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**Jag-Tech LLC dba Midland Park Food Mart – 184 Godwin Avenue – BL 17 LT 9.01** – Application has been withdrawn by the applicant on 10/11/23.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

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	3 IN THE MATTER OF: ) TRANSCRIPT OF	6	Mr. Formicola Vice Chairman Papapietro	20 23
	4 ) APPLICATION OF ) PROCEEDING	7		
	5 MHF MIDLAND PARK, LLC ) TACO BELL - )	· ·	SUMMATIONS	
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	9 LES ANDERSON, CHAIRMAN			
	10 NICK PAPAPIETRO, VICE CHAIRMAN	11		
	11 RICHARD FORMICOLA, SECRETARY	12	ΕΧΗΙΒΙΤ S	
	12 DAVID BARLOW, MEMBER	13	NO. DESCRIPTION	IDENT/EVID
	13 JAMES CAPALBO, MEMBER	14	A-15 Transcript, Dated September 23, 2021	74
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	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C. 22 CERTIFIED COURT REPORTERS			
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	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C. 201-641-1812			
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1	MS. HARMON: Mr. Eliya?	1	what need to consider.
2	MR. ELIYA: Here.	2	So just to refresh everybody's memory
3	MS. HARMON: Mr. Capalbo?	3	I'm sure you have not forgotten but this
4	MR. CAPALBO: Here.	4	application is for use variance relief pursuant to
5	MS. HARMON: Mr. Anderson?	5	N.J.S.A. 40:55D-70D(1) for a principal use not
6	CHAIRMAN ANDERSON: Here.	6	permitted in the zoning district.
7	Public hearings, I'm advised Jag Tech	7	The application specifically is for a
8	has been withdrawn. Okay.	8	drive-through restaurant. So the use variance isn't
9	So our only public hearing tonight is	9	for the drive-through and it isn't for the
10	Taco Bell.	10	restaurant; it's for a combination thereof of a
11	Mr. Whitaker, do you want to enter your	11	drive-through restaurant.
12	appearance?	12	In order to grant a D(1) use variance,
13	MR. WHITAKER: Certainly.	13	the board needs to consider both the positive and the
14	Good evening, Mr. Chairman, Members of	14	negative criteria.
15	the Board, for the record, Bruce Whitaker from the	15	With the positive criteria, the
16	firm of McDonnell & Whitaker representing the	16	applicant needs to demonstrate that there are special
17	applicant, MHF Midland Park, LLC.	17	reasons which exist for the granting of the variance,
18	CHAIRMAN ANDERSON: Yeah, go ahead.	18	and that the granting of the variance will further
19	Enter your appearance.	19	the purposes of Municipal Land Use Law.
20	MS. RIZZUTO: Good evening, Anne Marie	20	On the flip side of that with the
21	Rizzuto from Weiner Law Group on behalf of the	21	negative criteria, the applicant needs to demonstrate
22	objector, Burger Barn.	22	there will be no substantial detriment to the public
23	CHAIRMAN ANDERSON: Okay.	23	good and no substantial impairment to the intent of
24 25	I know you're here to give us your	24	the zone plan.
25	summation.	25	Regardless of one's opinions on Taco
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C. 201-641-1812		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C. 201-641-1812
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	9		11
1	is particularly suitable for that proposed use. And	1	clear that you should be making zoning decisions
2	that's what we're really looking at with this	2	based on an ordinance rather than a variance.
3	application, particular suitability.	3	So when you examine the negative
4	And particular suitability you can	4	criteria, you need to carefully consider the extent
5	think of as twofold. You can look at particular	5	to which granting the variance would constitute what
6	suitability as to why the location of the site within	6	they call an arrogation of the governing body. That
7	the borough is particularly suited to the use despite	7	is, are you usurping the power of the governing body?
8	the underlying zoning. You can also look at what	8	That brings us to the question which
9	unique characteristics of the site make it	9	has been discussed at the beginning of this hearing
10	particularly appropriate for that proposed use. And	10	process and was discussed by both planners, Order
11	the site doesn't necessarily need to be uniquely	11	Number 19:21, which was adopted by the Council on
			· ·
12	suited for the use. That is to say, it does not need	12	October 28, 2021, which specifically prohibited
13	to be the only site available for that use. It needs	13	drive-through restaurants.
14	to be particularly suited.	14	There was a lot of discussion by the
15	I want to take a step back even further	15	board and by the planners as to why that ordinance
16	a little bit to talk about planning and zoning in	16	was developed.
17	general.	17	To me, the intent of the ordinance is
18	Within the planning and zoning world,	18	inherent in the way the ordinance was written. It
19	you typically have three bodies. You have the	19	was intended to prohibit drive-through restaurants in
20	planning board; you have the zoning board; and you	20	your B-3 District, as well as your B-1 District. B-1
21	have the governing body.	21	District.
22	The planning board, as its name	22	MS. RIZZUTO: B-1 and 3.
23	implies, is responsible for establishing the planning	23	MR. NOVAK: B-1 and 3.
24	vision through the development of a Master Plan,	24	Thank you.
25	which is a comprehensive, long-term strategic	25	So there's been a lot of discussion
25		25	
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
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1 2	development guide which is intended to guide the growth and development of the community. It's	1 2	about what the rationale or the justification for that was, what the thought process was of the
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1	the neighborhood, since the adoption of the last	1	sure Mr. Whitaker probably has that in his summation
2	ordinance, or if there are needs or factors of the	2	as well but I believe he brought up Purpose A,
3	community which changed since the ordinance was	3	which is what you brought up, general welfare. There
4	adopted.	4	was also Purpose C, which is light, air and open
5	So to me, that's the most important	5	space, as well as Purpose I, which is promoting a
6	thing this board should focus on in their	6	desirable visual element.
7	deliberations, whether or not you feel that there's	7	So there were other purposes of zoning
8	been a factual justification for the granting of the	8	that were bought up for the special reasons by the
9	variance after the adoption of this ordinance.	9	applicant's planner, not just the general welfare.
10	That's an essential part to proving the negative	10	Your question as to how the approval of
11	criteria with a D(1) use variance.	11	a drive-through restaurant with fast food
12	Does anybody have any questions for me?	12	drive-through restaurant essentially promotes the
13	CHAIRMAN ANDERSON: Yes, I do.	13	general welfare.
14	MR. NOVAK: Yes.	14	Typically when we look at what promotes
15	CHAIRMAN ANDERSON: What weight can we	15	the general welfare, one of the first things that I
16	attribute to the fact that this is not just a use	16	do is look at what does your Master Plan say, what
17	that was not included as permissible, but it was	17	does your re-examination report say.
18	actually specifically prohibited?	18	The applicant's planner did discuss
19	In other words, we often get use	19	some of the goals of the Master Plan Re-examination
20	variance requests where, as you say, use the health	20	Report. Goal 1 was to maintain the existing areas of
21	one as an example, they come and it's not a permitted	21	visibility; Goal 2, which was environmental
22	use, so then automatically it's a prohibited use.	22	protection; and Goal 6, which was to reduce driveway
23	Can we establish any weight to the fact	23	movements onto Godwin Avenue.
24	that this is specifically prohibited as opposed to	24	So there was some discussion of our
25	not just not included?	25	Master Plan and how the promotion of those Master
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
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	17		19
1	the board that's not permitted, but whatever it is,	1	site, not only could it accommodate the shorter
2	it the steep slope doesn't impact it, and it's	2	drive-through bank queue or the shorter pharmacy bank
3	more suitable for that site than a permitted use.	3	queue, it could also accommodate the longer
4	Am I completely out of out of touch,	4	restaurant drive-through.
5	or is there any validity to that?	5	That's what I took away from that.
6	MR. NOVAK: I think we're saying the	6	CHAIRMAN ANDERSON: I missed that.
7	same thing, that there needs to be something about	7	MS. HERLIHY: That's how they tried to
8	that site that is not necessarily solely unique.	8	do that.
9	It does not need to be solely unique.	9	MR. NOVAK: To add onto that too, there
10	That was something that was discussed in the <u>Himeji</u>	10	was also a lot of discussion, especially at the last
11	case. Something about that site that lends itself to	11	meeting, regarding the menu board being a component
12	being suitable specifically for that type of use.	12	of a drive-through restaurant as well, and the
13	CHAIRMAN ANDERSON: Right.	13	placement of that menu board, potential sites and
14	I know I said that was the last	14	sounds.
15	question, but now I have another one.	15	So that would be another unique aspect.
16	MR. NOVAK: Okay.	16	MS. HERLIHY: The ordinance doesn't say
17	CHAIRMAN ANDERSON: Again, when the	17	drive-through restaurants are prohibited because we
18	applicant's planner was testifying, I was trying to	18	don't like longer queues, and menu boards, and
19	emphasis the fact that all of the testimony from the	19	speakers, and lights and noise.
20	planner and the engineer as far as how this site can	20	But Mr. Whitaker is trying to tell you
21	accommodate a drive-through, okay, was not to me	21	that that's what comes along with a drive-through
22	particularly important because a drive-through is	22	restaurant and that's what people find objectionable
23	permitted. It's not the drive-through that's the	23	about a drive-through restaurant. He's trying to
24	problem. The problem is it's a restaurant	24	tell you why all of those things are not of concern
25	drive-through that's not permitted.	25	here, why this site can accommodate those things
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
	18		20
1	And so it appears to me what we have to	1	better than, perhaps, other sites. That was my take
	find is there's some special reason why a restaurant	2	away Maybe I missed it. I just says at un
2		_	away. Maybe I missed it. I just caught up.
2 3	drive-through as opposed to any other kind of	3	CHAIRMAN ANDERSON: Before you, unless
	drive-through as opposed to any other kind of drive-through build a shoe repair or a Columbia		
3	drive-through as opposed to any other kind of drive-through build a shoe repair or a Columbia Bank or whatever, they wouldn't even be here. They'd	3	CHAIRMAN ANDERSON: Before you, unless
3 4	drive-through as opposed to any other kind of drive-through build a shoe repair or a Columbia Bank or whatever, they wouldn't even be here. They'd be at the planning board for a site plan, correct?	3 4	CHAIRMAN ANDERSON: Before you, unless I was going to have other board members ask
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1	and you can tell me if this is wrong when you've met	1	backyard I'm sorry 6 feet in a backyard, but
2	or when talked it's a general guideline, because	2	they could be 4 feet in a front yard.
3	if it was set in stone, am I correct and this is	3	But there may be some extenuating
4	what they don't want, and really it should never be	4	circumstances where a property is a corner lot or a
5	here because it's like a done deal. That's what	5	property is right next to a commercial business where
6	they want.	6	a 6-foot fence in the front yard might help things.
7	Anything that we do, pretty much, this	7	So there may be unique aspects of a
8	board, it's always an exception because they make a	8	specific piece of property which would or could
9	general assumption, we don't want something or we	9	warrant the granting of a variance. And that's what
10	don't want a fence over 6 foot, 7 foot, but if you	10	this board hears all the time, whether it's a $D(1)$
11	can show us a good reason, then you can that 10.	11	variance, or sometimes when it's something as simple
12	That's what we're here for.	12	as a bulk variance for a fence.
13	MR. NOVAK: Yeah.	13	MR. FORMICOLA: Okay, thank you.
14	Two responses to that.	14	VICE CHAIRMAN PAPAPIETRO: A question
15	The first would be, you are correct.	15	for you?
		15	
16	While Master Plans can offer a lot of specificity		MR. NOVAK: We're going down the line,
17	and I've had to write some of those Master Plans with	17	yes.
18	excruciating specificity they are supposed to	18	VICE CHAIRMAN PAPAPIETRO: Going down
19	serve as the basis for zoning. That means an	19	the line, when this ordinance was passed back in
20	ordinance is supposed to coincide with the vision of	20	2021, was your firm involved in part of this
21	a Master Plan. And if it doesn't	21	particular ordinance?
22	For example, say if a Master Plan makes	22	MR. NOVAK: We were not, no.
23	a recommendation that we don't want gas stations in a	23	VICE CHAIRMAN PAPAPIETRO: And the
24	residential zone, and the governing body decides we	24	reason why I'm saying that, then, you talked about
25	want to adopt and introduce an ordinance that says we	25	the Master Plan for the town. And the way this is
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
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1	want to make gas stations permitted in residential	1	worded, the objective of this ordinance is to
2	zones, that ordinance would get referred to the	2	eliminate drive-throughs for restaurants in general,
3	planning board. The planning board would say, no,	3	not other businesses.
4	this is inconsistent with our Master Plan. That goes	4	So it specifically indicates
5	back to the Council.	5	restaurants for this particular prohibition. And I'm
6	While on a very theoretical basis, that	6	just curious if you guys were a part of that, but you
7	ordinance should complement the Master Plan, the	7	weren't.
8	Municipal Land Use Law still gives the power to the	8	MR. NOVAK: We were not, no.
9	governing body to say, you know what even though	9	VICE CHAIRMAN PAPAPIETRO: So this is
10	it doesn't match up and it's inconsistent, we're	10	something that the governing body put into place and
11	still going to adopt this ordinance. Now, they would	11	then was approved, and that's why we're here now.
12	have to do that with a full majority of their	12	CHAIRMAN ANDERSON: Anybody else?
