

# **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

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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

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**Jag-Tech LLC dba Midland Park Food Mart – 184 Godwin Avenue – BL 17 LT 9.01** – Application has been withdrawn by the applicant on 10/11/23.

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**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.

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## **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.

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Meeting Adjourned – 9:56 PM

Jessica Harmon

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

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

B E F O R E:

LES ANDERSON, CHAIRMAN

NICK PAPAPIETRO, VICE CHAIRMAN

RICHARD FORMICOLA, SECRETARY

DAVID BARLOW, MEMBER

JAMES CAPALBO, MEMBER

WILLIAM PLACIER, MEMBER

MARK DIVAK, MEMBER (ABSENT)

JOSEPH ELIYA, MEMBER

DAVID ZUIDEMA, MEMBER

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

## INDEX

WITNESS	SWORN	TESTIMONY
DAVID NOVAK, P.P.	6	6
Examination by Mr. Whitaker		26
Examination by Ms. Rizzuto		51
Board/Professional Questions		
Chairman Anderson		13
Mr. Formicola	20	
Vice Chairman Papapietro		23

## SUMMATIONS

MR. WHITAKER	82, 110
MS. RIZZUTO	106

## EXHIBITS

NO.	DESCRIPTION	IDENT/EVID
A-15	Transcript, Dated September 23, 2021	74
A-16	Transcript, Dated October 18, 2021	74
A-17	Minutes of Mayor & Council Dated October 28, 2021	75
A-18	Outline	75
A-19	Stipulations	75

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

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

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Counsel for the Objector, Burger Barn

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

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

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

CHAIRMAN ANDERSON: I call the meeting  
to order.

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

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

Please stand for the Flag Salute.

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

MS. HARMON: Mr. Zuidema?

MR. ZUIDEMA: Here.

MS. HARMON: Mr. Formicola?

MR. FORMICOLA: Here.

MS. HARMON: Mr. Papapietro?

VICE CHAIRMAN PAPAPIETRO: Here.

MS. HARMON: Mr. Placier?

MR. PLACIER: Here.

MS. HARMON: Mr. Barlow?

MR. BARLOW: Here.

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

<p>5</p> <p>1 MS. HARMON: Mr. Eliya?</p> <p>2 MR. ELIYA: Here.</p> <p>3 MS. HARMON: Mr. Capalbo?</p> <p>4 MR. CAPALBO: Here.</p> <p>5 MS. HARMON: Mr. Anderson?</p> <p>6 CHAIRMAN ANDERSON: Here.</p> <p>7 Public hearings, I'm advised Jag Tech</p> <p>8 has been withdrawn. Okay.</p> <p>9 So our only public hearing tonight is</p> <p>10 Taco Bell.</p> <p>11 Mr. Whitaker, do you want to enter your</p> <p>12 appearance?</p> <p>13 MR. WHITAKER: Certainly.</p> <p>14 Good evening, Mr. Chairman, Members of</p> <p>15 the Board, for the record, Bruce Whitaker from the</p> <p>16 firm of McDonnell &amp; Whitaker representing the</p> <p>17 applicant, MHF Midland Park, LLC.</p> <p>18 CHAIRMAN ANDERSON: Yeah, go ahead.</p> <p>19 Enter your appearance.</p> <p>20 MS. RIZZUTO: Good evening, Anne Marie</p> <p>21 Rizzuto from Weiner Law Group on behalf of the</p> <p>22 objector, Burger Barn.</p> <p>23 CHAIRMAN ANDERSON: Okay.</p> <p>24 I know you're here to give us your</p> <p>25 summation.</p> <p><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p><b>201-641-1812</b></p>	<p>7</p> <p>1 what need to consider.</p> <p>2 So just to refresh everybody's memory</p> <p>3 -- I'm sure you have not forgotten -- but this</p> <p>4 application is for use variance relief pursuant to</p> <p>5 N.J.S.A. 40:55D-70D(1) for a principal use not</p> <p>6 permitted in the zoning district.</p> <p>7 The application specifically is for a</p> <p>8 drive-through restaurant. So the use variance isn't</p> <p>9 for the drive-through and it isn't for the</p> <p>10 restaurant; it's for a combination thereof of a</p> <p>11 drive-through restaurant.</p> <p>12 In order to grant a D(1) use variance,</p> <p>13 the board needs to consider both the positive and the</p> <p>14 negative criteria.</p> <p>15 With the positive criteria, the</p> <p>16 applicant needs to demonstrate that there are special</p> <p>17 reasons which exist for the granting of the variance,</p> <p>18 and that the granting of the variance will further</p> <p>19 the purposes of Municipal Land Use Law.</p> <p>20 On the flip side of that with the</p> <p>21 negative criteria, the applicant needs to demonstrate</p> <p>22 there will be no substantial detriment to the public</p> <p>23 good and no substantial impairment to the intent of</p> <p>24 the zone plan.</p> <p>25 Regardless of one's opinions on Taco</p> <p><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p><b>201-641-1812</b></p>
<p>6</p> <p>1 MR. WHITAKER: That is correct.</p> <p>2 CHAIRMAN ANDERSON: Before you do that,</p> <p>3 though, I never gave an opportunity to our planner to</p> <p>4 give us his thoughts on the application, so I'd like</p> <p>5 to do him first.</p> <p>6 MR. WHITAKER: Certainly.</p> <p>7 He did give some testimony and he was</p> <p>8 sworn in at the last meeting, because I read the</p> <p>9 transcript of it.</p> <p>10 MR. NOVAK: I was going to ask if I was</p> <p>11 sworn in. I forgot.</p> <p>12 CHAIRMAN ANDERSON: Okay.</p> <p>13 But you're still sworn in.</p> <p>14 D A V I D N O V A K, PP, ACIP</p> <p>15 25 Westwood Avenue, Westwood, New Jersey, having</p> <p>16 been previously duly sworn, continues to</p> <p>17 testify as follows:</p> <p>18 MR. NOVAK: I'm still sworn in, and</p> <p>19 still David Novak, for the record. Last name is</p> <p>20 spelled N-O-V-A-K. With Burgis Associates. That's</p> <p>21 spelled B-U-R-G-I-S. And we are the board planning</p> <p>22 consultants.</p> <p>23 So I just want to provide the board a</p> <p>24 little bit of a recap and a background of what we're</p> <p>25 looking at essentially of what this variance is and</p> <p><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p><b>201-641-1812</b></p>	<p>8</p> <p>1 Bell, I think we all agree this is not an inherently</p> <p>2 beneficial use, like a church, or a house of worship,</p> <p>3 or a hospital. Because it's not an inherently</p> <p>4 beneficial use, the applicant has an enhanced burden</p> <p>5 of proof where they need to demonstrate that the site</p> <p>6 is particularly suited for this use and that the use</p> <p>7 is not inconsistent with the intent of the Master</p> <p>8 Plan.</p> <p>9 To back up from there, because</p> <p>10 oftentimes when we talk about the statutory criteria</p> <p>11 you hear a bunch of buzz words, special reasons,</p> <p>12 particular suitability. So let's delve into a little</p> <p>13 bit of what that means.</p> <p>14 When we talk about special reasons,</p> <p>15 there's typically three types of categories for</p> <p>16 special reasons.</p> <p>17 There's a reason where the proposed use</p> <p>18 is something that inherently serves the public good.</p> <p>19 So, again, that would be more of an inherently</p> <p>20 beneficial use.</p> <p>21 One special reason could be where the</p> <p>22 property owner would suffer undue hardship if it was</p> <p>23 compelled to use the property for whatever the use</p> <p>24 is. Or another special reason is where the use would</p> <p>25 serve the general welfare because the proposed site</p> <p><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p><b>201-641-1812</b></p>

<p style="text-align: right;">9</p> <p>1 is particularly suitable for that proposed use. And</p> <p>2 that's what we're really looking at with this</p> <p>3 application, particular suitability.</p> <p>4 And particular suitability you can</p> <p>5 think of as twofold. You can look at particular</p> <p>6 suitability as to why the location of the site within</p> <p>7 the borough is particularly suited to the use despite</p> <p>8 the underlying zoning. You can also look at what</p> <p>9 unique characteristics of the site make it</p> <p>10 particularly appropriate for that proposed use. And</p> <p>11 the site doesn't necessarily need to be uniquely</p> <p>12 suited for the use. That is to say, it does not need</p> <p>13 to be the only site available for that use. It needs</p> <p>14 to be particularly suited.</p> <p>15 I want to take a step back even further</p> <p>16 a little bit to talk about planning and zoning in</p> <p>17 general.</p> <p>18 Within the planning and zoning world,</p> <p>19 you typically have three bodies. You have the</p> <p>20 planning board; you have the zoning board; and you</p> <p>21 have the governing body.</p> <p>22 The planning board, as its name</p> <p>23 implies, is responsible for establishing the planning</p> <p>24 vision through the development of a Master Plan,</p> <p>25 which is a comprehensive, long-term strategic</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">11</p> <p>1 clear that you should be making zoning decisions</p> <p>2 based on an ordinance rather than a variance.</p> <p>3 So when you examine the negative</p> <p>4 criteria, you need to carefully consider the extent</p> <p>5 to which granting the variance would constitute what</p> <p>6 they call an arrogation of the governing body. That</p> <p>7 is, are you usurping the power of the governing body?</p> <p>8 That brings us to the question which</p> <p>9 has been discussed at the beginning of this hearing</p> <p>10 process and was discussed by both planners, Order</p> <p>11 Number 19:21, which was adopted by the Council on</p> <p>12 October 28, 2021, which specifically prohibited</p> <p>13 drive-through restaurants.</p> <p>14 There was a lot of discussion by the</p> <p>15 board and by the planners as to why that ordinance</p> <p>16 was developed.</p> <p>17 To me, the intent of the ordinance is</p> <p>18 inherent in the way the ordinance was written. It</p> <p>19 was intended to prohibit drive-through restaurants in</p> <p>20 your B-3 District, as well as your B-1 District. B-1</p> <p>21 District.</p> <p>22 MS. RIZZUTO: B-1 and 3.</p> <p>23 MR. NOVAK: B-1 and 3.</p> <p>24 Thank you.</p> <p>25 So there's been a lot of discussion</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">10</p> <p>1 development guide which is intended to guide the</p> <p>2 growth and development of the community. It's</p> <p>3 essentially a road map. It outlines where a</p> <p>4 municipality currently is and where it wishes to go</p> <p>5 in the future. And that Master Plan is supposed to</p> <p>6 develop the general parameters around what types of</p> <p>7 development are to occur and, basically, what types</p> <p>8 of development are to occur and where. That's the</p> <p>9 planning board.</p> <p>10 The governing body, also known as the</p> <p>11 Mayor and Council, has a very important role to play</p> <p>12 in that as well. While the planning board prepares</p> <p>13 the Master Plan, the governing body is the sole</p> <p>14 entity responsible for adopting land use board</p> <p>15 regulations.</p> <p>16 And then there's the zoning board, you</p> <p>17 guys. You have to deal with the work product of both</p> <p>18 the planning board and zoning board. You have the</p> <p>19 power to grant a D(1) use variance from zoning</p> <p>20 regulations, which are dealt by the governing body in</p> <p>21 consideration of a planning board's Master Plan. So</p> <p>22 you are essentially a very powerful entity.</p> <p>23 When we look at the aspects of the</p> <p>24 negative criteria, and specifically the intent of the</p> <p>25 zone plan, the courts have typically made it very</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">12</p> <p>1 about what the rationale or the justification for</p> <p>2 that was, what the thought process was of the</p> <p>3 Council. It could be many things. There could be</p> <p>4 concerns about the number of drive-through</p> <p>5 restaurants. There could be concerns about the</p> <p>6 safety of drive-throughs. The fact of the matter is</p> <p>7 essentially that's no longer in the hands of this</p> <p>8 board. You have to just look at the intent.</p> <p>9 So when you grant the use variance and</p> <p>10 you look at the impact on the negative criteria,</p> <p>11 there's a number of aspects that you, as the board,</p> <p>12 can consider. One of the items would be involving</p> <p>13 your new land use.</p> <p>14 So a common example of that, I believe,</p> <p>15 was even used in <u>Medici</u> are health clubs. There's a</p> <p>16 proliferation of health clubs. A lot of older zoning</p> <p>17 ordinances did not envision health clubs popping up</p> <p>18 as a permitted use.</p> <p>19 As a more recent example, we see in</p> <p>20 downtowns paint-and-sip uses, new uses that may not</p> <p>21 be anticipated or envisioned by an older zoning</p> <p>22 ordinance.</p> <p>23 You can also look at whether there's</p> <p>24 been surrounding changes to the surrounding</p> <p>25 development pattern or the surrounding character of</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

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

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

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

12 Does anybody have any questions for me?

13 CHAIRMAN ANDERSON: Yes, I do.

14 MR. NOVAK: Yes.

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

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

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

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

**201-641-1812**

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

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

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

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

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

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

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**201-641-1812**

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

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

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

13 MR. NOVAK: Special reasons.

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

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

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

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

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

**201-641-1812**

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

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

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

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

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

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

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**201-641-1812**

<p style="text-align: right;">17</p> <p>1 the board that's not permitted, but whatever it is,  2 it -- the steep slope doesn't impact it, and it's  3 more suitable for that site than a permitted use.  4 Am I completely out of -- out of touch,  5 or is there any validity to that?  6 MR. NOVAK: I think we're saying the  7 same thing, that there needs to be something about  8 that site that is not necessarily solely unique.  9 It does not need to be solely unique.  10 That was something that was discussed in the <u>Himeji</u>  11 case. Something about that site that lends itself to  12 being suitable specifically for that type of use.  13 CHAIRMAN ANDERSON: Right.  14 I know I said that was the last  15 question, but now I have another one.  16 MR. NOVAK: Okay.  17 CHAIRMAN ANDERSON: Again, when the  18 applicant's planner was testifying, I was trying to  19 emphasize the fact that all of the testimony from the  20 planner and the engineer as far as how this site can  21 accommodate a drive-through, okay, was not to me  22 particularly important because a drive-through is  23 permitted. It's not the drive-through that's the  24 problem. The problem is it's a restaurant  25 drive-through that's not permitted.  <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p> </p>	<p style="text-align: right;">19</p> <p>1 site, not only could it accommodate the shorter  2 drive-through bank queue or the shorter pharmacy bank  3 queue, it could also accommodate the longer  4 restaurant drive-through.  5 That's what I took away from that.  6 CHAIRMAN ANDERSON: I missed that.  7 MS. HERLIHY: That's how they tried to  8 do that.  9 MR. NOVAK: To add onto that too, there  10 was also a lot of discussion, especially at the last  11 meeting, regarding the menu board being a component  12 of a drive-through restaurant as well, and the  13 placement of that menu board, potential sites and  14 sounds.  15 So that would be another unique aspect.  16 MS. HERLIHY: The ordinance doesn't say  17 drive-through restaurants are prohibited because we  18 don't like longer queues, and menu boards, and  19 speakers, and lights and noise.  20 But Mr. Whitaker is trying to tell you  21 that that's what comes along with a drive-through  22 restaurant and that's what people find objectionable  23 about a drive-through restaurant. He's trying to  24 tell you why all of those things are not of concern  25 here, why this site can accommodate those things  <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p> </p>
<p style="text-align: right;">18</p> <p>1 And so it appears to me what we have to  2 find is there's some special reason why a restaurant  3 drive-through as opposed to any other kind of  4 drive-through -- build a shoe repair or a Columbia  5 Bank or whatever, they wouldn't even be here. They'd  6 be at the planning board for a site plan, correct?  7 MR. NOVAK: Correct.  8 MS. HERLIHY: If I could?  9 CHAIRMAN ANDERSON: You may.  10 MS. HERLIHY: Just to shed a little  11 light on that, I think -- and not put words -- he'll  12 stop me if I'm putting words into his mouth.  13 CHAIRMAN ANDERSON: Oh, I'm sure he'll  14 stop you.  15 MS. HERLIHY: That the point -- so I  16 think they did do that, or they tried to do that.  17 In other words, they tried to point out  18 the difference or the distinction between a  19 drive-through associated with a restaurant and a  20 drive-through associated with a bank.  21 For example, it is typical that you  22 would have a longer queue at a drive-through  23 restaurant than you would at a drive-through bank.  24 And because of that, they attempted -- whether they  25 did or not, they attempted to show you that this  <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p> </p>	<p style="text-align: right;">20</p> <p>1 better than, perhaps, other sites. That was my take  2 away. Maybe I missed it. I just caught up.  3 CHAIRMAN ANDERSON: Before you, unless  4 -- I was going to have other board members ask  5 questions, but do you have something you want to ask  6 first?  7 MR. WHITAKER: No.  8 I was being looked at.  9 But, no, I don't have anything to say.  10 I'll get my turn.  11 CHAIRMAN ANDERSON: Okay.  12 Anybody else have any questions for  13 Mr. Novak?  14 Go ahead, Rich.  15 MR. FORMICOLA: Are you done?  16 Are you all right?  17 CHAIRMAN ANDERSON: Yeah. I'm...  18 MR. FORMICOLA: For now?  19 Well, I'm going to ask him a question.  20 CHAIRMAN ANDERSON: No.  21 He's going to ask one question.  22 MR. FORMICOLA: He's not done yet?  23 I'm sorry.  24 So the question I have is, with the --  25 with the Master Plan, okay, it's my interpretation --  <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p> </p>

<p style="text-align: right;">21</p> <p>1 and you can tell me if this is wrong when you've met  2 or when talked -- it's a general guideline, because  3 if it was set in stone, am I correct -- and this is  4 what they don't want, and really it should never be  5 here because it's like a done deal. That's what  6 they want.</p> <p>7 Anything that we do, pretty much, this  8 board, it's always an exception because they make a  9 general assumption, we don't want something or we  10 don't want a fence over 6 foot, 7 foot, but if you  11 can show us a good reason, then you can that 10.  12 That's what we're here for.</p> <p>13 MR. NOVAK: Yeah.  14 Two responses to that.  15 The first would be, you are correct.  16 While Master Plans can offer a lot of specificity --  17 and I've had to write some of those Master Plans with  18 excruciating specificity -- they are supposed to  19 serve as the basis for zoning. That means an  20 ordinance is supposed to coincide with the vision of  21 a Master Plan. And if it doesn't --</p> <p>22 For example, say if a Master Plan makes  23 a recommendation that we don't want gas stations in a  24 residential zone, and the governing body decides we  25 want to adopt and introduce an ordinance that says we</p> <p style="text-align: right;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>	<p style="text-align: right;">23</p> <p>1 backyard -- I'm sorry -- 6 feet in a backyard, but  2 they could be 4 feet in a front yard.</p> <p>3 But there may be some extenuating  4 circumstances where a property is a corner lot or a  5 property is right next to a commercial business where  6 a 6-foot fence in the front yard might help things.</p> <p>7 So there may be unique aspects of a  8 specific piece of property which would or could  9 warrant the granting of a variance. And that's what  10 this board hears all the time, whether it's a D(1)  11 variance, or sometimes when it's something as simple  12 as a bulk variance for a fence.</p> <p>13 MR. FORMICOLA: Okay, thank you.  14 VICE CHAIRMAN PAPAPIETRO: A question  15 for you?  16 MR. NOVAK: We're going down the line,  17 yes.</p> <p>18 VICE CHAIRMAN PAPAPIETRO: Going down  19 the line, when this ordinance was passed back in  20 2021, was your firm involved in part of this  21 particular ordinance?</p> <p>22 MR. NOVAK: We were not, no.  23 VICE CHAIRMAN PAPAPIETRO: And the  24 reason why I'm saying that, then, you talked about  25 the Master Plan for the town. And the way this is</p> <p style="text-align: right;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>
<p style="text-align: right;">22</p> <p>1 want to make gas stations permitted in residential  2 zones, that ordinance would get referred to the  3 planning board. The planning board would say, no,  4 this is inconsistent with our Master Plan. That goes  5 back to the Council.</p> <p>6 While on a very theoretical basis, that  7 ordinance should complement the Master Plan, the  8 Municipal Land Use Law still gives the power to the  9 governing body to say, you know what -- even though  10 it doesn't match up and it's inconsistent, we're  11 still going to adopt this ordinance. Now, they would  12 have to do that with a full majority of their  13 membership.</p> <p>14 But the governing body still has the  15 power to adopt ordinances which are inconsistent with  16 the Master Plan, provided those records -- reasons  17 are put in the record, that was the first -- I think  18 the first part of your question.</p> <p>19 The second part was the granting of the  20 variance. And, yes, so the way zoning is typically  21 designed -- and you brought up the example of fences.  22 Zoning is designed usually generally for a whole  23 municipality, right.</p> <p>24 So in a municipality, you might have a  25 regulation that says fences need to be 4 feet in a</p> <p style="text-align: right;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>	<p style="text-align: right;">24</p> <p>1 worded, the objective of this ordinance is to  2 eliminate drive-throughs for restaurants in general,  3 not other businesses.</p> <p>4 So it specifically indicates  5 restaurants for this particular prohibition. And I'm  6 just curious if you guys were a part of that, but you  7 weren't.</p> <p>8 MR. NOVAK: We were not, no.  9 VICE CHAIRMAN PAPAPIETRO: So this is  10 something that the governing body put into place and  11 then was approved, and that's why we're here now.</p> <p>12 CHAIRMAN ANDERSON: Anybody else?  13 MR. FORMICOLA: Just to -- because that  14 -- I understand what you're saying about the  15 governing body, but the problem I have with that is,  16 when that went into play, we all know it's because of  17 Starbucks when Starbucks went in.</p> <p>18 VICE CHAIRMAN PAPAPIETRO: We don't  19 know that for sure.</p> <p>20 MR. FORMICOLA: You know, I'm just  21 saying there was a lot of complaints back and forth.  22 And they didn't have anything in the area.</p> <p>23 But what I'm just saying is that they  24 put a lot of things in play. That's why we're here  25 because that doesn't necessarily mean all the time</p> <p style="text-align: right;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>

<p style="text-align: right;">25</p> <p>1 that, you know, okay, so there will never be any food</p> <p>2 drive-in food places in any of those districts ever</p> <p>3 again.</p> <p>4 And, you know, it's not necessarily --</p> <p>5 you know what I mean.</p> <p>6 VICE CHAIRMAN PAPAPIETRO: Oh, yeah.</p> <p>7 MR. FORMICOLA: I'm just -- I'm playing</p> <p>8 the devil's advocate on that.</p> <p>9 So I'm just saying each case is</p> <p>10 different. If there was going to be some wild case</p> <p>11 going in there, you know, crazy stuff, lights, disco,</p> <p>12 whatever it may be, you'd be like, you know.</p> <p>13 VICE CHAIRMAN PAPAPIETRO: A disco,</p> <p>14 you're showing your age.</p> <p>15 MR. FORMICOLA: You know, it would be</p> <p>16 -- it would be crazy. You would say, well, it's</p> <p>17 going to be a detriment to everybody for that. But</p> <p>18 on this something like, you know -- I'm not saying</p> <p>19 this particular, but in anything that -- whatever,</p> <p>20 there might be an exception to that. So I'm just --</p> <p>21 I'm just saying the Council put in a lot of things</p> <p>22 they voted, whether it be unanimously or not. That's</p> <p>23 another problem is that not everybody agrees with</p> <p>24 everything at the time.</p> <p>25 VICE CHAIRMAN PAPAPIETRO: I hear what</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>	<p style="text-align: right;">27</p> <p>1 MR. WHITAKER: One of the last</p> <p>2 hypotheticals you used, you stated that the governing</p> <p>3 body could create an ordinance that's contrary to the</p> <p>4 Master Plan, and the planning board could tell them</p> <p>5 that.</p> <p>6 And on the basis of that, you stated</p> <p>7 that the governing body could still pass it by a</p> <p>8 super majority, and they would have to put their</p> <p>9 reasons on the record, the purpose behind insisting</p> <p>10 on that ordinance.</p> <p>11 So I'm going to emphasis the word</p> <p>12 "purpose," P-U-R-P-O-S-E, okay?</p> <p>13 In your analysis and review as a</p> <p>14 planner -- and you are very cognizant and familiar</p> <p>15 with the Master Plan in Midland Park -- there is no</p> <p>16 provision in the Master Plan that says drive-through</p> <p>17 restaurants should not be encouraged or should not be</p> <p>18 allowed?</p> <p>19 MR. NOVAK: I would agree with that</p> <p>20 statement.</p> <p>21 MR. WHITAKER: In connection with --</p> <p>22 and we talked about this briefly in your last</p> <p>23 testimony, you've already confirmed that you were not</p> <p>24 involved as a planner in looking at this ordinance</p> <p>25 and maybe providing the purposes or reasons why for</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>
<p style="text-align: right;">26</p> <p>1 you're saying.</p> <p>2 If this was part of multiple things</p> <p>3 going through, this was a specific ordinance put in.</p> <p>4 Nothing else attaches. Just focus on this.</p> <p>5 CHAIRMAN ANDERSON: I'm not disagreeing</p> <p>6 with you, Rich, but just as a note, whether it was</p> <p>7 unanimous or not, whether it's reasonable or not,</p> <p>8 that's beyond -- we have to assume the ordinance --</p> <p>9 MR. FORMICOLA: Passed.</p> <p>10 CHAIRMAN ANDERSON: Not that it passed,</p> <p>11 but that it's reasonable. And that's what we have.</p> <p>12 We cannot decide, well, the Council</p> <p>13 voted 5/2 so it really wasn't that...</p> <p>14 As far as we're concerned, the</p> <p>15 ordinance is what it is. That's not our -- if</p> <p>16 somebody had a question about the validity of the</p> <p>17 ordinance, they would have to start a prerogative</p> <p>18 writ action and take it from there.</p> <p>19 MR. FORMICOLA: Okay, thank you.</p> <p>20 CHAIRMAN ANDERSON: Anyone else before</p> <p>21 Mr. Whitaker?</p> <p>22 (No Response.)</p> <p>23 MR. WHITAKER: So I have questions of</p> <p>24 Mr. Novak.</p> <p>25 CHAIRMAN ANDERSON: Sure.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>	<p style="text-align: right;">28</p> <p>1 this ordinance.</p> <p>2 MR. NOVAK: That is correct.</p> <p>3 MR. WHITAKER: You stated earlier there</p> <p>4 might, be is the word you used, reasons they gave,</p> <p>5 but you were hypothesizing; you don't know of any</p> <p>6 reasons for this ordinance.</p> <p>7 MR. NOVAK: That is correct.</p> <p>8 MR. WHITAKER: And you're also</p> <p>9 familiar, in having created Master Plans and creating</p> <p>10 ordinances, that many times there's an introduction</p> <p>11 in an ordinance that says here's why we're doing</p> <p>12 this, in so words, here is the purpose?</p> <p>13 MR. NOVAK: Absolutely.</p> <p>14 I would include that in the whereas</p> <p>15 classes.</p> <p>16 MR. WHITAKER: Now, you are familiar as</p> <p>17 planner with the <u>Medici</u> case.</p> <p>18 MR. NOVAK: Yes.</p> <p>19 MR. WHITAKER: And you've used the</p> <p>20 words already because you use them all the time, and</p> <p>21 rightfully so.</p> <p>22 The <u>Medici</u> case and the cases after</p> <p>23 that, including the <u>Himeji</u> case, always goes back and</p> <p>24 reflects that an applicant has to demonstrate that</p> <p>25 the relief requested can be granted without</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>



<p style="text-align: right;">29</p> <p>1 substantial detriment to the intent and purpose of</p> <p>2 the zoning ordinance.</p> <p>3 The word "purpose" is in that sentence,</p> <p>4 which presupposes that there's a purpose to the</p> <p>5 zoning ordinance. So as a -- correct.</p> <p>6 MR. NOVAK: Yes.</p> <p>7 MR. WHITAKER: So as a planner, in your</p> <p>8 analysis of a use variance, or in your analysis of</p> <p>9 looking at an ordinance, you want to understand, do</p> <p>10 you not, what the underlying purpose is?</p> <p>11 MR. NOVAK: It is often helpful to</p> <p>12 understand what the underlying purpose of that zoning</p> <p>13 regulation is, yes.</p> <p>14 MR. WHITAKER: And in your analysis --</p> <p>15 and you've had the opportunity to review the</p> <p>16 background of this -- you haven't seen any empirical</p> <p>17 data, any written data, that indicates what the</p> <p>18 purpose was in the introduction and adoption of this</p> <p>19 ordinance?</p> <p>20 MR. NOVAK: That is correct.</p> <p>21 MR. WHITAKER: In fact, if you look at</p> <p>22 the Planning Board -- and this is not in criticism --</p> <p>23 but if you look at the Planning Board, it was</p> <p>24 basically a couple of comments made, hey, we have to</p> <p>25 pass this, let's adopt it, and we'll say that it</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">31</p> <p>1 MR. NOVAK: Nothing that I saw in the</p> <p>2 transcripts.</p> <p>3 I'm unaware if there was a letter that</p> <p>4 was later submitted, but nothing in the transcripts.</p> <p>5 MR. WHITAKER: And let's go before the</p> <p>6 Planning Board is out.</p> <p>7 You looked at the transcript regarding</p> <p>8 the introduction of this ordinance -- again, not in</p> <p>9 criticism of the Mayor and Council -- but that</p> <p>10 transcript and what went on.</p> <p>11 MR. NOVAK: Yes.</p> <p>12 MR. WHITAKER: You saw some people that</p> <p>13 night didn't even have it yet; they had to run out</p> <p>14 and photocopy it, when you read that transcript.</p> <p>15 MR. NOVAK: Yes.</p> <p>16 MR. WHITAKER: And you saw that when</p> <p>17 they got it, they weren't quite sure what it was all</p> <p>18 about.</p> <p>19 MR. NOVAK: Yes.</p> <p>20 MR. WHITAKER: And then you saw the</p> <p>21 minutes of the meeting in which that ordinance was</p> <p>22 then adopted?</p> <p>23 MR. NOVAK: Yes.</p> <p>24 MR. WHITAKER: The Mayor called the</p> <p>25 meeting to order for the adoption of the ordinance,</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">30</p> <p>1 meets the requirements of the Master Plan?</p> <p>2 MR. NOVAK: So that is based on the</p> <p>3 transcript that had been forwarded over.</p> <p>4 MR. WHITAKER: Right.</p> <p>5 MR. NOVAK: I had not listened to a</p> <p>6 recording of that meeting.</p> <p>7 MR. WHITAKER: But the transcript, but</p> <p>8 you rely on transcripts?</p> <p>9 MR. NOVAK: Oh, yeah, absolutely, yes.</p> <p>10 And the transcript was very short.</p> <p>11 MR. WHITAKER: No reasons or purposes</p> <p>12 given there.</p> <p>13 MR. NOVAK: I don't believe there was,</p> <p>14 no.</p> <p>15 It was mostly discussion on the B-1 and</p> <p>16 B-3 District. Some discussion about whether or not</p> <p>17 the ordinance should be expanded to the industrial</p> <p>18 district as well, but that was really the crux of</p> <p>19 that discussion.</p> <p>20 MR. WHITAKER: No reason from the</p> <p>21 Planning Board in preparing a resolution or a letter</p> <p>22 back to the Mayor and Council that says this meets</p> <p>23 the requirements or the terms of the Master Plan</p> <p>24 because, and recitation of some of the goals or the</p> <p>25 requirements in the Master Plan, correct?</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">32</p> <p>1 asked for any comments from the public.</p> <p>2 The minutes reflect there were none.</p> <p>3 But there was no comments at that point from any of</p> <p>4 the Council Members or Mayor saying we're passing</p> <p>5 this ordinance because.</p> <p>6 MR. NOVAK: Correct.</p> <p>7 MR. WHITAKER: The transcript of</p> <p>8 introduction, the transcript from the Planning Board,</p> <p>9 the minutes from the Mayor and Council, did you see</p> <p>10 in any of those documents the purpose behind passing</p> <p>11 this ordinance?</p> <p>12 MR. NOVAK: I did not.</p> <p>13 MS. HERLIHY: Mr. Whitaker, so you've</p> <p>14 asked the question and he's answered. He's aware of</p> <p>15 the transcripts and these minutes but -- and I know</p> <p>16 you've provided copies to the board secretary.</p> <p>17 MR. WHITAKER: To everyone.</p> <p>18 And to my adversary.</p> <p>19 MS. RIZZUTO: And I have an objection.</p> <p>20 MS. HERLIHY: But in order for the</p> <p>21 board to consider them as part of this application,</p> <p>22 they need to have been entered as part of your</p> <p>23 evidence.</p> <p>24 If you're going to rely upon them, if</p> <p>25 you're going to now --</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">33</p> <p>1 MR. WHITAKER: I want to move them into  2 evidence, yes.  3 MS. HERLIHY: Okay. So then you're  4 going to then allow the objector's counsel --  5 MR. WHITAKER: Yeah, of course.  6 Absolutely. Yeah, we've opened it again. Okay.  7 MS. HERLIHY: Okay.  8 MR. WHITAKER: I want to just continue  9 on this train of thought.  10 CHAIRMAN ANDERSON: And I'll come back  11 to it in just a minute.  12 MS. RIZZUTO: Just for the record, I  13 object to this questioning on the exhibits that have  14 not been discussed yet as to whether they can be  15 admitted at this time.  16 CHAIRMAN ANDERSON: Your objection is  17 on the record.  18 MS. RIZZUTO: I was going to do it when  19 he did his closing.  20 Obviously they're going to stand.  21 CHAIRMAN ANDERSON: Well, they're going  22 to end up in the record.  23 MS. RIZZUTO: Yes.  24 CHAIRMAN ANDERSON: And he's seen them.  25 MS. RIZZUTO: Yes, I understand.  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>	<p style="text-align: right;">35</p> <p>1 chapter, are deemed to be prohibited."  2 MR. WHITAKER: Then, as we did this  3 exercise briefly the last time, if you go down to  4 34-13.13, it says:  5 "Drive-through, drive-up windows, and  6 outdoor ordering locations."  7 Do you see that?  8 MR. NOVAK: Yes, I do.  9 MR. WHITAKER: Okay. Do you see the  10 conditions that are listed there: A, B and C.  11 MR. NOVAK: Yes, I do.  12 MR. WHITAKER: Okay.  13 Does the applicant meet all those  14 conditions?  15 MR. NOVAK: Condition A is that the  16 drive-through --  17 MS. RIZZUTO: Objection.  18 CHAIRMAN ANDERSON: Are you going to  19 give a reason for your objection?  20 MS. RIZZUTO: Yes. Objection.  21 I don't know that the board planner  22 should be testifying about what the applicant proved.  23 That's for all of you to decide.  24 The case is over. And the witness -- I  25 mean, the attorney for the applicant has rested his  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>
<p style="text-align: right;">34</p> <p>1 MR. WHITAKER: The ZBA, a zoning board  2 in any town has the ability in doing their analysis  3 and deliberations to look back to try find out what  4 the purpose was when they're trying to determine if a  5 variance should be granted. Because in the <u>Medici</u>  6 case in N.J.S.A. 40:55-70D, that word "purpose"  7 constantly shows up, correct?  8 MR. NOVAK: Yes.  9 MR. WHITAKER: Now let's go look at the  10 ordinance.  11 Now you're going to pull it up on your  12 screen.  13 MR. NOVAK: All right.  14 MR. WHITAKER: Okay. 19-21.  15 MR. NOVAK: I am getting there,  16 Mr. Whitaker.  17 MR. WHITAKER: Yeah. Take your time.  18 It's actually 34-9.1 has all the uses.  19 MR. NOVAK: And the -- oh, 34-9.1, yes,  20 I have that open.  21 MR. WHITAKER: So Paragraph H, do you  22 want to read that into the record.  23 MR. NOVAK: Paragraph H states:  24 "Restaurants: Provided, however, that  25 drive-through restaurants, as defined in this  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>	<p style="text-align: right;">36</p> <p>1 case.  2 MR. WHITAKER: But the planner is  3 opened up tonight. And whether it's the planner or  4 the engineer, they can always opine on do we meet the  5 requirements of an ordinance. Okay?  6 CHAIRMAN ANDERSON: We asked for his  7 opinion.  8 MS. RIZZUTO: I understand.  9 CHAIRMAN ANDERSON: Okay.  10 But your objection is on the record.  11 MS. RIZZUTO: He's rested. He's rested  12 his case.  13 MR. WHITAKER: Mr. Novak?  14 MR. NOVAK: Item A is that the  15 drive-through be located a minimum of 75 feet from  16 any residential zone.  17 MR. WHITAKER: The drive-through,  18 itself.  19 MR. NOVAK: The drive-through, itself,  20 is the lot -- I know it's immediately adjacent to a  21 residential zone.  22 So I'm not familiar if that standard is  23 typically measured from the lot or from the  24 drive-through. It's a little ambiguous.  25 MR. WHITAKER: It's measured, from my  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>

