent in how it applies this requirement. At §230-21.1 C, the Code notes that the building footprint shall be limited to 40,000 square feet for multi-family, mixed use and non-residential uses; however, in paragraph §230-21.1 F(8), in providing the development standards for new construction of nonresidential, mixed and multifamily use, the Code includes the phrase “maximum building footprint for nonresidential buildings: 40,000 square feet”. Mr. Tracey stated that provision (F(8) treats nonresidential, mixed use and multi-family separately; whereas §230-21.1 C lumps it together, creating an inconsistency in

the Code. Mr. Tracey noted that when there is an inconsistency in the Code there is an argument that the landowner is the beneficiary if there is that confusion.

Mr. Losco stated that there is a general concept in the law that if the zoning regulation is ambiguous it should be interpreted in favor of the free use of land. Mr. Losco added that he does not necessarily see it as inconsistent, noting that C(1) says nonresidential, mixed or multifamily should not exceed 40,000 and paragraph F says the maximum building for nonresidential is 40,000, and that is consistent with one another; it's just that C1 adds mixed and multi-family as having that same limitation. Mr. Losco opined that the Code may be redundant but not inconsistent and there may not be a need for F(8) since it is already covered in C(1).

Mr. Tracey responded that there are two different provisions talking about two different things. In the section where F(8) falls in the beginning it talks about development standards for "nonresidential, mixed, and multifamily"; then at the bottom it says are seeking mixed use, multifamily and nonresidential; and at the bottom when it has the 40,000 square foot, which appears earlier for all three of the uses, it only applies that 40,000 to nonresidential.

Mr. Zorrer stated he was unclear and Mr. Tracey explained that the question is: is there a limitation just on nonresidential use, or is there a limitation on all three uses. Mr. Zorrer stated that he did not see an inconsistency.

Second, Mr. Tracey stated that a reasonable interpretation of the Code provision is that the 40,000 square foot limitation applies on a per-building basis as opposed to the site as a whole. The subject provision notes that the building footprint shall not exceed 40,000 square feet, which, as written, would suggest that no single building can exceed 40,000 square feet as opposed to combined square footage. Mr. Tracey opined this comes into play as one looks at the way the DG District is established. The vast majority of properties in the District could not accommodate a 40,000 square foot building; whereas there are a number of larger properties in the District, including the subject parcel, that could easily accommodate much more than 40,000 square feet. Mr. Tracey noted that when the limitation is imposed on larger properties it creates heavily underutilized properties. Mr. Tracey argued that 40,000 square feet makes sense from a per-building standpoint because it allows larger properties to be developed to take advantage of their size. Mr. Tracey stated that 40,000 square feet should be on a per-building limitation as opposed to an overall site limitation.

Third, Mr. Tracey stated that the property is a brownfield that requires remediation; it is located in a flood plain and needs to be elevated above base elevations; and substantial and costly necessary construction efforts have to be placed into the property before any building can be constructed. Absent the ability to reclaim these expenses the project, or probably any project, on the property is not viable.

Mr. Tracey noted that there are several cases examining Board of Adjustment Decisions such as this where the need for additional square footage is tied to the idea that to make the project it has

to be viable in order to make it work; and that that is a sufficient and acceptable practical difficulty to support the award of a zoning variance.

Mr. Tracey submitted Case Law to Mr. Losco:

- *Markert vs Board of Adjustment of Rehoboth Beach.*
- *Boyd vs. Heffron* from the City of Wilmington.

Mr. Tracey also referenced *CCOBH vs The New Castle Board of Adjustment* over the Rollins Building and *Rivers vs Turner* from the City of Wilmington.

Mr. Tracey stated that in these four cases square footage variances were sanctioned by BOA's and sustained by courts because relief was necessary to make the project viable based on the goals of the project and the cost of construction. In each case the relief was deemed to be appropriate where the developer sufficiently demonstrated the need for additional square footage to make the project work. In these cases, the limitation was based on maximum floor area ratio; whereas in this case the limitation is based on the footprint of the building, but they basically tie to the same thing because the footprint coupled with the height limitation puts a cap on what the square footage is.

Mr. Tracey asked Mr. Snowberger to testify relative to costs. Mr. Snowberger stated that:

- The property must be elevated above the flood plain.
- It is a brownfield site that requires remediation.

Mr. Snowberger stated that the analysis shows that to make the project viable there must be 117 units. Mr. Snowberger stated that at 117 units you are looking at approximately \$339,000 per unit. The Garrison built for \$265,000 per unit. Mr. Snowberger stated that it would be irresponsible for him to recommend that the Applicant proceed with the development if it is 40,000 square feet, especially when that number is fairly arbitrary when it applies to smaller sites that are less than one-half acre and sites that are 13 acres that have the same restriction. Mr. Snowberger added that when you have a 4 acre site that requires substantial remediation coupled with the desire of the DG District to be upscale and a gateway to the City, you do not want to skimp on amenities; and ultimately if the project is limited to 40,000 square feet all costs associated with fixing the site would be spread over 117 units.

Mr. Snowberger noted that the project could increase the number of studio apartments; however, the Applicant does not wish to do that. He added that the density on the site is largely off the road and the odd shape of the site creates issues when it comes to the front on 7th Street. When they started the project, it was proposed with 233 units; however, due to rising costs of materials and interest rates the number of units was reduced to 152. Mr. Snowberger added that by maintaining a 43' height, there are non-typical costs associated with construction, such as custom trusses that will be required.

In response to a question from Mayor Quaranta, Mr. Snowberger explained the extent of the issues with the property relative to it being a brownfield. Mr. Snowberger stated that the

property was in the Brownfield program; however, remediation was not finished. He estimated that the cost to haul away dirt and cap the site is approximately \$150,000. Mr. Tracey noted that the cost of remediation and elevation of the site are in addition to the cost of the actual construction. He noted that the cost of raising the site 2' out of the flood plain is approximately \$2M. Mr. Snowberger added that flood insurance is achievable on the site, as is financing; noting that raising the site is a requirement of the insurance carriers and many banks. Mr. Snowberger also noted that staying within the height restriction is very important to the Applicant. He added that project has been blessed by financing and insurance. In response to a question from Mayor Quaranta, Mr. Tracey invited Mr. Wendling of MidAtlantic Engineering Partners to testify.

Mr. Wendling was sworn in by Mr. Losco to testify.

Mr. Wendling identified areas of tidal and non-tidal wetlands on a rendering of the site. He explained that tidal wetlands are untouchable, and as part of the project a section of the non-tidal wetlands will be filled and a barrier will be built for access to the tidal wetlands. Mr. Wendling stated that the wetlands were delineated by a separate firm and there is a preliminary jurisdiction determination that confirms the lines placed on the Plan. The intent is to turn over the tidal wetlands to a conservancy for stewardship.