13	membership.	13	MR. FORMICOLA: Just to because that
14	But the governing body still has the	14	I understand what you're saying about the
15	power to adopt ordinances which are inconsistent with	15	governing body, but the problem I have with that is,
16	the Master Plan, provided those records reasons	16	when that went into play, we all know it's because of
17	are put in the record, that was the first I think	10	Starbucks when Starbucks went in.
18	the first part of your question.	18	VICE CHAIRMAN PAPAPIETRO: We don't
19		10	know that for sure.
	The second part was the granting of the	20	
20 21	variance. And, yes, so the way zoning is typically	20	MR. FORMICOLA: You know, I'm just
	designed and you brought up the example of fences.		saying there was a lot of complaints back and forth.
22	Zoning is designed usually generally for a whole	22	And they didn't have anything in the area.
23	municipality, right.	23	But what I'm just saying is that they
24	So in a municipality, you might have a	24	put a lot of things in play. That's why we're here
25	regulation that says fences need to be 4 feet in a	25	because that doesn't necessarily mean all the time
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
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	25		27
1	that, you know, okay, so there will never be any food	1	MR. WHITAKER: One of the last
2	drive-in food places in any of those districts ever	2	hypotheticals you used, you stated that the governing
3	again.	3	body could create an ordinance that's contrary to the
4	And, you know, it's not necessarily	4	Master Plan, and the planning board could tell them
5	you know what I mean.	5	that.
6	VICE CHAIRMAN PAPAPIETRO: Oh, yeah.	6	And on the basis of that, you stated
7	MR. FORMICOLA: I'm just I'm playing	7	that the governing body could still pass it by a
8	the devil's advocate on that.	8	super majority, and they would have to put their
9	So I'm just saying each case is	9	reasons on the record, the purpose behind insisting
10	different. If there was going to be some wild case	10	on that ordinance.
11	going in there, you know, crazy stuff, lights, disco,	11	So I'm going to emphasis the word
12	whatever it may be, you'd be like, you know.	12	"purpose," P-U-R-P-O-S-E, okay?
13	VICE CHAIRMAN PAPAPIETRO: A disco,	13	In your analysis and review as a
14	you're showing your age.	14	planner and you are very cognizant and familiar
15	MR. FORMICOLA: You know, it would be	15	with the Master Plan in Midland Park there is no
16	it would be crazy. You would say, well, it's	16	provision in the Master Plan that says drive-through
17	going to be a detriment to everybody for that. But	17	restaurants should not be encouraged or should not be
18	on this something like, you know I'm not saying	18	allowed?
19	this particular, but in anything that whatever,	19	MR. NOVAK: I would agree with that
20	there might be an exception to that. So I'm just	20	statement.
21	I'm just saying the Council put in a lot of things	21	MR. WHITAKER: In connection with
22	they voted, whether it be unanimously or not. That's	22	and we talked about this briefly in your last
23	another problem is that not everybody agrees with	23	testimony, you've already confirmed that you were not
24	everything at the time.	24	involved as a planner in looking at this ordinance
25	VICE CHAIRMAN PAPAPIETRO: I hear what	25	and maybe providing the purposes or reasons why for
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
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substantial detriment to the intent and nurness of		31
substantial detriment to the intent and purpose of	1	MR. NOVAK: Nothing that I saw in the
the zoning ordinance.	2	transcripts.
The word "purpose" is in that sentence,	3	I'm unaware if there was a letter that
which presupposes that there's a purpose to the	4	was later submitted, but nothing in the transcripts.
zoning ordinance. So as a correct.	5	MR. WHITAKER: And let's go before the
MR. NOVAK: Yes.	6	Planning Board is out.
MR. WHITAKER: So as a planner, in your	7	You looked at the transcript regarding
analysis of a use variance, or in your analysis of	8	the introduction of this ordinance again, not in
looking at an ordinance, you want to understand, do	9	criticism of the Mayor and Council but that
you not, what the underlying purpose is?	10	transcript and what went on.
MR. NOVAK: It is often helpful to	11	MR. NOVAK: Yes.
understand what the underlying purpose of that zoning	12	MR. WHITAKER: You saw some people that
regulation is, yes.	13	night didn't even have it yet; they had to run out
MR. WHITAKER: And in your analysis	14	and photocopy it, when you read that transcript.
and you've had the opportunity to review the	15	MR. NOVAK: Yes.
background of this you haven't seen any empirical	16	MR. WHITAKER: And you saw that when
data, any written data, that indicates what the	17	they got it, they weren't quite sure what it was all
purpose was in the introduction and adoption of this	18	about.
ordinance?	19	MR. NOVAK: Yes.
MR. NOVAK: That is correct.	20	MR. WHITAKER: And then you saw the
MR. WHITAKER: In fact, if you look at	21	minutes of the meeting in which that ordinance was
the Planning Board and this is not in criticism	22	then adopted?
but if you look at the Planning Board, it was	23	MR. NOVAK: Yes.
basically a couple of comments made, hey, we have to	24	MR. WHITAKER: The Mayor called the
pass this, let's adopt it, and we'll say that it	25	meeting to order for the adoption of the ordinance,
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30		32
meets the requirements of the Master Plan?	1	asked for any comments from the public.
MR. NOVAK: So that is based on the	2	The minutes reflect there were none.
transcript that had been forwarded over.	3	But there was no comments at that point from any of
MR. WHITAKER: Right.	4	the Council Members or Mayor saying we're passing
MR. NOVAK: I had not listened to a	5	this ordinance because.
recording of that meeting.	6	MR. NOVAK: Correct.
MR. WHITAKER: But the transcript, but	7	MR. WHITAKER: The transcript of
you rely on transcripts?	8	introduction, the transcript from the Planning Board,
MR. NOVAK: Oh, yeah, absolutely, yes.	9	the minutes from the Mayor and Council, did you see
And the transcript was very short.	10	in any of those documents the purpose behind passing
And the transcript was very short. MR. WHITAKER: No reasons or purposes	11	this ordinance?
MR. WHITAKER: No reasons or purposes given there.	11 12	
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	33		35
1	MR. WHITAKER: I want to move them into	1	chapter, are deemed to be prohibited."
2	evidence, yes.	2	MR. WHITAKER: Then, as we did this
3	MS. HERLIHY: Okay. So then you're	3	exercise briefly the last time, if you go down to
4	going to then allow the objector's counsel	4	34-13.13, it says:
5	MR. WHITAKER: Yeah, of course.	5	"Drive-through, drive-up windows, and
6	Absolutely. Yeah, we've opened it again. Okay.	6	outdoor ordering locations."
7	MS. HERLIHY: Okay.	7	Do you see that?
8	MR. WHITAKER: I want to just continue	8	MR. NOVAK: Yes, I do.
9	on this train of thought.	9	MR. WHITAKER: Okay. Do you see the
10	CHAIRMAN ANDERSON: And I'll come back	10	conditions that are listed there: A, B and C.
11	to it in just a minute.	11	MR. NOVAK: Yes, I do.
12	MS. RIZZUTO: Just for the record, I	12	MR. WHITAKER: Okay.
13	object to this questioning on the exhibits that have	13	Does the applicant meet all those
14	not been discussed yet as to whether they can be	14	conditions?
15	admitted at this time.	15	MR. NOVAK: Condition A is that the
16	CHAIRMAN ANDERSON: Your objection is	16	drive-through
17	on the record.	17	MS. RIZZUTO: Objection.
18	MS. RIZZUTO: I was going to do it when	18	CHAIRMAN ANDERSON: Are you going to
19	he did his closing.	19	give a reason for your objection?
20	Obviously they're going to stand.	20	MS. RIZZUTO: Yes. Objection.
21	CHAIRMAN ANDERSON: Well, they're going	21	I don't know that the board planner
22	to end up in the record.	22	should be testifying about what the applicant proved.
23	MS. RIZZUTO: Yes.	23	That's for all of you to decide.
24	CHAIRMAN ANDERSON: And he's seen them.	24	The case is over. And the witness I
25	MS. RIZZUTO: Yes, I understand.	25	mean, the attorney for the applicant has rested his
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1	MD WHITTAKED. The ZDA a series beard		
•	MR. WHITAKER: The ZBA, a zoning board	1	case.
2	in any town has the ability in doing their analysis	1 2	case. MR. WHITAKER: But the planner is
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2	in any town has the ability in doing their analysis	2	MR. WHITAKER: But the planner is opened up tonight. And whether it's the planner or the engineer, they can always opine on do we meet the
2 3	in any town has the ability in doing their analysis and deliberations to look back to try find out what	2 3	MR. WHITAKER: But the planner is opened up tonight. And whether it's the planner or
2 3	in any town has the ability in doing their analysis and deliberations to look back to try find out what the purpose was when they're trying to determine if a	2 3	MR. WHITAKER: But the planner is opened up tonight. And whether it's the planner or the engineer, they can always opine on do we meet the
2 3 4 5	in any town has the ability in doing their analysis and deliberations to look back to try find out what the purpose was when they're trying to determine if a variance should be granted. Because in the <u>Medici</u>	2 3 4 5	MR. WHITAKER: But the planner is opened up tonight. And whether it's the planner or the engineer, they can always opine on do we meet the requirements of an ordinance. Okay?
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4	37	4	39 But that would turically be one convice
1 2	experience, from a window, itself.	1 2	But that would typically be one service window.
	Let's move on. Hours of operation, we	2	
3 4	stipulated would be code compliant? MR. NOVAK: And that is, hours of	3 4	A pharmacy, that would typically have one service window.
4 5	operation will be limited to 6 a.m. to 12 o'clock	-+ 5	
6	midnight.	6	Without everybody laughing at me, cannabis uses have been opening up with service
7	And then Item 3 pardon me Item C:	7	windows.
8	"Any drive-through or drive-up window	8	MR. WHITAKER: In banks, actually.
9	shall have a minimum queueing length of	9	MR. NOVAK: Yes.
10	180 feet from the service area".	10	And I surprisingly can attest that I'm
11	MR. WHITAKER: One-hundred-fifty.	10	not familiar with how that drive-through service
12	MR. NOVAK: Which I believe was	12	works, but those would be the three big ones that I
13	MR. WHITAKER: One-hundred-fifty.	13	think you have now.
14	MR. NOVAK: What did I say?	14	MR. WHITAKER: This ordinance is still
15	MR. WHITAKER: One-hundred-eighty.	15	on the books?
16	MR. NOVAK: One-hundred-fifty.	16	MR. NOVAK: That is correct.
17	I believe the applicant is proposing	17	MS. RIZZUTO: I'm sorry. What is "this
18	180.	18	ordinance"?
19	MR. WHITAKER: One-hundred-fifty-three.	19	MR. WHITAKER: This ordinance,
20	MR. NOVAK: One-hundred-fifty-three.	20	34-13.13, the one he just read.
21	, My apologies.	21	CHAIRMAN ANDERSON: The drive-through
22	MR. WHITAKER: And that says:	22	ordinance.
23	"150 feet from the center of the first	23	MR. WHITAKER: Drive-through.
24	service area."	24	MS. HERLIHY: And it was it was
25	Do you know what they mean by "first	25	adopted 2021, prior to the adoption of the
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
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	41		43
1		1	premises."
2	CHAIRMAN ANDERSON: This is for	2	MR. WHITAKER: Okay.
3	drive-throughs that are permitted, like a bank.	3	So we touched base at the last meeting
4	MR. WHITAKER: Mr. Anderson, what I was	4	about this. And you agreed with me that if I pulled
5	saying is that the concept of where they say the	5	up a restaurant and the owner was kind enough to
6	first service area is probably I'm just laying	6	bring the food out to me and I drove off with it,
7	this out that the first service area, probably any	7	that that's something that violates the prohibition
8	use other than a restaurant would only have one	8	on a drive-through?
9	service area.	9	MR. NOVAK: Yes.
10	That's all I'm saying. Let me just	10	MR. WHITAKER: You confirmed at the
11	move on.	10	
12	CHAIRMAN ANDERSON: It's not uncommon	12	last meeting that a drive-through restaurant does not, in fact, need to be a window?
13	for banks to have three drive-throughs.	12	MR. NOVAK: Based on this definition,
13	-		
	MR. WHITAKER: But they're always	14 15	there is no reference of a window, yes.
15	usually in a line.	-	MR. WHITAKER: Correct.
16	MS. HERLIHY: They're separate.	16	And based on the definition of
17	MR. WHITAKER: They're separate.	17	drive-through that you read before, it says
18	CHAIRMAN ANDERSON: Right.	18	drive-through, drive-up windows; it also says outdoor
19	But you're measuring from the nearest	19	ordering locations.
20	one to the residential	20	MR. NOVAK: Yes.
21	MR. WHITAKER: Not from the	21	MR. WHITAKER: So now just to go
22	residential, 150 is the queueing.	22	through this definition so we understand, again,
23	CHAIRMAN ANDERSON: Yeah.	23	what's prohibited and what would be permitted.
24	But it could be different, depending	24	If I have an establishment in which
25	where the queue is.	25	food or drink is served to a customer and it's not
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
	42		44
1	Anyway, I'm not sure that I'm not	1	within an automobile
-			
2	getting the importance of it anyway. You're getting	2	MR. NOVAK: As in a walk-up window?
		2 3	
2 3 4	getting the importance of it anyway. You're getting there, okay. MR. WHITAKER: Let's go to the		MR. NOVAK: As in a walk-up window? MR. WHITAKER: Well, it's a person on a motorcycle.