<p style="text-align: right;">37</p> <p>1 experience, from a window, itself.</p> <p>2 Let's move on. Hours of operation, we</p> <p>3 stipulated would be code compliant?</p> <p>4 MR. NOVAK: And that is, hours of</p> <p>5 operation will be limited to 6 a.m. to 12 o'clock</p> <p>6 midnight.</p> <p>7 And then Item 3 -- pardon me -- Item C:</p> <p>8 "Any drive-through or drive-up window</p> <p>9 shall have a minimum queueing length of</p> <p>10 180 feet from the service area".</p> <p>11 MR. WHITAKER: One-hundred-fifty.</p> <p>12 MR. NOVAK: Which I believe was --</p> <p>13 MR. WHITAKER: One-hundred-fifty.</p> <p>14 MR. NOVAK: What did I say?</p> <p>15 MR. WHITAKER: One-hundred-eighty.</p> <p>16 MR. NOVAK: One-hundred-fifty.</p> <p>17 I believe the applicant is proposing</p> <p>18 180.</p> <p>19 MR. WHITAKER: One-hundred-fifty-three.</p> <p>20 MR. NOVAK: One-hundred-fifty-three.</p> <p>21 My apologies.</p> <p>22 MR. WHITAKER: And that says:</p> <p>23 "150 feet from the center of the first</p> <p>24 service area."</p> <p>25 Do you know what they mean by "first</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>	<p style="text-align: right;">39</p> <p>1 But that would typically be one service</p> <p>2 window.</p> <p>3 A pharmacy, that would typically have</p> <p>4 one service window.</p> <p>5 Without everybody laughing at me,</p> <p>6 cannabis uses have been opening up with service</p> <p>7 windows.</p> <p>8 MR. WHITAKER: In banks, actually.</p> <p>9 MR. NOVAK: Yes.</p> <p>10 And I surprisingly can attest that I'm</p> <p>11 not familiar with how that drive-through service</p> <p>12 works, but those would be the three big ones that I</p> <p>13 think you have now.</p> <p>14 MR. WHITAKER: This ordinance is still</p> <p>15 on the books?</p> <p>16 MR. NOVAK: That is correct.</p> <p>17 MS. RIZZUTO: I'm sorry. What is "this</p> <p>18 ordinance"?</p> <p>19 MR. WHITAKER: This ordinance,</p> <p>20 34-13.13, the one he just read.</p> <p>21 CHAIRMAN ANDERSON: The drive-through</p> <p>22 ordinance.</p> <p>23 MR. WHITAKER: Drive-through.</p> <p>24 MS. HERLIHY: And it was -- it was</p> <p>25 adopted 2021, prior to the adoption of the</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>
<p style="text-align: right;">38</p> <p>1 service area"?</p> <p>2 MR. NOVAK: My interpretation would be,</p> <p>3 essentially, where you're placing your order.</p> <p>4 MR. WHITAKER: Or where the window is.</p> <p>5 The service area is where the service is. That's the</p> <p>6 way it's been interpreted for Dunkin' Donuts,</p> <p>7 interpreted for Starbucks.</p> <p>8 MR. NOVAK: I'll rely on that.</p> <p>9 MS. RIZZUTO: Objection.</p> <p>10 Unsupported in the record.</p> <p>11 CHAIRMAN ANDERSON: I'm sorry?</p> <p>12 MS. RIZZUTO: Dunkin' Donuts and some</p> <p>13 other place that he just talked about, it's</p> <p>14 unsupported in the record.</p> <p>15 CHAIRMAN ANDERSON: Okay.</p> <p>16 MR. WHITAKER: With that said, can you</p> <p>17 think of a use that would have a service window,</p> <p>18 other than a -- would have multiple service windows</p> <p>19 other than a restaurant?</p> <p>20 MR. NOVAK: Multiple service windows</p> <p>21 other than a restaurant?</p> <p>22 MR. WHITAKER: All in a row. Because</p> <p>23 you're measuring from the closest one.</p> <p>24 MR. NOVAK: Other uses that would</p> <p>25 typically have service windows would be a bank.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>	<p style="text-align: right;">40</p> <p>1 prohibition.</p> <p>2 MR. WHITAKER: It wasn't modified when</p> <p>3 the prohibition came into play.</p> <p>4 MS. HERLIHY: It also wouldn't be the</p> <p>5 first time that a governing body missed something</p> <p>6 like that.</p> <p>7 MR. WHITAKER: I don't know about that.</p> <p>8 MS. HERLIHY: I'm just -- it wouldn't</p> <p>9 be the first time that not everything in the</p> <p>10 ordinance that applies to one action doesn't get --</p> <p>11 you know, gets looked over, so to speak.</p> <p>12 In other words, again, hypothecating,</p> <p>13 if the intent -- if the intent was outlaw or to</p> <p>14 prohibit all drive-up restaurants --</p> <p>15 CHAIRMAN ANDERSON: Drive-throughs are</p> <p>16 permitted.</p> <p>17 MS. HERLIHY: Drive-through</p> <p>18 restaurants, I just said, they believed potentially</p> <p>19 that that's what they did by adopting that ordinance,</p> <p>20 that they did not then have to go through the</p> <p>21 remainder of the ordinance and say Section 34-13.13</p> <p>22 does not apply to restaurants or somehow change that.</p> <p>23 CHAIRMAN ANDERSON: Well, why would</p> <p>24 they have to?</p> <p>25 MS. HERLIHY: He's trying to say that</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>

<p style="text-align: right;">41</p> <p>1 --</p> <p>2 CHAIRMAN ANDERSON: This is for</p> <p>3 drive-throughs that are permitted, like a bank.</p> <p>4 MR. WHITAKER: Mr. Anderson, what I was</p> <p>5 saying is that the concept of where they say the</p> <p>6 first service area is probably -- I'm just laying</p> <p>7 this out -- that the first service area, probably any</p> <p>8 use other than a restaurant would only have one</p> <p>9 service area.</p> <p>10 That's all I'm saying. Let me just</p> <p>11 move on.</p> <p>12 CHAIRMAN ANDERSON: It's not uncommon</p> <p>13 for banks to have three drive-throughs.</p> <p>14 MR. WHITAKER: But they're always</p> <p>15 usually in a line.</p> <p>16 MS. HERLIHY: They're separate.</p> <p>17 MR. WHITAKER: They're separate.</p> <p>18 CHAIRMAN ANDERSON: Right.</p> <p>19 But you're measuring from the nearest</p> <p>20 one to the residential --</p> <p>21 MR. WHITAKER: Not from the</p> <p>22 residential, 150 is the queueing.</p> <p>23 CHAIRMAN ANDERSON: Yeah.</p> <p>24 But it could be different, depending</p> <p>25 where the queue is.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">43</p> <p>1 premises."</p> <p>2 MR. WHITAKER: Okay.</p> <p>3 So we touched base at the last meeting</p> <p>4 about this. And you agreed with me that if I pulled</p> <p>5 up a restaurant and the owner was kind enough to</p> <p>6 bring the food out to me and I drove off with it,</p> <p>7 that that's something that violates the prohibition</p> <p>8 on a drive-through?</p> <p>9 MR. NOVAK: Yes.</p> <p>10 MR. WHITAKER: You confirmed at the</p> <p>11 last meeting that a drive-through restaurant does</p> <p>12 not, in fact, need to be a window?</p> <p>13 MR. NOVAK: Based on this definition,</p> <p>14 there is no reference of a window, yes.</p> <p>15 MR. WHITAKER: Correct.</p> <p>16 And based on the definition of</p> <p>17 drive-through that you read before, it says</p> <p>18 drive-through, drive-up windows; it also says outdoor</p> <p>19 ordering locations.</p> <p>20 MR. NOVAK: Yes.</p> <p>21 MR. WHITAKER: So now just to go</p> <p>22 through this definition so we understand, again,</p> <p>23 what's prohibited and what would be permitted.</p> <p>24 If I have an establishment in which</p> <p>25 food or drink is served to a customer and it's not</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">42</p> <p>1 Anyway, I'm not sure that -- I'm not</p> <p>2 getting the importance of it anyway. You're getting</p> <p>3 there, okay.</p> <p>4 MR. WHITAKER: Let's go to the</p> <p>5 definition of restaurant drive-through.</p> <p>6 We touched upon this before when you</p> <p>7 testified at the last meeting. That ordinance is</p> <p>8 still in the code.</p> <p>9 CHAIRMAN ANDERSON: Well, it's a</p> <p>10 definition.</p> <p>11 MR. NOVAK: That is correct, yes.</p> <p>12 MR. WHITAKER: Okay.</p> <p>13 Read that into the record for me.</p> <p>14 MR. NOVAK: Once I find it, I will.</p> <p>15 Sorry.</p> <p>16 Was that the definition of</p> <p>17 drive-through?</p> <p>18 MR. WHITAKER: Restaurants,</p> <p>19 drive-through.</p> <p>20 MR. NOVAK: Thank you.</p> <p>21 "An establishment in which food or</p> <p>22 drink is served to customers within</p> <p>23 automobiles outside of the confines of the</p> <p>24 building and where the consumption of such</p> <p>25 food or drink is intended to occur off the</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">44</p> <p>1 within an automobile --</p> <p>2 MR. NOVAK: As in a walk-up window?</p> <p>3 MR. WHITAKER: Well, it's a person on a</p> <p>4 motorcycle.</p> <p>5 MR. NOVAK: There's no definition of</p> <p>6 automobile, from what I'm aware of, in the zoning</p> <p>7 ordinance.</p> <p>8 I don't know what you would rely on</p> <p>9 then to define automobile or... A motorcycle would</p> <p>10 meet some sort of outside definition of automobile,</p> <p>11 but it certainly does say "automobiles" not vehicles.</p> <p>12 MR. WHITAKER: It doesn't say trucks?</p> <p>13 We might call a truck an automobile?</p> <p>14 MR. NOVAK: Yes.</p> <p>15 MR. WHITAKER: Let's move on.</p> <p>16 Again, I'll read it to you:</p> <p>17 "An establishment in which food or</p> <p>18 drink is served to customers within</p> <p>19 automobiles" -- my hypothetical was still an</p> <p>20 automobile -- "outside the confines of a</p> <p>21 building and where the consumption of such</p> <p>22 food or drink is intended to occur off the</p> <p>23 premises."</p> <p>24 If I pull up to the window in my</p> <p>25 automobile, and I get that bag of food, and I drive</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">45</p> <p>1 out that lane and stay on the premises and eat it in  2 the parking lot, I'm permitted to do that?  3 MR. NOVAK: Hm.  4 MS. HERLIHY: I would disagree.  5 MR. NOVAK: I think the intent -- the  6 language intended to occur off the premises separates  7 that possibility out from what's in -- from this  8 scenario.  9 MR. WHITAKER: It's nebulous, is it  10 not.  11 MR. NOVAK: Hm.  12 MR. WHITAKER: Nebulous? A little  13 confusing.  14 MR. NOVAK: It's a little confusing.  15 But, typically --  16 MR. WHITAKER: What I'm showing you,  17 basically, is that there's a question about the  18 purpose. That's what I'm trying to show.  19 And I think you see that this is not an  20 ordinance with clarity.  21 Wouldn't you agree?  22 MR. NOVAK: There are certain aspects  23 of this ordinance which could use clarification.  24 MR. WHITAKER: Thank you.  25 VICE CHAIRMAN PAPAPIETRO: Just to make  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>	<p style="text-align: right;">47</p> <p>1 It's to prohibit drive-through  2 restaurants. And all the rest of it is not for us to  3 determine what the Mayor and Council was thinking or  4 whatever.  5 We may -- we may think it's a silly  6 ordinance or whatever, but we're -- I'm going to ask  7 Linda to confirm -- but we're obligated to accept to  8 accept the ordinance the way it is.  9 MR. WHITAKER: I'd like to respond.  10 You're obligated to see as part of the <u>Medici</u> case as  11 to whether what we are seeking here violates the  12 purpose of the zoning ordinance. It presupposes  13 something.  14 CHAIRMAN ANDERSON: And the purpose is  15 to prohibit drive-through restaurants. That's the  16 purpose.  17 MR. WHITAKER: No.  18 The purpose from planning and zoning --  19 Mr. Novak would agree with you because he said it  20 already -- is to know what the purpose in passing the  21 ordinance was in the first place.  22 CHAIRMAN ANDERSON: Well, I disagree  23 with you.  24 MR. WHITAKER: Because -- because when  25 you don't know the purpose, you don't know how to  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>
<p style="text-align: right;">46</p> <p>1 a point you kind of the left open. The intent, the  2 way it was written, the interpretation is clear.  3 It's prohibited, drive-through restaurants.  4 MR. WHITAKER: Only if it's all -- all  5 these conditions have to be met in this ordinance.  6 CHAIRMAN ANDERSON: I didn't want to  7 interrupt you.  8 But along the same lines, we're all  9 agreed that the use that your applicant is proposing  10 is a prohibited use.  11 MR. WHITAKER: I am. I'm just -- I'm  12 going to purpose. Keep going.  13 CHAIRMAN ANDERSON: And I understand  14 what you're saying is either intentionally or  15 inadvertently there may be other uses that are now no  16 longer permitted.  17 But that doesn't change the fact that  18 the use you're proposing is strictly prohibited. And  19 I'm going to go back again to what I mentioned to  20 Rich.  21 The fact that the ordinance may be, to  22 use your term, lacks clarity or it's not clear why  23 the reasons they voted for it or whatever, as Nick  24 said, the purpose of the ordinance is clear on its  25 face.  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>	<p style="text-align: right;">48</p> <p>1 grant or not grant a use variance, if you know that  2 what my client is proposing to do violates the  3 purpose of the ordinance, then I lose. But here you  4 don't have a guideline to say here's why this should  5 not be here, because the ordinance says it's  6 prohibited, but why is it prohibited?  7 I'm saying my client's site is  8 particularly suited for what we're doing. And I show  9 all the reasons why it's particularly suited. And I  10 can't say that it violates a purpose of the ordinance  11 that we don't know about.  12 That's the picture I am painting.  13 CHAIRMAN ANDERSON: You can't show that  14 you can solve the reasons or the conditions that the  15 Mayor and Council was trying to -- was concerned  16 with.  17 But that's not the purpose of the  18 ordinance. The purpose of the ordinance is to  19 prohibit drive-through restaurants.  20 I understand what you're saying is  21 you're at a disadvantage because you have to show  22 special reasons why this is particularly suitable,  23 and without knowing what they were worried about, you  24 can't show that you can solve those issues.  25 To me, that doesn't impact the fact  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>

1 that the -- and the Medici language to me says it  
2 doesn't violate the purpose of the ordinance. The  
3 purpose of the ordinance is to prohibit drive-through  
4 restaurants.

5 MR. WHITAKER: And the board needs to  
6 know why from a zoning --

7 CHAIRMAN ANDERSON: No, we don't.

8 MR. WHITAKER: Let me finish.

9 The board needs to know why there's a  
10 prohibition, what is the zoning concern that the  
11 Mayor and Council had or the planning board had in  
12 referring it back to the Mayor and Council so that  
13 planners can look and say, okay, let's see how we can  
14 solve the problem that they think exists because of  
15 the prohibition that's in an ordinance.

16 And that's my approach because I'm  
17 saying -- and I started out with this and said, the  
18 word "purpose" is throughout the statute. It's  
19 throughout Medici, Himeji, whatever else.

20 You are at the same disadvantage that I  
21 am. And that is you're trying to apply an ordinance  
22 and say, well, what they're proposing here, how does  
23 this violate the reasons that ordinance was passed?  
24 We don't have any.

25 Sum and substance, that's my approach.

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

**201-641-1812**

1 some questions.

2 MS. RIZZUTO: Thank you.

3 Mr. Novak?

4 MR. NOVAK: Yes.

5 Easy one to start off with.

6 MS. RIZZUTO: Have you seen other  
7 zoning ordinances where they're nowhere as close?

8 MR. NOVAK: Yes.

9 MS. RIZZUTO: Have you seen other  
10 zoning ordinances where the purpose is not  
11 specifically stated, either during the meeting or in  
12 the ordinance, itself?

13 Purpose not stated, have you seen that?

14 MR. NOVAK: Within the ordinance, I  
15 have.

16 Typically in the -- within the meeting  
17 as well, I don't recall one way or the other, quite  
18 frankly.

19 MS. RIZZUTO: Okay.

20 So we established that you've looked at  
21 some of the things that Mr. Whitaker has not yet  
22 introduced into evidence.

23 Did you look at the transcript of  
24 9/28/2021? That's the first one when it was  
25 introduced before the governing body.

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

**201-641-1812**

1 That's my argument.

2 CHAIRMAN ANDERSON: Would you say that  
3 argument is similar, if not identical, to the  
4 argument in Saddle Brook Realty vs. The Saddle Brook  
5 Zoning Board of Adjustment? And is there a  
6 distinction with this application and that.

7 MR. WHITAKER: Yes.

8 And I'll go through it when I get to  
9 the summation.

10 CHAIRMAN ANDERSON: All right.

11 MS. RIZZUTO: Excuse me, Mr. Chairman?

12 CHAIRMAN ANDERSON: I'm sorry.

13 MS. RIZZUTO: Is he done with his  
14 questioning?

15 Because I would like to question this  
16 witness as well.

17 CHAIRMAN ANDERSON: Okay.

18 I'm not sure that he's done with the  
19 questions.

20 MS. RIZZUTO: Well, I think he said  
21 that he's done.

22 MR. WHITAKER: You asked a question?

23 MS. RIZZUTO: And then he went into his  
24 summation early.

25 CHAIRMAN ANDERSON: Yeah, go ahead, ask

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

**201-641-1812**

1 MR. NOVAK: Yes.

2 MS. RIZZUTO: Okay.

3 Did you note that it is unsigned and  
4 uncertified?

5 MR. NOVAK: I did not note that.

6 But I don't believe it was signed.

7 MS. RIZZUTO: Okay.

8 And did you also note that Mr. Whitaker  
9 was present at the governing body meeting that day?

10 MR. WHITAKER: No.

11 That was Mr. Wostbrock. I haven't been  
12 to a governing body in Midland Park in at least ten  
13 years.

14 MS. RIZZUTO: It says "Bruce Whitaker,  
15 Esquire" on the first page. On the first -- on page  
16 number 2 of the transcript --

17 MR. WHITAKER: That's who ordered it.

18 MS. RIZZUTO: -- where it says  
19 "Appearances," it says "Robert Reagan, Esq., Counsel  
20 to the Midland Park Mayor and Council," and "Bruce  
21 Whitaker, Esquire."

22 MR. NOVAK: May I see it?

23 MS. RIZZUTO: Sure.

24 MR. WHITAKER: Evidently I wasn't  
25 there.

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

**201-641-1812**

<p style="text-align: right;">53</p> <p>1 It's evidently an error. I didn't even 2 see that. 3 MS. RIZZUTO: I understand. 4 But it indicates that you're -- 5 MR. WHITAKER: Okay, yeah. 6 MS. RIZZUTO: It's an uncertified 7 transcript, so maybe there's a mistake because it's a 8 noncertified transcript. 9 MR. NOVAK: It does. 10 MS. RIZZUTO: But regardless of that, 11 let's move on. 12 So besides the transcript of -- that we 13 have here, there is also a set of minutes from the 14 Mayor and Council meeting. 15 Did you look at those? 16 MR. NOVAK: Yes. 17 MS. RIZZUTO: Okay. And were they 18 different from this transcript? Because they're not 19 -- they weren't provided by Mr. Whitaker. We don't 20 have them in front of us. 21 MR. WHITAKER: Well, the minutes are 22 from a different meeting. 23 MS. RIZZUTO: That's correct. 24 You chose what you wanted to give to 25 the board. I understand that. <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">55</p> <p>1 Yes. That was made on page 10 of that transcript. 2 MR. WHITAKER: Why don't you read it 3 into -- 4 MS. RIZZUTO: That's the Panning Board 5 transcript of October -- this is my turn right now, 6 right -- October 18th, 2021, they made a 7 determination -- they stated it on the record -- that 8 it was consistent. 9 MR. NOVAK: The most -- yes. 10 MS. RIZZUTO: Did the Planning Board -- 11 the Planning Board's main concern appeared to be that 12 the governing body was prohibiting drive-through 13 restaurants in B-1 and B-2, but -- 14 CHAIRMAN ANDERSON: Three. 15 MS. RIZZUTO: B-3. 16 But they felt it should also be 17 prohibited in I-2, which is an industrial zone; that 18 was the main gist of the Planning Board's review, 19 correct? 20 MR. NOVAK: Yes. 21 MS. RIZZUTO: Okay. 22 Are you familiar with the various 23 statutes that exist around the giving of a 24 recommendation and what the governing body can do if 25 they decide to go with the recommendations of changes <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">54</p> <p>1 You did not give the minutes to the 2 September 28th meeting when the -- when the -- when 3 the ordinance was -- was adopted. 4 So, sir, did you go look up those 5 minutes separately? Because Mr. Whitaker did not 6 provide them. 7 MR. NOVAK: No. I looked at the 8 October 20th. 9 MS. RIZZUTO: Okay. 10 That's for the second meeting. Did you 11 look at the minutes of the Planning Board when they 12 determined and made a recommendation that the 13 ordinance was consistent with the Master Plan? They 14 made that clear finding, correct? 15 MR. NOVAK: I am not familiar with the 16 minutes. 17 MS. RIZZUTO: Okay. 18 But in the transcript that is 19 uncertified that Mr. Whitaker produced, they, in 20 fact, made that finding in that uncertified 21 transcript, correct? 22 They say they're going to direct the 23 Planning Board attorney to write a letter. 24 MR. NOVAK: Yes. 25 I'm just looking for the exact text. <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">56</p> <p>1 by the planning board, or modify them, or reject 2 them? 3 Are you familiar with all of the 4 statutes that govern that decision process? 5 MR. NOVAK: Yeah, I'm typically 6 familiar. 7 MS. RIZZUTO: Yeah. 8 You stated earlier, they should be -- 9 if they are going to disagree with the Planning Board 10 recommendation, they should put their reasons on the 11 record, correct? 12 MR. NOVAK: If the -- 13 MS. RIZZUTO: If the governing -- 14 MR. NOVAK: Yes. 15 If the Planning Board finds that a 16 provision of the ordinance is -- 17 MS. RIZZUTO: Inconsistent. 18 MR. NOVAK: -- inconsistent with the 19 Master Plan -- and the Municipal Land Use Law is very 20 specific. It says inconsistent. 21 MS. RIZZUTO: Right. 22 MR. NOVAK: Then the governing body 23 needs to put the rationale for the adoption of that 24 ordinance on the record. 25 MS. RIZZUTO: Right. <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">57</p> <p>1 But here that didn't exist. It doesn't</p> <p>2 exist in any of these uncertified transcripts or</p> <p>3 minutes. They found it to be consistent.</p> <p>4 So the governing body then acted at the</p> <p>5 second adoption meeting. We don't have a transcript,</p> <p>6 but we do have the October 28 governing body minutes.</p> <p>7 Can you take a look at that, page 4?</p> <p>8 Page 4 is on the top.</p> <p>9 MS. HERLIHY: I'm sorry.</p> <p>10 We don't have a transcript of what did</p> <p>11 you say.</p> <p>12 MS. RIZZUTO: We don't -- we don't have</p> <p>13 a transcript of the second reading and adoption.</p> <p>14 No, we don't.</p> <p>15 MR. WHITAKER: We couldn't get the</p> <p>16 transcript.</p> <p>17 MS. HERLIHY: The planning board and</p> <p>18 the transcript.</p> <p>19 Just so I can clarify. The transcript</p> <p>20 of the September meeting, that was a transcript that</p> <p>21 you had done of a recording.</p> <p>22 MR. WHITAKER: I had any stenographer</p> <p>23 get a transcript of the recording of that for the</p> <p>24 Planning Board.</p> <p>25 But my stenographer was unable to get</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>	<p style="text-align: right;">59</p> <p>1 It's called severability. No, not a</p> <p>2 severability. It's called an inconsistency repealed?</p> <p>3 MR. NOVAK: Yes.</p> <p>4 MS. RIZZUTO: And that goes to what the</p> <p>5 board attorney was saying earlier, that sometimes the</p> <p>6 ordinances don't get directly repealed, but this</p> <p>7 provision does in fact repeal inconsistent</p> <p>8 ordinances, does it not?</p> <p>9 MR. NOVAK: It would repeal a very</p> <p>10 direct inconsistent ordinance.</p> <p>11 So if there's something else in the</p> <p>12 regulations that was discussing how drive-through</p> <p>13 restaurants were a permitted use in the B-3, this</p> <p>14 would in effect repeal that section.</p> <p>15 MS. RIZZUTO: Right.</p> <p>16 And judges struggle to figure out</p> <p>17 what's inconsistent or not. But this board is not</p> <p>18 the appellate board, right.</p> <p>19 So, in addition, the applicant made you</p> <p>20 read through the definition of restaurant</p> <p>21 drive-through. You see that that's in Section 1.</p> <p>22 Section 2, let's read Section 2, and</p> <p>23 tell me if that has enough clarity. It says:</p> <p>24 "Restaurants: Provided, however, that</p> <p>25 drive-through restaurants as defined in this</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>
<p style="text-align: right;">58</p> <p>1 the one for the 28th, or whatever, the minutes.</p> <p>2 MS. RIZZUTO: Just so you know, that</p> <p>3 would be not be acceptable in a superior court</p> <p>4 appeal. It has to be done by the municipal shorthand</p> <p>5 reporter, not the applicant.</p> <p>6 MS. HERLIHY: Was the recording not</p> <p>7 available?</p> <p>8 Why was --</p> <p>9 MR. WHITAKER: I don't know. I don't</p> <p>10 know. I'd have to check.</p> <p>11 MS. RIZZUTO: So can I just direct your</p> <p>12 attention to page 4 where the actual ordinance is</p> <p>13 repeated, and I'm going to presume word-for-word.</p> <p>14 Can you look at Section 5 of the</p> <p>15 ordinance where it says:</p> <p>16 "Inconsistent ordinances repealed. All</p> <p>17 ordinances or parts of ordinances which are</p> <p>18 inconsistent with the provisions of this</p> <p>19 ordinance are hereby repealed, only to the</p> <p>20 extent of such inconsistency."</p> <p>21 Do you recognize that language having</p> <p>22 seen it in other ordinances?</p> <p>23 MR. NOVAK: Yes.</p> <p>24 MS. RIZZUTO: It's typically found in</p> <p>25 other ordinances.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>	<p style="text-align: right;">60</p> <p>1 chapter are deemed to be prohibited."</p> <p>2 So Section 1 needs to be read with</p> <p>3 Section 2.</p> <p>4 MR. NOVAK: Yes.</p> <p>5 MS. RIZZUTO: Would you agree to that?</p> <p>6 MR. NOVAK: Yes.</p> <p>7 MS. RIZZUTO: Okay. Let me just -- I</p> <p>8 think that was pretty much all I had.</p> <p>9 Is the purpose of this ordinance to</p> <p>10 prohibit restaurants with drive-through lanes?</p> <p>11 MR. NOVAK: Yes.</p> <p>12 MS. RIZZUTO: Thank you.</p> <p>13 Nothing else.</p> <p>14 VICE CHAIRMAN PAPAPIETRO: Can I ask a</p> <p>15 question?</p> <p>16 Can you, for the benefit of the board,</p> <p>17 the section you were going through with the minutes,</p> <p>18 Section 1, Section 2 and Section 3, can you just read</p> <p>19 it out loud.</p> <p>20 MS. RIZZUTO: Sure.</p> <p>21 Of the ordinance?</p> <p>22 VICE CHAIRMAN PAPAPIETRO: The</p> <p>23 ordinance on final. Then the Section 1, 2, 3 and 4,</p> <p>24 everything that ties into that particular ordinance</p> <p>25 as part of these minutes.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>



<p style="text-align: right;">61</p> <p>1 MS. RIZZUTO: Okay. So it's on page 4.</p> <p>2 Section 1 is a --</p> <p>3 VICE CHAIRMAN PAPAPIETRO: Actually,</p> <p>4 start with the ordinance on final with the actual</p> <p>5 wording of it.</p> <p>6 MR. WHITAKER: Which ordinance are you</p> <p>7 talking about?</p> <p>8 MS. RIZZUTO: The title? Page 4 of the</p> <p>9 October 28, 2021 minutes of the governing body.</p> <p>10 So the ordinance on final reading --</p> <p>11 VICE CHAIRMAN PAPAPIETRO: Yes.</p> <p>12 MS. RIZZUTO: -- is labeled</p> <p>13 Ordinance 19:21, an Ordinance to Amend 08-21,</p> <p>14 entitled "An Ordinance to Amend and Replace in its</p> <p>15 Entirety" -- in its entirety -- "Chapter 34 of the</p> <p>16 Code of the Borough of Midland Park entitled 'Zoning</p> <p>17 (Restaurants - Drive-Throughs)." That's the title.</p> <p>18 "Be it ordained," et cetera.</p> <p>19 Section 1 is in the -- from the</p> <p>20 definitions. It did not change that -- that</p> <p>21 definition. It repeated it.</p> <p>22 So the restaurant drive-through is the</p> <p>23 definition. It says:</p> <p>24 "An establishment in which food or</p> <p>25 drink is served to customers within</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">63</p> <p>1 And they use the word "amended."</p> <p>2 Permitted Uses, Paragraph H, Restaurant, is hereby</p> <p>3 amended to read as follows: "Restaurants" --</p> <p>4 permitted.</p> <p>5 "Restaurants: Provided, however, that</p> <p>6 drive-through restaurants as defined in this</p> <p>7 chapter are deemed to be prohibited."</p> <p>8 So they were clear, they allowed</p> <p>9 restaurants in the B-1 and in the B-3 but not if they</p> <p>10 have drive-throughs.</p> <p>11 Severability is a standard clause that</p> <p>12 writers of ordinances like myself include all the</p> <p>13 time.</p> <p>14 And it basically says if this goes to a</p> <p>15 court, and if a court finds that Section Z is</p> <p>16 improper or unconstitutional, that doesn't affect</p> <p>17 Section A, B and C.</p> <p>18 That's an example. That's what</p> <p>19 severability means. Cut out the bad part. Leave all</p> <p>20 of the rest of the law in place. That's what</p> <p>21 severability is.</p> <p>22 Inconsistent ordinances repealed. I</p> <p>23 already went over that. That's a standard clause</p> <p>24 that people who write ordinances, like borough</p> <p>25 attorneys and planning board attorneys, keep into</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">62</p> <p>1 automobiles outside of the confines of the</p> <p>2 building and where the consumption of such</p> <p>3 food or drink is intended to occur off the</p> <p>4 premises."</p> <p>5 Not that it's required to be off the</p> <p>6 premises. It's intended to give it to a window, that</p> <p>7 they're going to drive off with it.</p> <p>8 Okay. Then you want me to keep</p> <p>9 reading?</p> <p>10 VICE CHAIRMAN PAPAPIETRO: Yes.</p> <p>11 MS. RIZZUTO: Number 2, Section 2, this</p> <p>12 is an amendment of Section 47-71, Use Regulations.</p> <p>13 Paragraph --</p> <p>14 CHAIRMAN ANDERSON: Thirty-four.</p> <p>15 MS. RIZZUTO: Thirty-four -- sorry,</p> <p>16 -7.1, Use Regulation, Paragraph A-7, Restaurants.</p> <p>17 So they're amending a section of the</p> <p>18 ordinance, and they're saying restaurants is hereby</p> <p>19 amended to read as follows:</p> <p>20 "Restaurants: Provided, however, that</p> <p>21 drive-through restaurants as defined in this</p> <p>22 chapter are deemed to be prohibited."</p> <p>23 Section 3 -- that was for the B-1 Zone.</p> <p>24 Section 3 is for the B-3 Zone. And it is amending</p> <p>25 34-9.1.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">64</p> <p>1 their ordinances.</p> <p>2 And then of course Section 6 is the</p> <p>3 effective date. And I'll note for the record that</p> <p>4 the governing body determined that it should take</p> <p>5 effect immediately. They didn't say six months from</p> <p>6 now, a year from now, whatever.</p> <p>7 They said October 28th.</p> <p>8 Now, are you familiar, Mr. Novak, with</p> <p>9 the -- with the time period required for filing a</p> <p>10 prerogative writ to oppose an ordinance; do you know</p> <p>11 the time period?</p> <p>12 MR. WHITAKER: That would be a legal</p> <p>13 question.</p> <p>14 MS. RIZZUTO: You asked him to do a lot</p> <p>15 of legal stuff.</p> <p>16 Is that objectionable?</p> <p>17 CHAIRMAN ANDERSON: First of all, are</p> <p>18 you qualified --</p> <p>19 MS. RIZZUTO: Do you know?</p> <p>20 CHAIRMAN ANDERSON: -- to answer that?</p> <p>21 MR. NOVAK: Can you repeat the</p> <p>22 question?</p> <p>23 MS. RIZZUTO: Do you know what the time</p> <p>24 frame to appeal an adoption of an ordinance is?</p> <p>25 After -- after the Council adopts it,</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">65</p> <p>1 what's the timeframe to appeal.</p> <p>2 MR. NOVAK: Is it 20 days or 45 days?</p> <p>3 MS. HERLIHY: It's really irrelevant to</p> <p>4 this board and what's before this board.</p> <p>5 MS. RIZZUTO: Right.</p> <p>6 But I'll note for the record that there</p> <p>7 was no appeal of this ordinance because we wouldn't</p> <p>8 be here if there was.</p> <p>9 We would have a decision from a judge,</p> <p>10 and maybe they would have overturned it, or maybe</p> <p>11 they wouldn't have.</p> <p>12 But it was never challenged.</p> <p>13 And 45 days from any municipal action</p> <p>14 is the appellate requirement. It's code of superior</p> <p>15 court.</p> <p>16 CHAIRMAN ANDERSON: But we know that.</p> <p>17 MS. RIZZUTO: Okay, I understand.</p> <p>18 I'm making a record.</p> <p>19 That's all I'm doing.</p> <p>20 MR. WHITAKER: Just so the record is</p> <p>21 clear, I haven't used the word "inconsistent" per se</p> <p>22 with your ordinance. I just said that the ordinance</p> <p>23 lacks clarity.</p> <p>24 And Mr. Novak agreed with me.</p> <p>25 MS. RIZZUTO: Yes, I understand.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">67</p> <p>1 MR. CAPALBO: I don't know why she said</p> <p>2 nobody appealed it. They shouldn't be here because</p> <p>3 nobody appealed it.</p> <p>4 MS. RIZZUTO: No. That's not what I'm</p> <p>5 saying.</p> <p>6 MR. CAPALBO: That's what you meant.</p> <p>7 MR. WHITAKER: My client is not the</p> <p>8 property owner.</p> <p>9 My client wasn't aware of the</p> <p>10 ordinance.</p> <p>11 MS. RIZZUTO: According to this,</p> <p>12 Mr. Whitaker was there.</p> <p>13 CHAIRMAN ANDERSON: Do you recall</p> <p>14 whether you were there?</p> <p>15 MR. WHITAKER: I do not believe I was</p> <p>16 there. I did not have this at the time the ordinance</p> <p>17 got passed.</p> <p>18 MS. RIZZUTO: You didn't have Taco Bell</p> <p>19 as the client.</p> <p>20 MR. WHITAKER: I came in in January, as</p> <p>21 I recall.</p> <p>22 MS. HERLIHY: I understand what</p> <p>23 probably happened. The transcript was done from a</p> <p>24 recording.</p> <p>25 There wasn't somebody actually there at</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">66</p> <p>1 But you've also picked and</p> <p>2 cherry-picked sections of Chapter 34 and said, this</p> <p>3 applies and this doesn't, and this applies and this</p> <p>4 doesn't. That's not for this board. This board has</p> <p>5 an ordinance that prohibits -- very recently from the</p> <p>6 Mayor and Council prohibits this use.</p> <p>7 MR. WHITAKER: We all know that.</p> <p>8 CHAIRMAN ANDERSON: Are you finished</p> <p>9 with your questions for Mr. Novak?</p> <p>10 MS. RIZZUTO: I am, for Mr. Novak.</p> <p>11 CHAIRMAN ANDERSON: Do you have</p> <p>12 anything?</p> <p>13 MS. HERLIHY: No.</p> <p>14 CHAIRMAN ANDERSON: Jim?</p> <p>15 MR. CAPALBO: Question.</p> <p>16 If we understand your questioning,</p> <p>17 then, if nobody appealed any ordinance that was</p> <p>18 adopted, nobody would be allowed to come for a</p> <p>19 variance; is that what you're saying?</p> <p>20 MS. RIZZUTO: No.</p> <p>21 MR. CAPALBO: Well, that's the why I</p> <p>22 understood it.</p> <p>23 MS. RIZZUTO: No.</p> <p>24 That's not what I'm saying.</p> <p>25 CHAIRMAN ANDERSON: She's saying --</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">68</p> <p>1 the meeting.</p> <p>2 CHAIRMAN ANDERSON: Right, okay.</p> <p>3 Anything else for Mr. Novak? I guess</p> <p>4 since he testified, we have to open it to the public</p> <p>5 for him to ask questions of him.</p> <p>6 Right.</p> <p>7 So if nobody else has any questions</p> <p>8 from the board, can we have a motion?</p> <p>9 MR. CAPALBO: So moved.</p> <p>10 MR. PLACIER: Second.</p> <p>11 MS. HARMON: Mr. Formicola?</p> <p>12 MR. FORMICOLA: Yes.</p> <p>13 MS. HARMON: Mr. Zuidema?</p> <p>14 MR. ZUIDEMA: Yes.</p> <p>15 MS. HARMON: Mr. Papapietro?</p> <p>16 VICE CHAIRMAN PAPAPIETRO: Yes.</p> <p>17 MS. HARMON: Mr. Placier?</p> <p>18 MR. PLACIER: Yes.</p> <p>19 MS. HARMON: Mr. Barlow?</p> <p>20 MR. BARLOW: Yes.</p> <p>21 MS. HARMON: Mr. Capalbo?</p> <p>22 MR. CAPALBO: Yes.</p> <p>23 MS. HARMON: Mr. Anderson?</p> <p>24 CHAIRMAN ANDERSON: Yes.</p> <p>25 Does anybody in the public have any</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">69</p> <p>1 questions for Mr. Novak?</p> <p>2 (No Response.)</p> <p>3 CHAIRMAN ANDERSON: Seeing none,</p> <p>4 motion.</p> <p>5 MR. PLACIER: So moved.</p> <p>6 MR. CAPALBO: Second.</p> <p>7 MS. HARMON: Mr. Formicola?</p> <p>8 MR. FORMICOLA: Yes.</p> <p>9 MS. HARMON: Mr. Zuidema?</p> <p>10 MR. ZUIDEMA: Yes.</p> <p>11 MS. HARMON: Mr. Papapietro?</p> <p>12 VICE CHAIRMAN PAPAPIETRO: Yes.</p> <p>13 MS. HARMON: Mr. Placier?</p> <p>14 MR. PLACIER: Yes.</p> <p>15 MS. HARMON: Mr. Barlow?</p> <p>16 MR. BARLOW: Yes.</p> <p>17 MS. HARMON: Mr. Eliya?</p> <p>18 MR. ELIYA: Yes.</p> <p>19 MS. HARMON: Mr. Anderson?</p> <p>20 CHAIRMAN ANDERSON: Yes. Yes.</p> <p>21 VICE CHAIRMAN PAPAPIETRO: I have a</p> <p>22 question for our esteemed attorney.</p> <p>23 For the minutes that were just read on</p> <p>24 Ordinance 19-21, and the way it's worded on here, and</p> <p>25 saying an ordinance to amend or replace in its</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>	<p style="text-align: right;">71</p> <p>1 Chapter 34 of the Code of the Borough of Midland Park</p> <p>2 entitled -- okay. This particular Ordinance 19-21</p> <p>3 just amends that ordinance.</p> <p>4 I don't have in front of me</p> <p>5 Ordinance 08-21 to make a comparison.</p> <p>6 But this particular ordinance -- as I'm</p> <p>7 reading this, this particular Ordinance 19-21 is not</p> <p>8 an ordinance to amend and replace.</p> <p>9 MR. WHITAKER: Ordinance 08-21 -- I</p> <p>10 have it -- lists all the permitted uses.</p> <p>11 And this amends the permitted uses.</p> <p>12 And I've never said that these ordinances are</p> <p>13 inconsistent. I was just showing that there's a lack</p> <p>14 of clarity in looking at this as to what they</p> <p>15 attempted to do, and that there's ordinances here</p> <p>16 that don't really get to the finish line.</p> <p>17 VICE CHAIRMAN PAPAPIETRO: Okay, thank</p> <p>18 you.</p> <p>19 CHAIRMAN ANDERSON: Anybody else?</p> <p>20 Have we already done your summation?</p> <p>21 MR. WHITAKER: I didn't even start.</p> <p>22 Sorry, I'm going to hold you up, but a couple things.</p> <p>23 I'd like to move all the exhibits, including those</p> <p>24 transcripts. I will give you one, if they're not</p> <p>25 certified by the stenographer. They are a matter of</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>
<p style="text-align: right;">70</p> <p>1 entirety Chapter 34 of the board of restaurant</p> <p>2 drive-throughs.</p> <p>3 Earlier on Mr. Whitaker was talking</p> <p>4 about some items that still remained in the current</p> <p>5 laws of the town, but doesn't this supercede that if</p> <p>6 they weren't removed for whatever reason?</p> <p>7 CHAIRMAN ANDERSON: I think, if I</p> <p>8 understand your question, that's what Ms. Rizzuto was</p> <p>9 trying to establish, that any inconsistencies in</p> <p>10 those other -- and they're not really ordinances.</p> <p>11 They're definitions.</p> <p>12 MS. HERLIHY: But hold on.</p> <p>13 You've got to read the title right,</p> <p>14 it's wrong. So this is ordinance number -- and maybe</p> <p>15 I'm not -- this isn't the answer to the question.</p> <p>16 This is Ordinance Number 19-21. Okay?</p> <p>17 Ordinance 19-21 is an ordinance that</p> <p>18 amends a prior ordinance. Okay?</p> <p>19 So it doesn't -- this Ordinance 19-21</p> <p>20 isn't amending and replacing anything. It's amending</p> <p>21 something. It's amending an Ordinance 08-21 that was</p> <p>22 entitled "An Ordinance to Amend and Replace in its</p> <p>23 Entirety."</p> <p>24 So Ordinance Number 08-21 was an</p> <p>25 ordinance to amend and replace in its entirety</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>	<p style="text-align: right;">72</p> <p>1 record. They came from the Mayor and Council. And</p> <p>2 I've given them to the board and for everybody for</p> <p>3 the purposes of edification. We're here to try to</p> <p>4 determine what the purpose of an ordinance is. I</p> <p>5 honestly did some research that anybody on the board</p> <p>6 could also have asked for and have done. I would</p> <p>7 like to do that.</p> <p>8 There was an -- as exhibits. That</p> <p>9 would be, I think, A-15 of my exhibits, if my list is</p> <p>10 correct, collectively.</p> <p>11 I was asked to provide an outline. And</p> <p>12 I did that and sent it over. I'd like to make that</p> <p>13 A-16.</p> <p>14 One of the other things that was asked</p> <p>15 when I went through all the transcripts of all the</p> <p>16 meetings -- they go back to March of this year -- is</p> <p>17 that a couple of times I saw in the transcripts there</p> <p>18 was questions of me, can you provide us with</p> <p>19 stipulations that we put on the record.</p> <p>20 So I have gone through -- I had my</p> <p>21 list. I went through and verified it with the</p> <p>22 transcripts. And so I have provided a list called</p> <p>23 "Stipulations." I've given that to opposing counsel.</p> <p>24 I'd like to mark that A-17. It consists from</p> <p>25 stipulations from A to L.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>