Mr. Snowberger added that the project is being financed and they are seeking HUD development insurance on the project; and the project is in complete compliance with Federal guidelines that will not insure a project federally if it is in danger of doing anything against the EPA. Mr. Tracey stated the Applicant will work with the City to find an appropriate funded conservancy for maintenance of the tidal wetlands. He added that the Applicant is looking into other options as well. In response to a question from Mr. Rogers, Mr. Tracey stated that the Applicant would like to identify a conservancy during the Site Plan process and they have had conversations with some parties already. Mr. Snowberger stated that finding a conservancy is the intent of the Applicant regardless of whether it is finalized during or after the Site Plan process.

Mr. Tracey turned to the legal standards for granting a variance, stating that all five variances are area variances and will have to satisfy the less restrictive exceptional practical difficulty analysis under the Kwik Check standards.

Mr. Tracey stated that:

- The nature of the zone and the character of the community are generally more feasibly met in almost every application;
- The property is zoned DG and located off the 7th Street corridor; bordered by industrial and multi-family communities, similar to what the Applicant is proposing and to the rear by undevelopable lands; and
- The uses proposed are all permitted in the DG zoning district and redevelopment of these properties is encouraged by the DG District in the CP to convert non-residential or industrial sites to a more productive mixed use.

Mr. Tracey stated that the Applicant feels the project fits comfortably within those goals.

Mr. Tracey stated that the remaining criteria are the balance of the harm between the impact to the public if the variances are approved and to the Applicant if the variances are denied. The Applicant does not believe that there is any significant negative impact, if any negative impact, to the public if approved. The benefits of the project include: meeting the CP; fulfilling the obligation of remediation of the brownfields; cleanup of the property, and bringing a desired mixed-use aspect to the area. It retains the mixed-use component at the urging of the City and three of the five variances are triggered to maintaining that mixed use.

Regarding the other two variances relative to parking space size, Mr. Tracey stated those variances are internal to the property and the evidence clearly shows it will have no negative impact on the property, the project or the surrounding community. Having 25% of the parking spaces reduce-size will not cause any burden. The parking study of nearby communities indicates that the number of sub-compact, compact, and mid-size cars in those parking lots were far greater than the 25% reduce-size parking spaces proposed by the Applicant and would not impact the ability to park in this area.

Mr. Tracey stated that given the fact that they are trying to maintain compliance with the 45' height, the Applicant does not feel that there is any harm to the community relative to the bulk standards limitations.

Relative to the impact to the Applicant if denied, Mr. Tracey referred to testimony from Mr. Snowberger that the costs invested in the property to this point of development are the type of costs anyone developing the property would likely have to confront, and in order to afford to do those things (raise the site out of the flood plain, remediate the Brownfields; and put the property back to productive use), you need to get the density to justify the project. Mr. Tracey further noted that as Mr. Snowberger testified, in addition to those costs there are non-typical construction costs involved. Absent these variances, and assuming the 40,000 square feet applies to the entire property and not on a building-by-building basis, the project will not move forward. Mr. Tracey again referenced case law he submitted to Mr. Losco and submitted into the record. Mr. Tracey submitted that the Applicant has met the criteria for acceptable practical difficulty in support of the variance in order to achieve the 52,000 square feet of building footprint.

Mr. Tracey asked that the Board of Adjustment look favorably on the Applicant's request.

Mr. Tracey and representatives of 9DSC responded to questions from the Board:

- At \$339,000 cost per unit, the project would absolutely not move forward, adding that it would not be financeable and they would have a defaulted property. (Mr. Zorrer)
- Relative to the average rental for the various units, Mr. Snowberger referred the members to the market study submitted into the record. He opined that families will rent the 3-bedroom units, while mainly young professionals and empty-nesters will rent the studio and 1-bedroom units. Mr. Snowberger also reiterated that as noted in the market

analysis there is a need for rental units in the area. Mr. Snowberger stated that the amenity package will include a pool, a bike room, a fitness center, and co-working space for tenants. Mr. Tracey added that these are market-rate apartments that require the types of amenities the Applicant is planning. (Ms. McClelland)

- Mr. Zorrer stated his concern for the number of parking spaces, noting he was informed that parking at The Garrison on the weekend is almost impossible and when The Garrison first opened there was an extra charge for parking under the building, which made parking more difficult. Mr. David Rinnier of 9DSC was sworn in by Mr. Losco to testify. Mr. Rinnier noted that The Garrison mix is very heavy in 2- 3-bedroom units (approximately 85%-90%). Mr. Zorrer reiterated his concern that there is a lack of parking spaces. Mr. Rinnier added that with more studio and 1-bedroom units and the same amount of parking, it should not be an issue. He added that the mix is approximately 60% 1-bedroom, 35% 2-bedroom and 5% 3-bedroom. There are 152 total units: 78 1-bedroom, 64 2-bedroom, 7 3-bedroom and 3 studio units. There are 228 parking spaces, or 1.5 parking spaces per unit. Mr. Tracey added that without the retail component the number of parking spaces would meet Code. The retail component adds nine parking spaces, hence the need for a Variance. Mayor Quaranta noted that mixed use was a concept that was supported by the PC.
- Mr. Zorrer asked if there would be a limit to approved residents if there was no retail component to the project. Mr. Rogers stated that there would be no limit. He noted that the DG Zone disincentivizes mixed use by capping it at 10 units per acre; which he opined was an oversight in the Code, noting that there is no cap in purely multi-family. He added that in order to fully meet the intent of the DG zoning and the CP, he had hoped there would be some non-residential space in the structure even if it meant asking for a variance.

Mr. Losco asked the Mayor if he intended to hear Mr. Rogers' recommendations before Public Comment. Mayor Quaranta stated that he wished the Board members to hear Mr. Rogers' commentary and invite them to ask questions and thereafter invite the public to comment.

Mr. Rogers, of AECOM, and City Planner for the City of New Castle, stated that AECOM was involved in the 2009 CP that first created the concept of the DG District, and in the codification of the CP recommendation that created the DG Zone. He stated that in general AECOM is in favor of the proposed development and in the granting of the Special Exception. He stated his concern that AECOM did not have sufficient time to fully vet the traffic data that was submitted by the Applicant as it relates to the West 7th Street and Washington Street intersection. The Applicant averred that the intersection operates at an acceptable level of service (LOS) and will continue to operate at an acceptable LOS. Mr. Rogers explained that Level A is the best operating intersection with very little delay, and Level F is intersection failure and means the intersection is gridlocked. Generally, a LOS of B is acceptable, but the lowest acceptable LOS is D. The Applicant is stating that the intersection will continue to operate at an LOS of C.

Regarding the maximum building coverage, Mr. Rogers explained the intent of the maximum 40,000 square feet, whether it is per building or site, is to ensure that the developments in the DG Zone maintain a pedestrian-oriented scale and to not overwhelm the Zone. He stated that given the configuration of the lot and the development, there is very little of the building that impacts the streetscape and he is not concerned about that Variance request relative to the intent of the DG Zone environment.