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2 3 4 5	getting the importance of it anyway. You're getting there, okay. MR. WHITAKER: Let's go to the definition of restaurant drive-through. We touched upon this before when you testified at the last meeting. That ordinance is	3 4 5 6 7	MR. NOVAK: As in a walk-up window? MR. WHITAKER: Well, it's a person on a motorcycle. MR. NOVAK: There's no definition of automobile, from what I'm aware of, in the zoning ordinance.
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	45		47
1	out that lane and stay on the premises and eat it in	1	It's to prohibit drive-through
2	the parking lot, I'm permitted to do that?	2	restaurants. And all the rest of it is not for us to
3	MR. NOVAK: Hm.	3	determine what the Mayor and Council was thinking or
4	MS. HERLIHY: I would disagree.	4	whatever.
5	MR. NOVAK: I think the intent the	5	We may we may think it's a silly
6	language intended to occur off the premises separates	6	ordinance or whatever, but we're I'm going to ask
7	that possibility out from what's in from this	7	Linda to confirm but we're obligated to accept to
8	scenario.	8	accept the ordinance the way it is.
9	MR. WHITAKER: It's nebulous, is it	9	MR. WHITAKER: I'd like to respond.
10	not.	10	You're obligated to see as part of the <u>Medici</u> case as
11	MR. NOVAK: Hm.	10	to whether what we are seeking here violates the
12	MR. NOVAK. HIII. MR. WHITAKER: Nebulous? A little	12	
13	confusing.	12	purpose of the zoning ordinance. It presupposes something.
14	5	13	2
	MR. NOVAK: It's a little confusing.		CHAIRMAN ANDERSON: And the purpose is to prohibit drive-through restaurants. That's the
15 16	But, typically	15	
	MR. WHITAKER: What I'm showing you,	16 17	purpose.
17	basically, is that there's a question about the		MR. WHITAKER: No.
18	purpose. That's what I'm trying to show.	18	The purpose from planning and zoning
19	And I think you see that this is not an	19	Mr. Novak would agree with you because he said it
20	ordinance with clarity.	20	already is to know what the purpose in passing the
21	Wouldn't you agree?	21	ordinance was in the first place.
22	MR. NOVAK: There are certain aspects	22	CHAIRMAN ANDERSON: Well, I disagree
23	of this ordinance which could use clarification.	23	with you.
24	MR. WHITAKER: Thank you.	24	MR. WHITAKER: Because because when
25	VICE CHAIRMAN PAPAPIETRO: Just to make	25	you don't know the purpose, you don't know how to
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
4	46	4	48
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2	a point you kind of the left open. The intent, the way it was written, the interpretation is clear.	2	grant or not grant a use variance, if you know that what my client is proposing to do violates the
2 3	a point you kind of the left open. The intent, the way it was written, the interpretation is clear. It's prohibited, drive-through restaurants.	2 3	grant or not grant a use variance, if you know that what my client is proposing to do violates the purpose of the ordinance, then I lose. But here you
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	49		51
1	that the and the <u>Medici</u> language to me says it	1	some questions.
2	doesn't violate the purpose of the ordinance. The	2	MS. RIZZUTO: Thank you.
3	purpose of the ordinance is to prohibit drive-through	3	Mr. Novak?
4	restaurants.	4	MR. NOVAK: Yes.
5	MR. WHITAKER: And the board needs to	5	Easy one to start off with.
6	know why from a zoning	6	MS. RIZZUTO: Have you seen other
7	CHAIRMAN ANDERSON: No, we don't.	7	zoning ordinances where they're nowhere as close?
8	MR. WHITAKER: Let me finish.	8	MR. NOVAK: Yes.
9	The board needs to know why there's a	9	MS. RIZZUTO: Have you seen other
10	prohibition, what is the zoning concern that the	10	zoning ordinances where the purpose is not
11	Mayor and Council had or the planning board had in	11	specifically stated, either during the meeting or in
12	referring it back to the Mayor and Council so that	12	the ordinance, itself?
13	planners can look and say, okay, let's see how we can	13	Purpose not stated, have you seen that?
14	solve the problem that they think exists because of	14	MR. NOVAK: Within the ordinance, I
15	the prohibition that's in an ordinance.	15	have.
16	And that's my approach because I'm	16	Typically in the within the meeting
17	saying and I started out with this and said, the	17	as well, I don't recall one way or the other, quite
18	word "purpose" is throughout the statute. It's	18	frankly.
19	throughout <u>Medici</u> , <u>Himeji</u> , whatever else.	19	MS. RIZZUTO: Okay.
20	You are at the same disadvantage that I	20	So we established that you've looked at
21	am. And that is you're trying to apply an ordinance	21	some of the things that Mr. Whitaker has not yet
22	and say, well, what they're proposing here, how does	22	introduced into evidence.
23	this violate the reasons that ordinance was passed?	23	Did you look at the transcript of
24	We don't have any.	24	9/28/2021? That's the first one when it was
25	Sum and substance, that's my approach.	25	introduced before the governing body.
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
	50		52
1	That's my argument.	1	MR. NOVAK: Yes.
2	CHAIRMAN ANDERSON: Would you say that	2 3	MS. RIZZUTO: Okay.
3 4	argument is similar, if not identical, to the		Did you note that it is unsigned and uncertified?
-+ 5	argument in <u>Saddle Brook Realty vs. The Saddle Brook</u> Zoning Board of Adjustment? And is there a	4 5	MR. NOVAK: I did not note that.
6	distinction with this application and that.	6	But I don't believe it was signed.
7	MR. WHITAKER: Yes.	7	MS. RIZZUTO: Okay.
8	And I'll go through it when I get to	8	And did you also note that Mr. Whitaker
9	the summation.	9	was present at the governing body meeting that day?
10	CHAIRMAN ANDERSON: All right.	10	MR. WHITAKER: No.
11	MS. RIZZUTO: Excuse me, Mr. Chairman?	11	That was Mr. Wostbrock. I haven't been
12	CHAIRMAN ANDERSON: I'm sorry.	12	to a governing body in Midland Park in at least ten
13	MS. RIZZUTO: Is he done with his	13	years.
14	questioning?	14	MS. RIZZUTO: It says "Bruce Whitaker,
15	Because I would like to question this	15	Esquire" on the first page. On the first on page
16	witness as well.	16	number 2 of the transcript
17	CHAIRMAN ANDERSON: Okay.	17	MR. WHITAKER: That's who ordered it.
18	I'm not sure that he's done with the	18	MS. RIZZUTO: where it says
19	questions.	19	"Appearances," it says "Robert Reagan, Esq., Counsel
20	MS. RIZZUTO: Well, I think he said	20	to the Midland Park Mayor and Council," and "Bruce
21	that he's done.	21	Whitaker, Esquire."
22	MR. WHITAKER: You asked a question?	22	MR. NOVAK: May I see it?
23	MS. RIZZUTO: And then he went into his	23	MS. RIZZUTO: Sure.
24	summation early.	24	MR. WHITAKER: Evidently I wasn't
25	CHAIRMAN ANDERSON: Yeah, go ahead, ask	25	there.
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812

	53		55
1	It's evidently an error. I didn't even	1	Yes. That was made on page 10 of that transcript.
2	see that.	2	MR. WHITAKER: Why don't you read it
3	MS. RIZZUTO: I understand.	3	into
4	But it indicates that you're	4	MS. RIZZUTO: That's the Panning Board
5	MR. WHITAKER: Okay, yeah.	5	transcript of October this is my turn right now,
6	MS. RIZZUTO: It's an uncertified	6	right October 18th, 2021, they made a
7	transcript, so maybe there's a mistake because it's a	7	determination they stated it on the record that
8	noncertified transcript.	8	it was consistent.
9	MR. NOVAK: It does.	9	MR. NOVAK: The most yes.
10	MS. RIZZUTO: But regardless of that,	10	MS. RIZZUTO: Did the Planning Board
11	let's move on.	11	the Planning Board's main concern appeared to be that
12	So besides the transcript of that we	12	the governing body was prohibiting drive-through
13	have here, there is also a set of minutes from the	13	restaurants in B-1 and B-2, but
14	Mayor and Council meeting.	14	CHAIRMAN ANDERSON: Three.
15	Did you look at those?	15	MS. RIZZUTO: B-3.
16	MR. NOVAK: Yes.	16	But they felt it should also be
17	MS. RIZZUTO: Okay. And were they	17	prohibited in I-2, which is an industrial zone; that
18	different from this transcript? Because they're not	18	was the main gist of the Planning Board's review,
19	they weren't provided by Mr. Whitaker. We don't	19	correct?
20	have them in front of us.	20	MR. NOVAK: Yes.
21	MR. WHITAKER: Well, the minutes are	21	MS. RIZZUTO: Okay.
22	from a different meeting.	22	Are you familiar with the various
23	MS. RIZZUTO: That's correct.	23	statutes that exist around the giving of a
24	You chose what you wanted to give to	24	recommendation and what the governing body can do if
25	the board. I understand that.	25	they decide to go with the recommendations of changes
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
	54		56
1	You did not give the minutes to the	1	by the planning board, or modify them, or reject
2	September 28th meeting when the when the when	2	them?
3	the ordinance was was adopted.	3	Are you familiar with all of the
4	So, sir, did you go look up those	4	statutes that govern that decision process?
5	minutes separately? Because Mr. Whitaker did not	5	MR. NOVAK: Yeah, I'm typically
6	provide them.	6	familiar.
7	MR. NOVAK: No. I looked at the	7	MS. RIZZUTO: Yeah.
8	October 20th.	8	You stated earlier, they should be
9	MS. RIZZUTO: Okay.	9	if they are going to disagree with the Planning Board
10	That's for the second meeting. Did you	10	recommendation, they should put their reasons on the
		11	record, correct?
11	look at the minutes of the Planning board when they		
11 12	look at the minutes of the Planning Board when they determined and made a recommendation that the	12	MR. NOVAK: If the
	determined and made a recommendation that the	12 13	
12	determined and made a recommendation that the ordinance was consistent with the Master Plan? They		MR. NOVAK: If the
12 13	determined and made a recommendation that the	13	MR. NOVAK: If the MS. RIZZUTO: If the governing
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	57		59
1	But here that didn't exist. It doesn't	1	It's called severability. No, not a
2	exist in any of these uncertified transcripts or	2	severability. It's called an inconsistency repealed?
_	minutes. They found it to be consistent.	2	MR. NOVAK: Yes.
3		3 4	
4	So the governing body then acted at the	_	MS. RIZZUTO: And that goes to what the
5	second adoption meeting. We don't have a transcript,	5	board attorney was saying earlier, that sometimes the
6	but we do have the October 28 governing body minutes.	6	ordinances don't get directly repealed, but this
7	Can you take a look at that, page 4?	7	provision does in fact repeal inconsistent
8	Page 4 is on the top.	8	ordinances, does it not?
9	MS. HERLIHY: I'm sorry.	9	MR. NOVAK: It would repeal a very
10	We don't have a transcript of what did	10	direct inconsistent ordinance.
11	you say.	11	So if there's something else in the
12	MS. RIZZUTO: We don't we don't have	12	regulations that was discussing how drive-through
13	a transcript of the second reading and adoption.	13	restaurants were a permitted use in the B-3, this
14	No, we don't.	14	would in effect repeal that section.
15	MR. WHITAKER: We couldn't get the	15	MS. RIZZUTO: Right.
16	transcript.	16	And judges struggle to figure out
17	MS. HERLIHY: The planning board and	17	what's inconsistent or not. But this board is not
18	the transcript.	18	the appellate board, right.
19	Just so I can clarify. The transcript	19	So, in addition, the applicant made you
20	of the September meeting, that was a transcript that	20	read through the definition of restaurant
21	you had done of a recording.	21	drive-through. You see that that's in Section 1.
22	MR. WHITAKER: I had any stenographer	22	Section 2, let's read Section 2, and
23	get a transcript of the recording of that for the	23	tell me if that has enough clarity. It says:
24	Planning Board.	24	"Restaurants: Provided, however, that
25	But my stenographer was unable to get	25	drive-through restaurants as defined in this
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
	58		60
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1 2		1 2	
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	61		63
1	MS. RIZZUTO: Okay. So it's on page 4.	1	And they use the word "amended."
2	Section 1 is a	2	Permitted Uses, Paragraph H, Restaurant, is hereby
3	VICE CHAIRMAN PAPAPIETRO: Actually,	3	amended to read as follows: "Restaurants"
4	start with the ordinance on final with the actual	4	permitted.
5	wording of it.	5	"Restaurants: Provided, however, that
6	MR. WHITAKER: Which ordinance are you	6	drive-through restaurants as defined in this
7	talking about?	7	chapter are deemed to be prohibited."
8	MS. RIZZUTO: The title? Page 4 of the	8	So they were clear, they allowed
9	October 28, 2021 minutes of the governing body.	9	restaurants in the B-1 and in the B-3 but not if they
10	So the ordinance on final reading	10	have drive-throughs.
11	VICE CHAIRMAN PAPAPIETRO: Yes.	11	Severability is a standard clause that
12	MS. RIZZUTO: is labeled	12	
			writers of ordinances like myself include all the
13	Ordinance 19:21, an Ordinance to Amend 08-21,	13	time.
14	entitled "An Ordinance to Amend and Replace in its	14	And it basically says if this goes to a
15	Entirety" in its entirety "Chapter 34 of the	15	court, and if a court finds that Section Z is
16	Code of the Borough of Midland Park entitled 'Zoning	16	improper or unconstitutional, that doesn't affect
17	(Restaurants - Drive-Throughs)." That's the title.	17	Section A, B and C.