<p style="text-align: right;">73</p> <p>1 With that, I would move all the</p> <p>2 exhibits from A-1 to A-17.</p> <p>3 CHAIRMAN ANDERSON: Ms. Rizzuto, do you</p> <p>4 have any objection to these exhibits going into</p> <p>5 evidence?</p> <p>6 MS. RIZZUTO: Yes.</p> <p>7 Yes, I do. I'd just like to make a</p> <p>8 record.</p> <p>9 The objection is that these are not</p> <p>10 properly transcribed materials because they are not</p> <p>11 signed and certified.</p> <p>12 And they are not done by the designated</p> <p>13 required Certified Court Reporter that's required</p> <p>14 under statute when we go on appeal to the Superior</p> <p>15 Court.</p> <p>16 For purposes of this board, this board</p> <p>17 could take judicial notice of properly presented</p> <p>18 documents. These are not properly presented because</p> <p>19 they are not certified. They are, in fact,</p> <p>20 uncertified.</p> <p>21 In addition, the October 28 -- I've</p> <p>22 done this many times. This is minutes. It looks</p> <p>23 like minutes. It reads like minutes.</p> <p>24 But the truth is, he could have had</p> <p>25 these certified by the borough clerk that they are</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">75</p> <p>1 (Whereupon, Minutes of Mayor and</p> <p>2 Council Dated October 28, 2021 are marked as</p> <p>3 Exhibit A-17 for identification.)</p> <p>4 (Whereupon, Outline is marked as</p> <p>5 Exhibit A-18 for identification.)</p> <p>6 (Whereupon, Stipulations are marked as</p> <p>7 Exhibit A-19 for identification.)</p> <p>8 MS. RIZZUTO: Okay. And there is also</p> <p>9 correspondence from Mr. Whitaker sending these things</p> <p>10 to the board dated October 3, 2023.</p> <p>11 I'm just making that part of the</p> <p>12 record.</p> <p>13 Now, just briefly, Your Honor.</p> <p>14 MR. WHITAKER: Your Honor?</p> <p>15 CHAIRMAN ANDERSON: Your Honor?</p> <p>16 Thank you.</p> <p>17 MS. RIZZUTO: Oh, sorry.</p> <p>18 MS. HERLIHY: Mr. Whitaker, any</p> <p>19 objection to -- should the board vote in favor of the</p> <p>20 application, should the board approve this</p> <p>21 application tonight, or at some other point in time,</p> <p>22 but should there be an approval, that it be</p> <p>23 conditioned upon you providing properly certified</p> <p>24 transcripts of both of these meetings as well as</p> <p>25 certified minutes so that the certified transcripts</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">74</p> <p>1 official minutes. However -- so that's my objection.</p> <p>2 I also think that, for the record,</p> <p>3 because there may be an appeal from this case, I</p> <p>4 think that the minutes -- the transcript of</p> <p>5 September 23, 2021 should be its own exhibit.</p> <p>6 The transcript of the Planning Board of</p> <p>7 10-18-2021 should be its own exhibit.</p> <p>8 And the minutes of the governing body</p> <p>9 from October 28, 2021 should be its own exhibit. The</p> <p>10 applicant asked for that to be all marked together.</p> <p>11 I'm sorry, I don't know what the number was.</p> <p>12 MR. WHITAKER: So for the first time in</p> <p>13 my life, I'm not going to disagree.</p> <p>14 A-15 will be the first one.</p> <p>15 A-16 will be the second.</p> <p>16 A-17 will be the third.</p> <p>17 The outline will be A-18.</p> <p>18 Just moving up the numbers.</p> <p>19 And the stipulations will be A-19.</p> <p>20 (Whereupon, Transcript Dated</p> <p>21 September 23, 2021 is marked as Exhibit A-15,</p> <p>22 for identification.)</p> <p>23 (Whereupon, Transcript Dated October</p> <p>24 18, 2021 is marked as Exhibit A-16 for</p> <p>25 identification.)</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">76</p> <p>1 and minutes could be compared to what was submitted</p> <p>2 as exhibits?</p> <p>3 MR. WHITAKER: No objection.</p> <p>4 MS. HERLIHY: As long as they are the</p> <p>5 same.</p> <p>6 MS. RIZZUTO: While I appreciate the</p> <p>7 assistance suggested by the board attorney, what you</p> <p>8 have before you is what I stated.</p> <p>9 And I believe that you can give it what</p> <p>10 -- excuse me -- whatever weight you want to give it,</p> <p>11 uncertified, uncertified by the -- by the reporter</p> <p>12 and uncertified by the clerk.</p> <p>13 And, yes, you can ask for something</p> <p>14 later. But if there's an appeal, you're just messing</p> <p>15 up the record at this point by asking for something</p> <p>16 after a decision is made. I understand.</p> <p>17 I just do not think that that is the</p> <p>18 proper procedure for what should be a final vote that</p> <p>19 should be published in the newspaper within ten days,</p> <p>20 et cetera.</p> <p>21 Also, you're not giving me an</p> <p>22 opportunity to state any objection I might have to</p> <p>23 what he does.</p> <p>24 So at this point --</p> <p>25 MS. HERLIHY: I'm not sure what you</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

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

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

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

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

12 MS. RIZZUTO: But you can't.

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

15 MS. RIZZUTO: No, no, no.

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

18 But listen, I only --

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

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

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

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

**201-641-1812**

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

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

5 Now, I read the transcript of the last  
6 meeting. I wasn't here. And someone requested --

7 VICE CHAIRMAN PAPAPIETRO: I did.

8 MS. RIZZUTO: Yeah.

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

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

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

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

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

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

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

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

**201-641-1812**

1 MS. RIZZUTO: Right, of course.

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

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

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

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

13 CHAIRMAN ANDERSON: Why can't they?

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

16 CHAIRMAN ANDERSON: Why can't they?

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

20 CHAIRMAN ANDERSON: All rise.

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

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

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

**201-641-1812**

1 gone on for a long time.

2 I wanted to make sure everything is  
3 documented.

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

6 MS. RIZZUTO: I understand.

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

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

13 VICE CHAIRMAN PAPAPIETRO: Absolutely.

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

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

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

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

**201-641-1812**

<p style="text-align: right;">81</p> <p>1 MR. WHITAKER: Well, I would assume</p> <p>2 that the board also has their own notes and can look</p> <p>3 at it themselves. I was doing it as a matter of</p> <p>4 courtesy.</p> <p>5 I did not reflect the page number or</p> <p>6 line number from the transcript because the language</p> <p>7 there is not out of the transcript. I never said it</p> <p>8 was. It was from my notes.</p> <p>9 And from my notes, I went back and</p> <p>10 looked at the transcripts to see that they matched</p> <p>11 up, that there was none missing.</p> <p>12 MS. RIZZUTO: Okay. So, you know,</p> <p>13 again, conditions happen all through hearings. And</p> <p>14 these are -- these are, he's saying, stipulations.</p> <p>15 They're conditions that were agreed to, I suppose, by</p> <p>16 the applicant during the numerous hearings.</p> <p>17 That's not unusual.</p> <p>18 What is unusual is getting the piece of</p> <p>19 paper at the end from the applicant's counsel. But</p> <p>20 it's not unusual that conditions are imposed and</p> <p>21 stipulations are made.</p> <p>22 MR. CAPALBO: Mr. Anderson, can I ask a</p> <p>23 question? Counsel indicates that Mr. Whitaker rested</p> <p>24 his case and he's going to do a summation.</p> <p>25 But she said he introduced new</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">83</p> <p>1 first witness was Evers Santana, who testified that</p> <p>2 he worked in the restaurant industry for over 30</p> <p>3 years and with the applicant's restaurant group, and</p> <p>4 is responsible for real estate development and</p> <p>5 construction.</p> <p>6 If you recall, he testified that he is</p> <p>7 involved with the QSRs specifically for over 25</p> <p>8 years.</p> <p>9 If you recall, he actually worked for</p> <p>10 Friendly's in Midland Park many years ago and</p> <p>11 actually trained at Roy Rogers before it and became a</p> <p>12 manager.</p> <p>13 Now, he's done everything from</p> <p>14 development through construction and operations. And</p> <p>15 he's operated multiple locations for many years. Why</p> <p>16 is that important?</p> <p>17 Because he basically is an expert in</p> <p>18 the field of QSR operations, because he was able to</p> <p>19 explain all of the aspects of a QSR, specifically a</p> <p>20 Taco Bell operation.</p> <p>21 He testified that the site will</p> <p>22 accommodate Taco Bell's needs. He testified that the</p> <p>23 demographics in Midland Park with the surrounding</p> <p>24 area show that a Taco Bell would be a successful</p> <p>25 franchise at this location. He testified that they</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">82</p> <p>1 information. That was all based on testimony of the</p> <p>2 planner. He didn't introduce it. He questioned the</p> <p>3 planner.</p> <p>4 CHAIRMAN ANDERSON: We know.</p> <p>5 MR. CAPALBO: We should be aware of</p> <p>6 that.</p> <p>7 CHAIRMAN ANDERSON: Okay.</p> <p>8 Anything else?</p> <p>9 (No Response.)</p> <p>10 CHAIRMAN ANDERSON: No?</p> <p>11 Okay, Mr. Whitaker?</p> <p>12 MR. WHITAKER: Thank you for your time.</p> <p>13 And I would ask that you indulge me, because we've</p> <p>14 been working on this since March, and there's a lot</p> <p>15 of information that's been provided to you. If you</p> <p>16 don't mind, I'm going to sit as I give the summation</p> <p>17 and not walk around the room.</p> <p>18 But there's a lot that we have to</p> <p>19 review. And this is the type of case, and important</p> <p>20 enough, and the considerations and the decisions you</p> <p>21 have to make are that important that I am going to</p> <p>22 walk you through what we presented, and then I want</p> <p>23 to explain to you our position from a planning</p> <p>24 perspective and from a legal perspective.</p> <p>25 When we go back, you'll know that our</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">84</p> <p>1 would operate seven days a week, 8 a.m. to midnight.</p> <p>2 And he testified that there are three shifts that</p> <p>3 overlap, that they have a maximum of eight employees,</p> <p>4 but they're not all there at the same time, they</p> <p>5 don't come all at the same time, they don't leave all</p> <p>6 at the same time.</p> <p>7 He testified, and we stipulated, that</p> <p>8 there are two deliveries per week, and the timing of</p> <p>9 them are controlled by the owner. And he stipulated</p> <p>10 that the distributor would be coming to this location</p> <p>11 between 5 a.m. and 7 a.m. He testified, if you</p> <p>12 recall, and it's important to know, that there's a</p> <p>13 lock box there. They have a key. They enter the</p> <p>14 facility. They drop off the merchandise. And the</p> <p>15 driver does it all. There's no employee there at</p> <p>16 that time. And that a typical delivery lasts about</p> <p>17 45 minutes to an hour.</p> <p>18 Remember, there's nothing in the</p> <p>19 ordinance that regards the prohibition as to when</p> <p>20 deliveries can be made; however, the applicant</p> <p>21 provided a stipulation to allay the concerns that</p> <p>22 were raised by board members during the course of the</p> <p>23 hearing.</p> <p>24 Mr. Santana testified to something that</p> <p>25 was very important, something that was not news to us</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">85</p> <p>1 but something that was very important in  2 understanding the drive-through QSR concept. And  3 that he said for a freestanding QSR, a franchise only  4 approves of it if it has a drive-through. You heard  5 that testimony a number of times. You heard it also  6 from Mr. Dean. Why? Because, as he testified, 70 to  7 75 percent of the business post-pandemic, where  8 people don't want to come face-to-face with a crew  9 member, where people have gotten used to not having  10 to get out of their car to get food, customers'  11 habits have changed. So that 75 percent business  12 aspect is for a drive-through.</p> <p>13 So effectively when you have an  14 ordinance that says no drive-through, and recognizing  15 that the QSR basically requires a drive-through to  16 have these type of franchises in a community, that  17 ordinance effectively says that the QSR doesn't exist  18 in this town. And that's an important aspect for you  19 to think about, because I think we all expect or have  20 an expectation in today's world that a business like  21 that belongs in a community.</p> <p>22 In addition, he talked about the  23 walk-in traffic. He talked about how they  24 accommodate DoorDash and the GrubHub operations in  25 specific areas for pickup. He established through  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>	<p style="text-align: right;">87</p> <p>1 different than a drive-through bank. But at the same  2 time, we acknowledged and showed you that this  3 particular site -- and you'll hear this word -- I'm  4 sorry -- a few times -- is particularly suited for  5 the use.</p> <p>6 He testified that there's sufficient  7 parking for the customers that actually come into the  8 facility. He stipulated, because this is what they  9 do, employees would park farther away and would not  10 be right next to the site, like any type of business,  11 so that the customers are there to be accommodated  12 first.</p> <p>13 He had uncontroverted testimony that  14 11-car stacking is more -- this is his words -- more  15 than ample for his business at this location.</p> <p>16 And at this point, you also may recall  17 -- it was a long time ago -- he testified that they  18 had two other locations, buildings similar to this,  19 and they have looked at those facilities, and it's  20 never queued up to be 11. It was typically at 8.</p> <p>21 What's important for you to understand  22 is that this person, knowing the operational aspects,  23 is a designer, not on his own, but did the design  24 with the engineer. And that was testified to. So  25 there was an operational experience when this plan  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>
<p style="text-align: right;">86</p> <p>1 all of that testimony that the drive-through is  2 essential for the viability of a QSR.</p> <p>3 He testified about the logistics of  4 this. He testified, and it was confirmed later by  5 Mr. Dean, and even you own traffic consultant, that  6 perhaps as many of 7 to 8 would be the maximum that  7 would ever be queued in this 153-foot queuing lane  8 that we have that will accommodate 11 cars.</p> <p>9 He testified that Taco Bell is very  10 different from other franchises in how the product is  11 served because it's not cooked per se. It's already  12 prepared. It's warmed. And then in a typical, if  13 you recall, transaction, it can run between a minute  14 to 2.5 minutes, and you're in and out.</p> <p>15 He talked about the uniqueness of this  16 franchise. And he talked in terms of the ordinance  17 that you have will more than accommodate this site.  18 Remember, this is a site that has a drive-through.  19 It's not something that's new to this site. There  20 was a drive-through there first before this applicant  21 knocked on your door.</p> <p>22 Yes, it was a franchise -- a  23 drive-through for a bank. And we acknowledged, and  24 we had the testimony provided to you, acknowledging  25 that the drive-through restaurant use will be  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>	<p style="text-align: right;">88</p> <p>1 was put together.</p> <p>2 From there, you heard the testimony of  3 Andrew Missey. You know Mr. Missey. He's a very  4 well experienced civil engineer. He's been doing  5 this in Bergen County for over 35 years. He does a  6 lot of planning and development work and many  7 projects in this municipality and others with Lapatka  8 &amp; Associates.</p> <p>9 What did he testify to? That the  10 current Columbia Bank, which is nonconforming, would  11 be removed. It would be eliminating some of those  12 nonconformities. That the site has a unique feature,  13 and that its driveways exit on Erie and Rea and  14 return you to Godwin.</p> <p>15 So there's no driving through  16 residential areas by this proposed tenant as well as  17 the other tenants in this commercial area.</p> <p>18 And he said that they were going to be  19 increasing the greenery over what's there now by some  20 1,500 square feet.</p> <p>21 He testified as to the design of the  22 drive-through, would be from an engineering aspect  23 adequate.</p> <p>24 And said -- and uncontroverted -- it  25 meets all the requirements of your ordinance. Even  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>

1 your planner has said that.

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

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

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

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

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

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

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

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

**201-641-1812**

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

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

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

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

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

25 He confirmed that the standards for a

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

**201-641-1812**

1 Parking requirements, we're proposing  
2 170 spaces for the whole center, and only 167 are  
3 needed.

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

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

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

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

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

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

**201-641-1812**

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

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

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

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

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

25 Then you heard from your own traffic

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

**201-641-1812**



<p style="text-align: right;">93</p> <p>1 expert. I've been doing this for a number of years.</p> <p>2 And many times I've listened to two traffic experts.</p> <p>3 And the one thing that they can agree on is that they</p> <p>4 disagree. That didn't happen here.</p> <p>5 Your traffic expert stated that he</p> <p>6 can't imagine anything that would be generated that</p> <p>7 would make an accident history here. He checked the</p> <p>8 accident history. He did more than we did. We</p> <p>9 didn't check that. He said there's no accident</p> <p>10 history here. He agreed with Mr. Dean that the</p> <p>11 elimination of the drive-through on Godwin Avenue is</p> <p>12 "a positive aspect" because it reduces the number of</p> <p>13 conflict points.</p> <p>14 He thinks, and he said, "I certainly</p> <p>15 think that the application should be supported from a</p> <p>16 traffic standpoint."</p> <p>17 He concurred with Mr. Dean pertaining</p> <p>18 to the pass-by traffic. And, in addition, he went</p> <p>19 beyond what Mr. Dean did. He looked at the ITE</p> <p>20 Manual. He looked at the NJ DOT numbers. And then</p> <p>21 he also found, because he did a lot of research -- he</p> <p>22 also found a periodical on a QSR report that</p> <p>23 confirmed that a Mexican-style restaurant needs a</p> <p>24 queuing of approximately seven.</p> <p>25 And I don't have to read it into the</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">95</p> <p>1 safety aspect to be able to see a sign as they come</p> <p>2 down the road.</p> <p>3 But I will tell you that if you</p> <p>4 disagree because we need a variance for that, that at</p> <p>5 the end of the day, that would not be a reason to</p> <p>6 deny the application. If you I believe that that</p> <p>7 sign is not warranted or necessary, then the sign</p> <p>8 goes away.</p> <p>9 The lighting, he testified to, as well</p> <p>10 as Mr. Missey, will be code compliant.</p> <p>11 So then we got to the crux of matter</p> <p>12 from a planning standpoint when we talk about the</p> <p>13 ordinance, we talk about this particular property,</p> <p>14 and we talk about the planning aspects. Matthew</p> <p>15 Seckler, our planner. Been practicing for over 15</p> <p>16 years. Been before more than 70 board. Serves as a</p> <p>17 municipal planner as well as a planner for</p> <p>18 applicants.</p> <p>19 And he testified and confirmed that the</p> <p>20 site 3.55 acres. It is 15 times more than a tract of</p> <p>21 land is necessary for in B-3. And here's the</p> <p>22 important part if you look at A-14 in your exhibits.</p> <p>23 This property is the third largest out of 109.</p> <p>24 He testified and confirmed that</p> <p>25 restaurants are a permitted use, and QSRs are a</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">94</p> <p>1 record, but you have it.</p> <p>2 Both his report and Mr. Dean's report</p> <p>3 comes to the same conclusion. And that is that this</p> <p>4 drive-through has no potential negative impact on</p> <p>5 Godwin Avenue or the adjacent properties, and that</p> <p>6 the site can accommodate the use. It's in his report</p> <p>7 of June the 9th. It's in Mr. Dean's of June the 1st.</p> <p>8 They both agree.</p> <p>9 We had some brief testimony from the</p> <p>10 architect, Mr. Liepins. He is an architect that is</p> <p>11 familiar and does the Taco Bell facilities. He</p> <p>12 prepared the plans for the location and he described</p> <p>13 them to you. I don't need to go into any detail.</p> <p>14 This is not a new aspect. This is a</p> <p>15 prototype. This building works well for the use that</p> <p>16 is intended.</p> <p>17 He testified that all the signage is</p> <p>18 compliant -- and we had an agreement with your</p> <p>19 professionals that it is -- except for one.</p> <p>20 And that the sign that faces the</p> <p>21 drive-through. And that's because it's not on a --</p> <p>22 facing a municipal parking lot, a public parking lot</p> <p>23 or a roadway.</p> <p>24 But he testified that the applicant</p> <p>25 thought it was good for traffic and motorists from a</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">96</p> <p>1 permitted use. It's solely the drive-through aspect</p> <p>2 that requires the D variance. And we know that.</p> <p>3 And then he walked you through the</p> <p>4 <u>Medici</u> standards. And I'm not going to belabor the</p> <p>5 <u>Medici</u> standards right now tonight because you've</p> <p>6 heard about it, we've talked about it, and we've</p> <p>7 talked about the particularly suited aspect under</p> <p>8 <u>Medici</u>.</p> <p>9 With that, he took you through that</p> <p>10 colored zoning map. He took you through all of the</p> <p>11 planning aspects that he testified to. And then he</p> <p>12 did a comparison. Because if you have in your mind</p> <p>13 that the town wanted to eliminate drive-throughs</p> <p>14 because of a traffic concern, because of stacking of</p> <p>15 cars on roadways or whatever, both Mr. Missey, both</p> <p>16 Mr. Seckler and Mr. Dean, as well as your engineer</p> <p>17 for traffic consultant here showed and confirmed that</p> <p>18 we don't have that problem here because additional</p> <p>19 traffic beyond what we think would ever be in the</p> <p>20 queue is internal. And what do I mean by that? It</p> <p>21 stays on the property.</p> <p>22 And he opined at this point that</p> <p>23 perhaps the town had a concern about a drive-through</p> <p>24 on one of the 109 lots in the B-1 and B-3 Zones that</p> <p>25 is small enough that it would be overburdened.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">97</p> <p>1 But maybe what the Mayor and Council  2 could have done -- and I'm not criticizing -- is  3 maybe they could have distinguished and said, well,  4 if it's a piece of property over 2-and-a-half acres,  5 then it would be permitted if it meets all the other  6 requirements for queuing and ingress and egress, et  7 cetera. If they had done something like that,  8 there's probably three properties in the 109 where it  9 would work. And it would be able to provide a QSR  10 with a drive-through. Because otherwise there's no  11 QSRs in Midland Park because the drive-through is an  12 integral part of being a QSR.  13 He testified -- and Mr. Novak went  14 through these already. He testified that it does  15 meet certain requirements under the municipal --  16 under your Master Plan. So let's walk back.  17 He showed you the first positive  18 criteria in showing -- and he confirmed what we've  19 already gone through ad nauseam, all of the reasons  20 why this property is particularly suited for the use.  21 And he then went and he testified to a number of the  22 goals in the Master Plan that are being enhanced or  23 being met, recognizing the Master Plan never said you  24 can't have drive-throughs in Midland Park. No,  25 there's not even anything in that Master Plan that</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>	<p style="text-align: right;">99</p> <p>1 safety benefit and would outweigh any detriment.  2 But, again, if you didn't agree with  3 that, that request for variance relief would be  4 withdrawn.  5 I'll very briefly go over the testimony  6 that was provided to you from the objector's planner,  7 the person that didn't come to all the meetings and  8 wasn't quite sure what meetings she came to, who  9 started out by talking about the sign on the side of  10 the building over the drive-through. That was the  11 first thing that was objectionable.  12 As I just stated, if the board agrees  13 with her, so be it, it's gone.  14 But in connection with her testimony  15 pertaining to the use variance itself, with all due  16 respect, I believe it was at best weak. I think one  17 of the best examples of how unsubstantiated her  18 testimony was, that at the beginning of the evening  19 she believed the testimony that Taco Bell made was  20 that they would be open 24 hours, seven days a week.  21 I objected to that and said that's not the case. The  22 Chairman said the same thing. Then I asked the next  23 question: Were you even here? She wasn't sure and  24 then she said no.  25 She had the chance to go back and look</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>
<p style="text-align: right;">98</p> <p>1 comes close to that.  2 And he was able to pick out goals in  3 your Master Plan, including revitalization of a  4 building that's vacant, a bank building. And we know  5 they're tearing them down or leaving them vacant  6 because they are anachronistic at this point. And he  7 showed that it was viable for the business corridor  8 on Godwin.  9 And I submit to you that in everything  10 that we've done here, we haven't seen or heard the  11 negatives from the Master Plan. We can't pick  12 anything out of the Master Plan that says, oh, the  13 Master Plan says this shouldn't happen because.  14 Because, ladies and gentlemen, it's not there. It  15 truly is not there.  16 So he testified that the goals are  17 being complied with, but they are also being  18 enhanced. So he testified and was able to prove the  19 positive criteria. He proved the negative criteria.  20 He then opined also about the signage.  21 And he talked and said that he thought from a  22 planning perspective the one sign that we need to  23 seek a variance for, not because of size but because  24 of location, was appropriate and met the C(1) --  25 excuse me -- the C(2) criteria. It was a substantial</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>	<p style="text-align: right;">100</p> <p>1 at transcripts. She had the chance to get a  2 recording of this and listen to it. She didn't do  3 her homework.  4 On the basis of that, I think it was  5 very evident why she was here. Because I also asked  6 her if she ever talked -- because the objector is  7 another property owner in Midland Park. So did you  8 talk to that objector and understand what your  9 client's concerns were in connection with this  10 application? And the answer was no. She only talked  11 to the law firm.  12 And I think we can all see through the  13 objections that were made there, that they were  14 really not planning objections. They were the  15 objections pertaining to trying to get this denied  16 because of competition. That's that sum and  17 substance of what we have from that planner. And I  18 think without going -- belaboring it and going  19 through all the various things that she couldn't say  20 or do, I think we all recognized I asked a series of  21 questions that she basically refused to answer  22 because she didn't have the right answer for it.  23 She was basically given a job to come  24 out and throw what she could from a planning  25 perspective against the wall and see what would</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>