Mr. Rogers stated that he had no issues with the other requested variances. His only concern with the application as a whole is AEACOM's inability to fully vet the traffic data.

In response to a question from Mr. Anuszewski, Mr. Rogers stated that AECOM should be able to fully vet the data in 2-3 days. Mr. Anuszewski asked if the matter should be tabled, and Mr. Rogers stated that was a question for the Board, or the Board could condition an approval on AECOM fully vetting the data after-the-fact and confirming that the LOS is satisfactory.

Mr. Rogers noted that the application is at the preliminary conceptual site plan phase right now and the Applicant is seeking approval of the use at this time. If the Special Exception is approved and the project moves forward, AECOM's recommendation would be that the Applicant will have to submit a full site plan so the Planning Commission (PC) can review and approve it. Mr. Rogers explained the data the Applicant would need to submit to the PC. He added that the DG Zone is the most prescriptive zone when it comes to architectural design guidelines, i.e., orientation of the building, materials, etc., and all of that would be confirmed by the PC. Mayor Quaranta added that the intent of the guidelines was to keep new development harmonious with the DG Zone.

Regarding the proposed Lot A and the conversation concerning it being dedicated to a conservancy, Mr. Rogers recommended that if the matter moves forward, the proposed Lot A be dedicated to a land trust or similar group, or that a conservation easement on the land be dedicated to a land trust or group; which would assure the land is maintained in an environmentally sensitive manner. Mayor Quaranta opined that one land trust had already refused the lot, so other options would need to be explored.

Mr. Zorrer asked if the eleven comments in the August minutes of the PC were completed and submitted. Mr. Rogers stated that the Applicant responded to all of the comments. Mr. Tracey noted that the comment letter is the record.

Mr. Rogers stated that the PC requested that the Applicant:

1. Submit plans to PLUS and address PLUS comments. The Applicant submitted Plans to PLUS and PLUS comments were received. The Delaware State Housing Authority was in favor of the project. Mr. Tracey noted that the Office of State Planning looks at what investment level the project is in, and the part being developed is in Investment Level 1 – reflects areas that are already developed in an urban or suburban fashion where infrastructure is readily available and where future redevelopment or infill projects are expected and encouraged by State Policy. Development of Level 1 is consistent with the

2020 State Strategies and therefore the Office of State Planning has no objection to this site plan provided it meets the City's requirements.

2. Provide elevation and floodplain data specific to the proposed development for end-of-century sea level rise projections as established in the 2018 Vulnerability Assessment. That information was provided and they are filling so the first floor will be 2' above the flood plain elevation, and residences will be at 10' above sea level elevation.
3. Provide architectural plans demonstrating compliance and commitment to the Downtown Gateway design standards contained in §230-21.1.G of the Zoning Ordinance. The Applicant provided those elevations and provided more of a description of how windows and the vertical and horizontal articulation of the building fits the DG Zone design standards. All of that will be verified by the PC during the site plan review.
4. Prepare a Traffic Impact Study for review by DeIDOT and the City Engineer. AECOM asked for traffic data regarding how the intersection is operational. Data was provided on December 14th. The traffic engineer asked for modifications that were submitted; however, AECOM did not have an opportunity to fully vet the data. Mr. Rogers opined that the data could be fully vetted in 2-3 days. The data provided looked at a.m. and p.m. peak, which is the core of a traffic impact study. The data Mr. Tracey provided during testimony related to traffic during the day. AECOM's review of the data will ensure that the intersection is operational at acceptable levels, and if it is not, then AECOM would recommend a full Traffic Impact Study be submitted to DeIDOT. DeIDOT will consider the limitations and the scale of the improvements that may be necessary.
5. Obtain comments from New Castle County regarding the proximity to the existing sewage pump station. There is an email in the Record from Regis Yurcich, Head of Operations for New Castle County Sewer, stating that they have many pump stations near residential communities and they do not typically put odor control devices at the pump stations.
6. Obtain feedback from the City Attorney and/or City Council regarding the extinguishment of the easement on the property. There is a recorded easement that was a condition of a subdivision approved by the City that establishes cross access easements for utilities and access between the parcels that were subdivided. This property is part of that subdivision and those easements can only be extinguished by City Council. Mr. Rogers opined that the intent of the easements was to create a blanket easement to ensure access from one lot to the other. As a result of this development, the easement will no longer be needed and only City Council can extinguish the easement.
7. Obtain comments from the City Fire Marshal. Mr. Rogers stated his understanding that the Applicant worked with Mr. Bergstrom in creating the site plan before the Board of Adjustment. This Plan will be vetted during the plan review process. This was requested to ensure there is nothing overtly preventing safe access per the Code.
8. Provide additional information regarding the nature and purpose of the Non-Structural Retaining Wall. The Applicant submitted photos of the riprap and the type of structure being proposed is satisfactory. Details will be confirmed during the site plan review.

9. Confirmation on the methodology used to measure Building Height. The Applicant provided this information and confirmed that the building will be less than the 45' maximum. This will be confirmed during the site plan review.
10. Obtain feedback from the City and/or City Council regarding proposed Lots A and B. There is a lot in the middle that is owned by the City. As a result of this project, access to the sewage pump station will have to be across City property. During Site Plan approval access to the pump station will have to be discussed and agreed upon. Mr. Losco noted that City Council's role is ministerial in nature and it must approve a site plan where the PC and City Planner have confirmed that all aspects of the Zoning Code have been met and that the plan is fully Code-compliant.

Mr. Losco noted that Item 10 is really discussing the wetlands that would be a separate parcel, not the pump station. Mr. Losco stated his concern that it would be a random, land-locked, unusable parcel that would fall into neglect and could become a problem that the City would have to maintain; and this is why the Applicant is discussing their intent to dedicate the lot to a conservation group for maintenance.
11. Provide information regarding the nature of filling and wetlands impact. The Applicant has provided this information via the Wetlands Report and the Jurisdictional Determination from the Corps of Engineers confirming their wetland delineation and they are on record with the amount of fill and disturbance that is necessary in order for this development to occur. As part of the site plan review process the PC will ensure that all of the necessary permits from those agencies are in place.

Public Comment

Mayor Quaranta noted that the City received a number of requests that the proceedings be postponed due to the holidays. He added that there were many meetings regarding the project and expressed his hope that the public had taken advantage of those opportunities to provide their commentary.

Mr. Phil Gross – 1301 13th Street

Mr. Gross expressed his support of the project as it was originally presented to the PC. He stated, however, that he has concerns regarding the 7th Street and Washington Street intersection, noting that WILMAPCO specifically said it was a problem and it needed to get redone. He added that the addition of 152 units will only exacerbate the situation. He opined that any vote should be postponed pending the outcome of the City's investigation.

Mr. Gross stated the Applicant is proposing filling in non-tidal wetlands, which, as sea level rises, will cause more flooding.