18	"Be it ordained," et cetera.	18	That's an example. That's what
19	Section 1 is in the from the	19	severability means. Cut out the bad part. Leave all
20	definitions. It did not change that that	20	of the rest of the law in place. That's what
21	definition. It repeated it.	21	severability is.
22	So the restaurant drive-through is the	22	Inconsistent ordinances repealed. I
23	definition. It says:	23	already went over that. That's a standard clause
24	"An establishment in which food or	24	that people who write ordinances, like borough
25	drink is served to customers within	25	attorneys and planning board attorneys, keep into
20	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
	62		64
	02		04
4	automobiles autoide of the confines of the	4	their ardinances
1	automobiles outside of the confines of the	1	their ordinances.
2	building and where the consumption of such	2	And then of course Section 6 is the
2 3	building and where the consumption of such food or drink is intended to occur off the	2 3	And then of course Section 6 is the effective date. And I'll note for the record that
2	building and where the consumption of such food or drink is intended to occur off the premises."	2	And then of course Section 6 is the effective date. And I'll note for the record that the governing body determined that it should take
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1	what's the timeframe to appeal.	1	MR. CAPALBO: I don't know why she said
2	MR. NOVAK: Is it 20 days or 45 days?	2	nobody appealed it. They shouldn't be here because
3	MS. HERLIHY: It's really irrelevant to	3	nobody appealed it.
4	this board and what's before this board.	4	MS. RIZZUTO: No. That's not what I'm
5	MS. RIZZUTO: Right.	5	saying.
6	But I'll note for the record that there	6	MR. CAPALBO: That's what you meant.
7	was no appeal of this ordinance because we wouldn't	7	MR. WHITAKER: My client is not the
8	be here if there was.	8	property owner.
9	We would have a decision from a judge,	9	My client wasn't aware of the
10	and maybe they would have overturned it, or maybe	10	ordinance.
11	they wouldn't have.	11	MS. RIZZUTO: According to this,
12	But it was never challenged.	12	Mr. Whitaker was there.
13	And 45 days from any municipal action	13	CHAIRMAN ANDERSON: Do you recall
14	is the appellate requirement. It's code of superior	14	whether you were there?
15	court.	15	MR. WHITAKER: I do not believe I was
16	CHAIRMAN ANDERSON: But we know that.	16	there. I did not have this at the time the ordinance
17	MS. RIZZUTO: Okay, I understand.	17	got passed.
18	I'm making a record.	18	MS. RIZZUTO: You didn't have Taco Bell
19	That's all I'm doing.	19	as the client.
20	MR. WHITAKER: Just so the record is	20	MR. WHITAKER: I came in in January, as
20	clear, I haven't used the word "inconsistent" per se	20	I recall.
22		21	MS. HERLIHY: I understand what
	with your ordinance. I just said that the ordinance		
23	lacks clarity.	23	probably happened. The transcript was done from a
24	And Mr. Novak agreed with me.	24	recording.
25	MS. RIZZUTO: Yes, I understand.	25	There wasn't somebody actually there at
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
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	69		71
1	questions for Mr. Novak?	1	Chapter 34 of the Code of the Borough of Midland Park
2	(No Response.)	2	entitled okay. This particular Ordinance 19-21
3	CHAIRMAN ANDERSON: Seeing none,	3	just amends that ordinance.
4	motion.	4	I don't have in front of me
5	MR. PLACIER: So moved.	5	Ordinance 08-21 to make a comparison.
6	MR. CAPALBO: Second.	6	
_		_	But this particular ordinance as I'm
7	MS. HARMON: Mr. Formicola?	7	reading this, this particular Ordinance 19-21 is not
8	MR. FORMICOLA: Yes.	8	an ordinance to amend and replace.
9	MS. HARMON: Mr. Zuidema?	9	MR. WHITAKER: Ordinance 08-21 I
10	MR. ZUIDEMA: Yes.	10	have it lists all the permitted uses.
11	MS. HARMON: Mr. Papapietro?	11	And this amends the permitted uses.
12	VICE CHAIRMAN PAPAPIETRO: Yes.	12	And I've never said that these ordinances are
13	MS. HARMON: Mr. Placier?	13	inconsistent. I was just showing that there's a lack
14	MR. PLACIER: Yes.	14	of clarity in looking at this as to what they
15	MS. HARMON: Mr. Barlow?	15	attempted to do, and that there's ordinances here
16	MR. BARLOW: Yes.	16	that don't really get to the finish line.
17	MS. HARMON: Mr. Eliya?	17	VICE CHAIRMAN PAPAPIETRO: Okay, thank
18	MR. ELIYA: Yes.	18	you.
19	MS. HARMON: Mr. Anderson?	19	CHAIRMAN ANDERSON: Anybody else?
20	CHAIRMAN ANDERSON: Yes. Yes.	20	Have we already done your summation?
21	VICE CHAIRMAN PAPAPIETRO: I have a	21	MR. WHITAKER: I didn't even start.
22	question for our esteemed attorney.	22	Sorry, I'm going to hold you up, but a couple things.
23	For the minutes that were just read on	23	I'd like to move all the exhibits, including those
24	Ordinance 19-21, and the way it's worded on here, and	24	transcripts. I will give you one, if they're not
25	saying an ordinance to amend or replace in its	25	certified by the stenographer. They are a matter of
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
	70		72
1	entirety Chapter 34 of the board of restaurant	1	record. They came from the Mayor and Council. And
2	drive-throughs.	2	I've given them to the board and for everybody for
3	Earlier on Mr. Whitaker was talking	3	
4			the purposes of edification. We're here to try to
-	about some items that still remained in the current	4	determine what the purpose of an ordinance is. I
5	about some items that still remained in the current laws of the town, but doesn't this supercede that if	5	determine what the purpose of an ordinance is. I honestly did some research that anybody on the board
6	about some items that still remained in the current laws of the town, but doesn't this supercede that if they weren't removed for whatever reason?	5	determine what the purpose of an ordinance is. I honestly did some research that anybody on the board could also have asked for and have done. I would
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	73		75
1	With that, I would move all the	1	(Whereupon, Minutes of Mayor and
2	exhibits from A-1 to A-17.	2	Council Dated October 28, 2021 are marked as
3	CHAIRMAN ANDERSON: Ms. Rizzuto, do you	3	Exhibit A-17 for identification.)
4	have any objection to these exhibits going into	4	(Whereupon, Outline is marked as
5	evidence?	5	Exhibit A-18 for identification.)
6	MS. RIZZUTO: Yes.	6	(Whereupon, Stipulations are marked as
7	Yes, I do. I'd just like to make a	7	Exhibit A-19 for identification.)
8	record.	8	MS. RIZZUTO: Okay. And there is also
9	The objection is that these are not	9	correspondence from Mr. Whitaker sending these things
10	properly transcribed materials because they are not	10	to the board dated October 3, 2023.
11	signed and certified.	11	I'm just making that part of the
12	And they are not done by the designated	12	record.
13	required Certified Court Reporter that's required	13	Now, just briefly, Your Honor.
14	under statute when we go on appeal to the Superior	14	MR. WHITAKER: Your Honor?
15	Court.	15	CHAIRMAN ANDERSON: Your Honor?
16	For purposes of this board, this board	16	Thank you.
17	could take judicial notice of properly presented	17	MS. RIZZUTO: Oh, sorry.
18	documents. These are not properly presented because	18	MS. HERLIHY: Mr. Whitaker, any
19	they are not certified. They are, in fact,	10	objection to should the board vote in favor of the
20	uncertified.	20	application, should the board approve this
21	In addition, the October 28 I've	20	application tonight, or at some other point in time,
22	done this many times. This is minutes. It looks	21	but should there be an approval, that it be
22		22	
23 24	like minutes. It reads like minutes.		conditioned upon you providing properly certified
	But the truth is, he could have had	24	transcripts of both of these meetings as well as
25	these certified by the borough clerk that they are	25	certified minutes so that the certified transcripts
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
	74		76
1	official minutes. However so that's my objection.	1	and minutes could be compared to what was submitted
2	I also think that, for the record,	2	and minutes could be compared to what was submitted as exhibits?
2 3	I also think that, for the record, because there may be an appeal from this case, I	2 3	and minutes could be compared to what was submitted as exhibits? MR. WHITAKER: No objection.
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	77		70
	77		79
1	mean by not giving you the opportunity hold on	1	presenting new things, which is beyond what is
2	to state an objection.	2	normally done.
3	And I did not make that request of	3	And he is presenting an outline for the
4	Mr. Whitaker for your benefit or for your client's	4	zoning application.
5	benefit. It was done for the benefit of the board.	5	Now, I read the transcript of the last
6	The board, I believe, may want to take	6	meeting. I wasn't here. And someone requested
7	notice of what he submitted, what's in those	7	VICE CHAIRMAN PAPAPIETRO: I did.
8	transcripts, and vote accordingly.	8	MS. RIZZUTO: Yeah.
9	And if they rely upon that, then I'm	9	What is the list of you asked what
10	just going to assure that are relying upon something	10	is the list of variances we're voting on. And we got
11	that's	11	this. We got this.
12	MS. RIZZUTO: But you can't.	12	And I object that it's expanding a
13	MS. HERLIHY: I can. I can do that. I	13	record on a case that he rested on the meeting
14	just did.	14	before. That's all I have to say about that.
15	MS. RIZZUTO: No, no, no.	15	And I don't know if it's accurate
16	But you can't change tonight what is	16	either because I haven't looked. I got it tonight.
17	before the board that they can rely upon.	10	
18		18	CHAIRMAN ANDERSON: Well, we asked him
	But listen, I only	-	for that. He got that for us as a favor for us.
19	MS. HERLIHY: It's a condition of	19	MR. WHITAKER: I sent that to the
20	approval.	20	counsel that was here last time. I did not realize
21	MS. RIZZUTO: I'm only stating for the	21	that he didn't share it with her.
22	record. And I don't need to belabor the point.	22	So I object to the concept that I
23	MR. WHITAKER: The Rules of Evidence,	23	didn't give it to her until tonight.
24	we all recognize, are somewhat relaxed under the	24	VICE CHAIRMAN PAPAPIETRO: I
25	Municipal Land Use Law.	25	specifically asked for that because this meeting has
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
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	78		80
1	MS. RIZZUTO: Right, of course.	1	gone on for a long time.
1 2	MS. RIZZUTO: Right, of course. And so I just want to move on to the	1 2	gone on for a long time. I wanted to make sure everything is
	5 ,		
2	And so I just want to move on to the	2	I wanted to make sure everything is
2 3	And so I just want to move on to the other two things.	2 3	I wanted to make sure everything is documented.
2 3 4	And so I just want to move on to the other two things. CHAIRMAN ANDERSON: But before you do	2 3 4	I wanted to make sure everything is documented. MR. WHITAKER: And the word you used
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	81		83
1	MR. WHITAKER: Well, I would assume	1	first witness was Evers Santana, who testified that
2	that the board also has their own notes and can look	2	he worked in the restaurant industry for over 30
3	at it themselves. I was doing it as a matter of	3	years and with the applicant's restaurant group, and
4	courtesy.	4	is responsible for real estate development and
5	I did not reflect the page number or	5	construction.
6	line number from the transcript because the language	6	If you recall, he testified that he is
7	there is not out of the transcript. I never said it	7	involved with the QSRs specifically for over 25
8	was. It was from my notes.	8	years.
9	And from my notes, I went back and	9	If you recall, he actually worked for
10	looked at the transcripts to see that they matched	10	Friendly's in Midland Park many years ago and
11	up, that there was none missing.	11	actually trained at Roy Rogers before it and became a
12	MS. RIZZUTO: Okay. So, you know,	12	manager.
13	again, conditions happen all through hearings. And	13	Now, he's done everything from
14	these are these are, he's saying, stipulations.	14	development through construction and operations. And
15	They're conditions that were agreed to, I suppose, by	15	he's operated multiple locations for many years. Why
16	the applicant during the numerous hearings.	16	is that important?
17	That's not unusual.	17	Because he basically is an expert in
18	What is unusual is getting the piece of	18	the field of QSR operations, because he was able to
19	paper at the end from the applicant's counsel. But	19	explain all of the aspects of a QSR, specifically a
20	it's not unusual that conditions are imposed and	20	Taco Bell operation.
21	stipulations are made.	21	He testified that the site will
22	MR. CAPALBO: Mr. Anderson, can I ask a	22	accommodate Taco Bell's needs. He testified that the
23	question? Counsel indicates that Mr. Whitaker rested	23	demographics in Midland Park with the surrounding
24	his case and he's going to do a summation.	24	area show that a Taco Bell would be a successful
25	But she said he introduced new	25	franchise at this location. He testified that they
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
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1	information. That was all based on testimony of the	1	would operate seven days a week, 8 a.m. to midnight.
2	planner. He didn't introduce it. He questioned the	2	And he testified that there are three shifts that
3	planner.	3	overlap, that they have a maximum of eight employees,
4	CHAIRMAN ANDERSON: We know.	4	but they're not all there at the same time, they
5	MR. CAPALBO: We should be aware of	5	don't come all at the same time, they don't leave all
6	that.	6	at the same time.