<p style="text-align: right;">101</p> <p>1 stick. I would say none of it really stuck.</p> <p>2 I think from the standpoint from</p> <p>3 Mr. Seckler, who gave much more extensive testimony</p> <p>4 about the positive and negative criteria, that at the</p> <p>5 end of the day, his planning testimony supports the</p> <p>6 applicant's request.</p> <p>7 So now, with that as a synopsis of the</p> <p>8 overview of this application that started in March, I</p> <p>9 want to walk you through what you're here to make a</p> <p>10 determination on. I maybe gave some of it away</p> <p>11 already when we had this further back-and-forth with</p> <p>12 Mr. Novak earlier.</p> <p>13 But what I've stated is that we have</p> <p>14 stipulated to certain conditions. We have all</p> <p>15 the engineers basically agreeing that this site can</p> <p>16 work. We've had planners give you sufficient reasons</p> <p>17 to support the positive and negative criteria of the</p> <p>18 application. And beyond that, we've had even your</p> <p>19 own professionals concur. We said we can meet all</p> <p>20 the conditions your borough engineer provided.</p> <p>21 We haven't heard -- not that it's his</p> <p>22 place -- any objections from your planner saying this</p> <p>23 violates this, this and this in the Master Plan,</p> <p>24 because it doesn't. And of course your traffic</p> <p>25 engineer went beyond what our traffic engineer said</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">103</p> <p>1 ordinance, you've got to look and say, okay, it's</p> <p>2 prohibited. But did they ever take into</p> <p>3 contemplation a piece of property that's 3-and-a-half</p> <p>4 acres, that's six times the size of Wendy's, six</p> <p>5 times the size of Dunkin' Donuts, six times the size</p> <p>6 of Starbucks?</p> <p>7 Was that ever thought of when they went</p> <p>8 to introduce an ordinance, when they sent it to the</p> <p>9 planning board, who had the right to say to their</p> <p>10 planner, hey, take a look at this; do you think we</p> <p>11 should just make it a carte blanche, or should we</p> <p>12 just say one line, prohibited, and maybe get a report</p> <p>13 back from the planner that says hey, you can tweak</p> <p>14 this and do that? It didn't happen. And I'm not</p> <p>15 criticizing anybody. It didn't happen. But I think</p> <p>16 that has to go into your thought decision-making</p> <p>17 process deliberation, if you will, in looking at this</p> <p>18 and saying, we've got a site that's particularly</p> <p>19 suited for it.</p> <p>20 I think when you look and go through</p> <p>21 all of the aspects of what we were able to show you</p> <p>22 here, that we meet our burden of proof. This doesn't</p> <p>23 open the door for every other property owner in the</p> <p>24 B-1 and the B-3 to say, oh, my turn. I know that was</p> <p>25 a concern that was raised here. But we all know that</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">102</p> <p>1 in supporting this application.</p> <p>2 I know that as board members you have a</p> <p>3 very hard task in being able to look at all this</p> <p>4 testimony, evaluate the testimony, the exhibits, and</p> <p>5 then at that point take that litmus test that's in</p> <p>6 Section D of the Municipal Land Use Law, in</p> <p>7 N.J.S.A. 40:55D-70, and you have to look at that and</p> <p>8 you have to look at whether this site is particularly</p> <p>9 suited. I've given you all the reasons why, and so</p> <p>10 did our professional.</p> <p>11 And to look at the negative criteria at</p> <p>12 the same time and see that we've met our burden of</p> <p>13 proof.</p> <p>14 And I'm going to go back just to dwell</p> <p>15 for a moment again. When you do that analysis from a</p> <p>16 planning perspective, you have to put into your head,</p> <p>17 why do I -- what is it in this ordinance of</p> <p>18 prohibiting it, what is it that I'm going to latch on</p> <p>19 to a deny for to say, oh, we can't do this because?</p> <p>20 It is contrary to the purpose of the ordinance.</p> <p>21 And I'm going to take you past the</p> <p>22 purpose of the ordinance being, thou shall not have a</p> <p>23 drive-through restaurant in Midland Park. I think</p> <p>24 what you have to look at -- and I know what you have</p> <p>25 to look at -- is when you don't have a purpose in the</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">104</p> <p>1 each piece of property is judged on its own merit.</p> <p>2 And you're looking here at maybe three pieces of</p> <p>3 property that would be large enough to accommodate a</p> <p>4 drive-through. I don't know because you haven't seen</p> <p>5 it. But that's not how you look at it either. You</p> <p>6 look at this site. And if you say to yourself, you</p> <p>7 know, the Mayor and Council really thought this was</p> <p>8 going to be something that has to be prohibited</p> <p>9 everywhere because they didn't want to fill up the</p> <p>10 street with cars out of a queue, well, if that's what</p> <p>11 you think is going on here, it's not happening here.</p> <p>12 You've heard all the testimony.</p> <p>13 Any additional traffic beyond the</p> <p>14 queuing where we have 11 cars we can queue, we need</p> <p>15 it only for 7. Let's just say it happens. It's a</p> <p>16 special day for Mexican food. Those cars are</p> <p>17 internal on this site. Why? Because it's</p> <p>18 3-and-a-half acres. It's not a half-acre. It's not</p> <p>19 out in one of your streets.</p> <p>20 You heard some borough residents that</p> <p>21 that came in here. And I think it was nice they</p> <p>22 came. It was encouraging to hear them say, hey, why</p> <p>23 can't we have this in the town. I know they didn't</p> <p>24 meet the standards of the Municipal Land Use Law.</p> <p>25 But I think they paint a picture of</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">105</p> <p>1 saying, why is it that an objector can tell us what</p> <p>2 we can and not have in the town?</p> <p>3 Again, I think what they came and</p> <p>4 looked at and saw is that from a practical</p> <p>5 standpoint, this application as proposed works.</p> <p>6 The planner testified that it's unique.</p> <p>7 The planner testified it's viable. The traffic</p> <p>8 engineer testified it's viable. Our engineer</p> <p>9 testified it's viable.</p> <p>10 And on the basis of that, you've heard</p> <p>11 all the goals of the Master Plan that are being met.</p> <p>12 There's nothing here that said there's goals that</p> <p>13 have not been met. And that's what we really had to</p> <p>14 look at for the negative criteria.</p> <p>15 I think I've given you many reasons</p> <p>16 why. You only need one to approve an application</p> <p>17 like this. Each case is decided on its own merits.</p> <p>18 And I believe in this instance we've been able to</p> <p>19 provide you with all of the foundation basis</p> <p>20 requirements for the positive criteria and the</p> <p>21 negative criteria. And on the basis of that, I would</p> <p>22 respectfully request that you approve this</p> <p>23 application.</p> <p>24 And I thank you most sincerely for all</p> <p>25 the time you spent on it, including putting up with</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">107</p> <p>1 can't even get out of the lane because they don't</p> <p>2 provide the second bypass lane, which almost every</p> <p>3 QSR that I've ever seen has that second bypass lane.</p> <p>4 This was a bank site, a totally different use than</p> <p>5 what the QSR that is provided with Taco Bell is</p> <p>6 proposed for.</p> <p>7 The applicant's counsel raised Mr. Dean</p> <p>8 and indicated how several of the other witnesses</p> <p>9 complemented his testimony. I'll just ask you to</p> <p>10 take judicial notice of an Appellate Division</p> <p>11 decision A1563-20, <u>Raritan Partners, LLC vs. Raritan</u></p> <p>12 <u>Township Zoning Board</u> in which Mr. Dean's testimony</p> <p>13 was found to be incredible by the board and backed up</p> <p>14 by an Appellate Division decision that supported the</p> <p>15 board in rejecting his testimony because it was not</p> <p>16 supported by evidence.</p> <p>17 So he's got a tarnished reputation that</p> <p>18 maybe this board isn't aware of.</p> <p>19 MR. WHITAKER: I'm going to object to</p> <p>20 that. One decision in the many that he's been</p> <p>21 involved with over the last 15 years --</p> <p>22 MS. RIZZUTO: I understand.</p> <p>23 MR. WHITAKER: -- doesn't mean that he</p> <p>24 has a tarnished reputation.</p> <p>25 That's insulting.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">106</p> <p>1 me tonight.</p> <p>2 Thank you.</p> <p>3 CHAIRMAN ANDERSON: Ms. Rizzuto, did</p> <p>4 you have any final comments?</p> <p>5 MS. RIZZUTO: Just a few -- just</p> <p>6 briefly, Members of the board and Mr. Chair, thank</p> <p>7 you for having the objector -- allowing the objector</p> <p>8 to be present and to state our positions on the</p> <p>9 record, et cetera. We appreciate the opportunity to</p> <p>10 have worked with the board.</p> <p>11 I just would like to remind the board</p> <p>12 that with respect to the particular suitability, this</p> <p>13 site is not particularly suited to a drive-through</p> <p>14 for a QSR, merely because it has a singular</p> <p>15 drive-through lane. The site is overcrowded. There</p> <p>16 is no parking on that site. The people -- the</p> <p>17 parking for people who want to go inside is across a</p> <p>18 double lane main aisle in the back of the whole mall</p> <p>19 site. There is no parking around the restaurant</p> <p>20 itself. So people have to cross that main aisle.</p> <p>21 The one handicap space is crowded into an area that</p> <p>22 is also dangerous. These were all raised during the</p> <p>23 course of the hearing, so I won't belabor them.</p> <p>24 But there is -- there is something to</p> <p>25 be said for there is only one lane. You can't -- you</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">108</p> <p>1 MS. RIZZUTO: The board can take</p> <p>2 judicial notice.</p> <p>3 And if you want, I gave you the cite;</p> <p>4 you can go and read the decision. That's all I'm</p> <p>5 saying.</p> <p>6 Bottom line, and this is my point, and</p> <p>7 I know that several of you have made comments to</p> <p>8 this, but the governing body made a decision, and</p> <p>9 they made a clear decision. And they did it in a</p> <p>10 perfectly legal way. There is no requirement to go</p> <p>11 to the board -- to go to the town planner or the</p> <p>12 board planner or the engineer. There is no</p> <p>13 requirement to seek outside help when they want to</p> <p>14 pass a zoning ordinance. They have one requirement.</p> <p>15 They did it. They sent it to the Planning Board.</p> <p>16 And the Planning Board found that it was consistent</p> <p>17 with the Master Plan, and said so in the documents</p> <p>18 that you have and in the letter that the borough</p> <p>19 clerk wrote thereafter.</p> <p>20 So they did what they were required to</p> <p>21 do. No appeal was taken. The ordinance was not</p> <p>22 challenged. It stands on the books.</p> <p>23 That doesn't mean, to your point, sir,</p> <p>24 that you can't grant a variance. But you should be</p> <p>25 aware that there is case law about the fact that this</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">109</p> <p>1 is only two years old. And you have to take -- you</p> <p>2 have to take into consideration and give weight to</p> <p>3 the governing body knows what sites it has. The</p> <p>4 governing body may have done it because of other</p> <p>5 sites within, but this site existed exactly as it</p> <p>6 was. If they wanted to exempt this site, they could</p> <p>7 have. If they wanted a drive-through, they could</p> <p>8 have, there. They didn't. They wanted no</p> <p>9 drive-throughs in B-1 and B-3. And that's what this</p> <p>10 property is. It's one of those zones. I apologize.</p> <p>11 In any event, so I urge you to stick</p> <p>12 with the ordinance. Your planner told you, you</p> <p>13 should be paying attention to your code and your</p> <p>14 Master Plan over the granting of a variance if in</p> <p>15 fact this is a prohibited use and they have not made</p> <p>16 their proofs as to particular suitability or any of</p> <p>17 the other elements.</p> <p>18 I think that you have plenty to show</p> <p>19 you that the D(1) variance, the hardest variance that</p> <p>20 you can get under the Municipal Land Use Law, is even</p> <p>21 harder because of the youthfulness of this ordinance.</p> <p>22 It just happened. By the time they came here, it was</p> <p>23 only six months old. It's approximately two -- two</p> <p>24 years old now, or whatever it is. And they didn't --</p> <p>25 they haven't gone and repealed it. And they haven't</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">111</p> <p>1 transcripts.</p> <p>2 MR. WHITAKER: We all agreed that the</p> <p>3 ordinance does not require a bypass lane.</p> <p>4 We all recognized that the bank didn't</p> <p>5 have a bypass lane. It was passed by the Planning</p> <p>6 Board when that was built for Atlantic Stewardship --</p> <p>7 or Columbia, I believe, some time ago.</p> <p>8 In connection with my approach as to</p> <p>9 purpose, I stand by that. I believe that it's</p> <p>10 necessary that you understand in any ordinance what's</p> <p>11 the reason for it.</p> <p>12 But putting aside for a moment and</p> <p>13 disagree with me on that and look at the same</p> <p>14 application and say, okay, it's prohibited, that</p> <p>15 doesn't mean we can't grant a variance. That's been</p> <p>16 said and agreed.</p> <p>17 So let's just look at all the reasons</p> <p>18 why this site works. And let's forget for the</p> <p>19 moment, if you will -- I'm not putting aside my</p> <p>20 argument, but just as an alternative, let's look and</p> <p>21 say this site works. There's no prohibition to it in</p> <p>22 the Master Plan. It's particularly suited. And make</p> <p>23 that finding without alluding to the purpose. That's</p> <p>24 your alternative here. I think either way the</p> <p>25 concept is that this is a site that can accommodate</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">110</p> <p>1 done anything to change it. And I think they think</p> <p>2 that there's plenty of QSRs already in town along</p> <p>3 Godwin Road. And I don't foresee them changing this</p> <p>4 anytime in the future.</p> <p>5 MR. WHITAKER: Well, I think that's</p> <p>6 truly speculative. Let the record reflect that.</p> <p>7 MS. RIZZUTO: Okay, that's speculative.</p> <p>8 But the point is, they just did it.</p> <p>9 There's no reason for them to make any changes. And</p> <p>10 there's no appeal of their -- it's too late for them</p> <p>11 to appeal.</p> <p>12 And for the applicant to say that you</p> <p>13 can just grant this variance because there's no</p> <p>14 purpose stated, it's a trick. That's a trick. There</p> <p>15 doesn't -- there isn't a requirement for a purpose.</p> <p>16 And I think you, Mr. Chair, said it -- said it</p> <p>17 perfectly. The purpose is to prohibit drive-throughs</p> <p>18 with a restaurant use in B-1 and B-3. That's what</p> <p>19 the purpose is.</p> <p>20 Thank you.</p> <p>21 MR. WHITAKER: So just rebuttal very</p> <p>22 quickly.</p> <p>23 I know my adversary wasn't at all the</p> <p>24 meetings.</p> <p>25 MS. RIZZUTO: But I read the</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">112</p> <p>1 what the applicant is proposing.</p> <p>2 Thank you.</p> <p>3 CHAIRMAN ANDERSON: Before we discuss</p> <p>4 this, since you have two different voting</p> <p>5 requirements, I assume we would vote first on the use</p> <p>6 and then --</p> <p>7 MR. WHITAKER: It's a D variance.</p> <p>8 First -- then you would go to the C variance</p> <p>9 certainly. Bifurcated first, yes, Mr. Chairman.</p> <p>10 CHAIRMAN ANDERSON: Just so everyone</p> <p>11 understands what we're going to do is, because we</p> <p>12 need five affirmative votes on the use variance,</p> <p>13 first we'll consider the use variance. If the use</p> <p>14 variance is approved, then we will vote again on the</p> <p>15 C variances, the front yard and the buffering and</p> <p>16 whatever.</p> <p>17 If the D variance is not approved, then</p> <p>18 we don't have to go to the C variance, right?</p> <p>19 MS. HERLIHY: Correct.</p> <p>20 CHAIRMAN ANDERSON: Okay.</p> <p>21 Is there anything before we discuss</p> <p>22 this that we need to know to not get in trouble?</p> <p>23 I'm assuming there's a good chance that</p> <p>24 we decide this may end up on appeal in court, but I</p> <p>25 want to make sure we...</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">113</p> <p>1 MS. HERLIHY: The only thing I want to</p> <p>2 add --</p> <p>3 MR. CAPALBO: Open to public at all, or</p> <p>4 no.</p> <p>5 MS. HERLIHY: No.</p> <p>6 MR. CAPALBO: We're done.</p> <p>7 MS. HERLIHY: I'm not going to</p> <p>8 reiterate this requirements, or the proofs, or the</p> <p>9 statutes.</p> <p>10 CHAIRMAN ANDERSON: Thank you.</p> <p>11 MS. HERLIHY: Because I think it's been</p> <p>12 covered in great detail and very well this evening by</p> <p>13 everyone.</p> <p>14 The only thing I wanted to add for the</p> <p>15 board -- the board to think about is that they are</p> <p>16 asking for a use variance tonight.</p> <p>17 So you are well within your power to</p> <p>18 impose reasonable conditions. I did not sit through</p> <p>19 all of the meetings.</p> <p>20 I did read all of the transcripts</p> <p>21 probably one-and-a-half times. And I know -- saw all</p> <p>22 the questions and the concerns of the board during</p> <p>23 the course of the hearings. And I know that on a</p> <p>24 number of occasions Mr. Whitaker, you know,</p> <p>25 stipulated that his client would comply with the</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">115</p> <p>1 have something that's of concern to you, you may be</p> <p>2 able to rectify or get over or get past it or satisfy</p> <p>3 yourself by some sort of a reasonable condition.</p> <p>4 I just want you to keep that in mind as</p> <p>5 you're talking about and thinking about it.</p> <p>6 CHAIRMAN ANDERSON: Well, I've had a</p> <p>7 lot to say so I'd like to hear from other -- other</p> <p>8 people.</p> <p>9 VICE CHAIRMAN PAPAPIETRO: I just have</p> <p>10 a question, though, of Mr. Whitaker.</p> <p>11 In your summation, I believe you</p> <p>12 indicated the bank did not have a bypass lane. I</p> <p>13 believe there was two lanes in that bank.</p> <p>14 MR. WHITAKER: No.</p> <p>15 You could go out onto Godwin.</p> <p>16 VICE CHAIRMAN PAPAPIETRO: I believe</p> <p>17 there was two lanes. They also had the existing</p> <p>18 structure.</p> <p>19 MR. WHITAKER: Perhaps I misspoke. But</p> <p>20 your ordinance does not require it. You've got --</p> <p>21 you've got an ordinance that tells you what has to</p> <p>22 be.</p> <p>23 VICE CHAIRMAN PAPAPIETRO: I just</p> <p>24 wanted to -- for the record.</p> <p>25 MR. WHITAKER: Understood.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">114</p> <p>1 ordinance or comply with the prior CVS approval. And</p> <p>2 that's great because they have to do that. They have</p> <p>3 to comply with ordinance and they have to comply with</p> <p>4 the prior CVS approval.</p> <p>5 But if you are -- if you're considering</p> <p>6 the application and you are considering approving the</p> <p>7 application and you're concerned about some of the</p> <p>8 things that were discussed, you can, like I said,</p> <p>9 impose reasonable -- we have to be reasonable --</p> <p>10 reasonable conditions to address a concern that you</p> <p>11 might have that might be swaying you one way or the</p> <p>12 other.</p> <p>13 So I didn't see that discussed before.</p> <p>14 I didn't see that raised or mentioned. And I just</p> <p>15 want everyone to know that if it does make a</p> <p>16 difference to you and -- you know, an example -- I'm</p> <p>17 not saying this is what came up -- but hours of</p> <p>18 operation.</p> <p>19 If the ordinance says that for a</p> <p>20 drive-through it can be until midnight, and the</p> <p>21 applicant has stipulated they'll comply with the</p> <p>22 ordinance -- they have to comply with the ordinance</p> <p>23 -- if you saw to condition an approval on closing at</p> <p>24 11 o'clock, you could do that. I'm not saying you</p> <p>25 should. I just wanted you to know that again, if you</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">116</p> <p>1 MS. HERLIHY: Was one a bypass lane, or</p> <p>2 were they both --</p> <p>3 VICE CHAIRMAN PAPAPIETRO: Well, no.</p> <p>4 There's two lanes at the bank.</p> <p>5 MS. HERLIHY: Right.</p> <p>6 And you could get service -- maybe one</p> <p>7 was like one of the tubes or something.</p> <p>8 MR. WHITAKER: Yeah.</p> <p>9 But if one is in front of both of them,</p> <p>10 you couldn't get bypass.</p> <p>11 MS. HERLIHY: Right.</p> <p>12 I was going to say, a bypass lane is a</p> <p>13 dedicated lane that you do not have service.</p> <p>14 But if you're -- if you're on line, at</p> <p>15 any given point while you're on line, you can change</p> <p>16 your mind, you could decide you have an emergency,</p> <p>17 and you could get out of the lane, as opposed to just</p> <p>18 a two-lane drive-through. You could still be stuck</p> <p>19 behind someone and not have to the ability to stay.</p> <p>20 MR. WHITAKER: And the law is clear</p> <p>21 that if you don't have a standard that requires a</p> <p>22 bypass, you would have a problem saying, well, you</p> <p>23 don't have a bypass and constitute a denial.</p> <p>24 MR. NOVAK: And the outside lane was a</p> <p>25 pneumatic tube.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">117</p> <p>1 MR. WHITAKER: Yeah.</p> <p>2 MS. HERLIHY: Was it?</p> <p>3 MR. NOVAK: Yes.</p> <p>4 MS. HERLIHY: That might be accurate.</p> <p>5 I just qualify that by saying when you're requesting</p> <p>6 a use variance --</p> <p>7 MR. WHITAKER: Understood.</p> <p>8 VICE CHAIRMAN PAPAPIETRO: I just</p> <p>9 wanted to make a point there was two lanes.</p> <p>10 CHAIRMAN ANDERSON: So do you want to</p> <p>11 go around, or does somebody want to volunteer</p> <p>12 thoughts or opinions? Somebody other than me</p> <p>13 hopefully.</p> <p>14 VICE CHAIRMAN PAPAPIETRO: I have a lot</p> <p>15 of thoughts and opinions. You heard some of them</p> <p>16 during this thing. Mr. Whitaker did an excellent job</p> <p>17 with his testimony and representing his client with</p> <p>18 this application.</p> <p>19 And while the site may be well-suited</p> <p>20 for this, and given the testimony, I'm still going by</p> <p>21 that the Mayor and Council specifically passed an</p> <p>22 ordinance to prohibit this type of business. And it</p> <p>23 was only two years ago. I can see if it was</p> <p>24 something that's been in the books for years or</p> <p>25 decades. Times have changed and there's also</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">119</p> <p>1 that decision based on facts and information. Look,</p> <p>2 it works. Sometimes it doesn't work.</p> <p>3 You know, I think it would work in this</p> <p>4 particular form. That's just my opinion. I think it</p> <p>5 would work. I've been there. I live right down the</p> <p>6 block from there. I've seen the size. I know I see</p> <p>7 the traffic at Wendy's. This is going to be much</p> <p>8 better than Wendy's. It goes into the street.</p> <p>9 So, I mean, that's just me. That's</p> <p>10 just how I feel about it.</p> <p>11 CHAIRMAN ANDERSON: Anybody else?</p> <p>12 MR. CAPALBO: I agree with Rich. And I</p> <p>13 think Starbucks was the rush to judgment for making</p> <p>14 this ordinance.</p> <p>15 That's my personal opinion. I don't</p> <p>16 have anything factual. But I think the conditions</p> <p>17 that prevailed because of the approval of Starbucks,</p> <p>18 which really didn't have to come to the Zoning Board,</p> <p>19 correct? So I think that was a rush to judgment, and</p> <p>20 let's stop drive-ins because of the condition of</p> <p>21 Starbucks.</p> <p>22 CHAIRMAN ANDERSON: Well, actually, it</p> <p>23 was after Starbucks was Dunkin' Donuts came here.</p> <p>24 And then we decided -- they came here for a use</p> <p>25 variance because the zoning ordinance -- because the</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">118</p> <p>1 applications coming to the zoning looking for a</p> <p>2 variance for this type of use, but this is something</p> <p>3 that's new.</p> <p>4 And we've had cases here with people</p> <p>5 coming in for porticos and then the town changes</p> <p>6 because we're getting so many requests for that type.</p> <p>7 This is something that's brand-new. And, you know,</p> <p>8 I'm going by the law or the ordinance that was</p> <p>9 passed. And I can't agree to vote yes for this one.</p> <p>10 CHAIRMAN ANDERSON: How about you,</p> <p>11 Rich?</p> <p>12 I have a feeling you may feel</p> <p>13 differently.</p> <p>14 MR. FORMICOLA: No.</p> <p>15 Actually, I respect Nick's opinion. I</p> <p>16 fully understand. I think they both run excellent</p> <p>17 points on both of them.</p> <p>18 My problem is that I don't think that</p> <p>19 when the Council did this, regardless of if it was</p> <p>20 yesterday, that they can look at everything and say,</p> <p>21 oh, I've looked at the land, I've looked at, you</p> <p>22 know, the size of it and say, oh, no, we definitely</p> <p>23 don't think we have something here. I think that's</p> <p>24 why they come to us. They say, you know, we're going</p> <p>25 to make a blanket law, and you guys are going to make</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">120</p> <p>1 zoning officer, and I assume the Mayor and Council</p> <p>2 thought the same thing, that you needed a use</p> <p>3 variance to do a drive-in.</p> <p>4 So we decided no, you don't. The</p> <p>5 ordinance is clear, you don't need a use variance.</p> <p>6 It went to the Planning Board, which of course has</p> <p>7 the Mayor and a councilman on it. And almost</p> <p>8 immediately after that, after it went to the Planning</p> <p>9 Board, there is a new ordinance that --</p> <p>10 MR. CAPALBO: My first -- my biggest</p> <p>11 concern was the queueing. And I think Mr. Whitaker</p> <p>12 and his people have addressed that. I think with 11</p> <p>13 or 12 cars, I think it's doable.</p> <p>14 CHAIRMAN ANDERSON: For myself, I mean,</p> <p>15 I really have no problem with a Taco Bell there.</p> <p>16 I agree, I think it would work fine.</p> <p>17 But it may even be a better location than some of the</p> <p>18 others. But like Nick said, I just -- I can't get</p> <p>19 past the fact that the Mayor and Council specifically</p> <p>20 prohibited this two years ago. And the fact that the</p> <p>21 site works for it, to me it doesn't -- it just</p> <p>22 doesn't come up to the level of that necessary for</p> <p>23 special reasons.</p> <p>24 And also, it's a case where it's</p> <p>25 specifically prohibited. As when I was talking to</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">121</p> <p>1 David, it's not that it's an use that they didn't  2 anticipate. And as Rich was saying, or one of them,  3 that times change and there's a new type of use that  4 the ordinance didn't -- didn't anticipate. They  5 certainly anticipated it. It was in direct response  6 to Dunkin' Donuts. We're not going to have any more  7 -- and, I mean, I'm not saying it's a good thing, or  8 that I agree with the ordinance or whatever. But  9 from my point of view, that's not for me to decide as  10 a member of this board.  11 As a resident of Midland Park, I don't  12 see any problem with a Taco Bell there. I mean, I  13 don't see a problem. But as a member of this board,  14 I just can't get past the fact that the Mayor and  15 Council has specifically prohibited it.  16 So anyone else for or against? Go  17 ahead.  18 Well, Dave or David?  19 MR. BARLOW: David.  20 CHAIRMAN ANDERSON: No. I thought --  21 I'm just --  22 MR. BARLOW: He's Dave.  23 I'm David.  24 CHAIRMAN ANDERSON: I know that.  25 Which one of you is going to talk?  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>	<p style="text-align: right;">123</p> <p>1 just my opinion.  2 CHAIRMAN ANDERSON: Go ahead, Dave.  3 MR. ZUIDEMA: Well, I just wanted to  4 address the board attorney, is that it keeps being  5 referred to as 3-and-a-half acres. And obviously  6 this is one corner of it.  7 But they always go back to 3-and-a-half  8 acres, 3-and-a-half acres.  9 MS. HERLIHY: I think that the site is  10 3-and-a-half acres.  11 MR. ZUIDEMA: I get it.  12 So my question is that, I would -- my  13 vote would be predicated a bit that we have a  14 building on those 3-and-a-half acres that has a  15 plastic sheet in front of it for the last three years  16 unfinished on the 3-and-a-half acres.  17 CHAIRMAN ANDERSON: He's talking about  18 --  19 MS. HERLIHY: Yeah, no, understood.  20 MR. ZUIDEMA: There's rodents in there.  21 And there's construction vehicles there. There's  22 construction materials in the back.  23 My vote would be -- could go either  24 way. But I don't think I would vote for this because  25 of the disrepair of the -- of the site. Because  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>
<p style="text-align: right;">122</p> <p>1 MR. BARLOW: Should I defer to my  2 eldest?  3 MS. HERLIHY: Who decided that they  4 should sit next to each other?  5 That's the problem.  6 MR. BARLOW: This is what I would say,  7 all right, both attorneys did very well. All right.  8 But Mr. Whitaker's point of view, all  9 right, as far as the positive criteria, all right --  10 all right, the world has changed right now. All  11 right. He to me has proven his point. We have a lot  12 of kids in Midland Park. Everyone likes Taco Bell.  13 It's not like we're having a Chick-Fil-A here. All  14 right. Because you can get chicken at Wendy's. You  15 can also get chicken at Burger King. All right.  16 So I think it's a good idea. And I  17 think with the stipulations, they have met  18 everything. And especially with the construction  19 materials, it has been removed, been completed.  20 So, you know, for me, I'm just looking  21 here. It says has been completed.  22 CHAIRMAN ANDERSON: Let me ask Dave  23 because he's our monitor.  24 MR. BARLOW: Well, he could be. He's  25 in the construction business. All right. So that's  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>	<p style="text-align: right;">124</p> <p>1 we're -- Mr. Whitaker, and rightfully so, we're going  2 to 3-and-a-half acres. I think it could accommodate  3 it because they're including all of, you know, right  4 over to Erie Ave.  5 But I don't think going Ridgewood  6 Heights or Midland Park Heights, how many more years  7 do we go by this? We have Dunkin' Donuts empty. We  8 have the dry cleaners that are empty. We have  9 potentially another store that's empty there. And  10 there hasn't -- nothing has been done.  11 So if somebody were to say to me --  12 now, I don't know -- that's why I have to ask you.  13 If somebody were to say to me --  14 MS. HERLIHY: Yeah, I know where you're  15 going.  16 MR. ZUIDEMA: -- yes, this will be -- I  17 don't think we can. So my vote would probably go not  18 bigger.  19 MS. HERLIHY: So to the extent that  20 anything that's happening on the site is a violation  21 or is contrary to a prior approval, you can condition  22 any further -- so it's one site. So this approval  23 affects it. You can condition this approval on this  24 property on any open or outstanding violations or  25 issues being taken care of.  <b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b>  <b>201-641-1812</b></p>



<p style="text-align: right;">125</p> <p>1 So, again, I don't know if -- I hear</p> <p>2 what -- listen, I live here too so I know what you're</p> <p>3 saying. I don't know if they are again in violation</p> <p>4 of a permit or if they're just failing to do -- I</p> <p>5 don't know what the issues are.</p> <p>6 But you can condition an approval on</p> <p>7 the property owner correcting any outstanding -- any</p> <p>8 outstanding issues or violations.</p> <p>9 CHAIRMAN ANDERSON: Mr. Whitaker has</p> <p>10 already agreed that they're going to stipulate that</p> <p>11 they're not going to --</p> <p>12 MS. HERLIHY: Right.</p> <p>13 And cleaning up -- again, cleaning up</p> <p>14 the property.</p> <p>15 Anything that they're required to do</p> <p>16 that they're not in compliance with, you can</p> <p>17 condition that on that. You can condition a CO. You</p> <p>18 can condition a building permit. You can say that</p> <p>19 you will not -- that the town will not sign a site</p> <p>20 plan, enter into a developer's agreement and allow</p> <p>21 them to get started with construction, let alone get</p> <p>22 to construction and not get a CO. They can't put a</p> <p>23 shovel in the ground until this is taken care of.</p> <p>24 MR. WHITAKER: I have no trouble with</p> <p>25 that.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">127</p> <p>1 with something.</p> <p>2 MR. CAPALBO: Does the same person own</p> <p>3 all of that.</p> <p>4 MS. HERLIHY: Yes.</p> <p>5 MR. ZUIDEMA: Yeah.</p> <p>6 That man owns it.</p> <p>7 MR. CAPALBO: That entities owns all,</p> <p>8 the whole --</p> <p>9 MS. HERLIHY: The whole shopping</p> <p>10 center, yes. They would be using a portion of the</p> <p>11 shopping center.</p> <p>12 MR. ZUIDEMA: They keep telling us it's</p> <p>13 3-and-a-half acres.</p> <p>14 MR. CAPALBO: Who is actually the</p> <p>15 applicant, the property owner.</p> <p>16 MS. HERLIHY: The applicant is the Taco</p> <p>17 Bell entity. And the owner -- in order to come</p> <p>18 before the board, the owner has to consent to the</p> <p>19 application.</p> <p>20 So the owner -- the potential landlord</p> <p>21 knows that the applicant is here and is doing this.</p> <p>22 MR. WOSTBROCK: Linda.</p> <p>23 MS. HERLIHY: Yes.</p> <p>24 MR. FORMICOLA: I'm sorry. You go</p> <p>25 ahead, sir.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>
<p style="text-align: right;">126</p> <p>1 MS. HERLIHY: Yeah.</p> <p>2 With respect, you know, stores being</p> <p>3 empty --</p> <p>4 MR. ZUIDEMA: No, I get it.</p> <p>5 MS. HERLIHY: Yeah. If anything, you</p> <p>6 know, having this -- having Taco Bell there</p> <p>7 generating traffic and people onsite may make it more</p> <p>8 attractive for leases for other people to want to be</p> <p>9 in that -- you know, in that area.</p> <p>10 MR. ZUIDEMA: I get it.</p> <p>11 And the building -- see, I would be --</p> <p>12 if I'm understanding you correctly, I would be</p> <p>13 favorable then.</p> <p>14 But having to put a timeline on that</p> <p>15 building there that's been sitting vacant and</p> <p>16 half-built basically, we've got to put a time on that</p> <p>17 that that has to be finished. Okay?</p> <p>18 Tell me legally, what do we do about</p> <p>19 that? Because I would vote then no, because that</p> <p>20 building will remain that way for another three</p> <p>21 years.</p> <p>22 MS. HERLIHY: I'm not familiar enough</p> <p>23 with our building code as to whether or not there's a</p> <p>24 particular period of time that they -- they get a</p> <p>25 building permit. They have to -- they may come up</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>	<p style="text-align: right;">128</p> <p>1 MR. WOSTBROCK: Could the condition be</p> <p>2 that the site is completed, the site work is</p> <p>3 completed and the building is shelled in?</p> <p>4 Certainly if they don't have a tenant</p> <p>5 there, the interior tenant fit-out isn't going to be</p> <p>6 completed.</p> <p>7 But the exterior wholeness of the</p> <p>8 building, you know, the windows are in, the roof is</p> <p>9 on, the tarps are off, whatever the conditions are.</p> <p>10 You know, how granular could that condition be,</p> <p>11 condition of approval.</p> <p>12 MS. HERLIHY: Yeah.</p> <p>13 It has to finish the building. I mean,</p> <p>14 I know that they have building permits. I think</p> <p>15 their building permits were...</p> <p>16 MR. FORMICOLA: They've been pulled.</p> <p>17 MS. HERLIHY: They've been pulled.</p> <p>18 MR. WHITAKER: I'm told there is a</p> <p>19 reapplication for the permits now. Then when permits</p> <p>20 are issued, it will be taken care of in six months.</p> <p>21 I'm also told that they have a prospective tenant for</p> <p>22 the building. I got that just now from the owner.</p> <p>23 MS. HERLIHY: So would you agree --</p> <p>24 MR. WHITAKER: Six-month timeframe from</p> <p>25 when the permits are issued?</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b> <b>201-641-1812</b></p>

<p style="text-align: right;">129</p> <p>1 MS. HERLIHY: Six months from when the</p> <p>2 permits are issued to complete.</p> <p>3 MR. WHITAKER: To complete, that's</p> <p>4 right.</p> <p>5 CHAIRMAN ANDERSON: When can they</p> <p>6 begin?</p> <p>7 MS. HERLIHY: When?</p> <p>8 CHAIRMAN ANDERSON: Taco Bell. He's</p> <p>9 just saying that's when --</p> <p>10 MR. WHITAKER: We could begin, but we</p> <p>11 don't get a CO until that time.</p> <p>12 MS. HERLIHY: I'm just taking a note</p> <p>13 here.</p> <p>14 MR. CAPALBO: You would agree to that</p> <p>15 stipulation.</p> <p>16 MR. WHITAKER: Yes.</p> <p>17 CHAIRMAN ANDERSON: Dave? Dave, what's</p> <p>18 your -- you're the one with the main concern.</p> <p>19 MR. CAPALBO: They have to abide by it.</p> <p>20 MR. PLACIER: You would think</p> <p>21 somebody's in the old Dunkin' Donuts.</p> <p>22 MR. WHITAKER: They have a Wonder</p> <p>23 tenant I'm told. I don't represent the tenant, but I</p> <p>24 was told that.</p> <p>25 VICE CHAIRMAN PAPAPIETRO: With the</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>	<p style="text-align: right;">131</p> <p>1 CHAIRMAN ANDERSON: He doesn't get a</p> <p>2 building -- Taco Bell doesn't get a building permit</p> <p>3 --</p> <p>4 MR. WHITAKER: Until the other building</p> <p>5 is done.</p> <p>6 CHAIRMAN ANDERSON: But what do you</p> <p>7 mean by "done".</p> <p>8 MS. HERLIHY: It has a CO.</p> <p>9 MR. WHITAKER: A CO.</p> <p>10 MR. FORMICOLA: Fixed.</p> <p>11 Everything is ready to go.</p> <p>12 CHAIRMAN ANDERSON: All right. That</p> <p>13 should --</p> <p>14 MR. ZUIDEMA: I wanted to hear his</p> <p>15 question.</p> <p>16 CHAIRMAN ANDERSON: Oh, yeah, yeah.</p> <p>17 MR. ELIYA: So if that was an</p> <p>18 agreed-upon stipulation, would that then be a</p> <p>19 positive criteria that you can take into</p> <p>20 consideration for the use variance?</p> <p>21 MR. FORMICOLA: It's up to the</p> <p>22 individual how you interpret it.</p> <p>23 CHAIRMAN ANDERSON: That's correct. I</p> <p>24 don't know.</p> <p>25 MR. ELIYA: I would see it, but I don't</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>
<p style="text-align: right;">130</p> <p>1 other building that's been under construction for</p> <p>2 three years, if you get new permits and you start</p> <p>3 again, based upon the history, who's to say the same</p> <p>4 thing won't happen again?</p> <p>5 In the meantime, you'll have a Taco</p> <p>6 Bell under construction again.</p> <p>7 MR. WHITAKER: Wait one second.</p> <p>8 MS. HERLIHY: Well, it might be under</p> <p>9 construction, but they certainly -- they wouldn't get</p> <p>10 a Certificate of Occupancy. So they would be -- they</p> <p>11 would have a Taco Bell potentially complete and</p> <p>12 closed.</p> <p>13 MR. ZUIDEMA: Let the landlord go</p> <p>14 against our applicant then instead we wouldn't be the</p> <p>15 guy calling the shot on that.</p> <p>16 MS. HERLIHY: So it would be no CO</p> <p>17 until it's finished.</p> <p>18 CHAIRMAN ANDERSON: It sounds like</p> <p>19 something's brewing. Let's wait a minute.</p> <p>20 MR. ELIYA: Would we be able to take</p> <p>21 that push of construction, would that be a positive</p> <p>22 criteria that you could take into consideration?</p> <p>23 MR. WHITAKER: I have it solved. He</p> <p>24 doesn't start and get a permit until the other</p> <p>25 building is done.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>	<p style="text-align: right;">132</p> <p>1 know if it's technical.</p> <p>2 MS. HERLIHY: It's something that they</p> <p>3 have to do anyway. We're just giving them a hook.</p> <p>4 In other words, we're making it --</p> <p>5 giving them an incentive, but if, you know, if...</p> <p>6 CHAIRMAN ANDERSON: Does it justify --</p> <p>7 MS. HERLIHY: You know, promote a</p> <p>8 purpose of zoning?</p> <p>9 Again, that's a --</p> <p>10 CHAIRMAN ANDERSON: That's why you get</p> <p>11 the medium bucks.</p> <p>12 MS. HERLIHY: Well, listen, it's not my</p> <p>13 place to say what someone thinks is going to promote</p> <p>14 a purpose of zoning or not.</p> <p>15 You could find potentially that it</p> <p>16 promotes the purpose of zoning. I'm trying to think</p> <p>17 which purpose of zoning.</p> <p>18 MR. NOVAK: I mean that --</p> <p>19 MS. HERLIHY: Promotion of the general</p> <p>20 welfare, health, safety. I mean, it's an unsafe</p> <p>21 condition.</p> <p>22 MR. NOVAK: Potentially yes.</p> <p>23 I would slightly disagree, though. I</p> <p>24 mean, there's the <u>Burbridge</u> case which is about an</p> <p>25 extension of a nonconforming use.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>

<p style="text-align: right;">133</p> <p>1 The board and court tied that to the</p> <p>2 beautification of the site.</p> <p>3 This is not quite the same because it's</p> <p>4 not the redevelopment of the whole site. So if</p> <p>5 they're catching up to the site to where it needs to</p> <p>6 be -- again, I know this is technical for us to give</p> <p>7 testimony. I don't know if I would necessarily</p> <p>8 consider that part of the special reasons myself</p> <p>9 but...</p> <p>10 MR. ELIYA: It's not development of the</p> <p>11 whole site.</p> <p>12 But they continually use the whole site</p> <p>13 as, you know, a basis that it is particularly suited</p> <p>14 for the variance.</p> <p>15 So if they're going to take everything</p> <p>16 in its entirety, then I would presume that you should</p> <p>17 probably take the entire site in its entirety.</p> <p>18 MS. HERLIHY: Yes, that is correct.</p> <p>19 The point here is that whether the Taco Bell</p> <p>20 application is approved or not, ultimately they're</p> <p>21 required to do certain things onsite. That would be</p> <p>22 required.</p> <p>23 MR. NOVAK: If they were tearing the</p> <p>24 whole thing and it was a Taco Bell with a new</p> <p>25 shopping center, removing blight, promoting a visual</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>	<p style="text-align: right;">135</p> <p>1 CHAIRMAN ANDERSON: Ms. Herlihy can</p> <p>2 figure it out.</p> <p>3 MS. HERLIHY: I got it.</p> <p>4 CHAIRMAN ANDERSON: Is there a second?</p> <p>5 MR. BARLOW: Second. I second it.</p> <p>6 CHAIRMAN ANDERSON: David. He said he</p> <p>7 --</p> <p>8 MR. BARLOW: Yeah, I second.</p> <p>9 CHAIRMAN ANDERSON: No.</p> <p>10 But you have listened to all the tapes?</p> <p>11 MR. BARLOW: Yes.</p> <p>12 MS. HARMON: Mr. Formicola?</p> <p>13 MR. FORMICOLA: Yes.</p> <p>14 MR. CAPALBO: Excuse me a minute.</p> <p>15 CHAIRMAN ANDERSON: Discussion on the</p> <p>16 motion?</p> <p>17 MR. CAPALBO: Pardon?</p> <p>18 CHAIRMAN ANDERSON: Discussion on the</p> <p>19 motion, yeah.</p> <p>20 MR. CAPALBO: Am I allowed to vote?</p> <p>21 CHAIRMAN ANDERSON: No. Wait.</p> <p>22 Do we have -- one, two, three, four,</p> <p>23 five, six, seven. No. Sorry.</p> <p>24 MR. CAPALBO: I was just wondering</p> <p>25 about that.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>
<p style="text-align: right;">134</p> <p>1 element, then potentially it's something you can</p> <p>2 consider a little bit more.</p> <p>3 CHAIRMAN ANDERSON: Does anybody else</p> <p>4 have anything to say before I beg someone for a</p> <p>5 resolution, either -- a motion either for or against,</p> <p>6 approve or deny?</p> <p>7 (No Response.)</p> <p>8 CHAIRMAN ANDERSON: No? Nothing?</p> <p>9 Does somebody want to make a motion one</p> <p>10 way or the other?</p> <p>11 MR. FORMICOLA: Yeah, I'll make a</p> <p>12 motion. I'll make a motion.</p> <p>13 CHAIRMAN ANDERSON: This is on the use</p> <p>14 variance.</p> <p>15 MR. FORMICOLA: Yes. Just the use</p> <p>16 only. This is for the D(1) variance.</p> <p>17 CHAIRMAN ANDERSON: Correct.</p> <p>18 MR. FORMICOLA: So I'll make a motion</p> <p>19 for it with the stipulations that we've got in front</p> <p>20 of us, plus with the window what you just asked about</p> <p>21 and agreed to. And Joe said as well with the site,</p> <p>22 you can't get a CO unless everything is taken care</p> <p>23 of. You know, everything that was in that</p> <p>24 conversation. I'm sorry. There was so much, I can't</p> <p>25 even...</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>	<p style="text-align: right;">136</p> <p>1 Everybody has caught up on all the</p> <p>2 meetings and everything.</p> <p>3 CHAIRMAN ANDERSON: Yes.</p> <p>4 MR. CAPALBO: Okay. You know, I didn't</p> <p>5 want to -- I didn't want to screw anything up by</p> <p>6 voting.</p> <p>7 CHAIRMAN ANDERSON: Well, she wasn't</p> <p>8 going to call your name.</p> <p>9 MR. CAPALBO: Oh, good.</p> <p>10 The other question, did we ever approve</p> <p>11 the minutes from the last meeting?</p> <p>12 MS. HERLIHY: Not yet.</p> <p>13 MR. CAPALBO: Okay. So I'll be quiet.</p> <p>14 CHAIRMAN ANDERSON: Should I have done</p> <p>15 that in the beginning? I missed it.</p> <p>16 MS. HERLIHY: It's all right.</p> <p>17 CHAIRMAN ANDERSON: All right. We'll</p> <p>18 do it with the resolution. You can do the roll call</p> <p>19 now.</p> <p>20 MS. HARMON: Mr. Formicola?</p> <p>21 MR. FORMICOLA: Yes.</p> <p>22 MS. HARMON: Mr. Zuidema?</p> <p>23 MR. ZUIDEMA: Yes.</p> <p>24 MS. HARMON: Mr. Papapietro?</p> <p>25 VICE CHAIRMAN PAPAPIETRO: No.</p> <p style="text-align: center;"><b>LAURA A. CARUCCI, C.S.R., R.P.R., L.L.C.</b></p> <p style="text-align: center;"><b>201-641-1812</b></p>

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**

1 C E R T I F I C A T E  
 2  
 3 I, RONDA L. REINSTEIN, a Certified Court  
 4 Reporter of the State of New Jersey, authorized to  
 5 administer oaths pursuant to R.S.41:2-2, do hereby  
 6 certify that the foregoing is a true and accurate  
 7 transcript of the testimony as taken stenographically  
 8 by and before me at the time, place and on the date  
 9 herein before set forth, to the best of my ability.  
 10 I DO FURTHER CERTIFY that I am neither a  
 11 relative nor employee nor attorney nor counsel of any  
 12 of the parties to this action, and that I am neither  
 13 a relative nor employee of such attorney or counsel,  
 14 and that I am not financially interested in the  
 15 action.  
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*Ronda L. Reinstein*  
 -----  
 RONDA L. REINSTEIN, CCR No. 30X100217800