Mr. Gross noted that the Trustees refused the wetlands, and opined that no one would want it because it is unusable and will be a problem to upkeep.

Mr. Gross stated that increasing the scope of the project should be rejected, opining that if the Applicant wants to increase the size the mixed-use aspect should be removed.

Mr. Gross stated his opposition to removing the commercial loading/unloading aspect of the plan.

Relative to evacuation routes, Mr. Gross opined that with the increased congestion in that area, the only viable route is up Washington Street where there are too many feeders and tall buildings.

Mr. Gross stated that the brownfields should be taken care of before the Board of Adjustment allows the project to go further.

Mr. Gross opined that the Applicants expanded the scope of the project to ensure they will get revenue and income from the project; and neither the City nor the citizens should pay for it or be aggravated when driving to ensure the Applicant makes the money they need to go ahead with the project.

Mr. Gross stated that the Application for Special Exception should be rejected.

Mr. Tom Whitehead – 2nd Street

Mr. Whitehead stated he was disappointed that PC comments came out prior to the Board of Adjustment meeting.

Mr. Whitehead noted that the PC was mentioned numerous times, and opined the Applicant should have stuck with the non-hardship variances. He added that they should not have brought up the cost of the project.

Mr. Whitehead read a statement into the Record:

I do not believe any of these variances are warranted. I think it would set a bad example for this and future projects around town. It seems to me this is about saving money and opening the door for future work on this site: good for the owner, bad for the City. Once again, once a variance is given, it sets a precedent for future development. It's hard to say no to a later variance request once you have said yes to a similar type of variance. And that's a fact. My advice is strictly follow the Zoning. Please. Think about it. I am personally insulted by the owner's temerity in asking for these outrageous non-hardship variances.

Ms. Alison Fuentes – Deemers Landing

Ms. Fuentes stated her support for the project, noting this would give her the opportunity to move into her own apartment while staying close to family and work. She added that it is an improvement to the current use of the parcel.

Ms. Paula Gambacorta

Ms. Gambacorta stated her support of the project, noting that it will increase the value of her property.

Mr. Brian DiSabatino – Historic New Castle

Mr. DiSabatino stated his support of the project, noting that the plan is inspirational. He thanked the City, noting that between the CP and the process laid out, it has inspired something special. Mr. DiSabatino stated that a very good developer has been inspired to join the project, adding that he can personally vouch for 9SDC. Mr. DiSabatino also noted that the Applicant is trying to provide a special project and is asking for reasonable accommodation; adding that when a CP vision meets the vision of a developer and the reality of the marketplace and site constraints, sometimes reasonable accommodations are required in order to make a special project economically viable. Mr. DiSabatino stated that setting a precedent is important; and noted that the precedent he worries about is one that rejects these kinds of reasonable accommodations as a signal to the marketplace that the City does not want really good development. Mr. DiSabatino stated he feels the Applicant's requests are very reasonable.

Mayor Quaranta read written comments into the Record:

Mr. John DiMondi – 301-303 West 7th Street

The BOA is a commission of Equity. By an applicant who feels they have been wronged or slighted by the city and or its hirelings.

Taking an overview of the application where its very clear this is not applicable in this matter, In short the applicant seeks relief from existing rules and regulations for their own benefit(build more units than is allowed under the present set of statutes put in place by the city representees for the benefit of the communities to insure their quality of life and living. Its not your position to over rule these just for the financial benefit of an applicant. The applicant seeks in the neighborhood of twice as many rental units as regulated in every means, Sq Footage, Parking etc. etc, etc. we are not talking about a few ft here or a few less parking but at least double. The lack of oversight at the Garrison adjacent should be a call to back off making exceptions to standing regulations. How many excuses can the city make to insure the financial windfall for yet another greedy developer? Through the “menage” better known as the western gateway which was an instrument to satisfy the greed of these developers the west end is now the dead end for quality of life and living. Don't be soo smug to dismiss it as whats best for someone's else without the knowledge of what you have born will not soon Haught your sacred downtown. It's a set fact that the quality of urban life is very well determined by the ratio of rentals to home owners. The Western gateway has and will add thousands of rentals to a small town of just 5,000 citizens. It has eliminated self employed businesses vital to service our population needs. Taken the use and value of their properties without compensation contrary to the 4th amendment, put strains on the mechanisms of our city, public works police school's parks are diminished for formers citizens use. In Final, the relief sought by the applicant is available at their expense not the cities and citizens. They need more property, properly zoned for their purpose, its readably available in his area so its not

hardship they seek but a gift at the citizens and neighborhoods expense. This is not in your permissible authority.

Ms. Alison Ellicott – 130 West 8th Street

To the City of New Castle and Board of Adjustment regarding the proposed project at 427 W. 7th Street. I'm strongly opposed to this project given the housing density, increased traffic, aggravated flooding, contamination and destruction of nearby wetlands. It is my strong hope that the project will not be approved. It seems that this area just keeps getting worse.

Sara Hutchinson

In the past 20 years there have been three enormous building complexes in this town: Deemer's Landing, The Helm, and most recently The Garrison. The small town of New Castle cannot sustain any more developments of this size. Climate change and future flooding in a state with minimal sea level makes future development unwise and foolhardy. Please forbid it!

Lois Bart – 110 East 3rd Street

I am a long term resident of New Castle. I have seen many inconsistencies in what is approved in terms of development. I have also experienced many instances of something being built before I ever heard of it. For example, the Garrison Apartments. It was very disturbing to see all the landfill brought in to raise a wetland's height, in conflict with our concern for sea level rise. Now that it is finished, it seems that there is enough high density housing in that particular area, considering traffic which is frequently bad.

I am opposed to all of the variants requested in the application by Battery Fee Owners, LLC & JAKSN, LLC for the property located at 427 W. Seventh St. Four variances are requested as well as a request for a special exception to utilize the property as a mixed use multi-family residential - commercial development (which makes it sound like the sky's the limit!) One of the variances asked to raise the residential density of 10 units per acre to having 36 units, more than 3 times as many (more traffic & congestion.) To me it seems that the original restrictions of the property must have been established for good reason.

This application seems like the developers are almost asking for carte blanche.

Another issue of this public meeting is the timing. Why has an important planning meeting been scheduled 2 days before a major holiday when many NC residents are away or occupied with family? It seems like an attempt to sneak this application through without time for proper public input.

For the record I am opposed to all the requests in this application.