7	CHAIRMAN ANDERSON: Okay.	7	He testified, and we stipulated, that
8	Anything else?	8	there are two deliveries per week, and the timing of
9 10	(No Response.) CHAIRMAN ANDERSON: No?	9 10	them are controlled by the owner. And he stipulated
11	Okay, Mr. Whitaker?	10	that the distributor would be coming to this location between 5 a.m. and 7 a.m. He testified, if you
12	MR. WHITAKER: Thank you for your time.	12	recall, and it's important to know, that there's a
13	And I would ask that you indulge me, because we've	12	lock box there. They have a key. They enter the
14	been working on this since March, and there's a lot	14	facility. They drop off the merchandise. And the
15	of information that's been provided to you. If you	15	driver does it all. There's no employee there at
16	don't mind, I'm going to sit as I give the summation	16	that time. And that a typical delivery lasts about
17	and not walk around the room.	17	45 minutes to an hour.
18	But there's a lot that we have to	18	Remember, there's nothing in the
19	review. And this is the type of case, and important	19	ordinance that regards the prohibition as to when
20	enough, and the considerations and the decisions you	20	deliveries can be made; however, the applicant
21	have to make are that important that I am going to	21	provided a stipulation to allay the concerns that
	walk you through what we presented, and then I want	22	were raised by board members during the course of the
22	-	23	
22 23	to explain to you our position from a planning		hearing.
	to explain to you our position from a planning perspective and from a legal perspective.	24	Mr. Santana testified to something that
23			-
23 24	perspective and from a legal perspective.	24	Mr. Santana testified to something that
23 24	perspective and from a legal perspective. When we go back, you'll know that our	24	Mr. Santana testified to something that was very important, something that was not news to us

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1	but something that was very important in	1	different than a drive-through bank. But at the same
2	understanding the drive-through QSR concept. And	2	time, we acknowledged and showed you that this
3	that he said for a freestanding QSR, a franchise only	3	particular site and you'll hear this word I'm
4	approves of it if it has a drive-through. You heard	4	sorry a few times is particularly suited for
5	that testimony a number of times. You heard it also	5 6	the use. He testified that there's sufficient
6	from Mr. Dean. Why? Because, as he testified, 70 to	•	
7 8	75 percent of the business post-pandemic, where	7 8	parking for the customers that actually come into the facility. He stipulated, because this is what they
9	people don't want to come face-to-face with a crew member, where people have gotten used to not having	9	do, employees would park farther away and would not
	to get out of their car to get food, customers'	9 10	be right next to the site, like any type of business,
11	habits have changed. So that 75 percent business	10	so that the customers are there to be accommodated
12	aspect is for a drive-through.	12	first.
13	So effectively when you have an	13	He had uncontroverted testimony that
14	ordinance that says no drive-through, and recognizing	14	11-car stacking is more this is his words more
15	that the QSR basically requires a drive-through to	15	than ample for his business at this location.
16	have these type of franchises in a community, that	16	And at this point, you also may recall
17	ordinance effectively says that the QSR doesn't exist	17	it was a long time ago he testified that they
18	in this town. And that's an important aspect for you	18	had two other locations, buildings similar to this,
19	to think about, because I think we all expect or have	19	and they have looked at those facilities, and it's
20	an expectation in today's world that a business like	20	never queued up to be 11. It was typically at 8.
21	that belongs in a community.	21	What's important for you to understand
22	In addition, he talked about the	22	is that this person, knowing the operational aspects,
23	walk-in traffic. He talked about how they	23	is a designer, not on his own, but did the design
24	accommodate DoorDash and the GrubHub operations in	24	with the engineer. And that was testified to. So
25	specific areas for pickup. He established through	25	there was an operational experience when this plan
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1	all of that testimony that the drive-through is	1	was put together.
2	essential for the viability of a QSR.	2	From there, you heard the testimony of
3	He testified about the logistics of	3	Andrew Missey. You know Mr. Missey. He's a very
4	this. He testified, and it was confirmed later by	4	well experienced civil engineer. He's been doing
5	Mr. Dean, and even you own traffic consultant, that	-	
		5	this in Bergen County for over 35 years. He does a
6	perhaps as many of 7 to 8 would be the maximum that	5 6	lot of planning and development work and many
7	would ever be queued in this 153-foot queuing lane	6 7	lot of planning and development work and many projects in this municipality and others with Lapatka
7 8	would ever be queued in this 153-foot queuing lane that we have that will accommodate 11 cars.	6 7 8	lot of planning and development work and many projects in this municipality and others with Lapatka & Associates.
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7 8 9 10	would ever be queued in this 153-foot queuing lane that we have that will accommodate 11 cars. He testified that Taco Bell is very different from other franchises in how the product is	6 7 8 9 10	lot of planning and development work and many projects in this municipality and others with Lapatka & Associates. What did he testify to? That the current Columbia Bank, which is nonconforming, would
7 8 9 10 11	would ever be queued in this 153-foot queuing lane that we have that will accommodate 11 cars. He testified that Taco Bell is very different from other franchises in how the product is served because it's not cooked per se. It's already	6 7 8 9 10 11	lot of planning and development work and many projects in this municipality and others with Lapatka & Associates. What did he testify to? That the current Columbia Bank, which is nonconforming, would be removed. It would be eliminating some of those
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91         your planner has said that.         91           2         It stacks 6 vehicles to the menu board, which is an important number, because the permits         1           4         the applicant to have 153 feet of stack, which is beyond the 150 feet required for a drive-through use.         1           6         facilty.         The Godwin Avenue exit is eliminated, a square footage of 154,555 square feet, where only 10,000 square feet is required in this zone to have a commercial facilty.         1         No the testified that it is is basically the the regorginal that a restrumutue is a a permitted there - we don't know what the 10 being permitted there - we don't know what the 10 being permitted there - we don't know what the 10 being permitted there - we don't know what the 11 purpose of the prohibition on a drive-through use.           16         It has a height of 25.6 feet, where the 15         1           17         The proposed coverage is going to be 18         1         1           18         remove nonconformiley, Think we all understrad, 19         1         10           14         The proposed coverage is going to be 10         1         1           14         The proposed coverage is going to be 10         1         1         1           16         The rowed.c. C.S.R., R.P.R., L.L.C. 20         1         2         1         1           21         Parking requirements, weher proposing 10         1         1				
2       It stacks 6 vehicles to the menu board,         3       which is an important number, because the parmits         4       the applicant to have 153 feet of stack, which is         5       beyond the 150 feet required for a drive-through         6       fail         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 forta is required in this zone to have a         11       10,000 square feet is required in this zone to have a         12       commercial facility.         13       The s width of 321 feet, where you         14       only need 100 feet.         15       The property is na b-3 Zone. It has         16       height can be 36 feet and two stories.         17       The propeod coverage is going to be         16       height can be 36 feet and two stories.         17       The propeod coverage is going to be         18       a nonconformity. It hais well understand,         20       noch of passes or the whole center, and ony 167 ar         18       needed.         21       Parking requimements, we're proposing         21       Ta sta weld on thave the ugyly telephone		89		91
<ul> <li>which is an important number, because that permits the applicant to have 155 feet, stored of a drive-through use with a different beyond the 150 feet required for a drive-through facility.</li> <li>The Godwin Avenue exit is eliminated, which is a nonconforming condition.</li> <li>The property is in B-3 Zone. It has a square footage of 154,555 square feet r, where only 10,000 guare feet is required in this zone to have a commercial facility.</li> <li>This a whigh of 25.6 feet, where the height can be 36 feet and two stories.</li> <li>The sa height of 25.6 feet, where the height can Godwin Avenue and on Rea for acducating the stored two stories.</li> <li>The stored con Godwin Avenue and on Rea for nonconformity location is removed.</li> <li>All of those aspects, when you can remove nonconformity location is removed.</li> <li>All of those aspects, when you can remove nonconformity location is removed.</li> <li>LAURA A CARUCCI, C.S.R. P.R., LLC. 20141-1812</li> <li>Parking requirements, we're proposing increasing the screening on the northest correr will have arboritae. You're going to have have poles and lines servicing this building.</li> <li>The leadscaping will be developed by increasing the screening on the northest correr will have arboritae. You're going to have have poles and lines servicing the building.</li> <li>The leadscaping will be developed by increasing the screening on the northest correr will have arboritae. You're going to have have putting in that frone to eliminate the concern that the drive-through the drive-through was.</li> <li>The leadscaping will be developed by increasing the screening on the northest correr is ubject to the brough engineer's approxi. The here twitness, who was here subject to the brough engineer's approxi. The here witness, who was here subject to the brough engineer's approxi. The here witness, who was here subject to the brough engineer's approxi. The the rest witness, who was here subject to the brough engin</li></ul>				
4       the applicant to have 153 feet of stack, which is       Performand to the applicant to have 150 feet required for a drive-through to the acknowledged that 265.65 will         5       by ond the 150 feet required in this zone to have a       a grammeted facility.         7       The Godwin Avenue exit is eliminated,       a more traffic, but he testified that it will         8       a square footage of 154, 555 square feet, where ony       the recognized that a restaurant use is         9       a permitted use - we don't know what the         10,000 square feet is required in this zone to have a       commercial facility.         11       D,000 square feet is required in this zone to have a         12       Davis of facility.         13       any creduited of 22.6 feet, where ony         14       only need 100 feet.         15       It has a height of 25.6 feet, where ony         16       The proposed coverage is going to be         17       The proposed coverage is going to be         18       Avenue will be conforming. The bank building's         19       anonconformity. Inst have a lunderstand,         20       out engrowend, so you will be coveraging a lunderstand,         21       Darkan CaRUCCI, C.S.R., R.P.R., LLC.         20       10       Fast food restaurant, a minimum of eight stacking in a neaded by				
5       beyond the 150 feet required for a drive-through use. He acknowledged that QSRs will         6       drive-through use. He acknowledged that QSRs will         7       The Gadwin Avenue exit is eliminated,         8       which is a nonconforming condition.       9         9       The property is in 8-3 Zone. It has       9         10       aguare footage of 154,555 square feet, where out       10         11       Quare feet is required in this zone to have a       10         12       ony neet is required.       10         14       only neet is required.       10         15       It has a height of 25.6 feet, where you       10         16       height catoo Godwin Avenue and on Rea       16       He provided a report that provides         17       The proposed coverage is going to be       16       He provided a report that provides         17       The proposed coverage is going to be       16       He provided a report that provides         17       The proposed coverage is going to be       16       He provided a report that provides         17       net mode trans, how much       17       Industry standard tip generation a drive-through use.         18       anot involued, and that be standards for a       17         19       Parking requirements, we're				
6 facility. generate more traffic, but he testified that it will   7 The Godwin Avenue exit is eliminated,   8 which is a nonconforming condition.   9 The property is in 8-3 20ne. It has   9 The property is in 8-3 20ne. It has   9 The property is in 8-3 20ne. It has   9 The property is in 8-3 20ne. It has   9 a square forces of the probletion on a drive-through was,   10 100 feet.   11 10,000 square feet is required in this zone to have a   12 only need 100 feet.   13 It has a height of 25.6 feet, where the   16 height can be 36 feet and two storids.   17 The propeed coverage is going to be   18 remove nonconformity cotation is removed.   10 Ad of those aspects, when you can   21 Ad of these aspects, when you can   22 neoded, packet has the weak of paining.   23 100 spaces for the whole center, and only 167 are   24 170 spaces for the whole center, and only 167 are   25 element of planning.   24 170 spaces for the screening on the northeast comer   25 170 spaces for the whole center, and only 167 are   26 not incolved, and it's only warming of precoxed   27 101 space aspecting on the northeast comer   29 102 spaces for the whole wath - the used the word   21 The landscaping will be developed by   35 nortenasing the screening on the northeast comer				
<ul> <li>The Godwin Avenue exit is eliminated,</li> <li>which is a nonconforming condition.</li> <li>The property is in a B-3 Zone. It has a square footage of 154,555 square feet, where only</li> <li>10,000 Square feet is required in this zone to have a furthed use in the zone. So a restaurant use is</li> <li>a square footage of 154,555 square feet, where only</li> <li>only need 100 feet.</li> <li>It has a height of 25.6 feet, where the</li> <li>height conforming. The bank building's nonconformity location is removed.</li> <li>All of those aspects, when you can remove an on Real of planning.</li> <li>LAURA A. CARUCCI, C.S.R. R.P.R. LL.C. 201641-1812</li> <li>Parking requirements, we're proposing 12105 spaces for the whole center, and only 167 are needed.</li> <li>The leardscaping will b developed by the the vale arbonize. You're going to have holy junipers.</li> <li>The leardscaping will b developed by the the readen you can remove for planning.</li> <li>The leardscaping will b developed by the the whole center, and only 167 are needed.</li> <li>The leardscaping will b developed by the the whole center, and only 167 are needed.</li> <li>The leardscaping will b developed by the the vale the word that the vale the statified, as will a reader bard that the statified is a suell as a stacking because the mort significant the optimany of for the the whole center, and only 167 are needed.</li> <li>The leardscaping will be developed by the the vedge. The screening on the northest correr.</li> <li>Will have arborvitae. You're going to have holy junipers.</li> <li>And he also testified that he would be the vedge. The screening on the northest correr.</li> <li>Will have astipulation for that the would be the vedge. The screening on the northest correr.</li> <li>Wilt will eliminate the concern that you regimeer dia boxic, and it's only warming of precoded is northest at point, the optiming setting status the height the will eliminate the correr dia suggested that would be whave.</li> <li>The leardscaping setting setting st</li></ul>	-		-	
<ul> <li>which is a nonconforming condition.</li> <li>The property is in a B-3 Zone. It has         a square foctage of 154,555 square feet, where only         commercial facility.</li> <li>D,000 square feet is required in this zone to have a         commercial facility.</li> <li>D,000 square feet is required in this zone to have a         commercial facility.</li> <li>D being permitted use in the zone. So a restaurant use is         a permitted use in the zone. So a restaurant use         is a permitted use in the zone. So a restaurant use         is a permitted use in the zone. So a restaurant use         is a permitted use in the zone. So a restaurant use         is a permitted use in the zone. So a restaurant use         is a permitted use in the zone. So a restaurant use         is a permitted use in the zone. So a restaurant use         is a permitted use in the zone. So a restaurant use         is a permitted use in the zone. So a restaurant use         is a permitted use in the zone. So a restaurant use         is a permitted use in the zone. So a restaurant use         is a permitted use in the zone. So a restaurant use         is more determined. The provide a report that provides         the oreal traffic in the area. It was his opinion         if those aspects, when you can         remove nonconformites, that the is a very good, positive         element of planning.         LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.         20         To spaces for the whole center, and only 167 are         needed.         The leadscaping will be developed by         increasing the screening on the northest correr         will have arboritae. You're going to have holy         junipers.         The leadscaping will be developed by         increasing the screening on the northest correr         will have arboritae. You're going to have holy         junipers.         The leadscaping will be developed by         that will eliminate lights from the headilights. And         we have a stipulatin for that</li></ul>				-
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16       height can be 36 feet and two stories.       16       He provided a report that provides         17       The proposed coverage is going to be       industry standard try generation rates, how much         18       reduced. The setbact so Godwin Avenue and on Rea       industry standard try generation rates, how much         19       Avenue will be conforming. The bank building's       industry standard try generation rates, how much         19       Aut of those sapects, when you can       remove nonconformity, that that is a very good, positive         20       a nonconformity, that that is a very good, positive       anot how sapects, when you can remove         21       AN AL CARUCI, C.S.R., R.P.R., LLC.       201-641-1812         20       Parking requirements, we're proposing       17         10       Spaces for the whole center, and only 167 are       needed.         1       The leadcricing of the drive-through with       fast food restaurant, a minimum of eight stacking in         19       poles and lines servicing this building.       fast food restaurant, a minimum of eight stacking in         10       The leadcricing of the drive-through with       the operational gentleman, that cooking per se is         10       Industry standard try generation in the other       Try our remember he testified, as well         11       And he also testified that he would be       mot involv	14	only need 100 feet.	14	drive-through use to eliminate traffic on the
17       The proposed coverage is going to be         18       reduced. The setback on Godwin Avenue and on Rea         Avenue will be conforming. The bank building's         20       nonconformity location is removed.         21       All of those aspects, when you can         28       remove nonconformities, I think we all understand,         29       you deal with this all the time, when you can remove         24       a nonconformity, that that is a very good, positive         29       element of planning.         LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.       201-641-1812         201       Parking requirements, we're proposing         21       TO spaces for the whole center, and only 167 are         a edded.       The leadscaping will be developed by         3       increasing the screening of the drive-through with         4       The screening of the drive-through with         5       inderground, so you will not have the uoyl telephone         6       If you remember he testified, as well         7       The landscaping will be developed by         8       not involved, and it's only warming of precoked         9       So service is quicker than the other         19       junipers.         10       Will have arborvitae. Youre going to have holly	15	It has a height of 25.6 feet, where the	15	roadways.