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

	<b>2-and-a-half</b> [1] - 97:4 <b>2.5</b> [1] - 86:14 <b>20</b> [2] - 3:5, 65:2 <b>201</b> [1] - 1:23 <b>2021</b> [13] - 3:14, 3:16, 3:17, 11:12, 23:20, 39:25, 55:6, 61:9, 74:5, 74:9, 74:21, 74:24, 75:2 <b>2023</b> [3] - 1:2, 4:4, 75:10 <b>20th</b> [1] - 54:8 <b>23</b> [4] - 3:6, 3:14, 74:5, 74:21 <b>24</b> [1] - 99:20 <b>245</b> [1] - 2:4 <b>25</b> [2] - 6:15, 83:7 <b>25.6</b> [1] - 89:15 <b>26</b> [1] - 3:3 <b>28</b> [7] - 3:17, 11:12, 57:6, 61:9, 73:21, 74:9, 75:2 <b>28th</b> [3] - 54:2, 58:1, 64:7	<b>47-71</b> [1] - 62:12	<b>A1563-20</b> [1] - 107:11 <b>abide</b> [1] - 129:19 <b>ability</b> [3] - 34:2, 116:19, 138:9 <b>able</b> [10] - 83:18, 95:1, 97:9, 98:2, 98:18, 102:3, 103:21, 105:18, 115:2, 130:20 <b>ABSENT</b> [1] - 1:15 <b>Absolutely</b> [3] - 28:13, 33:6, 80:13 <b>absolutely</b> [1] - 30:9 <b>accept</b> [2] - 47:7, 47:8 <b>acceptable</b> [1] - 58:3 <b>accident</b> [3] - 93:7, 93:8, 93:9 <b>accommodate</b> [12] - 17:21, 19:1, 19:3, 19:25, 83:22, 85:24, 86:8, 86:17, 94:6, 104:3, 111:25, 124:2 <b>accommodated</b> [1] - 87:11 <b>According</b> [1] - 67:11 <b>accordingly</b> [1] - 77:8 <b>accurate</b> [4] - 79:15, 80:23, 117:4, 138:6 <b>ACIP</b> [1] - 6:14 <b>acknowledged</b> [3] - 86:23, 87:2, 91:5 <b>acknowledging</b> [1] - 86:24 <b>acre</b> [1] - 104:18 <b>acres</b> [12] - 95:20, 97:4, 103:4, 104:18, 123:5, 123:8, 123:10, 123:14, 123:16, 124:2, 127:13 <b>Act</b> [1] - 4:12 <b>acted</b> [1] - 57:4 <b>action</b> [5] - 26:18, 40:10, 65:13, 138:12, 138:15 <b>actual</b> [2] - 58:12, 61:4 <b>ad</b> [1] - 97:19 <b>add</b> [3] - 19:9, 113:2, 113:14 <b>addition</b> [4] - 59:19, 73:21, 85:22, 93:18 <b>additional</b> [2] - 96:18, 104:13 <b>address</b> [2] - 114:10, 123:4 <b>addressed</b> [1] - 120:12 <b>Adequate</b> [1] - 4:5 <b>adequate</b> [1] - 88:23 <b>adjacent</b> [2] - 36:20,	94:5 <b>ADJUSTMENT</b> [1] - 1:1 <b>Adjustment</b> [3] - 2:2, 4:4, 50:5 <b>administer</b> [1] - 138:5 <b>admitted</b> [1] - 33:15 <b>adopt</b> [4] - 21:25, 22:11, 22:15, 29:25 <b>adopted</b> [6] - 11:11, 13:4, 31:22, 39:25, 54:3, 66:18 <b>adopting</b> [2] - 10:14, 40:19 <b>adoption</b> [10] - 13:1, 13:9, 14:5, 29:18, 31:25, 39:25, 56:23, 57:5, 57:13, 64:24 <b>adopts</b> [1] - 64:25 <b>advance</b> [1] - 14:19 <b>adversary</b> [2] - 32:18, 110:23 <b>advised</b> [1] - 5:7 <b>advocate</b> [1] - 25:8 <b>affect</b> [1] - 63:16 <b>affected</b> [1] - 91:24 <b>affects</b> [1] - 124:23 <b>age</b> [1] - 25:14 <b>ago</b> [6] - 78:24, 83:10, 87:17, 111:7, 117:23, 120:20 <b>agree</b> [14] - 8:1, 27:19, 45:21, 47:19, 60:5, 93:3, 94:8, 99:2, 118:9, 119:12, 120:16, 121:8, 128:23, 129:14 <b>agreed</b> [10] - 43:4, 46:9, 65:24, 81:15, 93:10, 111:2, 111:16, 125:10, 131:18, 134:21 <b>agreed-upon</b> [1] - 131:18 <b>agreeing</b> [1] - 101:15 <b>agreement</b> [2] - 94:18, 125:20 <b>agrees</b> [2] - 25:23, 99:12 <b>ahead</b> [6] - 5:18, 20:14, 50:25, 121:17, 123:2, 127:25 <b>air</b> [1] - 15:4 <b>aisle</b> [2] - 106:18, 106:20 <b>allay</b> [1] - 84:21 <b>Allegiance</b> [1] - 4:15 <b>allow</b> [2] - 33:4, 125:20
<b>'Zoning</b> [1] - 61:16		<b>5</b>		
<b>0</b>		<b>5</b> [2] - 58:14, 84:11 <b>5/2</b> [1] - 26:13 <b>505</b> [1] - 1:22 <b>51</b> [1] - 3:4		
<b>07054</b> [1] - 2:8 <b>07446</b> [1] - 2:5 <b>07663</b> [1] - 1:23 <b>08-21</b> [5] - 61:13, 70:21, 70:24, 71:5, 71:9		<b>6</b>		
<b>1</b>		<b>6</b> [9] - 1:6, 3:3, 15:22, 21:10, 23:1, 37:5, 64:2, 89:2 <b>6-foot</b> [1] - 23:6 <b>629</b> [1] - 2:7 <b>641-1812</b> [1] - 1:23		
<b>1</b> [7] - 15:20, 59:21, 60:2, 60:18, 60:23, 61:2, 61:19 <b>1,500</b> [1] - 88:20 <b>10</b> [2] - 21:11, 55:1 <b>10,000</b> [1] - 89:11 <b>10-18-2021</b> [1] - 74:7 <b>100</b> [1] - 89:14 <b>106</b> [1] - 3:9 <b>109</b> [3] - 95:23, 96:24, 97:8 <b>11</b> [8] - 1:2, 4:4, 86:8, 87:20, 92:2, 104:14, 114:24, 120:12 <b>11-car</b> [1] - 87:14 <b>110</b> [1] - 3:8 <b>12</b> [3] - 37:5, 92:2, 120:13 <b>13</b> [1] - 3:5 <b>15</b> [3] - 95:15, 95:20, 107:21 <b>150</b> [3] - 37:23, 41:22, 89:5 <b>153</b> [1] - 89:4 <b>153-foot</b> [1] - 86:7 <b>154,555</b> [1] - 89:10 <b>167</b> [1] - 90:2 <b>17.02</b> [1] - 1:6 <b>170</b> [1] - 90:2 <b>18</b> [2] - 3:16, 74:24 <b>180</b> [2] - 37:10, 37:18 <b>18th</b> [1] - 55:6 <b>19-21</b> [7] - 34:14, 69:24, 70:16, 70:17, 70:19, 71:2, 71:7 <b>1988</b> [1] - 90:25 <b>19:21</b> [2] - 11:11, 61:13 <b>1st</b> [1] - 94:7	<b>3</b>	<b>7</b>		
	<b>3</b> [8] - 11:22, 11:23, 37:7, 60:18, 60:23, 62:23, 62:24, 75:10 <b>3-and-a-half</b> [10] - 103:3, 104:18, 123:5, 123:7, 123:8, 123:10, 123:14, 123:16, 124:2, 127:13 <b>3.55</b> [1] - 95:20 <b>30</b> [1] - 83:2 <b>30X100217800</b> [1] - 138:24 <b>321</b> [1] - 89:13 <b>34</b> [4] - 61:15, 66:2, 70:1, 71:1 <b>34-13.13</b> [3] - 35:4, 39:20, 40:21 <b>34-9.1</b> [3] - 34:18, 34:19, 62:25 <b>35</b> [1] - 88:5 <b>36</b> [1] - 89:16	<b>7</b> [4] - 21:10, 84:11, 86:6, 104:15 <b>7.1</b> [1] - 62:16 <b>70</b> [2] - 85:6, 95:16 <b>74</b> [2] - 3:14, 3:16 <b>75</b> [6] - 3:17, 3:18, 3:19, 36:15, 85:7, 85:11 <b>7:30</b> [1] - 1:2		
		<b>8</b>		
		<b>8</b> [3] - 84:1, 86:6, 87:20 <b>80</b> [1] - 1:6 <b>82</b> [1] - 3:8		
		<b>9</b>		
		<b>9/28/2021</b> [1] - 51:24 <b>9:52</b> [1] - 137:15 <b>9th</b> [1] - 94:7		
	<b>4</b>	<b>A</b>		
	<b>4</b> [8] - 22:25, 23:2, 57:7, 57:8, 58:12, 60:23, 61:1, 61:8 <b>40:55-70D</b> [1] - 34:6 <b>40:55D-70</b> [1] - 102:7 <b>40:55D-70D(1</b> [1] - 7:5 <b>45</b> [3] - 65:2, 65:13, 84:17	<b>A-1</b> [1] - 73:2 <b>A-14</b> [1] - 95:22 <b>A-15</b> [4] - 3:14, 72:9, 74:14, 74:21 <b>A-16</b> [4] - 3:15, 72:13, 74:15, 74:24 <b>A-17</b> [5] - 3:17, 72:24, 73:2, 74:16, 75:3 <b>A-18</b> [3] - 3:18, 74:17, 75:5 <b>A-19</b> [3] - 3:19, 74:19, 75:7 <b>A-7</b> [1] - 62:16 <b>a.m</b> [4] - 37:5, 84:1, 84:11		
<b>2</b>				
<b>2</b> [9] - 15:21, 52:16, 59:22, 60:3, 60:18, 60:23, 62:11				

<p><b>allowed</b> [4] - 27:18, 63:8, 66:18, 135:20</p> <p><b>allowing</b> [1] - 106:7</p> <p><b>alluding</b> [1] - 111:23</p> <p><b>almost</b> [2] - 107:2, 120:7</p> <p><b>alone</b> [1] - 125:21</p> <p><b>alternative</b> [2] - 111:20, 111:24</p> <p><b>ambiguous</b> [1] - 36:24</p> <p><b>Amend</b> [3] - 61:13, 61:14, 70:22</p> <p><b>amend</b> [3] - 69:25, 70:25, 71:8</p> <p><b>amended</b> [3] - 62:19, 63:1, 63:3</p> <p><b>amending</b> [5] - 62:17, 62:24, 70:20, 70:21</p> <p><b>amendment</b> [1] - 62:12</p> <p><b>amends</b> [3] - 70:18, 71:3, 71:11</p> <p><b>ample</b> [1] - 87:15</p> <p><b>anachronistic</b> [1] - 98:6</p> <p><b>analysis</b> [6] - 27:13, 29:8, 29:14, 34:2, 102:15</p> <p><b>Anderson</b> [7] - 3:5, 5:5, 41:4, 68:23, 69:19, 81:22, 137:7</p> <p><b>ANDERSON</b> [124] - 1:9, 4:1, 5:6, 5:18, 5:23, 6:2, 6:12, 13:13, 13:15, 14:10, 14:14, 16:7, 17:13, 17:17, 18:9, 18:13, 19:6, 20:3, 20:11, 20:17, 20:20, 24:12, 26:5, 26:10, 26:20, 26:25, 33:10, 33:16, 33:21, 33:24, 35:18, 36:6, 36:9, 38:11, 38:15, 39:21, 40:15, 40:23, 41:2, 41:12, 41:18, 41:23, 42:9, 46:6, 46:13, 47:14, 47:22, 48:13, 49:7, 50:2, 50:10, 50:12, 50:17, 50:25, 55:14, 62:14, 64:17, 64:20, 65:16, 66:8, 66:11, 66:14, 66:25, 67:13, 68:2, 68:24, 69:3, 69:20, 70:7, 71:19, 73:3, 75:15, 78:4, 78:13, 78:16, 78:20, 79:17, 82:4, 82:7, 82:10, 106:3, 112:3, 112:10, 112:20,</p>	<p>113:10, 115:6, 117:10, 118:10, 119:11, 119:22, 120:14, 121:20, 121:24, 122:22, 123:2, 123:17, 125:9, 129:5, 129:8, 129:17, 130:18, 131:1, 131:6, 131:12, 131:16, 131:23, 132:6, 132:10, 134:3, 134:8, 134:13, 134:17, 135:1, 135:4, 135:6, 135:9, 135:15, 135:18, 135:21, 136:3, 136:7, 136:14, 136:17, 137:8</p> <p><b>Andrew</b> [1] - 88:3</p> <p><b>ANN</b> [1] - 2:6</p> <p><b>Anne</b> [1] - 5:20</p> <p><b>answer</b> [5] - 64:20, 70:15, 100:10, 100:21, 100:22</p> <p><b>answered</b> [1] - 32:14</p> <p><b>anticipate</b> [2] - 121:2, 121:4</p> <p><b>anticipated</b> [2] - 12:21, 121:5</p> <p><b>anytime</b> [1] - 110:4</p> <p><b>Anyway</b> [2] - 42:1, 80:14</p> <p><b>anyway</b> [3] - 42:2, 78:22, 132:3</p> <p><b>apologies</b> [1] - 37:21</p> <p><b>apologize</b> [1] - 109:10</p> <p><b>appeal</b> [11] - 58:4, 64:24, 65:1, 65:7, 73:14, 74:3, 76:14, 108:21, 110:10, 110:11, 112:24</p> <p><b>appealed</b> [3] - 66:17, 67:2, 67:3</p> <p><b>appearance</b> [2] - 5:12, 5:19</p> <p><b>Appearances</b> [1] - 52:19</p> <p><b>appeared</b> [1] - 55:11</p> <p><b>appellate</b> [2] - 59:18, 65:14</p> <p><b>Appellate</b> [2] - 107:10, 107:14</p> <p><b>applicant</b> [26] - 5:17, 69:20, 70:7, 71:19, 73:3, 75:15, 78:4, 78:13, 78:16, 78:20, 79:17, 82:4, 82:7, 82:10, 106:3, 112:3, 112:10, 112:20,</p>	<p>110:12, 112:1, 114:21, 127:15, 127:16, 127:21, 130:14</p> <p><b>Applicant</b> [1] - 2:5</p> <p><b>applicant's</b> [9] - 14:23, 15:9, 15:18, 17:18, 81:19, 83:3, 92:13, 101:6, 107:7</p> <p><b>applicants</b> [1] - 95:18</p> <p><b>APPLICATION</b> [1] - 1:4</p> <p><b>application</b> [25] - 6:4, 7:4, 7:7, 9:3, 32:21, 50:6, 75:20, 75:21, 79:4, 93:15, 95:6, 100:10, 101:8, 101:18, 102:1, 105:5, 105:16, 105:23, 111:14, 114:6, 114:7, 117:18, 127:19, 133:20, 137:12</p> <p><b>applications</b> [1] - 118:1</p> <p><b>applies</b> [3] - 40:10, 66:3</p> <p><b>apply</b> [2] - 40:22, 49:21</p> <p><b>appreciate</b> [2] - 76:6, 106:9</p> <p><b>approach</b> [3] - 49:16, 49:25, 111:8</p> <p><b>appropriate</b> [2] - 9:10, 98:24</p> <p><b>approval</b> [14] - 14:18, 15:10, 75:22, 77:20, 90:21, 114:1, 114:4, 114:23, 119:17, 124:21, 124:22, 124:23, 125:6, 128:11</p> <p><b>approve</b> [6] - 75:20, 80:25, 105:16, 105:22, 134:6, 136:10</p> <p><b>approved</b> [4] - 24:11, 112:14, 112:17, 133:20</p> <p><b>approves</b> [1] - 85:4</p> <p><b>approving</b> [1] - 114:6</p> <p><b>arborvitae</b> [1] - 90:10</p> <p><b>architect</b> [2] - 94:10</p> <p><b>area</b> [12] - 24:22, 37:24, 38:1, 38:5, 41:6, 41:7, 41:9, 83:24, 88:17, 91:20, 106:21, 126:9</p> <p><b>area"</b> [1] - 37:10</p> <p><b>areas</b> [3] - 15:20,</p>	<p>85:25, 88:16</p> <p><b>argument</b> [4] - 50:1, 50:3, 50:4, 111:20</p> <p><b>arrogation</b> [1] - 11:6</p> <p><b>aside</b> [2] - 111:12, 111:19</p> <p><b>aspect</b> [10] - 19:15, 85:12, 85:18, 88:22, 92:22, 93:12, 94:14, 95:1, 96:1, 96:7</p> <p><b>aspects</b> [11] - 10:23, 12:11, 16:12, 23:7, 45:22, 83:19, 87:22, 89:21, 95:14, 96:11, 103:21</p> <p><b>assistance</b> [1] - 76:7</p> <p><b>associated</b> [2] - 18:19, 18:20</p> <p><b>Associates</b> [2] - 6:20, 88:8</p> <p><b>assume</b> [4] - 26:8, 81:1, 112:5, 120:1</p> <p><b>assuming</b> [1] - 112:23</p> <p><b>assumption</b> [1] - 21:9</p> <p><b>assure</b> [1] - 77:10</p> <p><b>Atlantic</b> [1] - 111:6</p> <p><b>attaches</b> [1] - 26:4</p> <p><b>attempted</b> [3] - 18:24, 18:25, 71:15</p> <p><b>attention</b> [2] - 58:12, 109:13</p> <p><b>attest</b> [1] - 39:10</p> <p><b>attorney</b> [8] - 35:25, 54:23, 59:5, 69:22, 76:7, 123:4, 138:11, 138:13</p> <p><b>attorneys</b> [3] - 63:25, 122:7</p> <p><b>attractive</b> [1] - 126:8</p> <p><b>attribute</b> [1] - 13:16</p> <p><b>authorized</b> [1] - 138:4</p> <p><b>automatically</b> [1] - 13:22</p> <p><b>automobile</b> [7] - 44:1, 44:6, 44:9, 44:10, 44:13, 44:20, 44:25</p> <p><b>automobiles</b> [4] - 42:23, 44:11, 44:19, 62:1</p> <p><b>available</b> [2] - 9:13, 58:7</p> <p><b>Ave</b> [1] - 124:4</p> <p><b>Avenue</b> [8] - 6:15, 15:23, 89:7, 89:18, 89:19, 92:19, 93:11, 94:5</p> <p><b>AVENUE</b> [1] - 1:6</p> <p><b>aware</b> [6] - 32:14, 44:6, 67:9, 82:5, 107:18, 108:25</p>	<p><b>B</b></p> <p><b>B-1</b> [12] - 11:20, 11:22, 11:23, 30:15, 55:13, 62:23, 63:9, 96:24, 103:24, 109:9, 110:18</p> <p><b>B-2</b> [1] - 55:13</p> <p><b>B-3</b> [12] - 11:20, 30:16, 55:15, 59:13, 62:24, 63:9, 89:9, 95:21, 96:24, 103:24, 109:9, 110:18</p> <p><b>B-U-R-G-I-S</b> [1] - 6:21</p> <p><b>back-and-forth</b> [1] - 101:11</p> <p><b>backed</b> [1] - 107:13</p> <p><b>background</b> [2] - 6:24, 29:16</p> <p><b>backyard</b> [2] - 23:1</p> <p><b>bad</b> [1] - 63:19</p> <p><b>bag</b> [1] - 44:25</p> <p><b>Bank</b> [2] - 18:5, 88:10</p> <p><b>bank</b> [15] - 18:20, 18:23, 19:2, 38:25, 41:3, 86:23, 87:1, 89:19, 98:4, 107:4, 111:4, 115:12, 115:13, 116:4</p> <p><b>banks</b> [2] - 39:8, 41:13</p> <p><b>Barlow</b> [4] - 4:24, 68:19, 69:15, 137:3</p> <p><b>BARLOW</b> [13] - 1:12, 4:25, 68:20, 69:16, 121:19, 121:22, 122:1, 122:6, 122:24, 135:5, 135:8, 135:11, 137:4</p> <p><b>Barn</b> [2] - 2:8, 5:22</p> <p><b>base</b> [1] - 43:3</p> <p><b>based</b> [7] - 11:2, 30:2, 43:16, 82:1, 92:3, 119:1, 130:3</p> <p><b>Based</b> [1] - 43:13</p> <p><b>basis</b> [8] - 21:19, 22:6, 27:6, 100:4, 105:10, 105:19, 105:21, 133:13</p> <p><b>beautification</b> [1] - 133:2</p> <p><b>became</b> [2] - 16:8, 83:11</p> <p><b>beforehand</b> [1] - 80:16</p> <p><b>beg</b> [1] - 134:4</p> <p><b>begin</b> [2] - 129:6, 129:10</p> <p><b>beginning</b> [3] - 11:9, 99:18, 136:15</p> <p><b>behalf</b> [1] - 5:21</p>
---	---	---	--	---

<p><b>behind</b> [3] - 27:9, 32:10, 116:19</p> <p><b>belabor</b> [4] - 77:22, 78:18, 96:4, 106:23</p> <p><b>belaboring</b> [1] - 100:18</p> <p><b>BELL</b> [1] - 1:5</p> <p><b>Bell</b> [20] - 5:10, 8:1, 67:18, 83:20, 83:24, 86:9, 94:11, 99:19, 107:5, 120:15, 121:12, 122:12, 126:6, 127:17, 129:8, 130:6, 130:11, 131:2, 133:19, 133:24</p> <p><b>Bell's</b> [1] - 83:22</p> <p><b>belongs</b> [1] - 85:21</p> <p><b>beneficial</b> [3] - 8:2, 8:4, 8:20</p> <p><b>benefit</b> [5] - 60:16, 77:4, 77:5, 99:1</p> <p><b>Bergen</b> [1] - 88:5</p> <p><b>best</b> [3] - 99:16, 99:17, 138:9</p> <p><b>better</b> [3] - 20:1, 119:8, 120:17</p> <p><b>between</b> [3] - 18:18, 84:11, 86:13</p> <p><b>beyond</b> [8] - 26:8, 79:1, 89:5, 93:19, 96:19, 101:18, 101:25, 104:13</p> <p><b>Bifurcated</b> [1] - 112:9</p> <p><b>big</b> [1] - 39:12</p> <p><b>bigger</b> [1] - 124:18</p> <p><b>biggest</b> [1] - 120:10</p> <p><b>bit</b> [5] - 6:24, 8:13, 9:16, 123:13, 134:2</p> <p><b>blanche</b> [1] - 103:11</p> <p><b>blanket</b> [1] - 118:25</p> <p><b>blight</b> [1] - 133:25</p> <p><b>blinding</b> [1] - 90:15</p> <p><b>BLOCK</b> [1] - 1:6</p> <p><b>block</b> [1] - 119:6</p> <p><b>Board</b> [26] - 2:2, 2:12, 2:13, 4:3, 5:15, 29:22, 29:23, 30:21, 31:6, 32:8, 50:5, 54:11, 54:23, 55:4, 55:10, 56:9, 56:15, 57:24, 74:6, 107:12, 108:15, 108:16, 111:6, 119:18, 120:6, 120:9</p> <p><b>board</b> [88] - 4:10, 6:21, 6:23, 7:13, 9:20, 9:22, 10:9, 10:12, 10:14, 10:16, 10:18, 11:15, 12:8, 12:11,</p>	<p>13:6, 14:16, 16:4, 17:1, 18:6, 19:11, 19:13, 20:4, 21:8, 22:3, 23:10, 27:4, 32:16, 32:21, 34:1, 35:21, 49:5, 49:9, 49:11, 53:25, 56:1, 57:17, 59:5, 59:17, 59:18, 60:16, 63:25, 65:4, 66:4, 68:8, 70:1, 72:2, 72:5, 73:16, 75:10, 75:19, 75:20, 76:7, 77:5, 77:6, 77:17, 80:10, 80:24, 81:2, 84:22, 89:2, 92:16, 95:16, 99:12, 102:2, 103:9, 106:6, 106:10, 106:11, 107:13, 107:15, 107:18, 108:1, 108:11, 108:12, 113:15, 113:22, 121:10, 121:13, 123:4, 127:18, 133:1</p> <p><b>BOARD</b> [1] - 1:1</p> <p><b>Board's</b> [2] - 55:11, 55:18</p> <p><b>board's</b> [1] - 10:21</p> <p><b>Board/Professional</b> [1] - 3:4</p> <p><b>boards</b> [2] - 19:18, 78:22</p> <p><b>bodies</b> [1] - 9:19</p> <p><b>body</b> [28] - 9:21, 10:10, 10:13, 10:20, 11:6, 11:7, 21:24, 22:9, 22:14, 24:10, 24:15, 27:3, 27:7, 40:5, 51:25, 52:9, 52:12, 55:12, 55:24, 56:22, 57:4, 57:6, 61:9, 64:4, 74:8, 108:8, 109:3, 109:4</p> <p><b>books</b> [3] - 39:15, 108:22, 117:24</p> <p><b>BOROUGH</b> [1] - 1:1</p> <p><b>Borough</b> [3] - 4:11, 61:16, 71:1</p> <p><b>borough</b> [7] - 9:7, 63:24, 73:25, 90:21, 101:20, 104:20, 108:18</p> <p><b>bottom</b> [1] - 78:15</p> <p><b>Bottom</b> [1] - 108:6</p> <p><b>bought</b> [1] - 15:8</p> <p><b>box</b> [1] - 84:13</p> <p><b>BOX</b> [1] - 1:22</p> <p><b>brand</b> [1] - 118:7</p> <p><b>brand-new</b> [1] - 118:7</p>	<p><b>brewing</b> [1] - 130:19</p> <p><b>brief</b> [1] - 94:9</p> <p><b>briefly</b> [5] - 27:22, 35:3, 75:13, 99:5, 106:6</p> <p><b>bring</b> [2] - 14:24, 43:6</p> <p><b>brings</b> [1] - 11:8</p> <p><b>Brook</b> [2] - 50:4</p> <p><b>BROOK</b> [1] - 1:23</p> <p><b>brought</b> [3] - 15:2, 15:3, 22:21</p> <p><b>Bruce</b> [3] - 5:15, 52:14, 52:20</p> <p><b>BRUCE</b> [1] - 2:3</p> <p><b>bucks</b> [1] - 132:11</p> <p><b>buffering</b> [1] - 112:15</p> <p><b>build</b> [1] - 18:4</p> <p><b>building</b> [26] - 42:24, 44:21, 62:2, 90:6, 94:15, 98:4, 99:10, 123:14, 125:18, 126:11, 126:15, 126:20, 126:23, 126:25, 128:3, 128:8, 128:13, 128:14, 128:15, 128:22, 130:1, 130:25, 131:2, 131:4</p> <p><b>Building</b> [1] - 4:10</p> <p><b>building's</b> [1] - 89:19</p> <p><b>buildings</b> [1] - 87:18</p> <p><b>built</b> [2] - 111:6, 126:16</p> <p><b>bulk</b> [1] - 23:12</p> <p><b>bulletin</b> [1] - 4:9</p> <p><b>bunch</b> [1] - 8:11</p> <p><b>Burbridge</b> [1] - 132:24</p> <p><b>burden</b> [3] - 8:4, 102:12, 103:22</p> <p><b>Burger</b> [3] - 2:8, 5:22, 122:15</p> <p><b>Burgis</b> [1] - 6:20</p> <p><b>business</b> [9] - 23:5, 85:7, 85:11, 85:20, 87:10, 87:15, 98:7, 117:22, 122:25</p> <p><b>businesses</b> [1] - 24:3</p> <p><b>but..</b> [1] - 133:9</p> <p><b>buy</b> [1] - 16:5</p> <p><b>buzz</b> [1] - 8:11</p> <p><b>bypass</b> [10] - 107:2, 107:3, 111:3, 111:5, 115:12, 116:1, 116:10, 116:12, 116:22, 116:23</p>	<p><b>C.S.R</b> [1] - 1:21</p> <p><b>cannabis</b> [1] - 39:6</p> <p><b>cannot</b> [1] - 26:12</p> <p><b>Capalbo</b> [2] - 5:3, 68:21</p> <p><b>CAPALBO</b> [27] - 1:13, 5:4, 66:15, 66:21, 67:1, 67:6, 68:9, 68:22, 69:6, 81:22, 82:5, 113:3, 113:6, 119:12, 120:10, 127:2, 127:7, 127:14, 129:14, 129:19, 135:14, 135:17, 135:20, 135:24, 136:4, 136:9, 136:13</p> <p><b>car</b> [1] - 85:10</p> <p><b>care</b> [4] - 124:25, 125:23, 128:20, 134:22</p> <p><b>carefully</b> [1] - 11:4</p> <p><b>cars</b> [6] - 86:8, 96:15, 104:10, 104:14, 104:16, 120:13</p> <p><b>carte</b> [1] - 103:11</p> <p><b>CARUCCI</b> [1] - 1:21</p> <p><b>case</b> [22] - 17:11, 25:9, 25:10, 28:17, 28:22, 28:23, 34:6, 35:24, 36:1, 36:12, 47:10, 74:3, 78:23, 79:13, 80:8, 81:24, 82:19, 99:21, 105:17, 108:25, 120:24, 132:24</p> <p><b>cases</b> [2] - 28:22, 118:4</p> <p><b>catching</b> [1] - 133:5</p> <p><b>categories</b> [1] - 8:15</p> <p><b>caught</b> [2] - 20:2, 136:1</p> <p><b>caution</b> [1] - 80:22</p> <p><b>CCR</b> [1] - 138:24</p> <p><b>center</b> [5] - 37:23, 90:2, 127:10, 127:11, 133:25</p> <p><b>certain</b> [4] - 45:22, 97:15, 101:14, 133:21</p> <p><b>Certainly</b> [3] - 5:13, 6:6, 128:4</p> <p><b>certainly</b> [6] - 44:11, 91:12, 93:14, 112:9, 121:5, 130:9</p> <p><b>Certificate</b> [1] - 130:10</p> <p><b>CERTIFIED</b> [1] - 1:22</p> <p><b>certified</b> [9] - 71:25, 73:11, 73:19, 73:25, 75:23, 75:25, 78:9,</p>	<p>78:12</p> <p><b>Certified</b> [2] - 73:13, 138:3</p> <p><b>certify</b> [1] - 138:6</p> <p><b>CERTIFY</b> [1] - 138:10</p> <p><b>cetera</b> [4] - 61:18, 76:20, 97:7, 106:9</p> <p><b>Chair</b> [2] - 106:6, 110:16</p> <p><b>Chairman</b> [6] - 3:5, 3:6, 5:14, 50:11, 99:22, 112:9</p> <p><b>CHAIRMAN</b> [155] - 1:9, 1:10, 4:1, 4:21, 5:6, 5:18, 5:23, 6:2, 6:12, 13:13, 13:15, 14:10, 14:14, 16:7, 17:13, 17:17, 18:9, 18:13, 19:6, 20:3, 20:11, 20:17, 20:20, 23:14, 23:18, 23:23, 24:9, 24:12, 24:18, 25:6, 25:13, 25:25, 26:5, 26:10, 26:20, 26:25, 33:10, 33:16, 33:21, 33:24, 35:18, 36:6, 36:9, 38:11, 38:15, 39:21, 40:15, 40:23, 41:2, 41:12, 41:18, 41:23, 42:9, 45:25, 46:6, 46:13, 47:14, 47:22, 48:13, 49:7, 50:2, 50:10, 50:12, 50:17, 50:25, 55:14, 60:14, 60:22, 61:3, 61:11, 62:10, 62:14, 64:17, 64:20, 65:16, 66:8, 66:11, 66:14, 66:25, 67:13, 68:2, 68:16, 68:24, 69:3, 69:12, 69:20, 69:21, 70:7, 71:17, 71:19, 73:3, 75:15, 78:4, 78:13, 78:16, 78:20, 79:7, 79:17, 79:24, 80:13, 82:4, 82:7, 82:10, 106:3, 112:3, 112:10, 112:20, 113:10, 115:6, 115:9, 115:16, 115:23, 116:3, 117:8, 117:10, 117:14, 118:10, 119:11, 119:22, 120:14, 121:20, 121:24, 122:22, 123:2, 123:17, 125:9, 129:5, 129:8, 129:17, 129:25, 130:18, 131:1,</p>
--	--	---	---	--

<p>131:6, 131:12, 131:16, 131:23, 132:6, 132:10, 134:3, 134:8, 134:13, 134:17, 135:1, 135:4, 135:6, 135:9, 135:15, 135:18, 135:21, 136:3, 136:7, 136:14, 136:17, 136:25, 137:8 <b>challenged</b> [2] - 65:12, 108:22 <b>chance</b> [3] - 99:25, 100:1, 112:23 <b>change</b> [7] - 40:22, 46:17, 61:20, 77:16, 110:1, 116:15, 121:3 <b>changed</b> [4] - 13:3, 85:11, 117:25, 122:10 <b>changes</b> [4] - 12:24, 55:25, 110:9, 118:5 <b>changing</b> [1] - 110:3 <b>chapter</b> [4] - 35:1, 60:1, 62:22, 63:7 <b>Chapter</b> [4] - 61:15, 66:2, 70:1, 71:1 <b>character</b> [1] - 12:25 <b>characteristics</b> [1] - 9:9 <b>check</b> [2] - 58:10, 93:9 <b>checked</b> [1] - 93:7 <b>cherry</b> [1] - 66:2 <b>cherry-picked</b> [1] - 66:2 <b>Chick</b> [1] - 122:13 <b>Chick-Fil-A</b> [1] - 122:13 <b>chicken</b> [3] - 92:12, 122:14, 122:15 <b>chose</b> [1] - 53:24 <b>church</b> [1] - 8:2 <b>circumstances</b> [1] - 23:4 <b>cite</b> [1] - 108:3 <b>civil</b> [2] - 88:4, 91:1 <b>clarification</b> [1] - 45:23 <b>clarify</b> [1] - 57:19 <b>clarity</b> [5] - 45:20, 46:22, 59:23, 65:23, 71:14 <b>classes</b> [1] - 28:15 <b>clause</b> [2] - 63:11, 63:23 <b>cleaners</b> [1] - 124:8 <b>cleaning</b> [2] - 125:13 <b>clear</b> [10] - 11:1, 46:2, 46:22, 46:24, 54:14,</p>	<p>63:8, 65:21, 108:9, 116:20, 120:5 <b>clerk</b> [3] - 73:25, 76:12, 108:19 <b>Clerk</b> [1] - 4:11 <b>client</b> [6] - 48:2, 67:7, 67:9, 67:19, 113:25, 117:17 <b>client's</b> [3] - 48:7, 77:4, 100:9 <b>close</b> [2] - 51:7, 98:1 <b>closed</b> [1] - 130:12 <b>closest</b> [1] - 38:23 <b>closing</b> [2] - 33:19, 114:23 <b>clubs</b> [3] - 12:15, 12:16, 12:17 <b>CO</b> [7] - 125:17, 125:22, 129:11, 130:16, 131:8, 131:9, 134:22 <b>Code</b> [2] - 61:16, 71:1 <b>code</b> [6] - 37:3, 42:8, 65:14, 95:10, 109:13, 126:23 <b>cognizant</b> [1] - 27:14 <b>coincide</b> [1] - 21:20 <b>collectively</b> [1] - 72:10 <b>colored</b> [1] - 96:10 <b>Columbia</b> [3] - 18:4, 88:10, 111:7 <b>combination</b> [1] - 7:10 <b>coming</b> [4] - 84:10, 90:15, 118:1, 118:5 <b>comments</b> [5] - 29:24, 32:1, 32:3, 106:4, 108:7 <b>commercial</b> [3] - 23:5, 88:17, 89:12 <b>common</b> [1] - 12:14 <b>community</b> [4] - 10:2, 13:3, 85:16, 85:21 <b>compared</b> [1] - 76:1 <b>comparison</b> [2] - 71:5, 96:12 <b>compelled</b> [1] - 8:23 <b>competition</b> [1] - 100:16 <b>complaints</b> [1] - 24:21 <b>complement</b> [1] - 22:7 <b>complemented</b> [1] - 107:9 <b>complete</b> [3] - 129:2, 129:3, 130:11 <b>completed</b> [5] - 122:19, 122:21, 128:2, 128:3, 128:6 <b>completely</b> [1] - 17:4 <b>compliance</b> [1] - 125:16</p>	<p><b>compliant</b> [3] - 37:3, 94:18, 95:10 <b>complied</b> [1] - 98:17 <b>comply</b> [6] - 113:25, 114:1, 114:3, 114:21, 114:22 <b>component</b> [1] - 19:11 <b>comprehensive</b> [1] - 9:25 <b>concept</b> [4] - 41:5, 79:22, 85:2, 111:25 <b>concern</b> [11] - 19:24, 49:10, 55:11, 90:13, 96:14, 96:23, 103:25, 114:10, 115:1, 120:11, 129:18 <b>concerned</b> [3] - 26:14, 48:15, 114:7 <b>concerns</b> [5] - 12:4, 12:5, 84:21, 100:9, 113:22 <b>concluded</b> [1] - 137:14 <b>conclusion</b> [1] - 94:3 <b>concur</b> [1] - 101:19 <b>concurred</b> [2] - 92:21, 93:17 <b>condition</b> [17] - 77:19, 78:7, 80:24, 89:8, 114:23, 115:3, 119:20, 124:21, 124:23, 125:6, 125:17, 125:18, 128:1, 128:10, 128:11, 132:21 <b>Condition</b> [1] - 35:15 <b>conditioned</b> [1] - 75:23 <b>conditions</b> [13] - 35:10, 35:14, 46:5, 48:14, 81:13, 81:15, 81:20, 101:14, 101:20, 113:18, 114:10, 119:16, 128:9 <b>confines</b> [3] - 42:23, 44:20, 62:1 <b>confirm</b> [1] - 47:7 <b>confirmed</b> [9] - 27:23, 43:10, 86:4, 91:25, 93:23, 95:19, 95:24, 96:17, 97:18 <b>conflict</b> [1] - 93:13 <b>conforming</b> [1] - 89:19 <b>confusing</b> [2] - 45:13, 45:14 <b>connection</b> [4] - 27:21, 99:14, 100:9,</p>	<p>111:8 <b>consent</b> [1] - 127:18 <b>consider</b> [8] - 7:1, 7:13, 11:4, 12:12, 32:21, 112:13, 133:8, 134:2 <b>consideration</b> [4] - 10:21, 109:2, 130:22, 131:20 <b>considerations</b> [1] - 82:20 <b>considering</b> [2] - 114:5, 114:6 <b>consistent</b> [4] - 54:13, 55:8, 57:3, 108:16 <b>consists</b> [1] - 72:24 <b>constantly</b> [1] - 34:7 <b>constitute</b> [2] - 11:5, 116:23 <b>construction</b> [12] - 83:5, 83:14, 122:18, 122:25, 123:21, 123:22, 125:21, 125:22, 130:1, 130:6, 130:9, 130:21 <b>consultant</b> [3] - 86:5, 91:2, 96:17 <b>consultants</b> [1] - 6:22 <b>consumption</b> [3] - 42:24, 44:21, 62:2 <b>contemplation</b> [1] - 103:3 <b>continually</b> [1] - 133:12 <b>continue</b> [1] - 33:8 <b>continues</b> [1] - 6:16 <b>contrary</b> [3] - 27:3, 102:20, 124:21 <b>controlled</b> [1] - 84:9 <b>conversation</b> [1] - 134:24 <b>cooked</b> [1] - 86:11 <b>cooking</b> [2] - 92:7, 92:12 <b>copies</b> [1] - 32:16 <b>copy</b> [2] - 4:9, 4:10 <b>corner</b> [3] - 23:4, 90:9, 123:6 <b>Correct</b> [5] - 18:7, 32:6, 43:15, 112:19, 134:17 <b>correct</b> [21] - 6:1, 18:6, 21:3, 21:15, 28:2, 28:7, 29:5, 29:20, 30:25, 34:7, 39:16, 42:11, 53:23, 54:14, 54:21, 55:19, 56:11, 72:10, 119:19, 131:23, 133:18</p>	<p><b>correcting</b> [1] - 125:7 <b>correctly</b> [1] - 126:12 <b>correspondence</b> [1] - 75:9 <b>corridor</b> [1] - 98:7 <b>Council</b> [29] - 3:17, 10:11, 11:11, 12:3, 22:5, 25:21, 26:12, 30:22, 31:9, 32:4, 32:9, 47:3, 48:15, 49:11, 49:12, 52:20, 53:14, 64:25, 66:6, 72:1, 75:2, 91:13, 97:1, 104:7, 117:21, 118:19, 120:1, 120:19, 121:15 <b>councilman</b> [1] - 120:7 <b>counsel</b> [7] - 33:4, 72:23, 79:20, 81:19, 107:7, 138:11, 138:13 <b>Counsel</b> [5] - 2:2, 2:5, 2:8, 52:19, 81:23 <b>County</b> [1] - 88:5 <b>couple</b> [3] - 29:24, 71:22, 72:17 <b>course</b> [8] - 33:5, 64:2, 78:1, 84:22, 101:24, 106:23, 113:23, 120:6 <b>Court</b> [3] - 73:13, 73:15, 138:3 <b>court</b> [7] - 58:3, 63:15, 65:15, 78:22, 112:24, 133:1 <b>COURT</b> [1] - 1:22 <b>courtesy</b> [1] - 81:4 <b>courts</b> [1] - 10:25 <b>coverage</b> [1] - 89:17 <b>covered</b> [1] - 113:12 <b>crazy</b> [2] - 25:11, 25:16 <b>create</b> [1] - 27:3 <b>created</b> [1] - 28:9 <b>creating</b> [1] - 28:9 <b>crew</b> [1] - 85:8 <b>criteria</b> [25] - 7:14, 7:15, 7:21, 8:10, 10:24, 11:4, 12:10, 13:11, 14:11, 16:13, 16:14, 97:18, 98:19, 98:25, 101:4, 101:17, 102:11, 105:14, 105:20, 105:21, 122:9, 130:22, 131:19 <b>criticism</b> [2] - 29:22, 31:9 <b>criticizing</b> [2] - 97:2,</p>
--	---	--	--	--