Dorsey Fiske – 26 East 3rd Street

I hope that the new Board of Adjustment, composed of residents with a vested interest in the welfare of the City, will reject this application out of hand. First of all, I'm shocked that Mayor Quaranta, the BOA chair, has appointed this meeting for December 22, three days before Christmas. Why are these outrageous requests by Battery Fee Owner, LLC, and JKSN, LLC, so urgent that they must be brought to the Board of Adjustment now, during the holidays, when most people have family responsibilities and won't be able to attend the meeting? Someone seems to be trying to push an unheard-of gift through for these developers with no oversight or studies. If these multiple variances to make major changes are granted, they are not beneficial for the City. They are solely to benefit the developers, who will make a bundle of money. The current zoning was applied in that area because its requirements are appropriate for the neighborhood, but the applicants are asking for a complete redo. They want smaller parking spaces, fewer parking spaces, **36** residential units per acre instead of **10**, a combined building footprint of an extra third-- and this is only a partial list of demands. Furthermore, it's possible the project could end up eventually as Section 8 housing, just what the City doesn't need. If these giveaways to the developer take place, what benefit will there be for the citizens? Nothing. At a minimum, there will be snarls of traffic and possible flooding, a bad deal for us and for the town, but a great deal for the developer!

Ripping our zoning to pieces for a developer's benefit is the last thing the City should promote; it will encourage other developers to try eviscerating the current zoning in other parts of town to increase their profits. As I've said in comments to Council and the PC, developers don't care about the City of New Castle. Once they've built and sold what they've produced, much of it possibly shoddy, they're going to skedaddle out of town and leave us to cope with the unfortunate results. That's what the builders of The Garrison, the next-door development, have done.

Please reject this application.

Schuyler Borton, 42 East 4th Street

Scheduling tonight's meeting in the midst of the major holidays is a sign of gross disrespect to all of us, and we are left to suffer the consequences of irresponsible proposals like the one at hand.

The city's recently updated Comprehensive Plan was carefully conceived, reviewed, approved, and deemed appropriate (less than 5 minutes ago); then why must it now be hastily modified to accommodate a private, get-rich-quick plan that, in the cold light of day, fails to benefit – and in fact promises to work to the detriment of – our established community, traffic safety, and above all, safety from irresponsible construction on an in proximity to our cherished, fragile wetlands.

Thirty-six residential units per acre instead of 10? No off-street loading and unloading? What?? What??

I believe, and I am not alone, that visions of profit from such a project cannot take precedence over the common good, which consists of – but is not limited to – protecting of our lands and our services, planning for our future safety, and fostering goodwill.

Faye Harbottle – 42 East 4th Street

I was surprised to see the proposed changes to the city zoning plan come up at this time when most of us are in the middle of Christmas and holiday stress. An issue as important as this, i.e., town planning of New Castle, that affects all residents of our lovely historic town should be given time for proper consideration.

Let's call for a continuation of this discussion, preferably after the New Year.

Mayor Quaranta noted that assembling the Board of Adjustment was challenging, and this project was discussed at town meetings and planning meetings. Mayor Quaranta conceded that it is a bit of an inconvenience, but noted there have been multiple ways to communicate concerns over several months.

(Stenographer's Note: Comments in from Ms. Beverly Ross, 615 Delaware Street #7, and Ms. Dorothy Colburn, East 2nd Street, were submitted via email but were not read at the meeting.)

Mayor Quaranta invited Mr. Tracey to respond to comments from the public.

Mr. Tracey opined that the public did not quite understand what the Applicant was asking for (*eviscerating the zoning code, 10 units per acre to 36 units per acre*) noting that the City Planner said this was an error in the Code. Additionally, the other variances are minor and internal to the site. Mr. Tracey stated his appreciation for Mr. Rogers' comments and his perspective of being supportive of the relief. He added that if one wants to redevelop sites that require being lifted out of the flood plain, cleanup of the site, and instituting stormwater quality controls, you need to have the density to make it work.

Mr. Tracey stated that, as Mr. Snowberger testified, this does not seem to be a "money grab" and they are hoping that it is not a money loss.

Mr. Tracey noted several comments had concerns about high density; however, this seems to be the very area where the City Code and the CP want to see these types of mixed- and higher-density-uses taking place. Mr. Tracey opined that what is being proposed is entirely consistent with the Zoning Code.

Regarding traffic, Mr. Tracey stated that they are confident that after AECOM's review of the traffic study, the LOS presented to the Board will be confirmed and the intersection will be determined to be at a passing level.

Mr. Tracey thanked the Board for its time.

A Motion to adjourn the Hearing and adjourn to the Business Meeting was made by Mr. Zorrer, seconded by Mr. Anuszewski, and unanimously carried.

At 8:50 p.m. Mayor Quaranta proposed a 5-minute break before the Business Meeting commenced. The Board reconvened at 8:56 p.m.

Business Meeting

Mayor Quaranta thanked the public for their comments, the Applicant for its presentation and the City Planner for his perspective. He asked that each of the Board members to share their perspective on the Special Exception and the Variances

Ms. McClelland stated that:

- The property is an eyesore in its existing state and this would be an improvement.
- The traffic is not just the 7th and Washington Street intersection; it is bad in the entire town from May through October. Ms. McClelland opined that the City needs to fix flooding and traffic before we add any more issues to the problem.
- She stated that the project would add a nice aesthetic to the area in the future but that she was not certain the City is prepared to make this huge step at this point.

Mr. Irwin stated that:

- He echoed Ms. McClelland's statements, noting that he would like to see something done with the property.
- He is concerned with the traffic.

Mr. Anuszewski stated that:

- He concurred that traffic is an issue, noting that Mr. Rogers stated he could provide more perspective in a few more days.
- He suggested that the matter be tabled until the Board gets the results from AECOM in order to make a better-informed decision.

Mr. Zorrer stated that:

- He had some concerns about the size. He opined that the Code should state how big the building can be and on how many acres of land; and how many residential units you can have per acre. The project is something he would like to see on the parcel, noting that if the project does not move forward the parcel will just sit.
- Traffic is an issue, but Mr. Zorrer opined that the additional traffic will not make the situation much worse than it already is.
- He would like to see more about the Traffic Study during high-density hours. Mr. Rogers stated that a Traffic Study will review intersections the jurisdiction feels will be impacted by the proposed development. It does not address the broader issues that the City faces with cut-through traffic. This area was identified as an area of concern in the WILMAPCO Plan because of the cut-through traffic and the conceptual recommendation in the Plan was to address the cut-through issue and did not address capacity. The

additional time AECOM would need to confirm the traffic data results will not address cut-through traffic.

Mayor Quaranta stated that:

- These are areas that have remained largely vacant, and the area is changing and that will add to some amount traffic; but there is a larger traffic issue in the community. The Mayor stated he is prepared to support the Special Exception, with the condition that AECOM has time to review and submit additional information on the Traffic Study.
- He expressed his concern with parking.
- He noted that studies show there is a lack of multi-family housing in the area, and opined that there will be increased interest in 1- and 2-bedroom apartments.
- The Mayor stated he would support the Special Exception.
- Regarding the variances, he would like to see if there are ways to find flexibility with parking, both the size and number of spots; and he supports the variance related to off-street loading/unloading, noting that those activities can be scheduled during off-peak hours.