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<ul> <li>The electric is going to now be put underground, so you will not have the ugly telephone poles and lines servicing this building.</li> <li>The landscaping will be developed by increasing the screening of the drive-through with the yew hedge. The screening on the northeast corner will have arborvitae. You're going to have holly junipers.</li> <li>And he also testified that he would be putting in that fence to eliminate the concern that your engineer had about what he used the word "blinding" of headlights coming around on the on the drive-through.</li> <li>The parking setbacks are going to be improved. And there will be plantings at the height that will eliminate lights from the headlights. And we have a stipulation for that that it would be subject to the borough engineer's approval.</li> <li>Then the next witness, who was here twice, Gary Dean, a very well-recognized transportation engineer. He's been doing this work, as he testified, since 1988. And he is not only a LAURA A. CARUCCI, C.S.R., R.P.R., L.LC.</li> <li>Mexican-themed QSRs need less stacking because the menu is limited.</li> <li>If you remember he testified, as well as the operational gentleman, that cooking per se is not involved, and it's only warming of precooked foods.</li> <li>So service is quicker than the other</li> <li>types of facilities that you might used to and seen in cooking the hamburger or the chicken.</li> <li>He distinguished the applicant's use from Wendy's because of that, where at that point, they would need more queueing because there's more time to get from a reader board to the window.</li> <li>He testified that the most significant</li> <li>enhancement in terms of the overall safety</li> <li>eliminating the curb cut on Godwin Avenue. I've said it before. I have to say it again. Your engineer</li> <li>concurred and suggested that we do that. And we did.</li> <li>That, from a planning aspect, is a positive element.</li> <li>He submitted a report that substantiated his</li> <li>testimony.</li> <li>Then you heard</li></ul>	2	170 spaces for the whole center, and only 167 are	2	
<ul> <li>5 underground, so you will not have the ugly telephone poles and lines servicing this building.</li> <li>7 The landscaping will be developed by increasing the screening of the drive-through with the yew hedge. The screening on the northeast corner will have arborvitae. You're going to have holly junipers.</li> <li>10 will have arborvitae. You're going to have holly junipers.</li> <li>11 junipers.</li> <li>12 And he also testified that he would be putting in that fence to eliminate the concern that your engineer had about what he used the word</li> <li>13 putting in that fence to eliminate the concern that your engineer had about what he used the word</li> <li>14 from Wendy's because of that, where at that point, they would need more queueing because there's more the drive-through.</li> <li>17 The parking setbacks are going to be improved. And there will be plantings at the height that will eliminate lights from the headlights. And</li> <li>10 we have a stipulation for that that it would be subject to the borough engineer's approval.</li> <li>12 Then the next witness, who was here</li> <li>13 twice, Gary Dean, a very well-recognized</li> <li>14 transportation engineer. He's been doing this work, as he testified, since 1988. And he is not only a LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</li> <li>5 menu is limited.</li> <li>6 If you remember he testified, as well as the operational gentleman, that cooking per se is not involved, and it's only warming of precooked</li> <li>9 foods.</li> <li>10 So service is quicker than the other</li> <li>11 types of facilities that you might used to and seen</li> <li>12 in cooking the hamburger or the chicken.</li> <li>13 He distinguished the applicant's use</li> <li>14 from Wendy's because of that, where at that point, they would need more queueing because there's more</li> <li>16 time to get from a reader board to the window.</li> <li>17 He testified that the most significant</li> <li>18 improved. And there will be plantings at the height</li> <li>19 leininating th</li></ul>	3	needed.	3	based upon the ITE standards, he found that the
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1	expert. I've been doing this for a number of years.	1	safety aspect to be able to see a sign as they come
2	And many times I've listened to two traffic experts.	2	down the road.
3	And the one thing that they can agree on is that they	3	But I will tell you that if you
4	disagree. That didn't happen here.	4	disagree because we need a variance for that, that at
5	Your traffic expert stated that he	5	the end of the day, that would not be a reason to
6	can't imagine anything that would be generated that	6	deny the application. If you I believe that that
7	would make an accident history here. He checked the	7	sign is not warranted or necessary, then the sign
8	accident history. He did more than we did. We	8	goes away.
9	didn't check that. He said there's no accident	9	The lighting, he testified to, as well
10	history here. He agreed with Mr. Dean that the	10	as Mr. Missey, will be code compliant.
11	elimination of the drive-through on Godwin Avenue is	11	So then we got to the crux of matter
12	"a positive aspect" because it reduces the number of	12	from a planning standpoint when we talk about the
13	conflict points.	13	ordinance, we talk about this particular property,
14	He thinks, and he said, "I certainly	14	and we talk about the planning aspects. Matthew
15	think that the application should be supported from a	15	Seckler, our planner. Been practicing for over 15
16	traffic standpoint."	16	years. Been before more than 70 board. Serves as a
17	He concurred with Mr. Dean pertaining	17	municipal planner as well as a planner for
18	to the pass-by traffic. And, in addition, he went	18	applicants.
19	beyond what Mr. Dean did. He looked at the ITE	19	And he testified and confirmed that the
20	Manual. He looked at the NJ DOT numbers. And then	20	site 3.55 acres. It is 15 times more than a tract of
21	he also found, because he did a lot of research he	21	land is necessary for in B-3. And here's the
22	also found a periodical on a QSR report that	22	important part if you look at A-14 in your exhibits.
23	confirmed that a Mexican-style restaurant needs a	23	This property is the third largest out of 109.
24	queuing of approximately seven.	24	He testified and confirmed that
25	And I don't have to read it into the	25	restaurants are a permitted use, and QSRs are a
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
	94		96
	01		90
1	record, but you have it.	1	permitted use. It's solely the drive-through aspect
1 2		1 2	
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2	record, but you have it. Both his report and Mr. Dean's report	2	permitted use. It's solely the drive-through aspect that requires the D variance. And we know that.
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		1	
	97		99
1	But maybe what the Mayor and Council	1	safety benefit and would outweigh any detriment.
2	could have done and I'm not criticizing is	2	But, again, if you didn't agree with
3	maybe they could have distinguished and said, well,	3	that, that request for variance relief would be
4	if it's a piece of property over 2-and-a-half acres,	4	withdrawn.
5	then it would be permitted if it meets all the other	5	I'll very briefly go over the testimony
6	requirements for queuing and ingress and egress, et	6	that was provided to you from the objector's planner,
7	cetera. If they had done something like that,	7	the person that didn't come to all the meetings and
8	there's probably three properties in the 109 where it	8	wasn't quite sure what meetings she came to, who
9	would work. And it would be able to provide a QSR	9	started out by talking about the sign on the side of
10	with a drive-through. Because otherwise there's no	10	the building over the drive-through. That was the
11	QSRs in Midland Park because the drive-through is an	11	first thing that was objectionable.
12	integral part of being a QSR.	12	As I just stated, if the board agrees
13	He testified and Mr. Novak went	13	with her, so be it, it's gone.
14	through these already. He testified that it does	14	But in connection with her testimony
15	meet certain requirements under the municipal	15	pertaining to the use variance itself, with all due
16	under your Master Plan. So let's walk back.	16	respect, I believe it was at best weak. I think one
17	He showed you the first positive	17	of the best examples of how unsubstantiated her
18	criteria in showing and he confirmed what we've	18	testimony was, that at the beginning of the evening
19	already gone through ad nauseam, all of the reasons	19	she believed the testimony that Taco Bell made was
20	why this property is particularly suited for the use.	20	that they would be open 24 hours, seven days a week.
21	And he then went and he testified to a number of the	21	I objected to that and said that's not the case. The
22	goals in the Master Plan that are being enhanced or	22	Chairman said the same thing. Then I asked the next
23	being met, recognizing the Master Plan never said you	23	question: Were you even here? She wasn't sure and
24	can't have drive-throughs in Midland Park. No,	24	then she said no.
25	there's not even anything in that Master Plan that	25	She had the chance to go back and look
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
	98		100
1	comes close to that.	1	at transcripts. She had the chance to get a
2	And he was able to pick out goals in	2	at transcripts. She had the chance to get a recording of this and listen to it. She didn't do
2 3	And he was able to pick out goals in your Master Plan, including revitalization of a	2 3	at transcripts. She had the chance to get a recording of this and listen to it. She didn't do her homework.
2 3 4	And he was able to pick out goals in your Master Plan, including revitalization of a building that's vacant, a bank building. And we know	2 3 4	at transcripts. She had the chance to get a recording of this and listen to it. She didn't do her homework. On the basis of that, I think it was
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	101		103
1	stick. I would say none of it really stuck.	1	ordinance, you've got to look and say, okay, it's
2	I think from the standpoint from	2	prohibited. But did they ever take into
2	Mr. Seckler, who gave much more extensive testimony	3	
4	about the positive and negative criteria, that at the	4	acres, that's six times the size of Wendy's, six
4 5	end of the day, his planning testimony supports the	5	times the size of Dunkin' Donuts, six times the size
6	applicant's request.	6	of Starbucks?
7	So now, with that as a synapsis of the	7	Was that ever thought of when they went
8	overview of this application that started in March, I	8	to introduce an ordinance, when they sent it to the
9	want to walk you through what you're here to make a	9	planning board, who had the right to say to their
10	determination on. I maybe gave some of it away	10	planning board, who had the right to say to their planner, hey, take a look at this; do you think we
11	already when we had this further back-and-forth with	11	should just make it a carte blanche, or should we
12	Mr. Novak earlier.	12	
12	But what I've stated is that we have	12	just say one line, prohibited, and maybe get a report
13	stipulated to certain conditions. We have all	14	back from the planner that says hey, you can tweak
14		14	
	the engineers basically agreeing that this site can	_	criticizing anybody. It didn't happen. But I think
16	work. We've had planners give you sufficient reasons	16	that has to go into your thought decision-making
17	to support the positive and negative criteria of the	17 18	process deliberation, if you will, in looking at this
18 10	application. And beyond that, we've had even your		and saying, we've got a site that's particularly
19 20	own professionals concur. We said we can meet all	19 20	suited for it.