<p>103:15  <b>cross</b> [1] - 106:20  <b>crowded</b> [1] - 106:21  <b>crux</b> [2] - 30:18, 95:11  <b>Cs</b> [1] - 137:10  <b>curb</b> [1] - 92:19  <b>curious</b> [1] - 24:6  <b>current</b> [2] - 70:4, 88:10  <b>customer</b> [1] - 43:25  <b>customers</b> [5] - 42:22, 44:18, 61:25, 87:7, 87:11  <b>customers'</b> [1] - 85:10  <b>Cut</b> [1] - 63:19  <b>cut</b> [1] - 92:19  <b>CVS</b> [2] - 114:1, 114:4</p>	<p>80:11  <b>decision</b> [11] - 56:4, 65:9, 76:16, 103:16, 107:11, 107:14, 107:20, 108:4, 108:8, 108:9, 119:1  <b>decision-making</b> [1] - 103:16  <b>decisions</b> [2] - 11:1, 82:20  <b>dedicated</b> [1] - 116:13  <b>deemed</b> [4] - 35:1, 60:1, 62:22, 63:7  <b>defer</b> [1] - 122:1  <b>define</b> [1] - 44:9  <b>defined</b> [4] - 34:25, 59:25, 62:21, 63:6  <b>definitely</b> [1] - 118:22  <b>definition</b> [11] - 42:5, 42:10, 42:16, 43:13, 43:16, 43:22, 44:5, 44:10, 59:20, 61:21, 61:23  <b>definitions</b> [2] - 61:20, 70:11  <b>deliberation</b> [1] - 103:17  <b>deliberations</b> [2] - 13:7, 34:3  <b>delivered</b> [1] - 4:8  <b>deliveries</b> [2] - 84:8, 84:20  <b>delivery</b> [1] - 84:16  <b>delve</b> [1] - 8:12  <b>demographics</b> [1] - 83:23  <b>demonstrate</b> [4] - 7:16, 7:21, 8:5, 28:24  <b>denial</b> [1] - 116:23  <b>denied</b> [2] - 100:15, 137:12  <b>deny</b> [3] - 95:6, 102:19, 134:6  <b>described</b> [1] - 94:12  <b>DESCRIPTION</b> [1] - 3:13  <b>design</b> [2] - 87:23, 88:21  <b>designated</b> [1] - 73:12  <b>designed</b> [2] - 22:21, 22:22  <b>designer</b> [1] - 87:23  <b>desirable</b> [1] - 15:6  <b>despite</b> [1] - 9:7  <b>detail</b> [2] - 94:13, 113:12  <b>determination</b> [2] - 55:7, 101:10  <b>determine</b> [3] - 34:4,</p>	<p>47:3, 72:4  <b>determined</b> [2] - 54:12, 64:4  <b>detriment</b> [4] - 7:22, 25:17, 29:1, 99:1  <b>develop</b> [1] - 10:6  <b>developed</b> [2] - 11:16, 90:7  <b>developer's</b> [1] - 125:20  <b>development</b> [10] - 9:24, 10:1, 10:2, 10:7, 10:8, 12:25, 83:4, 83:14, 88:6, 133:10  <b>devil's</b> [1] - 25:8  <b>difference</b> [2] - 18:18, 114:16  <b>different</b> [9] - 25:10, 41:24, 53:18, 53:22, 86:10, 87:1, 91:4, 107:4, 112:4  <b>differently</b> [1] - 118:13  <b>direct</b> [4] - 54:22, 58:11, 59:10, 121:5  <b>directly</b> [1] - 59:6  <b>disadvantage</b> [2] - 48:21, 49:20  <b>disagree</b> [8] - 45:4, 47:22, 56:9, 74:13, 93:4, 95:4, 111:13, 132:23  <b>disagreeing</b> [1] - 26:5  <b>disco</b> [2] - 25:11, 25:13  <b>discuss</b> [3] - 15:18, 112:3, 112:21  <b>discussed</b> [6] - 11:9, 11:10, 17:10, 33:14, 114:8, 114:13  <b>discussing</b> [1] - 59:12  <b>Discussion</b> [2] - 135:15, 135:18  <b>discussion</b> [8] - 11:14, 11:25, 15:24, 16:3, 19:10, 30:15, 30:16, 30:19  <b>disrepair</b> [1] - 123:25  <b>distinction</b> [2] - 18:18, 50:6  <b>distinguished</b> [2] - 92:13, 97:3  <b>distributor</b> [1] - 84:10  <b>District</b> [4] - 11:20, 11:21, 30:16  <b>district</b> [2] - 7:6, 30:18  <b>districts</b> [1] - 25:2  <b>DIVAK</b> [1] - 1:15  <b>Division</b> [2] - 107:10, 107:14</p>	<p><b>DO</b> [1] - 138:10  <b>doable</b> [1] - 120:13  <b>documented</b> [1] - 80:3  <b>documents</b> [3] - 32:10, 73:18, 108:17  <b>done</b> [26] - 20:15, 20:22, 21:5, 50:13, 50:18, 50:21, 57:21, 58:4, 67:23, 71:20, 72:6, 73:12, 73:22, 77:5, 79:2, 83:13, 97:2, 97:7, 98:10, 109:4, 110:1, 113:6, 124:10, 130:25, 131:5, 136:14  <b>done"</b> [1] - 131:7  <b>Donuts</b> [7] - 38:6, 38:12, 103:5, 119:23, 121:6, 124:7, 129:21  <b>door</b> [2] - 86:21, 103:23  <b>DoorDash</b> [1] - 85:24  <b>DOT</b> [1] - 93:20  <b>double</b> [1] - 106:18  <b>down</b> [7] - 23:16, 23:18, 35:3, 78:22, 95:2, 98:5, 119:5  <b>downtowns</b> [1] - 12:20  <b>drink</b> [7] - 42:22, 42:25, 43:25, 44:18, 44:22, 61:25, 62:3  <b>Drive</b> [5] - 35:5, 39:23, 40:15, 40:17, 61:17  <b>drive</b> [109] - 7:8, 7:9, 7:11, 11:13, 11:19, 12:4, 12:6, 15:11, 15:12, 16:5, 17:21, 17:22, 17:23, 17:25, 18:3, 18:4, 18:19, 18:20, 18:22, 18:23, 19:2, 19:4, 19:12, 19:17, 19:21, 19:23, 19:17, 19:21, 19:23, 24:2, 25:2, 27:16, 34:25, 35:5, 35:16, 36:15, 36:17, 36:19, 36:24, 37:8, 39:11, 39:21, 40:14, 41:3, 41:13, 42:5, 42:17, 42:19, 43:8, 43:11, 43:17, 43:18, 44:25, 46:3, 47:1, 47:15, 47:15, 48:19, 49:3, 55:12, 59:12, 59:21, 59:25, 59:25, 60:10, 61:22, 62:21, 63:6, 85:2, 85:4, 85:12, 85:14, 85:15, 86:1, 86:18, 86:20, 86:23, 86:25, 87:1, 88:22, 89:5, 90:8, 90:16, 91:4, 91:5, 91:11, 91:14, 91:24, 93:11, 94:4, 94:21, 96:1, 96:23, 97:10, 97:11, 99:10, 102:23, 104:4, 106:13, 106:15, 109:7, 114:20, 116:18  <b>Drive-throughs</b> [1] - 40:15  <b>drive-throughs</b> [10] - 12:6, 24:2, 41:3, 41:13, 63:10, 70:2, 96:13, 97:24, 109:9, 110:17  <b>Drive-Throughs</b> [1] - 61:17  <b>drive-up</b> [4] - 35:5,</p>	<p>86:23, 86:25, 87:1, 88:22, 89:5, 90:8, 90:16, 91:4, 91:5, 91:11, 91:14, 91:24, 93:11, 94:4, 94:21, 96:1, 96:13, 96:23, 97:10, 97:11, 97:24, 99:10, 102:23, 104:4, 106:13, 106:15, 109:7, 109:9, 110:17, 114:20, 116:18, 119:20, 120:3  <b>drive-in</b> [2] - 25:2, 120:3  <b>drive-ins</b> [1] - 119:20  <b>Drive-through</b> [3] - 35:5, 39:23, 40:17  <b>drive-through</b> [90] - 7:8, 7:9, 7:11, 11:13, 11:19, 12:4, 15:11, 15:12, 16:5, 17:21, 17:22, 17:23, 17:25, 18:3, 18:4, 18:19, 18:20, 18:22, 18:23, 19:2, 19:4, 19:12, 19:17, 19:21, 19:23, 27:16, 34:25, 35:16, 36:15, 36:17, 36:19, 36:24, 37:8, 39:11, 39:21, 42:5, 42:17, 42:19, 43:8, 43:11, 43:17, 43:18, 46:3, 47:1, 47:15, 48:19, 49:3, 55:12, 59:12, 59:21, 59:25, 60:10, 61:22, 62:21, 63:6, 85:2, 85:4, 85:12, 85:14, 85:15, 86:1, 86:18, 86:20, 86:23, 86:25, 87:1, 88:22, 89:5, 90:8, 90:16, 91:4, 91:5, 91:11, 91:14, 91:24, 93:11, 94:4, 94:21, 96:1, 96:23, 97:10, 97:11, 99:10, 102:23, 104:4, 106:13, 106:15, 109:7, 114:20, 116:18  <b>Drive-throughs</b> [1] - 40:15  <b>drive-throughs</b> [10] - 12:6, 24:2, 41:3, 41:13, 63:10, 70:2, 96:13, 97:24, 109:9, 110:17  <b>Drive-Throughs</b> [1] - 61:17  <b>drive-up</b> [4] - 35:5,</p>
---	---	---	--	---



25:2, 42:21, 42:25, 43:6, 43:25, 44:17, 44:22, 44:25, 61:24, 62:3, 85:10, 92:1, 104:16 <b>foods</b> [1] - 92:9 <b>foot</b> [2] - 21:10 <b>footage</b> [1] - 89:10 <b>foregoing</b> [1] - 138:6 <b>foresee</b> [1] - 110:3 <b>forget</b> [1] - 111:18 <b>forgot</b> [1] - 6:11 <b>forgotten</b> [1] - 7:3 <b>form</b> [1] - 119:4 <b>FORMICOLA</b> [24] - 1:11, 4:19, 20:15, 20:18, 20:22, 23:13, 24:13, 24:20, 25:7, 25:15, 26:9, 26:19, 68:12, 69:8, 118:14, 127:24, 128:16, 131:10, 131:21, 134:11, 134:15, 134:18, 135:13, 136:21 <b>Formicola</b> [6] - 3:5, 4:18, 68:11, 69:7, 135:12, 136:20 <b>forth</b> [3] - 24:21, 101:11, 138:9 <b>forwarded</b> [1] - 30:3 <b>foundation</b> [1] - 105:19 <b>four</b> [3] - 62:14, 62:15, 135:22 <b>Four/three</b> [1] - 137:8 <b>four/three</b> [1] - 137:11 <b>frame</b> [1] - 64:24 <b>franchise</b> [4] - 83:25, 85:3, 86:16, 86:22 <b>franchises</b> [2] - 85:16, 86:10 <b>frankly</b> [1] - 51:18 <b>freestanding</b> [1] - 85:3 <b>Friendly's</b> [1] - 83:10 <b>front</b> [8] - 23:2, 23:6, 53:20, 71:4, 112:15, 116:9, 123:15, 134:19 <b>frustrated</b> [1] - 16:9 <b>full</b> [1] - 22:12 <b>fully</b> [1] - 118:16 <b>FURTHER</b> [1] - 138:10 <b>furthered</b> [1] - 16:2 <b>future</b> [2] - 10:5, 110:4	<b>gas</b> [2] - 21:23, 22:1 <b>gathered</b> [1] - 80:18 <b>general</b> [11] - 8:25, 9:17, 10:6, 15:3, 15:9, 15:13, 15:15, 21:2, 21:9, 24:2, 132:19 <b>generally</b> [1] - 22:22 <b>generate</b> [2] - 91:6, 91:18 <b>generated</b> [1] - 93:6 <b>generating</b> [1] - 126:7 <b>generation</b> [1] - 91:17 <b>gentleman</b> [1] - 92:7 <b>gentlemen</b> [1] - 98:14 <b>gist</b> [1] - 55:18 <b>given</b> [8] - 30:12, 72:2, 72:23, 100:23, 102:9, 105:15, 116:15, 117:20 <b>Goal</b> [3] - 15:20, 15:21, 15:22 <b>goals</b> [9] - 15:19, 16:1, 16:6, 30:24, 97:22, 98:2, 98:16, 105:11, 105:12 <b>GODWIN</b> [1] - 1:6 <b>Godwin</b> [10] - 15:23, 88:14, 89:7, 89:18, 92:19, 93:11, 94:5, 98:8, 110:3, 115:15 <b>govern</b> [1] - 56:4 <b>governing</b> [29] - 9:21, 10:10, 10:13, 10:20, 11:6, 11:7, 21:24, 22:9, 22:14, 24:10, 24:15, 27:2, 27:7, 40:5, 51:25, 52:9, 52:12, 55:12, 55:24, 56:13, 56:22, 57:4, 57:6, 61:9, 64:4, 74:8, 108:8, 109:3, 109:4 <b>grant</b> [8] - 7:12, 10:19, 12:9, 48:1, 108:24, 110:13, 111:15 <b>granted</b> [2] - 28:25, 34:5 <b>granting</b> [7] - 7:17, 7:18, 11:5, 13:8, 22:19, 23:9, 109:14 <b>granular</b> [1] - 128:10 <b>great</b> [2] - 113:12, 114:2 <b>greenery</b> [1] - 88:19 <b>grocery</b> [1] - 16:22 <b>ground</b> [1] - 125:23 <b>GROUP</b> [1] - 2:7 <b>group</b> [1] - 83:3 <b>Group</b> [1] - 5:21	<b>growth</b> [1] - 10:2 <b>GrubHub</b> [1] - 85:24 <b>guess</b> [1] - 68:3 <b>guide</b> [2] - 10:1 <b>guideline</b> [2] - 21:2, 48:4 <b>guy</b> [1] - 130:15 <b>guys</b> [3] - 10:17, 24:6, 118:25	<b>held</b> [1] - 4:4 <b>help</b> [2] - 23:6, 108:13 <b>helpful</b> [1] - 29:11 <b>hereby</b> [4] - 58:19, 62:18, 63:2, 138:5 <b>herein</b> [1] - 138:9 <b>HERLIHY</b> [69] - 2:2, 18:8, 18:10, 18:15, 19:7, 19:16, 32:13, 32:20, 33:3, 33:7, 39:24, 40:4, 40:8, 40:17, 40:25, 41:16, 45:4, 57:9, 57:17, 58:6, 65:3, 66:13, 67:22, 70:12, 75:18, 76:4, 76:25, 77:13, 77:19, 112:19, 113:1, 113:5, 113:7, 113:11, 116:1, 116:5, 116:11, 117:2, 117:4, 122:3, 123:9, 123:19, 124:14, 124:19, 125:12, 126:1, 126:5, 126:22, 127:4, 127:9, 127:16, 127:23, 128:12, 128:17, 128:23, 129:1, 129:7, 129:12, 130:8, 130:16, 131:8, 132:2, 132:7, 132:12, 132:19, 133:18, 135:3, 136:12, 136:16 <b>Herlihy</b> [2] - 78:7, 135:1 <b>Hills</b> [1] - 2:8 <b>Himeji</b> [3] - 17:10, 28:23, 49:19 <b>history</b> [4] - 93:7, 93:8, 93:10, 130:3 <b>Hm</b> [2] - 45:3, 45:11 <b>hold</b> [3] - 70:12, 71:22, 77:1 <b>holly</b> [1] - 90:10 <b>homework</b> [1] - 100:3 <b>honestly</b> [1] - 72:5 <b>Honor</b> [5] - 75:13, 75:14, 75:15, 78:18, 78:19 <b>hook</b> [1] - 132:3 <b>hopefully</b> [1] - 117:13 <b>hospital</b> [1] - 8:3 <b>hour</b> [1] - 84:17 <b>Hours</b> [1] - 37:2 <b>hours</b> [3] - 37:4, 99:20, 114:17 <b>house</b> [1] - 8:2 <b>hundred</b> [6] - 37:11,	37:13, 37:15, 37:16, 37:19, 37:20 <b>hypothecating</b> [1] - 40:12 <b>hypothesizing</b> [1] - 28:5 <b>hypothetical</b> [1] - 44:19 <b>hypotheticals</b> [1] - 27:2
<b>H</b>				
<b>habits</b> [1] - 85:11 <b>half</b> [3] - 104:18, 113:21, 126:16 <b>half-acre</b> [1] - 104:18 <b>half-built</b> [1] - 126:16 <b>hamburger</b> [1] - 92:12 <b>handicap</b> [1] - 106:21 <b>hands</b> [1] - 12:7 <b>hard</b> [1] - 102:3 <b>harder</b> [1] - 109:21 <b>hardest</b> [1] - 109:19 <b>hardship</b> [1] - 8:22 <b>HARMON</b> [31] - 2:12, 4:16, 4:18, 4:20, 4:22, 4:24, 5:1, 5:3, 5:5, 68:11, 68:13, 68:15, 68:17, 68:19, 68:21, 68:23, 69:7, 69:9, 69:11, 69:13, 69:15, 69:17, 69:19, 135:12, 136:20, 136:22, 136:24, 137:1, 137:3, 137:5, 137:7 <b>head</b> [1] - 102:16 <b>headlights</b> [2] - 90:15, 90:19 <b>health</b> [5] - 12:15, 12:16, 12:17, 13:20, 132:20 <b>hear</b> [8] - 8:11, 14:15, 25:25, 87:3, 104:22, 115:7, 125:1, 131:14 <b>heard</b> [14] - 14:15, 14:17, 85:4, 85:5, 88:2, 91:12, 92:25, 96:6, 98:10, 101:21, 104:12, 104:20, 105:10, 117:15 <b>hearing</b> [4] - 5:9, 11:9, 84:23, 106:23 <b>hearings</b> [4] - 5:7, 81:13, 81:16, 113:23 <b>hears</b> [1] - 23:10 <b>hedge</b> [1] - 90:9 <b>height</b> [3] - 89:15, 89:16, 90:18 <b>Heights</b> [2] - 124:6				
<b>I</b>				
<b>I'm..</b> [1] - 20:17 <b>I-2</b> [1] - 55:17 <b>idea</b> [1] - 122:16 <b>IDENT/EVID</b> [1] - 3:13 <b>identical</b> [1] - 50:3 <b>identification</b> [5] - 74:22, 74:25, 75:3, 75:5, 75:7 <b>if..</b> [1] - 132:5 <b>imagine</b> [1] - 93:6 <b>immediately</b> [3] - 36:20, 64:5, 120:8 <b>impact</b> [6] - 12:10, 17:2, 48:25, 91:7, 91:21, 94:4 <b>impairment</b> [1] - 7:23 <b>implies</b> [1] - 9:23 <b>importance</b> [1] - 42:2 <b>important</b> [13] - 10:11, 13:5, 17:22, 82:19, 82:21, 83:16, 84:12, 84:25, 85:1, 85:18, 87:21, 89:3, 95:22 <b>impose</b> [3] - 80:24, 113:18, 114:9 <b>imposed</b> [1] - 81:20 <b>improper</b> [1] - 63:16 <b>improved</b> [1] - 90:18 <b>IN</b> [1] - 1:3 <b>inadvertently</b> [1] - 46:15 <b>incentive</b> [1] - 132:5 <b>include</b> [2] - 28:14, 63:12 <b>included</b> [2] - 13:17, 13:25 <b>including</b> [5] - 28:23, 71:23, 98:3, 105:25, 124:3 <b>inconsistencies</b> [1] - 70:9 <b>inconsistency</b> [2] - 58:20, 59:2 <b>Inconsistent</b> [3] - 56:17, 58:16, 63:22 <b>inconsistent</b> [12] - 8:7, 22:4, 22:10,				
<b>G</b>				
<b>Gary</b> [1] - 90:23				

22:15, 56:18, 56:20, 58:18, 59:7, 59:10, 59:17, 65:21, 71:13 <b>increasing</b> [2] - 88:19, 90:8 <b>incredible</b> [1] - 107:13 <b>indicated</b> [3] - 80:17, 107:8, 115:12 <b>indicates</b> [4] - 24:4, 29:17, 53:4, 81:23 <b>individual</b> [1] - 131:22 <b>indulge</b> [1] - 82:13 <b>industrial</b> [2] - 30:17, 55:17 <b>industry</b> [2] - 83:2, 91:17 <b>information</b> [3] - 82:1, 82:15, 119:1 <b>ingress</b> [1] - 97:6 <b>inherent</b> [1] - 11:18 <b>inherently</b> [4] - 8:1, 8:3, 8:18, 8:19 <b>innocuous</b> [1] - 91:22 <b>inside</b> [1] - 106:17 <b>insisting</b> [1] - 27:9 <b>instance</b> [1] - 105:18 <b>instead</b> [1] - 130:14 <b>insulting</b> [1] - 107:25 <b>integral</b> [1] - 97:12 <b>intended</b> [8] - 10:1, 11:19, 42:25, 44:22, 45:6, 62:3, 62:6, 94:16 <b>intent</b> [11] - 7:23, 8:7, 10:24, 11:17, 12:8, 14:8, 29:1, 40:13, 45:5, 46:1 <b>intentionally</b> [1] - 46:14 <b>interested</b> [1] - 138:14 <b>interior</b> [1] - 128:5 <b>internal</b> [2] - 96:20, 104:17 <b>interpret</b> [1] - 131:22 <b>interpretation</b> [3] - 20:25, 38:2, 46:2 <b>interpreted</b> [2] - 38:6, 38:7 <b>interrupt</b> [1] - 46:7 <b>introduce</b> [3] - 21:25, 82:2, 103:8 <b>introduced</b> [3] - 51:22, 51:25, 81:25 <b>introduction</b> [4] - 28:10, 29:18, 31:8, 32:8 <b>involved</b> [5] - 23:20, 27:24, 83:7, 92:8, 107:21 <b>involving</b> [1] - 12:12	<b>irrelevant</b> [1] - 65:3 <b>issued</b> [3] - 128:20, 128:25, 129:2 <b>issues</b> [4] - 48:24, 124:25, 125:5, 125:8 <b>ITE</b> [2] - 92:3, 93:19 <b>Item</b> [3] - 36:14, 37:7 <b>items</b> [2] - 12:12, 70:4 <b>itself</b> [7] - 17:11, 36:18, 36:19, 37:1, 51:12, 99:15, 106:20	<b>labeled</b> [1] - 61:12 <b>lack</b> [1] - 71:13 <b>lacks</b> [2] - 46:22, 65:23 <b>ladies</b> [1] - 98:14 <b>Land</b> [7] - 7:19, 22:8, 56:19, 77:25, 102:6, 104:24, 109:20 <b>land</b> [4] - 10:14, 12:13, 95:21, 118:21 <b>landlord</b> [2] - 127:20, 130:13 <b>landscaping</b> [1] - 90:7 <b>lane</b> [17] - 45:1, 86:7, 106:15, 106:18, 106:25, 107:1, 107:2, 107:3, 111:3, 111:5, 115:12, 116:1, 116:12, 116:13, 116:17, 116:18, 116:24 <b>lanes</b> [5] - 60:10, 115:13, 115:17, 116:4, 117:9 <b>language</b> [4] - 45:6, 49:1, 58:21, 81:6 <b>Lapatka</b> [1] - 88:7 <b>large</b> [1] - 104:3 <b>largest</b> [1] - 95:23 <b>last</b> [18] - 6:8, 13:1, 16:7, 17:14, 19:10, 27:1, 27:22, 35:3, 42:7, 43:3, 43:11, 78:24, 79:5, 79:20, 80:15, 107:21, 123:15, 136:11 <b>Last</b> [1] - 6:19 <b>lasts</b> [1] - 84:16 <b>latch</b> [1] - 102:18 <b>late</b> [1] - 110:10 <b>laughing</b> [1] - 39:5 <b>LAURA</b> [1] - 1:21 <b>lauraACarucci @ gmail.com</b> [1] - 1:24 <b>law</b> [6] - 63:20, 100:11, 108:25, 116:20, 118:8, 118:25 <b>Law</b> [8] - 5:21, 7:19, 22:8, 56:19, 77:25, 102:6, 104:24, 109:20 <b>LAW</b> [1] - 2:7 <b>laws</b> [1] - 70:5 <b>laying</b> [1] - 41:6 <b>leases</b> [1] - 126:8 <b>least</b> [1] - 52:12 <b>leave</b> [1] - 84:5 <b>Leave</b> [1] - 63:19 <b>leaving</b> [1] - 98:5	<b>left</b> [2] - 14:3, 46:1 <b>legal</b> [4] - 64:12, 64:15, 82:24, 108:10 <b>legally</b> [1] - 126:18 <b>lends</b> [1] - 17:11 <b>length</b> [1] - 37:9 <b>LES</b> [1] - 1:9 <b>less</b> [1] - 92:4 <b>letter</b> [4] - 30:21, 31:3, 54:23, 108:18 <b>level</b> [1] - 120:22 <b>Liepins</b> [1] - 94:10 <b>life</b> [1] - 74:13 <b>light</b> [2] - 15:4, 18:11 <b>lighting</b> [1] - 95:9 <b>lights</b> [3] - 19:19, 25:11, 90:19 <b>limited</b> [2] - 37:5, 92:5 <b>LINDA</b> [1] - 2:2 <b>Linda</b> [2] - 47:7, 127:22 <b>line</b> [9] - 23:16, 23:19, 41:15, 71:16, 81:6, 103:12, 108:6, 116:14, 116:15 <b>lines</b> [2] - 46:8, 90:6 <b>list</b> [5] - 72:9, 72:21, 72:22, 79:9, 79:10 <b>listed</b> [1] - 35:10 <b>listen</b> [4] - 77:18, 100:2, 125:2, 132:12 <b>listened</b> [3] - 30:5, 93:2, 135:10 <b>lists</b> [1] - 71:10 <b>litmus</b> [1] - 102:5 <b>live</b> [2] - 119:5, 125:2 <b>LLC</b> [3] - 1:5, 5:17, 107:11 <b>LLP</b> [1] - 2:7 <b>located</b> [1] - 36:15 <b>location</b> [9] - 9:6, 16:17, 83:25, 84:10, 87:15, 89:20, 94:12, 98:24, 120:17 <b>locations</b> [4] - 35:6, 43:19, 83:15, 87:18 <b>lock</b> [1] - 84:13 <b>logistics</b> [1] - 86:3 <b>long-term</b> [1] - 9:25 <b>Look</b> [1] - 119:1 <b>look</b> [39] - 9:5, 9:8, 10:23, 12:8, 12:10, 12:23, 15:14, 15:16, 29:21, 29:23, 34:3, 34:9, 49:13, 51:23, 53:15, 54:4, 54:11, 57:7, 58:14, 80:10, 81:2, 95:22, 99:25, 102:3, 102:7, 102:8, 102:11, 102:24,	102:25, 103:1, 103:10, 103:20, 104:5, 104:6, 105:14, 111:13, 111:17, 111:20, 118:20 <b>looked</b> [13] - 20:8, 31:7, 40:11, 51:20, 54:7, 79:16, 81:10, 87:19, 93:19, 93:20, 105:4, 118:21 <b>looking</b> [11] - 6:25, 9:2, 14:25, 27:24, 29:9, 54:25, 71:14, 103:17, 104:2, 118:1, 122:20 <b>looks</b> [1] - 73:22 <b>lose</b> [1] - 48:3 <b>LOT</b> [1] - 1:6 <b>loud</b> [1] - 60:19				
<b>J</b>								
<b>Jag</b> [1] - 5:7 <b>JAMES</b> [1] - 1:13 <b>January</b> [1] - 67:20 <b>JERSEY</b> [1] - 1:23 <b>Jersey</b> [4] - 2:5, 2:8, 6:15, 138:4 <b>JESSICA</b> [1] - 2:12 <b>Jim</b> [1] - 66:14 <b>job</b> [2] - 100:23, 117:16 <b>Joe</b> [1] - 134:21 <b>JOSEPH</b> [1] - 1:16 <b>judge</b> [1] - 65:9 <b>judged</b> [1] - 104:1 <b>judges</b> [1] - 59:16 <b>judgment</b> [2] - 119:13, 119:19 <b>judicial</b> [3] - 73:17, 107:10, 108:2 <b>June</b> [2] - 94:7 <b>junipers</b> [1] - 90:11 <b>justification</b> [2] - 12:1, 13:8 <b>justify</b> [1] - 132:6	<b>M</b>							
<b>K</b>								
<b>Keep</b> [1] - 46:12 <b>keep</b> [4] - 62:8, 63:25, 115:4, 127:12 <b>keeps</b> [1] - 123:4 <b>key</b> [1] - 84:13 <b>kids</b> [1] - 122:12 <b>kind</b> [3] - 18:3, 43:5, 46:1 <b>King</b> [1] - 122:15 <b>knocked</b> [1] - 86:21 <b>knowing</b> [2] - 48:23, 87:22 <b>known</b> [1] - 10:10 <b>knows</b> [2] - 109:3, 127:21	<b>L</b>							
<b>L</b>								
<b>L.L.C</b> [1] - 1:21								

<p><b>matched</b> <sup>[1]</sup> - 81:10</p> <p><b>materials</b> <sup>[3]</sup> - 73:10, 122:19, 123:22</p> <p><b>MATTER</b> <sup>[1]</sup> - 1:3</p> <p><b>matter</b> <sup>[5]</sup> - 12:6, 71:25, 81:3, 95:11, 137:14</p> <p><b>Matthew</b> <sup>[1]</sup> - 95:14</p> <p><b>maximum</b> <sup>[2]</sup> - 84:3, 86:6</p> <p><b>Mayor</b> <sup>[24]</sup> - 3:17, 10:11, 30:22, 31:9, 31:24, 32:4, 32:9, 47:3, 48:15, 49:11, 49:12, 52:20, 53:14, 66:6, 72:1, 75:1, 91:13, 97:1, 104:7, 117:21, 120:1, 120:7, 120:19, 121:14</p> <p><b>McDonnell</b> <sup>[2]</sup> - 2:4, 5:16</p> <p><b>mean</b> <sup>[18]</sup> - 24:25, 25:5, 35:25, 37:25, 77:1, 96:20, 107:23, 108:23, 111:15, 119:9, 120:14, 121:7, 121:12, 128:13, 131:7, 132:18, 132:20, 132:24</p> <p><b>means</b> <sup>[3]</sup> - 8:13, 21:19, 63:19</p> <p><b>meant</b> <sup>[1]</sup> - 67:6</p> <p><b>meantime</b> <sup>[1]</sup> - 130:5</p> <p><b>measured</b> <sup>[2]</sup> - 36:23, 36:25</p> <p><b>measuring</b> <sup>[2]</sup> - 38:23, 41:19</p> <p><b>Medici</b> <sup>[10]</sup> - 12:15, 28:17, 28:22, 34:5, 47:10, 49:1, 49:19, 96:4, 96:5, 96:8</p> <p><b>medium</b> <sup>[1]</sup> - 132:11</p> <p><b>meet</b> <sup>[7]</sup> - 35:13, 36:4, 44:10, 97:15, 101:19, 103:22, 104:24</p> <p><b>meeting</b> <sup>[28]</sup> - 4:1, 4:3, 4:5, 4:7, 6:8, 19:11, 30:6, 31:21, 31:25, 42:7, 43:3, 43:11, 51:11, 51:16, 52:9, 53:14, 53:22, 54:2, 54:10, 57:5, 57:20, 68:1, 78:24, 78:25, 79:6, 79:13, 79:25, 136:11</p> <p><b>meetings</b> <sup>[8]</sup> - 72:16, 75:24, 78:24, 99:7,</p>	<p>99:8, 110:24, 113:19, 136:2</p> <p><b>Meetings</b> <sup>[1]</sup> - 4:12</p> <p><b>meets</b> <sup>[4]</sup> - 30:1, 30:22, 88:25, 97:5</p> <p><b>member</b> <sup>[3]</sup> - 85:9, 121:10, 121:13</p> <p><b>MEMBER</b> <sup>[6]</sup> - 1:12, 1:13, 1:14, 1:15, 1:16, 1:17</p> <p><b>Members</b> <sup>[3]</sup> - 5:14, 32:4, 106:6</p> <p><b>members</b> <sup>[4]</sup> - 14:16, 20:4, 84:22, 102:2</p> <p><b>membership</b> <sup>[1]</sup> - 22:13</p> <p><b>memory</b> <sup>[1]</sup> - 7:2</p> <p><b>mentioned</b> <sup>[2]</sup> - 46:19, 114:14</p> <p><b>menu</b> <sup>[5]</sup> - 19:11, 19:13, 19:18, 89:2, 92:5</p> <p><b>merchandise</b> <sup>[1]</sup> - 84:14</p> <p><b>merely</b> <sup>[1]</sup> - 106:14</p> <p><b>merit</b> <sup>[1]</sup> - 104:1</p> <p><b>merits</b> <sup>[1]</sup> - 105:17</p> <p><b>messing</b> <sup>[1]</sup> - 76:14</p> <p><b>met</b> <sup>[8]</sup> - 21:1, 46:5, 97:23, 98:24, 102:12, 105:11, 105:13, 122:17</p> <p><b>Mexican</b> <sup>[3]</sup> - 92:4, 93:23, 104:16</p> <p><b>Mexican-style</b> <sup>[1]</sup> - 93:23</p> <p><b>Mexican-themed</b> <sup>[1]</sup> - 92:4</p> <p><b>MHF</b> <sup>[2]</sup> - 1:5, 5:17</p> <p><b>Midland</b> <sup>[15]</sup> - 5:17, 27:15, 52:12, 52:20, 61:16, 71:1, 83:10, 83:23, 97:11, 97:24, 100:7, 102:23, 121:11, 122:12, 124:6</p> <p><b>MIDLAND</b> <sup>[2]</sup> - 1:1, 1:5</p> <p><b>midnight</b> <sup>[3]</sup> - 37:6, 84:1, 114:20</p> <p><b>might</b> <sup>[12]</sup> - 22:24, 23:6, 25:20, 28:4, 44:13, 76:22, 80:24, 92:11, 114:11, 117:4, 130:8</p> <p><b>mind</b> <sup>[4]</sup> - 82:16, 96:12, 115:4, 116:16</p> <p><b>minimis</b> <sup>[1]</sup> - 91:19</p> <p><b>minimum</b> <sup>[3]</sup> - 36:15, 37:9, 92:1</p> <p><b>minute</b> <sup>[4]</sup> - 33:11,</p>	<p>86:13, 130:19, 135:14</p> <p><b>Minutes</b> <sup>[2]</sup> - 3:17, 75:1</p> <p><b>minutes</b> <sup>[28]</sup> - 31:21, 32:2, 32:9, 32:15, 53:13, 53:21, 54:1, 54:5, 54:11, 54:16, 57:3, 57:6, 58:1, 60:17, 60:25, 61:9, 69:23, 73:22, 73:23, 74:1, 74:4, 74:8, 75:25, 76:1, 84:17, 86:14, 136:11</p> <p><b>miss</b> <sup>[1]</sup> - 78:5</p> <p><b>missed</b> <sup>[5]</sup> - 14:22, 19:6, 20:2, 40:5, 136:15</p> <p><b>Missey</b> <sup>[4]</sup> - 88:3, 95:10, 96:15</p> <p><b>missing</b> <sup>[2]</sup> - 80:23, 81:11</p> <p><b>misspoke</b> <sup>[1]</sup> - 115:19</p> <p><b>mistake</b> <sup>[1]</sup> - 53:7</p> <p><b>modified</b> <sup>[1]</sup> - 40:2</p> <p><b>modify</b> <sup>[1]</sup> - 56:1</p> <p><b>moment</b> <sup>[3]</sup> - 102:15, 111:12, 111:19</p> <p><b>monitor</b> <sup>[1]</sup> - 122:23</p> <p><b>month</b> <sup>[1]</sup> - 128:24</p> <p><b>months</b> <sup>[4]</sup> - 64:5, 109:23, 128:20, 129:1</p> <p><b>most</b> <sup>[4]</sup> - 13:5, 55:9, 92:17, 105:24</p> <p><b>mostly</b> <sup>[1]</sup> - 30:15</p> <p><b>motion</b> <sup>[9]</sup> - 68:8, 69:4, 134:5, 134:9, 134:12, 134:18, 135:16, 135:19</p> <p><b>motorcycle</b> <sup>[2]</sup> - 44:4, 44:9</p> <p><b>motorists</b> <sup>[1]</sup> - 94:25</p> <p><b>mouth</b> <sup>[1]</sup> - 18:12</p> <p><b>move</b> <sup>[8]</sup> - 33:1, 37:2, 41:11, 44:15, 53:11, 71:23, 73:1, 78:2</p> <p><b>moved</b> <sup>[2]</sup> - 68:9, 69:5</p> <p><b>movements</b> <sup>[1]</sup> - 15:23</p> <p><b>moving</b> <sup>[1]</sup> - 74:18</p> <p><b>MR</b> <sup>[325]</sup> - 3:8, 4:17, 4:19, 4:23, 4:25, 5:2, 5:4, 5:13, 6:1, 6:6, 6:10, 6:18, 11:23, 13:14, 14:1, 14:13, 14:23, 17:6, 17:16, 18:7, 19:9, 20:7, 20:15, 20:18, 20:22, 21:13, 23:13, 23:16,</p>	<p>23:22, 24:8, 24:13, 24:20, 25:7, 25:15, 26:9, 26:19, 26:23, 27:1, 27:19, 27:21, 28:2, 28:3, 28:7, 28:8, 28:13, 28:16, 28:18, 28:19, 29:6, 29:7, 29:11, 29:14, 29:20, 29:21, 30:2, 30:4, 30:5, 30:7, 30:9, 30:11, 30:13, 30:20, 31:1, 31:5, 31:11, 31:12, 31:15, 31:16, 31:19, 31:20, 31:23, 31:24, 32:6, 32:7, 32:12, 32:17, 33:1, 33:5, 33:8, 34:1, 34:8, 34:9, 34:13, 34:14, 34:15, 34:17, 34:19, 34:21, 34:23, 35:2, 35:8, 35:9, 35:11, 35:12, 35:15, 36:2, 36:13, 36:14, 36:17, 36:19, 36:25, 37:4, 37:11, 37:12, 37:13, 37:14, 37:15, 37:16, 37:19, 37:20, 37:22, 38:2, 38:4, 38:8, 38:16, 38:20, 38:22, 38:24, 39:8, 39:9, 39:14, 39:16, 39:19, 39:23, 40:2, 40:7, 41:4, 41:14, 41:17, 41:21, 42:4, 42:11, 42:12, 42:14, 42:18, 42:20, 43:2, 43:9, 43:10, 43:13, 43:15, 43:20, 43:21, 44:2, 44:3, 44:5, 44:12, 44:14, 44:15, 45:3, 45:5, 45:9, 45:11, 45:12, 45:14, 45:16, 45:22, 45:24, 46:4, 46:11, 47:9, 47:17, 47:24, 49:5, 49:8, 50:7, 50:22, 51:4, 51:8, 51:14, 52:1, 52:5, 52:10, 52:17, 52:22, 52:24, 53:5, 53:9, 53:16, 53:21, 54:7, 54:15, 54:24, 55:2, 55:9, 55:20, 56:5, 56:12, 56:14, 56:18, 56:22, 57:15, 57:22, 58:9, 58:23, 59:3, 59:9, 60:4, 60:6, 60:11, 61:6, 64:12, 64:21, 65:2, 65:20, 66:7, 66:15, 66:21, 67:1, 67:6, 67:7,</p>	<p>67:15, 67:20, 68:9, 68:10, 68:12, 68:14, 68:18, 68:20, 68:22, 69:5, 69:6, 69:8, 69:10, 69:14, 69:16, 69:18, 71:9, 71:21, 74:12, 75:14, 76:3, 77:23, 78:14, 79:19, 80:4, 81:1, 81:22, 82:5, 82:12, 107:19, 107:23, 110:5, 110:21, 111:2, 112:7, 113:3, 113:6, 115:14, 115:19, 115:25, 116:8, 116:20, 116:24, 117:1, 117:3, 117:7, 118:14, 119:12, 120:10, 121:19, 121:22, 122:1, 122:6, 122:24, 123:3, 123:11, 123:20, 124:16, 125:24, 126:4, 126:10, 127:2, 127:5, 127:7, 127:12, 127:14, 127:22, 127:24, 128:1, 128:16, 128:18, 128:24, 129:3, 129:10, 129:14, 129:16, 129:19, 129:20, 129:22, 130:7, 130:13, 130:20, 130:23, 131:4, 131:9, 131:10, 131:14, 131:17, 131:21, 131:25, 132:18, 132:22, 133:10, 133:23, 134:11, 134:15, 134:18, 135:5, 135:8, 135:11, 135:13, 135:14, 135:17, 135:20, 135:24, 136:4, 136:9, 136:13, 136:21, 136:23, 137:2, 137:4, 137:6, 137:13</p> <p><b>MS</b> <sup>[188]</sup> - 3:9, 4:16, 4:18, 4:20, 4:22, 4:24, 5:1, 5:3, 5:5, 5:20, 11:22, 18:8, 18:10, 18:15, 19:7, 19:16, 32:13, 32:19, 32:20, 33:3, 33:7, 33:12, 33:18, 33:23, 33:25, 35:17, 35:20, 36:8, 36:11, 38:9,</p>
--	---	---	--	---