Ms. McClelland concurred that off-street loading/unloading seems to be an internal problem and not something the Board needs to address. She thought there was going to be more retail involved in the project. She added that parking is a slight concern. Mr. Zorrer was also concerned with parking, but he felt that his concerns regarding the number and size of parking spaces were addressed satisfactorily.

Mr. Anuszewski expressed his concern about the wetlands and who will maintain those lands. He noted there is no guarantee that someone will take responsibility for the area. He suggested he would be in favor of the project as long as there is a condition that the area will be maintained. Mr. Zorrer asked who currently maintains the wetlands. Mayor Quaranta suggested that in the absence of finding someone to maintain the property, the developer would need to manage it.

Mr. Losco commented based on his experience with fragment parcels. Noting that the original developer could become defunct; the parcel would become unusable; taxes would accrue; and the City would end up maintaining it. He recommended that some type of a permanent solution is appropriate for a fragment land-locked parcel and should be strongly considered. Mr. Losco added that the easement document that was previously discussed includes a prohibition of further subdivision of this parcel, so extinguishing the easement would be required to permit this subdivision.

Mayor Quaranta polled the members and they unanimously stated they would approve the Special Exception.

Variance 1 - a variance from the maximum building footprint of 40,000 square feet to permit a project containing two (2) buildings with a combined building footprint of 52,273 square feet (§230-21.1.C(1)(a))

Mayor Quaranta stated he is concerned. He noted his understanding that every piece of ground and every project is different. He asked Mr. Losco to comment relative to setting a precedent. Mr. Losco stated that courts rely on precedents when making rulings, and different facts and circumstances apply to every piece of ground. If a precedent is granted in one case, it can be difficult to deny it in a similar case. He noted that there is some relevance to precedents but every parcel is unique and facts and circumstances are different and can change over time so you are not necessarily bound by a prior decision.

Relative to the wetlands, Mayor Quaranta stated his view that the developer owns it and should maintain it. He noted, however, that even if it is gifted it can come back to being the City's responsibility to provide oversight and maintenance. He suggested that the wetlands become part of the property.

Mayor Quaranta asked Mr. Losco to comment on what happens to the fragment parcel if the property is sold. Mr. Losco opined that the buyer will not want it, and there are no guarantees that the fragment will remain part of the property. He added that the easement has not yet been extinguished and there is still a prohibition against subdivision; and ultimately that would come before City Council for a decision. Mr. Losco said theoretically the Board could condition the grant of a Special Exception on the developer finding an adequate, responsible party who would commit to long-term ownership and maintenance of Lot A; however, because there would still be the matter of enforcing that condition he opined it may be better to have City Council make the decision. Mayor Quaranta concurred.

Mr. Zorrer asked what the purpose of the easement was. Mr. Losco stated that he cannot tell the origin of easement that was done 20+ years ago. Mr. Rogers opined that when the property was divided it was not known where utilities were that serviced each particular building and because cross-access was needed to get to each property and an easement was created for that purpose.

Mayor Quaranta suggested that the easement issue be turned over to the City Council. Mr. Losco stated that no special language in a Motion was necessary. Mayor Quaranta asked the members if they were comfortable having City Council resolve the easement matter. Ms. McClelland stated she wants to ensure that the wetlands are being taken care of. Messrs. Irwin, Anuszewski and Zorrer concurred.

Mayor Quaranta asked Mr. Losco what the Board could say. Mr. Losco stated that what he has heard is that the Board members are concerned with traffic and that the City Planner has inadequate information to give the Board a recommendation and that the more problematic issue was traffic during the summer months. Mr. Losco was not sure when the traffic counts were done and agreed that was a valid consideration. He stated that Mr. Rogers and his engineer will take that into account. Mr. Losco stated that the Board could make a motion to continue the matter for 30 days which would give the City Planner the necessary time to digest the traffic data, prepare a recommendation for the Board to discuss, and give time to re-notice a continued hearing so that the Board can make a final decision. Ms. McClelland stated that this is a huge

project and she did not want to rush through the process. Mr. Losco reminded the Board members that if the matter is continued, the Board members must adhere to all FOIA rules and the matter should not be discussed outside a public meeting.

Mayor Quaranta brought the discussion back to variance 1 and asked the Board members their thoughts for the variance for 52,273 square feet.

Mr. Anuszewski stated that he knows the area and he thinks the request is reasonable.

Mr. Zorrer stated that he thinks the request is reasonable. He added that he would like to see the Code revised so this does not happen in the future.

Ms. McClelland stated that it is 30%, and after consideration, she thinks the request is reasonable.

Mr. Irwin stated that the request is reasonable.

Variance 2 – a variance from the minimum area for a parking space of 9'x18' to permit a project containing 55 (24%) compact parking spaces each having an area of 8'x16' (§230-1.B).

Variance 3 – a variance from the required 237 shared parking spaces to permit a project containing 228 shared parking spaces (§230-28.A(15)(a))

Mr. Irwin stated it is a reasonable request based on the nature of the property and he is inclined to approve the variances.

Ms. McClelland stated that is an internal issue.

Mr. Anuszewski stated that she thinks this is a reasonable request.

Mr. Zorrer stated he is still concerned because of the number of 1-bedroom apartments.

Variance 4 – a variance from the required one (1) off-street loading space to permit a project containing no off-street loading spaces (§230.28.C)

Mayor Quaranta stated his only concern is what happens if the current lessee leaves and another lessee comes in that would require off-street loading/unloading. It was noted that there is no parking on the street, and Mr. Losco stated that is a condition the Board could make. Mr. Anuszewski noted that on other streets delivery trucks simply block traffic during loading/unloading. Mayor Quaranta suggested that a condition of absolutely no on-street parking be made.

Mayor Quaranta asked the Board if Variance 4 would be acceptable with the condition that there is no on-street parking. The members stated unanimously that it would be acceptable with the condition that there will be no on-street parking. Mr. Losco noted that there is a fining mechanism in the Code for violation of conditions the Board of Adjustment imposes on variances.

Variance 5 – a variance from the permitted residential density of 10 residential units per acre within a mixed use project to permit a mixed use project having 36 residential units per acre - 152 total residential units (§230-21.1.B(2))

Mayor Quaranta stated that the studio and 1-bedroom units do not concern him. He noted that 100% occupancy is seldom the outcome, and because of the mix of residential units and single vs multi-family units in the building he supports the variance.

Mr. Zorrer stated he supports the variance. He suggested that the Code should be clarified on this as well. Mayor Quaranta explained the theory behind residential density in the Code.

Mr. Irwin stated he is fine with the variance.

Ms. McClelland stated that she is not OK, stating she would rather see 26 units per acre and larger units, noting that the requested square footage vs the number of units seems off.

Mr. Anuszewski stated the variance was fine as it is.

Mayor Quaranta asked if the Board wanted to continue the matter for a few weeks or vote on the matter with conditions. Mayor Quaranta stated his view that they could vote with conditions and pending a successful outcome of AECOM's review of the Traffic Study.