20 21	the conditions your borough engineer provided.		I think when you look and go through
21	We haven't heard not that it's his	21 22	all of the aspects of what we were able to show you here, that we meet our burden of proof. This doesn't
22	place any objections from your planner saying this	22	
23 24	violates this, this and this in the Master Plan, because it doesn't. And of course your traffic	23	open the door for every other property owner in the B-1 and the B-3 to say, oh, my turn. I know that was
24 25	engineer went beyond what our traffic engineer said	24	
20	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.	25	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
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1	in supporting this application.	1	each piece of property is judged on its own merit.
2	I know that as board members you have a	2	
3	very hard task in being able to look at all this	3	property that would be large enough to accommodate a
4	testimony, evaluate the testimony, the exhibits, and	4	drive-through. I don't know because you haven't seen
5	then at that point take that litmus test that's in	5	it. But that's not how you look at it either. You
6	Section D of the Municipal Land Use Law, in	6	look at this site. And if you say to yourself, you
7	N.J.S.A. 40:55D-70, and you have to look at that and	7	know, the Mayor and Council really thought this was
8	you have to look at whether this site is particularly	8	going to be something that has to be prohibited
9	suited. I've given you all the reasons why, and so	9	everywhere because they didn't want to fill up the
10	did our professional.	10	street with cars out of a queue, well, if that's what
11	And to look at the negative criteria at	11	you think is going on here, it's not happening here.
12	the same time and see that we've met our burden of	12	You've heard all the testimony.
13	proof.	13	Any additional traffic beyond the
14	And I'm going to go back just to dwell	14	queuing where we have 11 cars we can queue, we need
15	for a moment again. When you do that analysis from a	15	it only for 7. Let's just say it happens. It's a
16	planning perspective, you have to put into your head,	16	special day for Mexican food. Those cars are
17	why do I what is it in this ordinance of	17	internal on this site. Why? Because it's
18	prohibiting it, what is it that I'm going to latch on	18	3-and-a-half acres. It's not a half-acre. It's not
19	to a deny for to say, oh, we can't do this because?	19	out in one of your streets.
20	It is contrary to the purpose of the ordinance.	20	You heard some borough residents that
21	And I'm going to take you past the	21	that came in here. And I think it was nice they
22	purpose of the ordinance being, thou shall not have a	22	came. It was encouraging to hear them say, hey, why
23	drive-through restaurant in Midland Park. I think	23	can't we have this in the town. I know they didn't
24	what you have to look at and I know what you have	24	meet the standards of the Municipal Land Use Law.
25	to look at is when you don't have a purpose in the	25	But I think they paint a picture of
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
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	105		107
4		4	
1	saying, why is it that an objector can tell us what	1	can't even get out of the lane because they don't
2	we can and not have in the town?	2	provide the second bypass lane, which almost every
3	Again, I think what they came and	3	QSR that I've ever seen has that second bypass lane.
4	looked at and saw is that from a practical	4	This was a bank site, a totally different use than
5	standpoint, this application as proposed works.	5	what the QSR that is provided with Taco Bell is
6	The planner testified that it's unique.	6	proposed for.
7	The planner testified it's viable. The traffic	7	The applicant's counsel raised Mr. Dean
8	engineer testified it's viable. Our engineer	8	and indicated how several of the other witnesses
9	testified it's viable.	9	complemented his testimony. I'll just ask you to
10	And on the basis of that, you've heard	10	take judicial notice of an Appellate Division
11	all the goals of the Master Plan that are being met.	11	decision A1563-20, <u>Raritan Partners, LLC vs. Raritan</u>
12	There's nothing here that said there's goals that	12	Township Zoning Board in which Mr. Dean's testimony
13	have not been met. And that's what we really had to	13	was found to be incredible by the board and backed up
14	look at for the negative criteria.	14	by an Appellate Division decision that supported the
15	I think I've given you many reasons	15	board in rejecting his testimony because it was not
16	why. You only need one to approve an application	16	supported by evidence.
17	like this. Each case is decided on its own merits.	17	So he's got a tarnished reputation that
18	And I believe in this instance we've been able to	18	maybe this board isn't aware of.
19	provide you with all of the foundation basis	19	MR. WHITAKER: I'm going to object to
20	requirements for the positive criteria and the	20	that. One decision in the many that he's been
21	negative criteria. And on the basis of that, I would	21	involved with over the last 15 years
22	respectfully request that you approve this	22	MS. RIZZUTO: I understand.
23	application.	23	MR. WHITAKER: doesn't mean that he
24	And I thank you most sincerely for all	24	has a tarnished reputation.
25	the time you spent on it, including putting up with	25	That's insulting.
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
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2	me tonight. Thank you.	2	MS. RIZZUTO: The board can take judicial notice.
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2 3 4	me tonight. Thank you. CHAIRMAN ANDERSON: Ms. Rizzuto, did you have any final comments?	2	MS. RIZZUTO: The board can take judicial notice.
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1	is only two years old. And you have to take you	1	transcripts.
2	have to take into consideration and give weight to	2	MR. WHITAKER: We all agreed that the
3	the governing body knows what sites it has. The	3	ordinance does not require a bypass lane.
4	governing body may have done it because of other	4	We all recognized that the bank didn't
5	sites within, but this site existed exactly as it	5	have a bypass lane. It was passed by the Planning
6	was. If they wanted to exempt this site, they could	6	Board when that was built for Atlantic Stewardship
7	have. If they wanted a drive-through, they could	7	or Columbia, I believe, some time ago.
8	have, there. They didn't. They wanted no	8	In connection with my approach as to
9	drive-throughs in B-1 and B-3. And that's what this	9	purpose, I stand by that. I believe that it's
10	property is. It's one of those zones. I apologize.	10	necessary that you understand in any ordinance what's
11	In any event, so I urge you to stick	11	the reason for it.
12	with the ordinance. Your planner told you, you	12	But putting aside for a moment and
13	should be paying attention to your code and your	13	disagree with me on that and look at the same
14	Master Plan over the granting of a variance if in	14	application and say, okay, it's prohibited, that
15	fact this is a prohibited use and they have not made	15	doesn't mean we can't grant a variance. That's been
16	their proofs as to particular suitability or any of	16	said and agreed.
17	the other elements.	17	So let's just look at all the reasons
18	I think that you have plenty to show	18	why this site works. And let's forget for the
19	you that the D(1) variance, the hardest variance that	19	moment, if you will I'm not putting aside my
20	you can get under the Municipal Land Use Law, is even	20	argument, but just as an alternative, let's look and
21	harder because of the youthfulness of this ordinance.	21	say this site works. There's no prohibition to it in
22	It just happened. By the time they came here, it was	22	the Master Plan. It's particularly suited. And make
23	only six months old. It's approximately two two	23	that finding without alluding to the purpose. That's
24	years old now, or whatever it is. And they didn't	24	your alternative here. I think either way the
25	they haven't gone and repealed it. And they haven't	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	1	what the applicant is proposing.
2	that there's plenty of QSRs already in town along	2	Thank you.
3	Godwin Road. And I don't foresee them changing this	3	CHAIRMAN ANDERSON: Before we discuss
4	anytime in the future.	4	this, since you have two different voting
5	MR. WHITAKER: Well, I think that's	5	requirements, I assume we would vote first on the use
6	truly speculative. Let the record reflect that.	6	and then
7	MS. RIZZUTO: Okay, that's speculative.	7	MR. WHITAKER: It's a D variance.
8	But the point is, they just did it.	8	First then you would go to the C variance
9	There's no reason for them to make any changes. And	9	certainly. Bifurcated first, yes, Mr. Chairman.
10	there's no appeal of their it's too late for them	10	CHAIRMAN ANDERSON: Just so everyone
11	to appeal.	11	understands what we're going to do is, because we
12	And for the applicant to say that you	12	need five affirmative votes on the use variance,
13	can just grant this variance because there's no	13	first we'll consider the use variance. If the use
14	purpose stated, it's a trick. That's a trick. There	14	variance is approved, then we will vote again on the
15	doesn't there isn't a requirement for a purpose.	15	C variances, the front yard and the buffering and
16	And I think you, Mr. Chair, said it said it	16	whatever.
17	perfectly. The purpose is to prohibit drive-throughs	17	If the D variance is not approved, then
18	with a restaurant use in B-1 and B-3. That's what	18	we don't have to go to the C variance, right?
19	the purpose is.	19	MS. HERLIHY: Correct.
20	Thank you.	20	CHAIRMAN ANDERSON: Okay.
21	MR. WHITAKER: So just rebuttal very	21	Is there anything before we discuss
22	quickly.	22	this that we need to know to not get in trouble?
23	I know my adversary wasn't at all the	23	I'm assuming there's a good chance that
24	meetings.	24	we decide this may end up on appeal in court, but I
25	MS. RIZZUTO: But I read the	25	want to make sure we
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113 1 have something that's of concern to you, you may be MS. HERLIHY: The only thing I want to 1 2 add --2 able to rectify or get over or get past it or satisfy 3 3 yourself by some sort of a reasonable condition. MR. CAPALBO: Open to public at all, or 4 4 no. I just want you to keep that in mind as 5 MS. HERLIHY: No. 5 you're talking about and thinking about it. 6 6 MR. CAPALBO: We're done. CHAIRMAN ANDERSON: Well, I've had a 7 7 MS. HERLIHY: I'm not going to lot to say so I'd like to hear from other -- other 8 8 reiterate this requirements, or the proofs, or the people. 9 statutes. 9 VICE CHAIRMAN PAPAPIETRO: I just have 10 CHAIRMAN ANDERSON: Thank you. 10 a question, though, of Mr. Whitaker. 11 MS. HERLIHY: Because I think it's been 11 In your summation, I believe you 12 12 indicated the bank did not have a bypass lane. I covered in great detail and very well this evening by 13 everyone. 13 believe there was two lanes in that bank. 14 14 The only thing I wanted to add for the MR. WHITAKER: No. 15 board -- the board to think about is that they are 15 You could go out onto Godwin. 16 asking for a use variance tonight. 16 VICE CHAIRMAN PAPAPIETRO: I believe So you are well within your power to there was two lanes. They also had the existing 17 17 18 impose reasonable conditions. I did not sit through 18 structure. 19 all of the meetings. 19 MR. WHITAKER: Perhaps I misspoke. But 20 20 I did read all of the transcripts your ordinance does not require it. You've got --21 probably one-and-a-half times. And I know -- saw all you've got an ordinance that tells you what has to 21 22 the questions and the concerns of the board during 22 be. 23 23 the course of the hearings. And I know that on a VICE CHAIRMAN PAPAPIETRO: I just 24 number of occasions Mr. Whitaker, you know, 24 wanted to -- for the record. 25 25 stipulated that his client would comply with the MR. WHITAKER: Understood. LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C. LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C. 201-641-1812 201-641-1812 114 1 ordinance or comply with the prior CVS approval. And 1 MS. HERLIHY: Was one a bypass lane, or 2 **2** that's great because they have to do that. They have were they both --3 to comply with ordinance and they have to comply with 3 VICE CHAIRMAN PAPAPIETRO: Well, no. 4 4 the prior CVS approval. There's two lanes at the bank. 5 But if you are -- if you're considering 5 MS. HERLIHY: Right. 6 6 And you could get service -- maybe one the application and you are considering approving the 7 7 application and you're concerned about some of the was like one of the tubes or something. 8 things that were discussed, you can, like I said, 8 MR. WHITAKER: Yeah. 9 9 impose reasonable -- we have to be reasonable --But if one is in front of both of them, 10 reasonable conditions to address a concern that you 10 you couldn't get bypass. 11 11 might have that might be swaying you one way or the MS. HERLIHY: Right. 12 12 other. I was going to say, a bypass lane is a 13 So I didn't see that discussed before. 13 dedicated lane that you do not have service. But if you're -- if you're on line, at **14** I didn't see that raised or mentioned. And I just 14 any given point while you're on line, you can change 15 want everyone to know that if it does make a 15 16 difference to you and -- you know, an example -- I'm 16 your mind, you could decide you have an emergency, not saying this is what came up -- but hours of 17 17 and you could get out of the lane, as opposed to just 18 operation. 18 a two-lane drive-through. You could still be stuck 19 19 behind someone and not have to the ability to stay. If the ordinance says that for a 20 20 drive-through it can be until midnight, and the MR. WHITAKER: And the law is clear 21 21 applicant has stipulated they'll comply with the that if you don't have a standard that requires a 22 22 ordinance -- they have to comply with the ordinance bypass, you would have a problem saying, well, you 23 -- if you saw to condition an approval on closing at 23 don't have a bypass and constitute a denial. 24 MR. NOVAK: And the outside lane was a 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 25 pneumatic tube. LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C. LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.

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1	MR. WHITAKER: Yeah.	1	that decision based on facts and information. Look,
2	MS. HERLIHY: Was it?	2	it works. Sometimes it doesn't work.
3	MR. NOVAK: Yes.	3	You know, I think it would work in this
4	MS. HERLIHY: That might be accurate.	4	particular form. That's just my opinion. I think it
5	I just qualify that by saying when you're requesting	5	would work. I've been there. I live right down the
6	a use variance	6	block from there. I've seen the size. I know I see
7	MR. WHITAKER: Understood.	7	the traffic at Wendy's. This is going to be much
8	VICE CHAIRMAN PAPAPIETRO: I just	8	better than Wendy's. It goes into the street.
9	wanted to make a point there was two lanes.	9	So, I mean, that's just me. That's
10	CHAIRMAN ANDERSON: So do you want to	10	just how I feel about it.
11	go around, or does somebody want to volunteer	11	CHAIRMAN ANDERSON: Anybody else?