38:12, 39:17, 39:24, 40:4, 40:8, 40:17, 40:25, 41:16, 45:4, 50:11, 50:13, 50:20, 50:23, 51:2, 51:6, 51:9, 51:19, 52:2, 52:7, 52:14, 52:18, 52:23, 53:3, 53:6, 53:10, 53:17, 53:23, 54:9, 54:17, 55:4, 55:10, 55:15, 55:21, 56:7, 56:13, 56:17, 56:21, 56:25, 57:9, 57:12, 57:17, 58:2, 58:6, 58:11, 58:24, 59:4, 59:15, 60:5, 60:7, 60:12, 60:20, 61:1, 61:8, 61:12, 62:11, 62:15, 64:14, 64:19, 64:23, 65:3, 65:5, 65:17, 65:25, 66:10, 66:13, 66:20, 66:23, 67:4, 67:11, 67:18, 67:22, 68:11, 68:13, 68:15, 68:17, 68:19, 68:21, 68:23, 69:7, 69:9, 69:11, 69:13, 69:15, 69:17, 69:19, 70:12, 73:6, 75:8, 75:17, 75:18, 76:4, 76:6, 76:25, 77:12, 77:13, 77:15, 77:19, 77:21, 78:1, 78:11, 78:17, 79:8, 80:6, 80:14, 81:12, 106:5, 107:22, 108:1, 110:7, 110:25, 112:19, 113:1, 113:5, 113:7, 113:11, 116:1, 116:5, 116:11, 117:2, 117:4, 122:3, 123:9, 123:19, 124:14, 124:19, 125:12, 126:1, 126:5, 126:22, 127:4, 127:9, 127:16, 127:23, 128:12, 128:17, 128:23, 129:1, 129:7, 129:12, 130:8, 130:16, 131:8, 132:2, 132:7, 132:12, 132:19, 133:18, 135:3, 135:12, 136:12, 136:16, 136:20, 136:22, 136:24, 137:1, 137:3, 137:5, 137:7 <b>multiple</b> [3] - 26:2,	38:18, 83:15 <b>Multiple</b> [1] - 38:20 <b>municipal</b> [5] - 58:4, 65:13, 94:22, 95:17, 97:15 <b>Municipal</b> [8] - 4:10, 7:19, 22:8, 56:19, 77:25, 102:6, 104:24, 109:20 <b>municipality</b> [4] - 10:4, 22:23, 22:24, 88:7  <b>N</b>  <b>N-O-V-A-K</b> [1] - 6:20 <b>N.J.S.A</b> [3] - 7:5, 34:6, 102:7 <b>name</b> [3] - 6:19, 9:22, 136:8 <b>nauseam</b> [1] - 97:19 <b>nearest</b> [1] - 41:19 <b>nebulous</b> [1] - 45:9 <b>Nebulous</b> [1] - 45:12 <b>necessarily</b> [6] - 9:11, 14:4, 17:8, 24:25, 25:4, 133:7 <b>necessary</b> [4] - 95:7, 95:21, 111:10, 120:22 <b>need</b> [22] - 7:1, 8:5, 9:11, 9:12, 11:4, 17:9, 22:25, 32:22, 43:12, 77:22, 78:17, 89:14, 92:4, 92:15, 94:13, 95:4, 98:22, 104:14, 105:16, 112:12, 112:22, 120:5 <b>needed</b> [2] - 90:3, 120:2 <b>needs</b> [13] - 7:13, 7:16, 7:21, 9:13, 13:2, 17:7, 49:5, 49:9, 56:23, 60:2, 83:22, 93:23, 133:5 <b>negative</b> [14] - 7:14, 7:21, 10:24, 11:3, 12:10, 13:10, 16:12, 94:4, 98:19, 101:4, 101:17, 102:11, 105:14, 105:21 <b>negatives</b> [1] - 98:11 <b>neglect</b> [1] - 14:4 <b>neighborhood</b> [1] - 13:1 <b>never</b> [9] - 6:3, 21:4, 25:1, 65:12, 71:12, 81:7, 87:20, 91:12, 97:23	<b>NEW</b> [1] - 1:23 <b>new</b> [13] - 12:13, 12:20, 79:1, 80:9, 81:25, 86:19, 94:14, 118:3, 118:7, 120:9, 121:3, 130:2, 133:24 <b>New</b> [4] - 2:5, 2:8, 6:15, 138:4 <b>news</b> [1] - 84:25 <b>News</b> [1] - 4:8 <b>newspaper</b> [1] - 76:19 <b>next</b> [5] - 23:5, 87:10, 90:22, 99:22, 122:4 <b>nice</b> [1] - 104:21 <b>NICK</b> [1] - 1:10 <b>Nick</b> [2] - 46:23, 120:18 <b>Nick's</b> [1] - 118:15 <b>night</b> [1] - 31:13 <b>NJ</b> [1] - 93:20 <b>NO</b> [1] - 3:13 <b>nobody</b> [5] - 66:17, 66:18, 67:2, 67:3, 68:7 <b>noise</b> [1] - 19:19 <b>noncertified</b> [1] - 53:8 <b>nonconforming</b> [3] - 88:10, 89:8, 132:25 <b>nonconformities</b> [2] - 88:12, 89:22 <b>nonconformity</b> [2] - 89:20, 89:24 <b>none</b> [4] - 32:2, 69:3, 81:11, 101:1 <b>normally</b> [1] - 79:2 <b>northeast</b> [1] - 90:9 <b>note</b> [7] - 26:6, 52:3, 52:5, 52:8, 64:3, 65:6, 129:12 <b>noted</b> [1] - 137:15 <b>notes</b> [4] - 14:25, 81:2, 81:8, 81:9 <b>nothing</b> [4] - 31:4, 84:18, 105:12, 124:10 <b>Nothing</b> [4] - 26:4, 31:1, 60:13, 134:8 <b>notice</b> [8] - 4:5, 4:6, 4:9, 4:11, 73:17, 77:7, 107:10, 108:2 <b>NOVAK</b> [102] - 2:13, 3:3, 6:10, 6:18, 11:23, 13:14, 14:1, 14:13, 14:23, 17:6, 17:16, 18:7, 19:9, 21:13, 23:16, 23:22, 24:8, 27:19, 28:2, 28:7, 28:13, 28:18, 29:6, 29:11, 29:20, 30:2, 30:5, 30:9,	30:13, 31:1, 31:11, 31:15, 31:19, 31:23, 32:6, 32:12, 34:8, 34:13, 34:15, 34:19, 34:23, 35:8, 35:11, 35:15, 36:14, 36:19, 37:4, 37:12, 37:14, 37:16, 37:20, 38:2, 38:8, 38:20, 38:24, 39:9, 39:16, 42:11, 42:14, 42:20, 43:9, 43:13, 43:20, 44:2, 44:5, 44:14, 45:3, 45:5, 45:11, 45:14, 45:22, 51:4, 51:8, 51:14, 52:1, 52:5, 52:22, 53:9, 53:16, 54:7, 54:15, 54:24, 55:9, 55:20, 56:5, 56:12, 56:14, 56:18, 56:22, 58:23, 59:3, 59:9, 60:4, 60:6, 60:11, 64:21, 65:2, 116:24, 117:3, 132:18, 132:22, 133:23 <b>Novak</b> [14] - 6:19, 20:13, 26:24, 36:13, 47:19, 51:3, 64:8, 65:24, 66:9, 66:10, 68:3, 69:1, 97:13, 101:12 <b>nowhere</b> [1] - 51:7 <b>Number</b> [4] - 11:11, 62:11, 70:16, 70:24 <b>number</b> [13] - 12:4, 12:11, 52:16, 70:14, 74:11, 81:5, 81:6, 85:5, 89:3, 93:1, 93:12, 97:21, 113:24 <b>numbers</b> [2] - 74:18, 93:20 <b>numerous</b> [1] - 81:16  <b>O</b>  <b>o'clock</b> [2] - 37:5, 114:24 <b>oaths</b> [1] - 138:5 <b>object</b> [4] - 33:13, 79:12, 79:22, 107:19 <b>objected</b> [1] - 99:21 <b>Objection</b> [3] - 35:17, 35:20, 38:9 <b>objection</b> [12] - 32:19, 33:16, 35:19, 36:10, 73:4, 73:9, 74:1, 75:19, 76:3, 76:22, 77:2, 80:22 <b>objectionable</b> [3] -	19:22, 64:16, 99:11 <b>objections</b> [4] - 100:13, 100:14, 100:15, 101:22 <b>objective</b> [1] - 24:1 <b>objector</b> [6] - 5:22, 100:6, 100:8, 105:1, 106:7 <b>Objector</b> [1] - 2:8 <b>objector's</b> [2] - 33:4, 99:6 <b>obligated</b> [2] - 47:7, 47:10 <b>obviously</b> [1] - 123:5 <b>Obviously</b> [1] - 33:20 <b>occasions</b> [1] - 113:24 <b>Occupancy</b> [1] - 130:10 <b>occur</b> [6] - 10:7, 10:8, 42:25, 44:22, 45:6, 62:3 <b>October</b> [15] - 3:16, 3:17, 4:4, 11:12, 54:8, 55:5, 55:6, 57:6, 61:9, 64:7, 73:21, 74:9, 74:23, 75:2, 75:10 <b>OCTOBER</b> [1] - 1:2 <b>OF</b> [5] - 1:1, 1:1, 1:3, 1:4 <b>offer</b> [1] - 21:16 <b>officer</b> [1] - 120:1 <b>official</b> [1] - 74:1 <b>often</b> [2] - 13:19, 29:11 <b>oftentimes</b> [1] - 8:10 <b>old</b> [4] - 109:1, 109:23, 109:24, 129:21 <b>older</b> [2] - 12:16, 12:21 <b>Once</b> [1] - 42:14 <b>One</b> [7] - 8:21, 12:12, 16:7, 16:12, 27:1, 72:14, 107:20 <b>one</b> [53] - 13:21, 14:19, 15:15, 16:13, 17:15, 20:21, 37:11, 37:13, 37:15, 37:16, 37:19, 37:20, 38:23, 39:1, 39:4, 39:20, 40:10, 41:8, 41:20, 51:5, 51:17, 51:24, 58:1, 71:24, 74:14, 91:4, 93:3, 94:19, 96:24, 98:22, 99:16, 103:12, 104:19, 105:16, 106:21, 106:25, 108:14, 109:10, 113:21,
---	---	---	---	--

<p>114:11, 116:1, 116:6, 116:7, 116:9, 118:9, 121:2, 121:25, 123:6, 124:22, 129:18, 130:7, 134:9, 135:22 <b>one's</b> [1] - 7:25 <b>one-and-a-half</b> [1] - 113:21 <b>one-hundred-eighty</b> [1] - 37:15 <b>one-hundred-fifty</b> [3] - 37:11, 37:13, 37:16 <b>one-hundred-fifty-</b> <b>three</b> [2] - 37:19, 37:20 <b>ones</b> [1] - 39:12 <b>onsite</b> [2] - 126:7, 133:21 <b>open</b> [7] - 15:4, 34:20, 46:1, 68:4, 99:20, 103:23, 124:24 <b>Open</b> [2] - 4:12, 113:3 <b>opened</b> [2] - 33:6, 36:3 <b>opening</b> [1] - 39:6 <b>operate</b> [1] - 84:1 <b>operated</b> [1] - 83:15 <b>operation</b> [4] - 37:2, 37:5, 83:20, 114:18 <b>operational</b> [3] - 87:22, 87:25, 92:7 <b>operations</b> [3] - 83:14, 83:18, 85:24 <b>opine</b> [1] - 36:4 <b>opined</b> [2] - 96:22, 98:20 <b>opinion</b> [6] - 36:7, 91:20, 118:15, 119:4, 119:15, 123:1 <b>opinions</b> [3] - 7:25, 117:12, 117:15 <b>opportunity</b> [5] - 6:3, 29:15, 76:22, 77:1, 106:9 <b>oppose</b> [1] - 64:10 <b>opposed</b> [4] - 13:24, 14:3, 18:3, 116:17 <b>opposing</b> [1] - 72:23 <b>or..</b> [1] - 44:9 <b>ordained</b> [1] - 61:18 <b>Order</b> [1] - 11:10 <b>order</b> [6] - 4:2, 7:12, 31:25, 32:20, 38:3, 127:17 <b>ordered</b> [1] - 52:17 <b>ordering</b> [2] - 35:6, 43:19 <b>Ordinance</b> [14] - 61:13, 61:14, 69:24,</p>	<p>70:16, 70:17, 70:19, 70:21, 70:22, 70:24, 71:2, 71:5, 71:7, 71:9 <b>ordinance</b> [137] - 11:2, 11:15, 11:17, 11:18, 12:22, 13:2, 13:3, 13:9, 14:3, 14:6, 19:16, 21:20, 21:25, 22:2, 22:7, 22:11, 23:19, 23:21, 24:1, 26:3, 26:8, 26:15, 26:17, 27:3, 27:10, 27:24, 28:1, 28:6, 28:11, 29:2, 29:5, 29:9, 29:19, 30:17, 31:8, 31:21, 31:25, 32:5, 32:11, 34:10, 36:5, 39:14, 39:18, 39:19, 39:22, 40:10, 40:19, 40:21, 42:7, 44:7, 45:20, 45:23, 46:5, 46:21, 46:24, 47:6, 47:8, 47:12, 47:21, 48:3, 48:5, 48:10, 48:18, 49:2, 49:3, 49:15, 49:21, 49:23, 51:12, 51:14, 54:3, 54:13, 56:16, 56:24, 58:12, 58:15, 58:19, 59:10, 60:9, 60:21, 60:23, 60:24, 61:4, 61:6, 61:10, 62:18, 64:10, 64:24, 65:7, 65:22, 66:5, 66:17, 67:10, 67:16, 69:25, 70:14, 70:17, 70:18, 70:25, 71:3, 71:6, 71:8, 72:4, 84:19, 85:14, 85:17, 86:16, 88:25, 95:13, 102:17, 102:20, 102:22, 103:1, 103:8, 108:14, 108:21, 109:12, 109:21, 111:3, 111:10, 114:1, 114:3, 114:19, 114:22, 115:20, 115:21, 117:22, 118:8, 119:14, 119:25, 120:5, 120:9, 121:4, 121:8 <b>ordinances</b> [19] - 12:17, 22:15, 28:10, 51:7, 51:10, 58:16, 58:17, 58:22, 58:25, 59:6, 59:8, 63:12, 63:22, 63:24, 64:1, 70:10, 71:12, 71:15 <b>otherwise</b> [1] - 97:10</p>	<p><b>outdoor</b> [2] - 35:6, 43:18 <b>outlaw</b> [1] - 40:13 <b>outline</b> [4] - 72:11, 74:17, 79:3, 80:5 <b>Outline</b> [2] - 3:18, 75:4 <b>outlines</b> [1] - 10:3 <b>outside</b> [6] - 42:23, 44:10, 44:20, 62:1, 108:13, 116:24 <b>outstanding</b> [3] - 124:24, 125:7, 125:8 <b>outweigh</b> [1] - 99:1 <b>overall</b> [2] - 91:20, 92:18 <b>overburdened</b> [1] - 96:25 <b>overcrowded</b> [1] - 106:15 <b>overlap</b> [1] - 84:3 <b>overturned</b> [1] - 65:10 <b>overview</b> [1] - 101:8 <b>own</b> [11] - 74:5, 74:7, 74:9, 81:2, 86:5, 87:23, 92:25, 101:19, 104:1, 105:17, 127:2 <b>owner</b> [12] - 8:22, 43:5, 67:8, 84:9, 100:7, 103:23, 125:7, 127:15, 127:17, 127:18, 127:20, 128:22 <b>owns</b> [2] - 127:6, 127:7</p>	<p>62:10, 68:16, 69:12, 69:21, 71:17, 79:7, 79:24, 80:13, 115:9, 115:16, 115:23, 116:3, 117:8, 117:14, 129:25, 136:25 <b>Papapietro</b> [5] - 3:6, 4:20, 68:15, 69:11, 136:24 <b>paper</b> [1] - 81:19 <b>Paragraph</b> [5] - 34:21, 34:23, 62:13, 62:16, 63:2 <b>parameters</b> [1] - 10:6 <b>pardon</b> [1] - 37:7 <b>Pardon</b> [1] - 135:17 <b>park</b> [1] - 87:9 <b>Park</b> [15] - 5:17, 27:15, 52:12, 52:20, 61:16, 71:1, 83:10, 83:23, 97:11, 97:24, 100:7, 102:23, 121:11, 122:12, 124:6 <b>PARK</b> [2] - 1:1, 1:5 <b>Parking</b> [1] - 90:1 <b>parking</b> [8] - 45:2, 87:7, 90:17, 94:22, 106:16, 106:17, 106:19 <b>Parsippany</b> [2] - 2:7, 2:8 <b>Parsippany-Troy</b> [1] - 2:8 <b>part</b> [15] - 13:10, 22:18, 22:19, 23:20, 24:6, 26:2, 32:21, 32:22, 47:10, 60:25, 63:19, 75:11, 95:22, 97:12, 133:8 <b>particular</b> [19] - 8:12, 9:3, 9:4, 9:5, 16:11, 16:17, 23:21, 24:5, 25:19, 60:24, 71:2, 71:6, 71:7, 87:3, 95:13, 106:12, 109:16, 119:4, 126:24 <b>particularly</b> [20] - 8:6, 9:1, 9:7, 9:10, 9:14, 14:17, 16:16, 16:19, 17:22, 48:8, 48:9, 48:22, 87:4, 96:7, 97:20, 102:8, 103:18, 106:13, 111:22, 133:13 <b>parties</b> [1] - 138:12 <b>Partners</b> [1] - 107:11 <b>parts</b> [1] - 58:17 <b>pass</b> [4] - 27:7, 29:25,</p>	<p>93:18, 108:14 <b>pass-by</b> [1] - 93:18 <b>passed</b> [7] - 23:19, 26:10, 49:23, 67:17, 111:5, 117:21, 118:9 <b>Passed</b> [1] - 26:9 <b>passing</b> [3] - 32:4, 32:10, 47:20 <b>past</b> [4] - 102:21, 115:2, 120:19, 121:14 <b>pattern</b> [1] - 12:25 <b>paying</b> [1] - 109:13 <b>people</b> [13] - 19:22, 31:12, 63:24, 85:8, 85:9, 106:16, 106:17, 106:20, 115:8, 118:4, 120:12, 126:7, 126:8 <b>per</b> [4] - 65:21, 84:8, 86:11, 92:7 <b>percent</b> [2] - 85:7, 85:11 <b>perfectly</b> [2] - 108:10, 110:17 <b>Perhaps</b> [1] - 115:19 <b>perhaps</b> [4] - 20:1, 86:6, 92:2, 96:23 <b>period</b> [3] - 64:9, 64:11, 126:24 <b>periodical</b> [1] - 93:22 <b>permissible</b> [1] - 13:17 <b>permit</b> [5] - 125:4, 125:18, 126:25, 130:24, 131:2 <b>permits</b> [8] - 89:3, 128:14, 128:15, 128:19, 128:25, 129:2, 130:2 <b>permitted</b> [22] - 7:6, 12:18, 13:21, 17:1, 17:3, 17:23, 17:25, 22:1, 40:16, 41:3, 43:23, 45:2, 46:16, 59:13, 63:4, 71:10, 71:11, 91:9, 91:10, 95:25, 96:1, 97:5 <b>Permitted</b> [1] - 63:2 <b>person</b> [4] - 44:3, 87:22, 99:7, 127:2 <b>personal</b> [1] - 119:15 <b>perspective</b> [5] - 82:24, 98:22, 100:25, 102:16 <b>persuasive</b> [1] - 14:17 <b>pertaining</b> [3] - 93:17, 99:15, 100:15 <b>pertains</b> [2] - 16:12, 16:13</p>
<b>P</b>				
<p><b>P.E</b> [1] - 2:14 <b>P.M</b> [1] - 1:2 <b>p.m</b> [1] - 137:15 <b>P.O</b> [1] - 1:22 <b>P.P</b> [2] - 2:13, 3:3 <b>page</b> [8] - 52:15, 55:1, 57:7, 58:12, 61:1, 80:20, 81:5 <b>Page</b> [2] - 57:8, 61:8 <b>paint</b> [2] - 12:20, 104:25 <b>paint-and-sip</b> [1] - 12:20 <b>painting</b> [1] - 48:12 <b>pandemic</b> [1] - 85:7 <b>Panning</b> [1] - 55:4 <b>PAPAPIETRO</b> [31] - 1:10, 4:21, 23:14, 23:18, 23:23, 24:9, 24:18, 25:6, 25:13, 25:25, 45:25, 60:14, 60:22, 61:3, 61:11,</p>				

<p><b>pharmacy</b> [2] - 19:2, 39:3</p> <p><b>photocopy</b> [1] - 31:14</p> <p><b>pick</b> [2] - 98:2, 98:11</p> <p><b>picked</b> [2] - 66:1, 66:2</p> <p><b>pickup</b> [1] - 85:25</p> <p><b>picture</b> [2] - 48:12, 104:25</p> <p><b>piece</b> [5] - 23:8, 81:18, 97:4, 103:3, 104:1</p> <p><b>pieces</b> [1] - 104:2</p> <p><b>place</b> [8] - 4:7, 24:10, 38:13, 47:21, 63:20, 101:22, 132:13, 138:8</p> <p><b>placement</b> [1] - 19:13</p> <p><b>places</b> [1] - 25:2</p> <p><b>Placier</b> [4] - 4:22, 68:17, 69:13, 137:1</p> <p><b>PLACIER</b> [8] - 1:14, 4:23, 68:10, 68:18, 69:5, 69:14, 129:20, 137:2</p> <p><b>placing</b> [1] - 38:3</p> <p><b>Plan</b> [37] - 8:8, 9:24, 10:5, 10:13, 10:21, 15:16, 15:19, 15:25, 16:1, 20:25, 21:21, 21:22, 22:4, 22:7, 22:16, 23:25, 27:4, 27:15, 27:16, 30:1, 30:23, 30:25, 54:13, 56:19, 97:16, 97:22, 97:23, 97:25, 98:3, 98:11, 98:12, 98:13, 101:23, 105:11, 108:17, 109:14, 111:22</p> <p><b>plan</b> [6] - 7:24, 10:25, 14:9, 18:6, 87:25, 125:20</p> <p><b>Planner</b> [1] - 2:13</p> <p><b>planner</b> [30] - 6:3, 14:22, 14:23, 15:9, 15:18, 17:18, 17:20, 27:14, 27:24, 28:17, 29:7, 35:21, 36:2, 36:3, 82:2, 82:3, 89:1, 95:15, 95:17, 99:6, 100:17, 101:22, 103:10, 103:13, 105:6, 105:7, 108:11, 108:12, 109:12</p> <p><b>planners</b> [6] - 11:10, 11:15, 14:18, 16:9, 49:13, 101:16</p> <p><b>Planning</b> [19] - 29:22, 29:23, 30:21, 31:6, 32:8, 54:11, 54:23,</p>	<p>55:10, 55:11, 55:18, 56:9, 56:15, 57:24, 74:6, 108:15, 108:16, 111:5, 120:6, 120:8</p> <p><b>planning</b> [32] - 6:21, 9:16, 9:18, 9:20, 9:22, 9:23, 10:9, 10:12, 10:18, 10:21, 18:6, 22:3, 27:4, 47:18, 49:11, 56:1, 57:17, 63:25, 82:23, 88:6, 89:25, 92:22, 95:12, 95:14, 96:11, 98:22, 100:14, 100:24, 101:5, 102:16, 103:9</p> <p><b>Plans</b> [3] - 21:16, 21:17, 28:9</p> <p><b>plans</b> [1] - 94:12</p> <p><b>plantings</b> [1] - 90:18</p> <p><b>plastic</b> [1] - 123:15</p> <p><b>play</b> [4] - 10:11, 24:16, 24:24, 40:3</p> <p><b>playing</b> [1] - 25:7</p> <p><b>Pledge</b> [1] - 4:15</p> <p><b>plenty</b> [2] - 109:18, 110:2</p> <p><b>plus</b> [1] - 134:20</p> <p><b>pneumatic</b> [1] - 116:25</p> <p><b>point</b> [23] - 18:15, 18:17, 32:3, 46:1, 75:21, 76:15, 76:24, 77:22, 78:18, 87:16, 92:14, 96:22, 98:6, 102:5, 108:6, 108:23, 110:8, 116:15, 117:9, 121:9, 122:8, 122:11, 133:19</p> <p><b>points</b> [2] - 93:13, 118:17</p> <p><b>poles</b> [1] - 90:6</p> <p><b>popping</b> [1] - 12:17</p> <p><b>porticos</b> [1] - 118:5</p> <p><b>portion</b> [1] - 127:10</p> <p><b>position</b> [1] - 82:23</p> <p><b>positions</b> [1] - 106:8</p> <p><b>positive</b> [16] - 7:13, 7:15, 14:11, 16:13, 16:14, 89:24, 92:22, 93:12, 97:17, 98:19, 101:4, 101:17, 105:20, 122:9, 130:21, 131:19</p> <p><b>possibility</b> [1] - 45:7</p> <p><b>post</b> [1] - 85:7</p> <p><b>post-pandemic</b> [1] - 85:7</p>	<p><b>posting</b> [1] - 4:9</p> <p><b>potential</b> [3] - 19:13, 94:4, 127:20</p> <p><b>Potentially</b> [1] - 132:22</p> <p><b>potentially</b> [5] - 40:18, 124:9, 130:11, 132:15, 134:1</p> <p><b>power</b> [5] - 10:19, 11:7, 22:8, 22:15, 113:17</p> <p><b>powerful</b> [1] - 10:22</p> <p><b>PP</b> [1] - 6:14</p> <p><b>practical</b> [1] - 105:4</p> <p><b>practicing</b> [1] - 95:15</p> <p><b>precooked</b> [1] - 92:8</p> <p><b>predicated</b> [1] - 123:13</p> <p><b>premises</b> [6] - 43:1, 44:23, 45:1, 45:6, 62:4, 62:6</p> <p><b>prepared</b> [2] - 86:12, 94:12</p> <p><b>prepares</b> [1] - 10:12</p> <p><b>preparing</b> [1] - 30:21</p> <p><b>prerogative</b> [2] - 26:17, 64:10</p> <p><b>present</b> [2] - 52:9, 106:8</p> <p><b>presented</b> [4] - 73:17, 73:18, 78:10, 82:22</p> <p><b>presenting</b> [3] - 79:1, 79:3, 80:9</p> <p><b>presume</b> [2] - 58:13, 133:16</p> <p><b>presupposes</b> [2] - 29:4, 47:12</p> <p><b>pretty</b> [2] - 21:7, 60:8</p> <p><b>prevailed</b> [1] - 119:17</p> <p><b>previously</b> [1] - 6:16</p> <p><b>principal</b> [1] - 7:5</p> <p><b>problem</b> [12] - 17:24, 24:15, 25:23, 49:14, 96:18, 116:22, 118:18, 120:15, 121:12, 121:13, 122:5</p> <p><b>problems</b> [1] - 16:25</p> <p><b>procedure</b> [1] - 76:18</p> <p><b>PROCEEDING</b> [1] - 1:4</p> <p><b>process</b> [4] - 11:10, 12:2, 56:4, 103:17</p> <p><b>produced</b> [1] - 54:19</p> <p><b>product</b> [2] - 10:17, 86:10</p> <p><b>professional</b> [1] - 102:10</p> <p><b>professionals</b> [2] - 94:19, 101:19</p>	<p><b>prohibit</b> [9] - 11:19, 40:14, 47:1, 47:15, 48:19, 49:3, 60:10, 110:17, 117:22</p> <p><b>prohibited</b> [24] - 11:12, 13:18, 13:22, 13:24, 19:17, 35:1, 43:23, 46:3, 46:10, 46:18, 48:6, 55:17, 60:1, 62:22, 63:7, 103:2, 103:12, 104:8, 109:15, 111:14, 120:20, 120:25, 121:15</p> <p><b>prohibiting</b> [2] - 55:12, 102:18</p> <p><b>prohibition</b> [9] - 24:5, 40:1, 40:3, 43:7, 49:10, 49:15, 84:19, 91:11, 111:21</p> <p><b>prohibits</b> [2] - 66:5, 66:6</p> <p><b>projects</b> [1] - 88:7</p> <p><b>proliferation</b> [1] - 12:16</p> <p><b>promote</b> [2] - 132:7, 132:13</p> <p><b>promotes</b> [4] - 15:12, 15:14, 16:6, 132:16</p> <p><b>promoting</b> [2] - 15:5, 133:25</p> <p><b>Promotion</b> [1] - 132:19</p> <p><b>promotion</b> [1] - 15:25</p> <p><b>proof</b> [3] - 8:5, 102:13, 103:22</p> <p><b>proofs</b> [2] - 109:16, 113:8</p> <p><b>proper</b> [1] - 76:18</p> <p><b>properly</b> [4] - 73:10, 73:17, 73:18, 75:23</p> <p><b>properties</b> [2] - 94:5, 97:8</p> <p><b>property</b> [22] - 8:22, 8:23, 23:4, 23:5, 23:8, 67:8, 89:9, 95:13, 95:23, 96:21, 97:4, 97:20, 100:7, 103:3, 103:23, 104:1, 104:3, 109:10, 124:24, 125:7, 125:14, 127:15</p> <p><b>proposed</b> [9] - 8:17, 8:25, 9:1, 9:10, 16:2, 88:16, 89:17, 105:5, 107:6</p> <p><b>proposing</b> [7] - 37:17, 46:9, 46:18, 48:2, 49:22, 90:1, 112:1</p>	<p><b>prospective</b> [1] - 128:21</p> <p><b>protection</b> [1] - 15:22</p> <p><b>prototype</b> [1] - 94:15</p> <p><b>prove</b> [1] - 98:18</p> <p><b>proved</b> [2] - 35:22, 98:19</p> <p><b>proven</b> [1] - 122:11</p> <p><b>provide</b> [7] - 6:23, 54:6, 72:11, 72:18, 97:9, 105:19, 107:2</p> <p><b>Provided</b> [4] - 34:24, 59:24, 62:20, 63:5</p> <p><b>provided</b> [12] - 4:6, 22:16, 32:16, 53:19, 72:22, 82:15, 84:21, 86:24, 91:16, 99:6, 101:20, 107:5</p> <p><b>provides</b> [1] - 91:16</p> <p><b>providing</b> [2] - 27:25, 75:23</p> <p><b>proving</b> [1] - 13:10</p> <p><b>provision</b> [3] - 27:16, 56:16, 59:7</p> <p><b>provisions</b> [1] - 58:18</p> <p><b>public</b> [9] - 4:6, 5:9, 7:22, 8:18, 32:1, 68:4, 68:25, 94:22, 113:3</p> <p><b>Public</b> [2] - 4:12, 5:7</p> <p><b>published</b> [1] - 76:19</p> <p><b>pull</b> [2] - 34:11, 44:24</p> <p><b>pulled</b> [3] - 43:4, 128:16, 128:17</p> <p><b>purpose</b> [45] - 27:9, 27:12, 28:12, 29:1, 29:3, 29:4, 29:10, 29:12, 29:18, 32:10, 34:4, 34:6, 45:18, 46:12, 46:24, 47:12, 47:14, 47:16, 47:18, 47:20, 47:25, 48:3, 48:10, 48:17, 48:18, 49:2, 49:3, 49:18, 51:10, 60:9, 72:4, 91:11, 102:20, 102:22, 102:25, 110:14, 110:15, 110:17, 110:19, 111:9, 111:23, 132:8, 132:14, 132:16, 132:17</p> <p><b>Purpose</b> [4] - 15:2, 15:4, 15:5, 51:13</p> <p><b>PURPOSE</b> [1] - 27:12</p> <p><b>purposes</b> [8] - 7:19, 14:19, 14:24, 15:7, 27:25, 30:11, 72:3, 73:16</p> <p><b>pursuant</b> [2] - 7:4,</p>
--	--	---	---	---