Mr. Losco reviewed the Kwik Check criteria for variances.

1. You must consider the nature of the zone in which the property lies.
2. You must consider the character of the immediate vicinity and the uses contained therein.
3. You must consider whether if the restriction upon the Applicant's property were removed such removal would seriously affect neighboring property and uses.
4. You must consider whether if the restriction is not removed the restriction would create exceptional practical difficulty for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is permitted under the Zoning Ordinance.

Mr. Losco explained that exceptional practical difficulty relates to the nature of the property, and there would have to be something unique about the size or shape of the lot, wetlands, etc. The ability to make reasonable improvements to one's property in an economically satisfactory

fashion is a consideration; so the cost involved is something the Board can consider when making this decision. The Kwik Check test must be applied to each variance request.

Mr. Losco explained that if there is an appeal, the appeal is on the record. The record is what has been submitted into the record this evening: testimony, public comment, and comments from the Board, and on appeal that is all the judge has to evaluate, so the members must articulate the reasons for their decision.

Mr. Losco reviewed the criteria for Special Exceptions (§230.57.2):

1. Consider the suitability of the property for the use desired. Assure itself that the proposal is consistent with the spirit, purpose, and intent of this chapter, the Comprehensive Plan, and other relevant plans.
2. Determine that the proposal will not substantially injure or detract from the use of neighboring property or from the character of the neighborhood and that the use of the adjacent property is adequately safeguarded.
3. Determine that the proposal will serve the best interests of the City, the convenience of the community, and benefit the public welfare.
4. Consider the effect of the proposal upon the public services and facilities, such as public water, sewers, police and fire protection, and public schools.
5. Consider the probable effects upon highway traffic and pedestrian movements, and assure adequate access and circulation arrangements in order to protect major roads from undue congestion and hazard.
6. Be guided in its decision by sound standards of subdivision and land development practice where applicable.
7. The Board may prescribe conditions and safeguards.

Mr. Losco noted that a special exception is applied for a use that is permitted by Code subject to the Board of Adjustment review and approval, with or without conditions. With a variance the Applicant is asking to do something that the Code prohibits.

Mayor Quaranta noted that Mr. Rogers testified that AECOM supports the Special Exception and the variances, and the PC found the Special Exception to be consistent with the Comprehensive Plan.

Special exception to utilize the property as a mixed use multi-family residential – commercial development.

A Motion was made by Mr. Irwin to approve the special exception to utilize the property as a mixed use multi-family residential – commercial development conditioned upon AECOM's review of the Traffic data and confirming that the 7th Street and Washington Street intersection currently operates and will continue to operate at a Level of Service D or better to the build-out

year of the project. If this condition cannot be met, the Applicant shall submit a Traffic Impact Study for review by DelDOT as part of the Site Plan submission of the Planning Commission. The Motion was seconded by Mr. Anuszewski.

The Motion passed with a vote of 5 in favor and none opposed.

Mayor Quaranta stated his support for the special exception because the Applicant's Plan is consistent with the Comprehensive Plan; it is consistent with other similar projects in the surrounding neighborhood; and based on other multi-family projects of similar size Mayor Quaranta is unaware of any stress, financial hardship or challenges to the City or its services as a result of those similar projects. Mayor Quaranta stated that for those reasons he supports the special exception.

Mr. Zorrer stated that he supports the special exception because it complies with the Comprehensive Plan; it is consistent with the uses of the land around it; the proposal fits with the immediate area; neighbors who testified support the project; it will not negatively impact the neighbors; it will benefit the City; and it is an area that will not otherwise be developed.

Mr. Anuszewski stated that he supports the special exception because it is good for the City; it will not hurt the neighborhood; there are multi-use apartment buildings in the area; it fits in with what the Comprehensive Plan is trying to accomplish for the area; and conditions have been made for traffic.

Mr. Irwin stated he supports the special exception with conditions for traffic; it fits in with the Comprehensive Plan; it is good for the City; per testimony it does not appear to have any negative impact on City services; and it addresses a section of land that has been abandoned and is an eyesore.

Ms. McClelland stated voted "yes" on the special exception because it will be good for the community; aesthetically it fits in with the Downtown Gateway vision; she is comfortable having the traffic study reviewed even if it's after the fact; and it is positive for the area because the site has been an eyesore.

Variance 1 - a variance from the maximum building footprint of 40,000 square feet to permit a project containing two (2) buildings with a combined building footprint of 52,273 square feet.

Ms. McClelland stated she supports variance 1 because not approving it might inhibit the project from being competitive with the neighboring multi-family apartment, The Garrison, and that size wise it will be fine in the area.

A Motion was made by Mr. Anuszewski to approve a variance from the maximum building footprint of 40,000 square feet to permit a project containing two (2) buildings with a combined building footprint of 52,273 square feet. The Motion was seconded by Mr. Irwin.

Ms. McClelland voted in favor of the motion on variance 1, stating that the Board not approving it could cause the business to not be competitive.

Mr. Irwin voted in favor of the motion, citing the unique character of the parcel; that it aligns with the character of the community; and the inability to use the parcel without the variance.

Mayor Quaranta voted in favor of the motion on variance 1, stating that the parcel presents unique characteristics and challenges due to its physical configuration; the design and aesthetic is consistent with other parts of the community; and it fulfills the vision of the Comprehensive Plan.

Mr. Anuszewski voted in favor the motion on variance 1, stating that it fits in with the character of other buildings in the area; it will be good for the City; and it fits the Comprehensive Plan for that area.

Mr. Zorrer voted in favor of the motion on variance 1, stating the project fits with the nature and intent of the DG Zone and the Comprehensive Plan; the proposal suits the immediate area; the apartments next to it are high-density; there should be little impact on the neighboring properties; and it will be good for the community.

The motion passed with a vote of 5 in favor and none opposed.

Variance 2 – a variance from the minimum area for a parking space of 9'x18' to permit a project containing 55 (24%) compact parking spaces each having an area of 8'x16'.

A motion was made by Mr. Zorrer to approve variance 2, a variance from the minimum area for a parking space of 9'x18' to permit a project containing 55 (24%) compact parking spaces each having an area of 8'x16'. The motion was seconded by Mr. Irwin.

Mr. Zorrer stated that 30% of cars being sold today are compact and that is in line with the percentage of reduce-size parking spaces being proposed.

Mr. Losco reminded the Board that the major test for an area variance is exceptional practical difficulty, which is something unique with the property.

Mr. Zorrer stated that the Applicant needs to shrink the size of 55 parking spaces to accommodate a sufficient number of parking spaces based on the number of units they are trying to construct.

Mr. Anuszewski concurred, stating it is a good idea. He noted that cars, especially EVs, are getting smaller; it shouldn't cause a problem; and having 55 reduced-size spaces is fine.