12	thoughts or opinions? Somebody other than me	12	MR. CAPALBO: I agree with Rich. And I
13	hopefully.	13	think Starbucks was the rush to judgment for making
14	VICE CHAIRMAN PAPAPIETRO: I have a lot	14	this ordinance.
15	of thoughts and opinions. You heard some of them	15	That's my personal opinion. I don't
16	during this thing. Mr. Whitaker did an excellent job	16	have anything factual. But I think the conditions
17	with his testimony and representing his client with	17	that prevailed because of the approval of Starbucks,
18	this application.	18	which really didn't have to come to the Zoning Board,
19	And while the site may be well-suited	19	correct? So I think that was a rush to judgment, and
20	for this, and given the testimony, I'm still going by	20	let's stop drive-ins because of the condition of
21	that the Mayor and Council specifically passed an	21	Starbucks.
22	ordinance to prohibit this type of business. And it	22	CHAIRMAN ANDERSON: Well, actually, it
23	was only two years ago. I can see if it was	23	was after Starbucks was Dunkin' Donuts came here.
24	something that's been in the books for years or	24	And then we decided they came here for a use
25	decades. Times have changed and there's also	25	variance because the zoning ordinance because the
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2	118 applications coming to the zoning looking for a variance for this type of use, but this is something	2	120 zoning officer, and I assume the Mayor and Council thought the same thing, that you needed a use
2 3	118 applications coming to the zoning looking for a variance for this type of use, but this is something that's new.	2 3	120 zoning officer, and I assume the Mayor and Council thought the same thing, that you needed a use variance to do a drive-in.
2 3 4	118 applications coming to the zoning looking for a variance for this type of use, but this is something that's new. And we've had cases here with people	2 3 4	120 zoning officer, and I assume the Mayor and Council thought the same thing, that you needed a use variance to do a drive-in. So we decided no, you don't. The
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2 3 4 5 6	118 applications coming to the zoning looking for a variance for this type of use, but this is something that's new. And we've had cases here with people coming in for porticos and then the town changes because we're getting so many requests for that type.	2 3 4 5 6	120 zoning officer, and I assume the Mayor and Council thought the same thing, that you needed a use variance to do a drive-in. So we decided no, you don't. The ordinance is clear, you don't need a use variance. It went to the Planning Board, which of course has
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	121		123
1	David, it's not that it's an use that they didn't	1	just my opinion.
2	anticipate. And as Rich was saying, or one of them,	2	CHAIRMAN ANDERSON: Go ahead, Dave.
3	that times change and there's a new type of use that	3	MR. ZUIDEMA: Well, I just wanted to
4	the ordinance didn't didn't anticipate. They	4	address the board attorney, is that it keeps being
5	certainly anticipated it. It was in direct response	5	referred to as 3-and-a-half acres. And obviously this is one corner of it.
6	to Dunkin' Donuts. We're not going to have any more	7	
7 8	and, I mean, I'm not saying it's a good thing, or	8	But they always go back to 3-and-a-half acres, 3-and-a-half acres.
	that I agree with the ordinance or whatever. But	9	MS. HERLIHY: I think that the site is
9 10	from my point of view, that's not for me to decide as a member of this board.	9 10	3-and-a-half acres.
10		10	
12	As a resident of Midland Park, I don't	12	MR. ZUIDEMA: I get it.
12	see any problem with a Taco Bell there. I mean, I	12	So my question is that, I would my
	don't see a problem. But as a member of this board,		vote would be predicated a bit that we have a
14 15	I just can't get past the fact that the Mayor and Council has specifically prohibited it.	14 15	building on those 3-and-a-half acres that has a
15		15	plastic sheet in front of it for the last three years unfinished on the 3-and-a-half acres.
17	So anyone else for or against? Go ahead.	10	CHAIRMAN ANDERSON: He's talking about
18	Well, Dave or David?	17	
10	MR. BARLOW: David.	10	 MS. HERLIHY: Yeah, no, understood.
20		20	MS. HERLINY: Yean, no, understood. MR. ZUIDEMA: There's rodents in there.
20 21	CHAIRMAN ANDERSON: No. I thought	20	And there's construction vehicles there. There's
21	I'm just MR. BARLOW: He's Dave.	21	construction materials in the back.
22	I'm David.	22	
23 24	CHAIRMAN ANDERSON: I know that.	23	My vote would be could go either way. But I don't think I would vote for this because
24 25	Which one of you is going to talk?	24	of the disrepair of the of the site. Because
25	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.	25	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812		201-641-1812
4	122		124
1	MR. BARLOW: Should I defer to my	1	we're Mr. Whitaker, and rightfully so, we're going
2			to 2 and a half acres. I think it could accommodate
2	eldest?	2	to 3-and-a-half acres. I think it could accommodate
3	MS. HERLIHY: Who decided that they	3	it because they're including all of, you know, right
3 4	MS. HERLIHY: Who decided that they should sit next to each other?	3 4	it because they're including all of, you know, right over to Erie Ave.
3 4 5	MS. HERLIHY: Who decided that they should sit next to each other? That's the problem.	3 4 5	it because they're including all of, you know, right over to Erie Ave. But I don't think going Ridgewood
3 4 5 6	MS. HERLIHY: Who decided that they should sit next to each other? That's the problem. MR. BARLOW: This is what I would say,	3 4 5 6	it because they're including all of, you know, right over to Erie Ave. But I don't think going Ridgewood Heights or Midland Park Heights, how many more years
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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	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

15 building there that's been sitting vacant and 16 half-built basically, we've got to put a time on that that that has to be finished. Okay? 17 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 LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C. 201-641-1812

- with something. MR. CAPALBO: Does the same person own all of that. MS. HERLIHY: Yes. MR. ZUIDEMA: Yeah. That man owns it. MR. CAPALBO: That entities owns all, the whole --MS. HERLIHY: The whole shopping center, yes. They would be using a portion of the shopping center. MR. ZUIDEMA: They keep telling us it's 3-and-a-half acres. MR. CAPALBO: Who is actually the applicant, the property owner. MS. HERLIHY: The applicant is the Taco Bell entity. And the owner -- in order to come
- 17 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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## LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C. 201-641-1812

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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?
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.

### A A. CARUCCI, C.S.R., R.P.R., L.L. 201-641-1812

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	129		131
1	MS. HERLIHY: Six months from when the	1	
			CHAIRMAN ANDERSON: He doesn't get a
2	permits are issued to complete.	2	building Taco Bell doesn't get a building permit
3	MR. WHITAKER: To complete, that's	3	
4	right.	4	MR. WHITAKER: Until the other building
5	CHAIRMAN ANDERSON: When can they	5	is done.
6	begin?	6	CHAIRMAN ANDERSON: But what do you
7	MS. HERLIHY: When?	7	mean by "done".
8	CHAIRMAN ANDERSON: Taco Bell. He's	8	MS. HERLIHY: It has a CO.
9	just saying that's when	9	MR. WHITAKER: A CO.
10	MR. WHITAKER: We could begin, but we	10	MR. FORMICOLA: Fixed.
11	don't get a CO until that time.	11	Everything is ready to go.
12	MS. HERLIHY: I'm just taking a note	12	CHAIRMAN ANDERSON: All right. That
13	here.	13	should
14	MR. CAPALBO: You would agree to that	14	MR. ZUIDEMA: I wanted to hear his
15	stipulation.	15	question.
16	MR. WHITAKER: Yes.	16	CHAIRMAN ANDERSON: Oh, yeah, yeah.
17		10	
	CHAIRMAN ANDERSON: Dave? Dave, what's		MR. ELIYA: So if that was an
18	your you're the one with the main concern.	18	agreed-upon stipulation, would that then be a
19	MR. CAPALBO: They have to abide by it.	19	positive criteria that you can take into
20	MR. PLACIER: You would think	20	consideration for the use variance?
21	somebody's in the old Dunkin' Donuts.	21	MR. FORMICOLA: It's up to the
22	MR. WHITAKER: They have a Wonder	22	individual how you interpret it.
23	tenant I'm told. I don't represent the tenant, but I	23	CHAIRMAN ANDERSON: That's correct. I
24	was told that.	24	don't know.
25	VICE CHAIRMAN PAPAPIETRO: With the	25	MR. ELIYA: I would see it, but I don't
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
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	130		132
1	130 other building that's been under construction for	1	132 know if it's technical.
1 2		1 2	
-	other building that's been under construction for		know if it's technical.
2	other building that's been under construction for three years, if you get new permits and you start	2	know if it's technical. MS. HERLIHY: It's something that they
2 3	other building that's been under construction for three years, if you get new permits and you start again, based upon the history, who's to say the same	2 3	know if it's technical. MS. HERLIHY: It's something that they have to do anyway. We're just giving them a hook.
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	133		135
1	The board and court tied that to the	1	CHAIRMAN ANDERSON: Ms. Herlihy can
2	beautification of the site.	2	figure it out.
3	This is not quite the same because it's	3	MS. HERLIHY: I got it.
4	not the redevelopment of the whole site. So if	4	CHAIRMAN ANDERSON: Is there a second?
5	they're catching up to the site to where it needs to	5	MR. BARLOW: Second. I second it.
6	be again, I know this is technical for us to give	6	CHAIRMAN ANDERSON: David. He said he
7	testimony. I don't know if I would necessarily	7	
8	consider that part of the special reasons myself	8	MR. BARLOW: Yeah, I second.
9	but	9	CHAIRMAN ANDERSON: No.
10	MR. ELIYA: It's not development of the	10	But you have listened to all the tapes?
11	whole site.	11	MR. BARLOW: Yes.
12	But they continually use the whole site	12	MS. HARMON: Mr. Formicola?
13	as, you know, a basis that it is particularly suited	13	MR. FORMICOLA: Yes.
14	for the variance.	14	MR. CAPALBO: Excuse me a minute.
15	So if they're going to take everything	15	CHAIRMAN ANDERSON: Discussion on the
16	in its entirety, then I would presume that you should	16	motion?
17	probably take the entire site in its entirety.	17	MR. CAPALBO: Pardon?
18	MS. HERLIHY: Yes, that is correct.	18	CHAIRMAN ANDERSON: Discussion on the
19	The point here is that whether the Taco Bell	19	motion, yeah.
20	application is approved or not, ultimately they're	20	MR. CAPALBO: Am I allowed to vote?
21	required to do certain things onsite. That would be	21	CHAIRMAN ANDERSON: No. Wait.
22	required.	22	Do we have one, two, three, four,
23	MR. NOVAK: If they were tearing the	23	five, six, seven. No. Sorry.
24 25	whole thing and it was a Taco Bell with a new	24	MR. CAPALBO: I was just wondering
25	shopping center, removing blight, promoting a visual	25	about that.
	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C. 201-641-1812		LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C. 201-641-1812
	134		136
	134		150
1	element then notentially it's something you can	1	Everybody has caught up on all the
1	element, then potentially it's something you can consider a little bit more	1 2	Everybody has caught up on all the meetings and everything
2	consider a little bit more.	2	meetings and everything.
-	consider a little bit more. CHAIRMAN ANDERSON: Does anybody else		meetings and everything. CHAIRMAN ANDERSON: Yes.
2 3	consider a little bit more. CHAIRMAN ANDERSON: Does anybody else have anything to say before I beg someone for a	2 3 4	meetings and everything. CHAIRMAN ANDERSON: Yes. MR. CAPALBO: Okay. You know, I didn't
2 3	consider a little bit more. CHAIRMAN ANDERSON: Does anybody else	2 3 4	meetings and everything. CHAIRMAN ANDERSON: Yes.
2 3 4 5	consider a little bit more. CHAIRMAN ANDERSON: Does anybody else have anything to say before I beg someone for a resolution, either a motion either for or against,	2 3 4 5	meetings and everything. CHAIRMAN ANDERSON: Yes. MR. CAPALBO: Okay. You know, I didn't want to I didn't want to screw anything up by
2 3 4 5 6	consider a little bit more. CHAIRMAN ANDERSON: Does anybody else have anything to say before I beg someone for a resolution, either a motion either for or against, approve or deny?	2 3 4 5 6	meetings and everything. CHAIRMAN ANDERSON: Yes. MR. CAPALBO: Okay. You know, I didn't want to I didn't want to screw anything up by voting.
2 3 4 5 6 7	consider a little bit more. CHAIRMAN ANDERSON: Does anybody else have anything to say before I beg someone for a resolution, either a motion either for or against, approve or deny? (No Response.)	2 3 4 5 6 7	meetings and everything. CHAIRMAN ANDERSON: Yes. MR. CAPALBO: Okay. You know, I didn't want to I didn't want to screw anything up by voting. CHAIRMAN ANDERSON: Well, she wasn't
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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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	LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.
	201-641-1812
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1	CERTIFICATE
2	CERTIFICATE
2 3	C E R T I F I C A T E I, RONDA L. REINSTEIN, a Certified Court
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2 3 4 5	C E R T I F I C A T E I, RONDA L. REINSTEIN, a Certified Court Reporter of the State of New Jersey, authorized to administer oaths pursuant to R.S.41:2-2, do hereby
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