Mayor Quaranta stated he is voting in favor of the motion on variance 2 because of the unique characteristics of the property and the constraints placed on the Applicant to meet the ratios required by the City; and to accommodate an adequate number of parking spots for tenants and visitors because of the configuration of the property and the density that is contemplated.

Mr. Irwin stated he supports variance 2 because of the unique nature of the property and the need to condense the number of parking spots. He does not believe that the smaller-size spaces will have a serious effect for the community, and it presents a practical difficulty for the Applicant if they were to have all full-size spaces.

Ms. McClelland stated she approves variance 2 because the unique footprint of the way they have to curve around there in the back would present an exceptional practical difficulty not to have the smaller-size spaces.

The motion on variance 2 passed with a vote of 5 in favor and none opposed.

Variance 3 – a variance from the required 237 shared parking spaces to permit a project containing 228 shared parking spaces.

A motion was made by Mr. Irwin to approve variance 3, a variance from the required 237 shared parking spaces to permit a project containing 228 shared parking spaces. The motion was seconded by Ms. McClelland.

Mayor Quaranta stated he supports variance 3 because in the nature of the number of units contemplated and the unique characteristics of the property the blend of 1-bedroom units, the necessity to have 237 shared parking spaces is not justified, and he stated 228 spaces would be sufficient.

Mr. Anuszewski stated he approves variance 3 because of the size and character of the building and based on the number of studio and 1-bedroom apartments it should be enough to have 228 parking spaces instead of 237; and because of the size and character of the building.

Mr. Zorrer stated he approves variance 3 because of the characteristics of the land and the property that not approving nine less spaces would be a burden or hardship especially because of the mix of the studio and 1-bedroom units, and not as many spaces should be needed.

Mr. Irwin stated he approves variance 3 because of the unique characteristics of the property and the number of 1-bedroom and studio units.

Ms. McClelland stated she approves variance 3, stating that because of the unique footprint of the property it is necessary to avoid an exceptional practical difficulty, and it is maintaining the character of the immediate area.

The Motion on variance 3 passed with a vote of 5 in favor and none opposed.

Variance 4 – a variance from the required one (1) off-street loading space to permit a project containing no off-street loading spaces.

A motion was made by Mr. Irwin to consider a variance from the required one (1) off-street loading space to permit a project containing no off-street loading spaces.

Mr. Losco stated that Mr. Irwin’s motion should be to approve or reject, and not to consider the variance. Mr. Irwin amended his Motion to be:

A motion was made by Mr. Irwin to approve a variance from the required one (1) off-street loading space to permit a project containing no off-street loading spaces. The motion was seconded by Mr. Zorrer.

Mayor Quaranta asked Mr. Irwin if he would amend his motion to include a condition that there be a prohibition of on-street loading and unloading that would be enforceable as a condition of the Board and under the City Code.

Mr. Irwin amended his motion to be:

A motion was made by Mr. Irwin to approve a variance from the required one (1) off-street loading space to permit a project containing no off-street loading spaces conditioned that there be a prohibition of on-street loading and unloading that would be enforceable as a condition of the Board and under the City Code. The motion was seconded by Mr. Zorrer.

Mayor Quaranta stated he supports the amended motion on variance 4 because the property does present some unique challenges. While the Applicant’s plan is consistent with the Comprehensive Plan there is a requirement in the City Code for mixed use that includes a commercial tenant. The Applicant testified that they do not believe the tenant will have any hardship without a dedicated off-street loading space; however, it is important for the City to protect the streets and the traffic flows and he stated he supports the variance with the condition that no on-street loading/unloading is permitted.

Mr. Anuszewski stated that he approves the amended motion on variance 4 because to have on-street unloading would be dangerous for residents and people traveling down 7th Street, and based on the uniqueness of the property they can handle loading and unloading on their property.

Mr. Zorrer stated that he approves the amended motion on variance 4 because the tenant believes he can work around the requirement and it will not affect the nature of the property or the people around it, and as long as the condition of no on-street parking is included and loading/unloading occurs on the property.

Mr. Irwin stated he approves the amended motion on variance 4 due to the unique challenges that are presented by this property; the developers have seemed to have worked through a solution to

this by creating space inside the property for loading and unloading; he does not think the variance would adversely impact the community or vehicles on public streets; and the condition has highlighted that.

Ms. McClelland stated she approves the amended motion on variance 4 because she does not feel it will have a negative impact on the community or the tenants and the Applicant maintains they can handle the situation.

The motion passed with a vote of 5 in favor and none opposed.

Variance 5 – a variance from the permitted residential density of 10 residential units per acre within a mixed use project to permit a mixed use project having 36 residential units per acre - 152 total residential units.

A motion to was made by Mr. Anuszewski to approve a variance from the permitted residential density of 10 residential units per acre within a mixed use project to permit a mixed use project having 36 residential units per acre - 152 total residential units. The motion was seconded by Mr. Irwin.

Mr. Zorrer asked if there is a way for the Applicant to decrease the number of units per acre and still make the same amount of money. Mr. Zorrer stated he votes no on variance 5, stating that 36 residential units per acre pretty tight for the area suggested 26 residential units per acre. He stated that he would like to see some kind of consideration to see what can be done to reduce the number of total residential units to make the project less dense. He stated it will impact the area, the traffic, and it may solve some parking issues.

Mr. Irwin clarified that Mr. Zorrer is suggesting 26 residential units per acre.

Mr. Irwin stated he votes to approve variance 5 because of the unique character and nature of the property. The developer testified as to the number of spaces, how the project will be configured and how it will be supported with 1-bedroom and studio apartments. Mr. Irwin also stated that he has also heard about the challenges and feels that there is a challenge to make this practical from a business standpoint.

Ms. McClelland stated she votes no on variance 5, stating she would be more comfortable if there could be an amendment to the motion with a lower density number. She stated she has concerns the area variance standard is one of exceptional practical difficulty as it affects the bulk density of the area.

Mayor Quaranta asked if Ms. McClelland wished to ask Mr. Anuszewski to amend his motion. Mr. Losco stated that the Board is in the process of voting and an amendment cannot be made to a motion on the floor. He added that another motion can be made after voting has concluded on the motion on the floor.

Mr. Anuszewski stated he votes in favor of variance 5, because the density is not spread across the acreage but is going up and there will be plenty of people in and out of the property. Mr. Anuszewski added that we want to make sure that the Applicant can make a profit and will continue with the project otherwise we may not get anyone to develop the site.

Mayor Quaranta stated he votes to approve variance 5, because he does not have the benefit of the financials and that he feels the entirety of the project is based on a certain number of units.

The motion passed with a vote of three in favor and two opposed.

There being no further business to discuss, Mayor Quaranta called for a motion to adjourn.

A motion to adjourn the meeting was made and seconded. The motion was unanimously approved and the meeting adjourned at 10:17 p.m.

Respectfully submitted,

Kathleen R. Weirich
Stenographer