<p>138:5  <b>push</b> [1] - 130:21  <b>put</b> [17] - 18:11, 22:17, 24:10, 24:24, 25:21, 26:3, 27:8, 56:10, 56:23, 72:19, 80:19, 88:1, 90:4, 102:16, 125:22, 126:14, 126:16  <b>putting</b> [5] - 18:12, 90:13, 105:25, 111:12, 111:19</p>	<p><b>Raritan</b> [2] - 107:11  <b>rates</b> [1] - 91:17  <b>rather</b> [1] - 11:2  <b>rationale</b> [2] - 12:1, 56:23  <b>re</b> [1] - 15:17  <b>Re</b> [2] - 15:19, 16:1  <b>re-examination</b> [1] - 15:17  <b>Re-examination</b> [2] - 15:19, 16:1  <b>Rea</b> [2] - 88:13, 89:18  <b>Read</b> [1] - 42:13  <b>read</b> [20] - 6:8, 31:14, 34:22, 39:20, 43:17, 44:16, 55:2, 59:20, 59:22, 60:2, 60:18, 62:19, 63:3, 69:23, 70:13, 79:5, 93:25, 108:4, 110:25, 113:20  <b>reader</b> [1] - 92:16  <b>reading</b> [4] - 57:13, 61:10, 62:9, 71:7  <b>reads</b> [1] - 73:23  <b>ready</b> [1] - 131:11  <b>Reagan</b> [1] - 52:19  <b>real</b> [1] - 83:4  <b>realize</b> [1] - 79:20  <b>really</b> [16] - 9:2, 16:1, 21:4, 26:13, 30:18, 65:3, 70:10, 71:16, 78:18, 78:19, 100:14, 101:1, 104:7, 105:13, 119:18, 120:15  <b>Realty</b> [1] - 50:4  <b>reapplication</b> [1] - 128:19  <b>reason</b> [13] - 8:17, 8:21, 8:24, 16:16, 18:2, 21:11, 23:24, 30:20, 35:19, 70:6, 95:5, 110:9, 111:11  <b>reasonable</b> [7] - 26:7, 26:11, 113:18, 114:9, 114:10, 115:3  <b>reasons</b> [25] - 7:17, 8:11, 8:14, 8:16, 14:13, 15:8, 22:16, 27:9, 27:25, 28:4, 28:6, 30:11, 46:23, 48:9, 48:14, 48:22, 49:23, 56:10, 97:19, 101:16, 102:9, 105:15, 111:17, 120:23, 133:8  <b>rebuttal</b> [1] - 110:21  <b>recap</b> [1] - 6:24  <b>recent</b> [1] - 12:19</p>	<p><b>recently</b> [1] - 66:5  <b>recitation</b> [2] - 4:14, 30:24  <b>recognize</b> [2] - 58:21, 77:24  <b>recognized</b> [4] - 90:23, 91:8, 100:20, 111:4  <b>recognizing</b> [2] - 85:14, 97:23  <b>recommendation</b> [4] - 21:23, 54:12, 55:24, 56:10  <b>recommendations</b> [1] - 55:25  <b>reconcile</b> [1] - 14:8  <b>record</b> [33] - 5:15, 6:19, 22:17, 27:9, 33:12, 33:17, 33:22, 34:22, 36:10, 38:10, 38:14, 42:13, 55:7, 56:11, 56:24, 64:3, 65:6, 65:18, 65:20, 72:1, 72:19, 73:8, 74:2, 75:12, 76:15, 77:22, 79:13, 80:8, 80:10, 94:1, 106:9, 110:6, 115:24  <b>Record</b> [1] - 4:8  <b>recording</b> [6] - 30:6, 57:21, 57:23, 58:6, 67:24, 100:2  <b>records</b> [1] - 22:16  <b>rectify</b> [1] - 115:2  <b>redevelopment</b> [1] - 133:4  <b>reduce</b> [1] - 15:22  <b>reduced</b> [1] - 89:18  <b>reduces</b> [1] - 93:12  <b>reference</b> [1] - 43:14  <b>references</b> [1] - 80:19  <b>referred</b> [2] - 22:2, 123:5  <b>referring</b> [1] - 49:12  <b>reflect</b> [3] - 32:2, 81:5, 110:6  <b>reflects</b> [1] - 28:24  <b>refresh</b> [1] - 7:2  <b>refused</b> [1] - 100:21  <b>regarding</b> [2] - 19:11, 31:7  <b>regardless</b> [2] - 53:10, 118:19  <b>Regardless</b> [1] - 7:25  <b>regards</b> [1] - 84:19  <b>Regulation</b> [1] - 62:16  <b>regulation</b> [2] - 22:25, 29:13  <b>regulations</b> [3] - 10:15, 10:20, 59:12</p>	<p><b>Regulations</b> [1] - 62:12  <b>REINSTEIN</b> [2] - 138:3, 138:24  <b>reiterate</b> [1] - 113:8  <b>reject</b> [1] - 56:1  <b>rejecting</b> [1] - 107:15  <b>relative</b> [2] - 138:11, 138:13  <b>relaxed</b> [1] - 77:24  <b>relief</b> [3] - 7:4, 28:25, 99:3  <b>rely</b> [6] - 30:8, 32:24, 38:8, 44:8, 77:9, 77:17  <b>relying</b> [1] - 77:10  <b>remain</b> [1] - 126:20  <b>remainder</b> [1] - 40:21  <b>remained</b> [1] - 70:4  <b>remember</b> [2] - 16:8, 92:6  <b>Remember</b> [2] - 84:18, 86:18  <b>remind</b> [1] - 106:11  <b>remove</b> [2] - 89:22, 89:23  <b>removed</b> [4] - 70:6, 88:11, 89:20, 122:19  <b>removing</b> [1] - 133:25  <b>repair</b> [1] - 18:4  <b>repeal</b> [3] - 59:7, 59:9, 59:14  <b>repealed</b> [6] - 58:16, 58:19, 59:2, 59:6, 63:22, 109:25  <b>repeat</b> [1] - 64:21  <b>repeated</b> [2] - 58:13, 61:21  <b>replace</b> [3] - 69:25, 70:25, 71:8  <b>Replace</b> [2] - 61:14, 70:22  <b>replacement</b> [1] - 91:4  <b>replacing</b> [1] - 70:20  <b>report</b> [8] - 15:17, 91:16, 92:23, 93:22, 94:2, 94:6, 103:12  <b>Report</b> [2] - 15:20, 16:1  <b>Reporter</b> [2] - 73:13, 138:4  <b>reporter</b> [2] - 58:5, 76:11  <b>REPORTERS</b> [1] - 1:22  <b>represent</b> [1] - 129:23  <b>representing</b> [2] - 5:16, 117:17  <b>reputation</b> [2] - 107:17, 107:24</p>	<p><b>request</b> [4] - 77:3, 99:3, 101:6, 105:22  <b>requested</b> [2] - 28:25, 79:6  <b>requesting</b> [1] - 117:5  <b>requests</b> [2] - 13:20, 118:6  <b>require</b> [2] - 111:3, 115:20  <b>required</b> [11] - 4:12, 62:5, 64:9, 73:13, 89:5, 89:11, 108:20, 125:15, 133:21, 133:22  <b>requirement</b> [5] - 65:14, 108:10, 108:13, 108:14, 110:15  <b>requirements</b> [11] - 30:1, 30:23, 30:25, 36:5, 88:25, 90:1, 97:6, 97:15, 105:20, 112:5, 113:8  <b>requires</b> [3] - 85:15, 96:2, 116:21  <b>research</b> [2] - 72:5, 93:21  <b>resident</b> [1] - 121:11  <b>residential</b> [7] - 21:24, 22:1, 36:16, 36:21, 41:20, 41:22, 88:16  <b>residents</b> [1] - 104:20  <b>resolution</b> [3] - 30:21, 134:5, 136:18  <b>respect</b> [5] - 80:14, 99:16, 106:12, 118:15, 126:2  <b>respectfully</b> [1] - 105:22  <b>respond</b> [1] - 47:9  <b>Response</b> [4] - 26:22, 69:2, 82:9, 134:7  <b>response</b> [1] - 121:5  <b>responses</b> [1] - 21:14  <b>responsible</b> [3] - 9:23, 10:14, 83:4  <b>rest</b> [2] - 47:2, 63:20  <b>Restaurant</b> [1] - 63:2  <b>restaurant</b> [33] - 7:8, 7:10, 7:11, 15:11, 15:12, 16:5, 17:24, 18:2, 18:19, 18:23, 19:4, 19:12, 19:22, 19:23, 38:19, 38:21, 41:8, 42:5, 43:5, 43:11, 59:20, 61:22, 70:1, 83:2, 83:3, 86:25, 91:8, 91:9, 92:1, 93:23, 102:23, 106:19, 110:18</p>
<b>Q</b>				
<p><b>QSR</b> [13] - 83:18, 83:19, 85:2, 85:3, 85:15, 85:17, 86:2, 93:22, 97:9, 97:12, 106:14, 107:3, 107:5  <b>QSRs</b> [6] - 83:7, 91:5, 92:4, 95:25, 97:11, 110:2  <b>qualified</b> [1] - 64:18  <b>qualify</b> [1] - 117:5  <b>questioned</b> [1] - 82:2  <b>questioning</b> [3] - 33:13, 50:14, 66:16  <b>questions</b> [13] - 13:12, 20:5, 20:12, 26:23, 50:19, 51:1, 66:9, 68:5, 68:7, 69:1, 72:18, 100:21, 113:22  <b>Questions</b> [1] - 3:4  <b>queue</b> [8] - 18:22, 19:2, 19:3, 41:25, 92:2, 96:20, 104:10, 104:14  <b>queued</b> [2] - 86:7, 87:20  <b>queueing</b> [4] - 37:9, 41:22, 92:15, 120:11  <b>queues</b> [1] - 19:18  <b>queueing</b> [4] - 86:7, 93:24, 97:6, 104:14  <b>quicker</b> [1] - 92:10  <b>quickly</b> [1] - 110:22  <b>quiet</b> [1] - 136:13  <b>quite</b> [4] - 31:17, 51:17, 99:8, 133:3</p>				
<b>R</b>				
<p><b>R.P.R</b> [1] - 1:21  <b>R.S.41:2-2</b> [1] - 138:5  <b>raised</b> [5] - 84:22, 103:25, 106:22, 107:7, 114:14  <b>Ramsey</b> [1] - 2:5</p>				

<b>Restaurants</b> [8] - 34:24, 42:18, 59:24, 61:17, 62:16, 62:20, 63:3, 63:5 <b>restaurants</b> [25] - 11:13, 11:19, 12:5, 19:17, 24:2, 24:5, 27:17, 34:25, 40:14, 40:18, 40:22, 46:3, 47:2, 47:15, 48:19, 49:4, 55:13, 59:13, 59:25, 60:10, 62:18, 62:21, 63:6, 63:9, 95:25 <b>rested</b> [8] - 35:25, 36:11, 78:23, 78:25, 79:13, 80:8, 81:23 <b>return</b> [1] - 88:14 <b>review</b> [4] - 27:13, 29:15, 55:18, 82:19 <b>revitalization</b> [1] - 98:3 <b>Rich</b> [6] - 20:14, 26:6, 46:20, 118:11, 119:12, 121:2 <b>RICHARD</b> [2] - 1:11, 2:14 <b>Ridgewood</b> [2] - 4:8, 124:5 <b>rightfully</b> [2] - 28:21, 124:1 <b>rise</b> [2] - 4:14, 78:20 <b>RIZZUTO</b> [91] - 2:6, 3:9, 5:20, 11:22, 32:19, 33:12, 33:18, 33:23, 33:25, 35:17, 35:20, 36:8, 36:11, 38:9, 38:12, 39:17, 50:11, 50:13, 50:20, 50:23, 51:2, 51:6, 51:9, 51:19, 52:2, 52:7, 52:14, 52:18, 52:23, 53:3, 53:6, 53:10, 53:17, 53:23, 54:9, 54:17, 55:4, 55:10, 55:15, 55:21, 56:7, 56:13, 56:17, 56:21, 56:25, 57:12, 58:2, 58:11, 58:24, 59:4, 59:15, 60:5, 60:7, 60:12, 60:20, 61:1, 61:8, 61:12, 62:11, 62:15, 64:14, 64:19, 64:23, 65:5, 65:17, 65:25, 66:10, 66:20, 66:23, 67:4, 67:11, 67:18, 73:6, 75:8, 75:17, 76:6, 77:12, 77:15, 77:21, 78:1, 78:11, 78:17, 79:8, 80:6, 80:14, 81:12, 106:5, 107:22, 108:1, 110:7, 110:25 <b>Rizzuto</b> [5] - 3:4, 5:21, 70:8, 73:3, 106:3 <b>road</b> [2] - 10:3, 95:2 <b>Road</b> [2] - 2:7, 110:3 <b>roadway</b> [2] - 91:23, 94:23 <b>roadways</b> [3] - 91:7, 91:15, 96:15 <b>Robert</b> [1] - 52:19 <b>rodents</b> [1] - 123:20 <b>Rogers</b> [1] - 83:11 <b>role</b> [1] - 10:11 <b>roll</b> [1] - 136:18 <b>RONDA</b> [2] - 138:3, 138:24 <b>roof</b> [1] - 128:8 <b>room</b> [1] - 82:17 <b>row</b> [1] - 38:22 <b>Roy</b> [1] - 83:11 <b>Rules</b> [1] - 77:23 <b>run</b> [3] - 31:13, 86:13, 118:16 <b>rush</b> [2] - 119:13, 119:19  <b>S</b>  <b>Saddle</b> [2] - 50:4 <b>SADDLE</b> [1] - 1:23 <b>safety</b> [5] - 12:6, 92:18, 95:1, 99:1, 132:20 <b>Salute</b> [1] - 4:13 <b>Santana</b> [2] - 83:1, 84:24 <b>satisfy</b> [1] - 115:2 <b>saw</b> [9] - 31:1, 31:12, 31:16, 31:20, 72:17, 91:12, 105:4, 113:21, 114:23 <b>scenario</b> [1] - 45:8 <b>screen</b> [1] - 34:12 <b>screening</b> [2] - 90:8, 90:9 <b>screw</b> [1] - 136:5 <b>se</b> [3] - 65:21, 86:11, 92:7 <b>Seckler</b> [3] - 95:15, 96:16, 101:3 <b>second</b> [11] - 22:19, 54:10, 57:5, 57:13, 74:15, 107:2, 107:3, 130:7, 135:4, 135:5, 135:8 <b>Second</b> [3] - 68:10, 69:6, 135:5  <b>SECRETARY</b> [1] - 1:11 <b>secretary</b> [1] - 32:16 <b>Secretary</b> [1] - 2:12 <b>Section</b> [21] - 40:21, 58:14, 59:21, 59:22, 60:2, 60:3, 60:18, 60:23, 61:2, 61:19, 62:11, 62:12, 62:23, 62:24, 63:15, 63:17, 64:2, 102:6 <b>section</b> [3] - 59:14, 60:17, 62:17 <b>sections</b> [1] - 66:2 <b>see</b> [24] - 12:19, 14:22, 32:9, 35:7, 35:9, 45:19, 47:10, 49:13, 52:22, 53:2, 59:21, 81:10, 95:1, 100:12, 100:25, 102:12, 114:13, 114:14, 117:23, 119:6, 121:12, 121:13, 126:11, 131:25 <b>Seeing</b> [1] - 69:3 <b>seek</b> [2] - 98:23, 108:13 <b>seeking</b> [1] - 47:11 <b>sending</b> [1] - 75:9 <b>sent</b> [4] - 72:12, 79:19, 103:8, 108:15 <b>sentence</b> [1] - 29:3 <b>separate</b> [2] - 41:16, 41:17 <b>separately</b> [1] - 54:5 <b>separates</b> [1] - 45:6 <b>September</b> [5] - 3:14, 54:2, 57:20, 74:5, 74:21 <b>series</b> [1] - 100:20 <b>serve</b> [2] - 8:25, 21:19 <b>served</b> [5] - 42:22, 43:25, 44:18, 61:25, 86:11 <b>Serves</b> [1] - 95:16 <b>serves</b> [1] - 8:18 <b>service</b> [19] - 37:10, 37:24, 38:1, 38:5, 38:17, 38:18, 38:20, 38:25, 39:1, 39:4, 39:6, 39:11, 41:6, 41:7, 41:9, 92:10, 116:6, 116:13 <b>servicing</b> [1] - 90:6 <b>set</b> [3] - 21:3, 53:13, 138:9 <b>setback</b> [1] - 89:18 <b>setbacks</b> [1] - 90:17 <b>seven</b> [4] - 84:1, 93:24, 99:20, 135:23  <b>severability</b> [4] - 59:1, 59:2, 63:19, 63:21 <b>Severability</b> [1] - 63:11 <b>several</b> [3] - 78:24, 107:8, 108:7 <b>severe</b> [1] - 16:24 <b>shall</b> [2] - 37:9, 102:22 <b>share</b> [1] - 79:21 <b>shed</b> [1] - 18:10 <b>sheet</b> [1] - 123:15 <b>shelled</b> [1] - 128:3 <b>shifts</b> [1] - 84:2 <b>shoe</b> [1] - 18:4 <b>shopping</b> [3] - 127:9, 127:11, 133:25 <b>short</b> [1] - 30:10 <b>shorter</b> [2] - 19:1, 19:2 <b>shorthand</b> [1] - 58:4 <b>shot</b> [1] - 130:15 <b>shovel</b> [1] - 125:23 <b>show</b> [10] - 18:25, 21:11, 45:18, 48:8, 48:13, 48:21, 48:24, 83:24, 103:21, 109:18 <b>showed</b> [4] - 87:2, 96:17, 97:17, 98:7 <b>showing</b> [4] - 25:14, 45:16, 71:13, 97:18 <b>shows</b> [1] - 34:7 <b>side</b> [3] - 7:20, 78:21, 99:9 <b>sign</b> [7] - 94:20, 95:1, 95:7, 98:22, 99:9, 125:19 <b>signage</b> [2] - 94:17, 98:20 <b>signed</b> [3] - 52:6, 73:11, 78:15 <b>significant</b> [1] - 92:17 <b>silly</b> [1] - 47:5 <b>similar</b> [2] - 50:3, 87:18 <b>simple</b> [1] - 23:11 <b>sincerely</b> [1] - 105:24 <b>singular</b> [1] - 106:14 <b>sip</b> [1] - 12:20 <b>sit</b> [3] - 82:16, 113:18, 122:4 <b>site</b> [55] - 8:5, 8:25, 9:6, 9:9, 9:11, 9:13, 16:18, 17:3, 17:8, 17:11, 17:20, 18:6, 19:1, 19:25, 48:7, 83:21, 86:17, 86:18, 86:19, 87:3, 87:10, 88:12, 94:6, 95:20, 101:15, 102:8, 103:18, 104:6, 104:17, 106:13, 106:15, 106:16, 106:19, 107:4, 109:5, 109:6, 111:18, 111:21, 111:25, 117:19, 120:21, 123:9, 123:25, 124:20, 124:22, 125:19, 128:2, 133:2, 133:4, 133:5, 133:11, 133:12, 133:17, 134:21 <b>sites</b> [4] - 19:13, 20:1, 109:3, 109:5 <b>sitting</b> [1] - 126:15 <b>six</b> [7] - 64:5, 103:4, 103:5, 109:23, 128:20, 135:23 <b>Six</b> [2] - 128:24, 129:1 <b>Six-month</b> [1] - 128:24 <b>size</b> [6] - 98:23, 103:4, 103:5, 118:22, 119:6 <b>slightly</b> [1] - 132:23 <b>slope</b> [2] - 16:25, 17:2 <b>small</b> [2] - 91:21, 96:25 <b>sole</b> [1] - 10:13 <b>solely</b> [3] - 17:8, 17:9, 96:1 <b>solve</b> [3] - 48:14, 48:24, 49:14 <b>solved</b> [1] - 130:23 <b>someone</b> [4] - 79:6, 116:19, 132:13, 134:4 <b>something's</b> [1] - 130:19 <b>sometimes</b> [2] - 23:11, 59:5 <b>Sometimes</b> [1] - 119:2 <b>somewhat</b> [2] - 16:8, 77:24 <b>Sorry</b> [3] - 42:15, 71:22, 135:23 <b>sorry</b> [13] - 20:23, 23:1, 38:11, 39:17, 50:12, 57:9, 62:15, 74:11, 75:17, 78:19, 87:4, 127:24, 134:24 <b>sort</b> [2] - 44:10, 115:3 <b>sounds</b> [2] - 19:14, 130:18 <b>space</b> [2] - 15:5, 106:21 <b>spaces</b> [1] - 90:2 <b>speakers</b> [1] - 19:19 <b>special</b> [12] - 7:16, 8:11, 8:14, 8:16,	
---	--

<p>8:21, 8:24, 15:8, 18:2, 48:22, 104:16, 120:23, 133:8</p> <p><b>Special</b> [2] - 2:14, 14:13</p> <p><b>specific</b> [5] - 14:12, 23:8, 26:3, 56:20, 85:25</p> <p><b>specifically</b> [18] - 7:7, 10:24, 11:12, 13:18, 13:24, 14:2, 16:5, 17:12, 24:4, 51:11, 78:8, 79:25, 83:7, 83:19, 117:21, 120:19, 120:25, 121:15</p> <p><b>specificity</b> [2] - 21:16, 21:18</p> <p><b>speculative</b> [2] - 110:6, 110:7</p> <p><b>spelled</b> [2] - 6:20, 6:21</p> <p><b>spent</b> [1] - 105:25</p> <p><b>square</b> [4] - 88:20, 89:10, 89:11</p> <p><b>stack</b> [1] - 89:4</p> <p><b>stacking</b> [4] - 87:14, 92:1, 92:4, 96:14</p> <p><b>stacks</b> [1] - 89:2</p> <p><b>stand</b> [3] - 4:13, 33:20, 111:9</p> <p><b>standard</b> [5] - 36:22, 63:11, 63:23, 91:17, 116:21</p> <p><b>standards</b> [5] - 91:25, 92:3, 96:4, 96:5, 104:24</p> <p><b>standpoint</b> [4] - 93:16, 95:12, 101:2, 105:5</p> <p><b>stands</b> [1] - 108:22</p> <p><b>Starbucks</b> [8] - 24:17, 38:7, 103:6, 119:13, 119:17, 119:21, 119:23</p> <p><b>start</b> [6] - 26:17, 51:5, 61:4, 71:21, 130:2, 130:24</p> <p><b>started</b> [4] - 49:17, 99:9, 101:8, 125:21</p> <p><b>State</b> [1] - 138:4</p> <p><b>state</b> [3] - 76:22, 77:2, 106:8</p> <p><b>statement</b> [1] - 27:20</p> <p><b>states</b> [1] - 34:23</p> <p><b>stating</b> [1] - 77:21</p> <p><b>stations</b> [2] - 21:23, 22:1</p> <p><b>statute</b> [2] - 49:18, 73:14</p> <p><b>statutes</b> [3] - 55:23, 56:4, 113:9</p>	<p><b>statutory</b> [1] - 8:10</p> <p><b>stay</b> [2] - 45:1, 116:19</p> <p><b>stays</b> [1] - 96:21</p> <p><b>steep</b> [2] - 16:24, 17:2</p> <p><b>stenographer</b> [3] - 57:22, 57:25, 71:25</p> <p><b>stenographically</b> [1] - 138:7</p> <p><b>step</b> [1] - 9:15</p> <p><b>Stewardship</b> [1] - 111:6</p> <p><b>stick</b> [2] - 101:1, 109:11</p> <p><b>still</b> [13] - 6:13, 6:18, 6:19, 22:8, 22:11, 22:14, 27:7, 39:14, 42:8, 44:19, 70:4, 116:18, 117:20</p> <p><b>stipulate</b> [1] - 125:10</p> <p><b>stipulated</b> [7] - 37:3, 84:7, 84:9, 87:8, 101:14, 113:25, 114:21</p> <p><b>stipulation</b> [4] - 84:21, 90:20, 129:15, 131:18</p> <p><b>Stipulations</b> [3] - 3:19, 72:23, 75:6</p> <p><b>stipulations</b> [8] - 72:19, 72:25, 74:19, 80:15, 81:14, 81:21, 122:17, 134:19</p> <p><b>stone</b> [1] - 21:3</p> <p><b>stop</b> [3] - 18:12, 18:14, 119:20</p> <p><b>store</b> [1] - 124:9</p> <p><b>stores</b> [2] - 16:22, 126:2</p> <p><b>stories</b> [1] - 89:16</p> <p><b>strategic</b> [1] - 9:25</p> <p><b>street</b> [2] - 104:10, 119:8</p> <p><b>Street</b> [1] - 2:4</p> <p><b>streets</b> [1] - 104:19</p> <p><b>strictly</b> [1] - 46:18</p> <p><b>structure</b> [1] - 115:18</p> <p><b>struggle</b> [1] - 59:16</p> <p><b>stuck</b> [2] - 101:1, 116:18</p> <p><b>stuff</b> [2] - 25:11, 64:15</p> <p><b>style</b> [1] - 93:23</p> <p><b>subject</b> [1] - 90:21</p> <p><b>submit</b> [1] - 98:9</p> <p><b>submitted</b> [4] - 31:4, 76:1, 77:7, 92:23</p> <p><b>substance</b> [2] - 49:25, 100:17</p> <p><b>substantial</b> [4] - 7:22, 7:23, 29:1, 98:25</p> <p><b>substantiated</b> [1] -</p>	<p>92:23</p> <p><b>successful</b> [1] - 83:24</p> <p><b>suffer</b> [1] - 8:22</p> <p><b>sufficient</b> [2] - 87:6, 101:16</p> <p><b>suggested</b> [2] - 76:7, 92:21</p> <p><b>suitability</b> [7] - 8:12, 9:3, 9:4, 9:6, 16:11, 106:12, 109:16</p> <p><b>suitable</b> [7] - 9:1, 16:17, 16:19, 17:3, 17:12, 48:22</p> <p><b>suited</b> [16] - 8:6, 9:7, 9:12, 9:14, 16:16, 48:8, 48:9, 87:4, 96:7, 97:20, 102:9, 103:19, 106:13, 111:22, 117:19, 133:13</p> <p><b>Sum</b> [1] - 49:25</p> <p><b>sum</b> [1] - 100:16</p> <p><b>summation</b> [8] - 5:25, 15:1, 50:9, 50:24, 71:20, 81:24, 82:16, 115:11</p> <p><b>SUMMATIONS</b> [1] - 3:7</p> <p><b>super</b> [1] - 27:8</p> <p><b>supercede</b> [1] - 70:5</p> <p><b>superior</b> [2] - 58:3, 65:14</p> <p><b>Superior</b> [1] - 73:14</p> <p><b>support</b> [1] - 101:17</p> <p><b>supported</b> [3] - 93:15, 107:14, 107:16</p> <p><b>supporting</b> [1] - 102:1</p> <p><b>supports</b> [1] - 101:5</p> <p><b>suppose</b> [1] - 81:15</p> <p><b>supposed</b> [3] - 10:5, 21:18, 21:20</p> <p><b>surprisingly</b> [1] - 39:10</p> <p><b>surrounding</b> [4] - 12:24, 12:25, 83:23</p> <p><b>swaying</b> [1] - 114:11</p> <p><b>sworn</b> [5] - 6:8, 6:11, 6:13, 6:16, 6:18</p> <p><b>SWORN</b> [1] - 3:2</p> <p><b>synopsis</b> [1] - 101:7</p> <p><b>system</b> [1] - 91:23</p>	<p>122:12, 126:6, 127:16, 129:8, 130:5, 130:11, 131:2, 133:19, 133:24</p> <p><b>tapes</b> [1] - 135:10</p> <p><b>tarnished</b> [2] - 107:17, 107:24</p> <p><b>tarps</b> [1] - 128:9</p> <p><b>task</b> [1] - 102:3</p> <p><b>tearing</b> [2] - 98:5, 133:23</p> <p><b>Tech</b> [1] - 5:7</p> <p><b>technical</b> [2] - 132:1, 133:6</p> <p><b>telephone</b> [1] - 90:5</p> <p><b>ten</b> [2] - 52:12, 76:19</p> <p><b>tenant</b> [6] - 88:16, 128:4, 128:5, 128:21, 129:23</p> <p><b>tenants</b> [1] - 88:17</p> <p><b>term</b> [2] - 9:25, 46:22</p> <p><b>terms</b> [3] - 30:23, 86:16, 92:18</p> <p><b>test</b> [1] - 102:5</p> <p><b>testified</b> [41] - 42:7, 68:4, 83:1, 83:6, 83:21, 83:22, 83:25, 84:2, 84:7, 84:11, 84:24, 85:6, 86:3, 86:4, 86:9, 87:6, 87:17, 87:24, 88:21, 90:12, 90:25, 91:3, 91:6, 92:2, 92:6, 92:17, 94:17, 94:24, 95:9, 95:19, 95:24, 96:11, 97:13, 97:14, 97:21, 98:16, 98:18, 105:6, 105:7, 105:8, 105:9</p> <p><b>testify</b> [2] - 6:17, 88:9</p> <p><b>testifying</b> [3] - 16:10, 17:18, 35:22</p> <p><b>testimony</b> [30] - 6:7, 14:15, 14:17, 14:21, 17:19, 27:23, 82:1, 85:5, 86:1, 86:24, 87:13, 88:2, 92:24, 94:9, 99:5, 99:14, 99:18, 99:19, 101:3, 101:5, 102:4, 104:12, 107:9, 107:12, 107:15, 117:17, 117:20, 133:7, 138:7</p> <p><b>TESTIMONY</b> [1] - 3:2</p> <p><b>text</b> [1] - 54:25</p> <p><b>that..</b> [1] - 26:13</p> <p><b>THE</b> [1] - 1:3</p> <p><b>themed</b> [1] - 92:4</p>	<p><b>themselves</b> [2] - 81:3, 91:7</p> <p><b>theoretical</b> [1] - 22:6</p> <p><b>thereafter</b> [1] - 108:19</p> <p><b>therefore</b> [1] - 91:23</p> <p><b>thereof</b> [1] - 7:10</p> <p><b>They've</b> [2] - 128:16, 128:17</p> <p><b>thinking</b> [2] - 47:3, 115:5</p> <p><b>thinks</b> [2] - 93:14, 132:13</p> <p><b>third</b> [2] - 74:16, 95:23</p> <p><b>thirty</b> [2] - 62:14, 62:15</p> <p><b>thirty-four</b> [2] - 62:14, 62:15</p> <p><b>thou</b> [1] - 102:22</p> <p><b>thoughts</b> [3] - 6:4, 117:12, 117:15</p> <p><b>three</b> [14] - 8:15, 9:19, 37:19, 37:20, 39:12, 41:13, 55:14, 84:2, 97:8, 104:2, 123:15, 126:20, 130:2, 135:22</p> <p><b>throughout</b> [2] - 49:18, 49:19</p> <p><b>throughs</b> [11] - 12:6, 24:2, 40:15, 41:3, 41:13, 63:10, 70:2, 96:13, 97:24, 109:9, 110:17</p> <p><b>Throughs</b> [1] - 61:17</p> <p><b>throw</b> [1] - 100:24</p> <p><b>tied</b> [1] - 133:1</p> <p><b>ties</b> [1] - 60:24</p> <p><b>timeframe</b> [2] - 65:1, 128:24</p> <p><b>timeline</b> [1] - 126:14</p> <p><b>timing</b> [1] - 84:8</p> <p><b>title</b> [3] - 61:8, 61:17, 70:13</p> <p><b>today's</b> [1] - 85:20</p> <p><b>together</b> [2] - 74:10, 88:1</p> <p><b>tonight</b> [10] - 5:9, 36:3, 75:21, 77:16, 78:10, 79:16, 79:23, 96:5, 106:1, 113:16</p> <p><b>took</b> [3] - 19:5, 96:9, 96:10</p> <p><b>top</b> [1] - 57:8</p> <p><b>totally</b> [1] - 107:4</p> <p><b>touch</b> [1] - 17:4</p> <p><b>touched</b> [2] - 42:6, 43:3</p> <p><b>town</b> [12] - 23:25, 34:2, 70:5, 85:18, 96:13, 96:23,</p>
---	--	---	---	---

<p>104:23, 105:2, 108:11, 110:2, 118:5, 125:19</p> <p><b>Township</b> [1] - 107:12</p> <p><b>tract</b> [1] - 95:20</p> <p><b>Traffic</b> [1] - 2:14</p> <p><b>traffic</b> [23] - 85:23, 86:5, 91:1, 91:2, 91:6, 91:7, 91:14, 91:20, 92:25, 93:2, 93:5, 93:16, 93:18, 94:25, 96:14, 96:17, 96:19, 101:24, 101:25, 104:13, 105:7, 119:7, 126:7</p> <p><b>train</b> [1] - 33:9</p> <p><b>trained</b> [1] - 83:11</p> <p><b>transaction</b> [1] - 86:13</p> <p><b>transcribed</b> [1] - 73:10</p> <p><b>transcript</b> [34] - 6:9, 30:3, 30:7, 30:10, 31:7, 31:10, 31:14, 32:7, 32:8, 51:23, 52:16, 53:7, 53:8, 53:12, 53:18, 54:18, 54:21, 55:1, 55:5, 57:5, 57:10, 57:13, 57:16, 57:18, 57:19, 57:20, 57:23, 67:23, 74:4, 74:6, 79:5, 81:6, 81:7, 138:7</p> <p><b>Transcript</b> [4] - 3:14, 3:15, 74:20, 74:23</p> <p><b>TRANSCRIPT</b> [1] - 1:3</p> <p><b>transcripts</b> [19] - 30:8, 31:2, 31:4, 32:15, 57:2, 71:24, 72:15, 72:17, 72:22, 75:24, 75:25, 77:8, 80:17, 80:18, 80:20, 81:10, 100:1, 111:1, 113:20</p> <p><b>transportation</b> [1] - 90:24</p> <p><b>trick</b> [2] - 110:14</p> <p><b>tried</b> [3] - 18:16, 18:17, 19:7</p> <p><b>trip</b> [1] - 91:17</p> <p><b>trouble</b> [2] - 112:22, 125:24</p> <p><b>Troy</b> [1] - 2:8</p> <p><b>truck</b> [1] - 44:13</p> <p><b>trucks</b> [1] - 44:12</p> <p><b>true</b> [1] - 138:6</p> <p><b>truly</b> [2] - 98:15, 110:6</p> <p><b>truth</b> [1] - 73:24</p> <p><b>try</b> [2] - 34:3, 72:3</p> <p><b>trying</b> [11] - 17:18, 19:20, 19:23, 34:4, 40:25, 45:18, 48:15, 49:21, 70:9, 100:15,</p>	<p>132:16</p> <p><b>tube</b> [1] - 116:25</p> <p><b>tubes</b> [1] - 116:7</p> <p><b>turn</b> [3] - 20:10, 55:5, 103:24</p> <p><b>tweak</b> [1] - 103:13</p> <p><b>twice</b> [1] - 90:23</p> <p><b>two</b> [18] - 16:11, 78:3, 84:8, 87:18, 89:16, 93:2, 109:1, 109:23, 112:4, 115:13, 115:17, 116:4, 116:18, 117:9, 117:23, 120:20, 135:22</p> <p><b>Two</b> [1] - 21:14</p> <p><b>two-lane</b> [1] - 116:18</p> <p><b>twofold</b> [1] - 9:5</p> <p><b>type</b> [8] - 17:12, 82:19, 85:16, 87:10, 117:22, 118:2, 118:6, 121:3</p> <p><b>types</b> [4] - 8:15, 10:6, 10:7, 92:11</p> <p><b>typical</b> [3] - 18:21, 84:16, 86:12</p> <p><b>Typically</b> [2] - 15:14, 51:16</p> <p><b>typically</b> [12] - 8:15, 9:19, 10:25, 22:20, 36:23, 38:25, 39:1, 39:3, 45:15, 56:5, 58:24, 87:20</p>	<p><b>understood</b> [2] - 66:22, 123:19</p> <p><b>Understood</b> [2] - 115:25, 117:7</p> <p><b>undue</b> [1] - 8:22</p> <p><b>unfinished</b> [1] - 123:16</p> <p><b>unique</b> [7] - 9:9, 17:8, 17:9, 19:15, 23:7, 88:12, 105:6</p> <p><b>uniquely</b> [2] - 9:11, 16:18</p> <p><b>uniqueness</b> [1] - 86:15</p> <p><b>unless</b> [2] - 20:3, 134:22</p> <p><b>unsafe</b> [1] - 132:20</p> <p><b>unsigned</b> [1] - 52:3</p> <p><b>unsubstantiated</b> [1] - 99:17</p> <p><b>Unsupported</b> [1] - 38:10</p> <p><b>unsupported</b> [1] - 38:14</p> <p><b>unusual</b> [3] - 81:17, 81:18, 81:20</p> <p><b>up</b> [40] - 8:9, 12:17, 14:24, 15:2, 15:3, 15:8, 20:2, 22:10, 22:21, 33:22, 34:7, 34:11, 35:5, 36:3, 37:8, 39:6, 40:14, 43:5, 43:18, 44:2, 44:24, 54:4, 71:22, 74:18, 76:15, 81:11, 87:20, 104:9, 105:25, 107:13, 112:24, 114:17, 120:22, 125:13, 126:25, 131:21, 133:5, 136:1, 136:5</p> <p><b>urge</b> [1] - 109:11</p> <p><b>uses</b> [8] - 12:20, 34:18, 38:24, 39:6, 46:15, 71:10, 71:11</p> <p><b>Uses</b> [1] - 63:2</p> <p><b>usurping</b> [1] - 11:7</p>	<p>29:8, 34:5, 48:1, 66:19, 95:4, 96:2, 98:23, 99:3, 99:15, 108:24, 109:14, 109:19, 110:13, 111:15, 112:7, 112:8, 112:12, 112:13, 112:14, 112:17, 112:18, 113:16, 117:6, 118:2, 119:25, 120:3, 120:5, 131:20, 133:14, 134:14, 134:16</p> <p><b>variances</b> [2] - 79:10, 112:15</p> <p><b>various</b> [2] - 55:22, 100:19</p> <p><b>vehicles</b> [3] - 44:11, 89:2, 123:21</p> <p><b>verified</b> [1] - 72:21</p> <p><b>viability</b> [1] - 86:2</p> <p><b>viable</b> [4] - 98:7, 105:7, 105:8, 105:9</p> <p><b>VICE</b> [31] - 1:10, 4:21, 23:14, 23:18, 23:23, 24:9, 24:18, 25:6, 25:13, 25:25, 45:25, 60:14, 60:22, 61:3, 61:11, 62:10, 68:16, 69:12, 69:21, 71:17, 79:7, 79:24, 80:13, 115:9, 115:16, 115:23, 116:3, 117:8, 117:14, 129:25, 136:25</p> <p><b>Vice</b> [1] - 3:6</p> <p><b>view</b> [2] - 121:9, 122:8</p> <p><b>violate</b> [2] - 49:2, 49:23</p> <p><b>violates</b> [5] - 43:7, 47:11, 48:2, 48:10, 101:23</p> <p><b>violation</b> [2] - 124:20, 125:3</p> <p><b>violations</b> [2] - 124:24, 125:8</p> <p><b>visibility</b> [1] - 15:21</p> <p><b>vision</b> [2] - 9:24, 21:20</p> <p><b>visual</b> [2] - 15:6, 133:25</p> <p><b>volunteer</b> [1] - 117:11</p> <p><b>vote</b> [12] - 75:19, 76:18, 77:8, 112:5, 112:14, 118:9, 123:13, 123:23, 123:24, 124:17, 126:19, 135:20</p> <p><b>voted</b> [3] - 25:22, 26:13, 46:23</p>	<p><b>votes</b> [1] - 112:12</p> <p><b>voting</b> [3] - 79:10, 112:4, 136:6</p> <p><b>vs</b> [2] - 50:4, 107:11</p>
<b>W</b>				
<p><b>Wait</b> [2] - 130:7, 135:21</p> <p><b>wait</b> [1] - 130:19</p> <p><b>walk</b> [6] - 44:2, 82:17, 82:22, 85:23, 97:16, 101:9</p> <p><b>walk-in</b> [1] - 85:23</p> <p><b>walk-up</b> [1] - 44:2</p> <p><b>walked</b> [1] - 96:3</p> <p><b>wall</b> [1] - 100:25</p> <p><b>warmed</b> [1] - 86:12</p> <p><b>warming</b> [1] - 92:8</p> <p><b>warrant</b> [1] - 23:9</p> <p><b>warranted</b> [1] - 95:7</p> <p><b>we..</b> [1] - 112:25</p> <p><b>weak</b> [1] - 99:16</p> <p><b>Wednesday</b> [1] - 4:4</p> <p><b>WEDNESDAY</b> [1] - 1:2</p> <p><b>week</b> [3] - 84:1, 84:8, 99:20</p> <p><b>weigh</b> [2] - 14:7, 16:4</p> <p><b>weight</b> [4] - 13:15, 13:23, 76:10, 109:2</p> <p><b>WEINER</b> [1] - 2:7</p> <p><b>Weiner</b> [1] - 5:21</p> <p><b>welfare</b> [6] - 8:25, 15:3, 15:9, 15:13, 15:15, 132:20</p> <p><b>well-recognized</b> [1] - 90:23</p> <p><b>well-suited</b> [1] - 117:19</p> <p><b>Wendy's</b> [5] - 92:14, 103:4, 119:7, 119:8, 122:14</p> <p><b>were..</b> [1] - 128:15</p> <p><b>Westwood</b> [2] - 6:15</p> <p><b>whereas</b> [1] - 28:14</p> <p><b>WHITAKER</b> [136] - 2:3, 2:4, 3:8, 5:13, 6:1, 6:6, 20:7, 26:23, 27:1, 27:21, 28:3, 28:8, 28:16, 28:19, 29:7, 29:14, 29:21, 30:4, 30:7, 30:11, 30:20, 31:5, 31:12, 31:16, 31:20, 31:24, 32:7, 32:17, 33:1, 33:5, 33:8, 34:1, 34:9, 34:14, 34:17, 34:21, 35:2, 35:9, 35:12, 36:2, 36:13, 36:17, 36:25, 37:11,</p>				

37:13, 37:15, 37:19, 37:22, 38:4, 38:16, 38:22, 39:8, 39:14, 39:19, 39:23, 40:2, 40:7, 41:4, 41:14, 41:17, 41:21, 42:4, 42:12, 42:18, 43:2, 43:10, 43:15, 43:21, 44:3, 44:12, 44:15, 45:9, 45:12, 45:16, 45:24, 46:4, 46:11, 47:9, 47:17, 47:24, 49:5, 49:8, 50:7, 50:22, 52:10, 52:17, 52:24, 53:5, 53:21, 55:2, 57:15, 57:22, 58:9, 61:6, 64:12, 65:20, 66:7, 67:7, 67:15, 67:20, 71:9, 71:21, 74:12, 75:14, 76:3, 77:23, 78:14, 79:19, 80:4, 81:1, 82:12, 107:19, 107:23, 110:5, 110:21, 111:2, 112:7, 115:14, 115:19, 115:25, 116:8, 116:20, 117:1, 117:7, 125:24, 128:18, 128:24, 129:3, 129:10, 129:16, 129:22, 130:7, 130:23, 131:4, 131:9, 137:13 <b>Whitaker</b> [31] - 3:3, 5:11, 5:15, 5:16, 15:1, 19:20, 26:21, 32:13, 34:16, 51:21, 52:8, 52:14, 52:21, 53:19, 54:5, 54:19, 67:12, 70:3, 75:9, 75:18, 77:4, 78:23, 80:16, 81:23, 82:11, 113:24, 115:10, 117:16, 120:11, 124:1, 125:9 <b>Whitaker's</b> [1] - 122:8 <b>whole</b> [9] - 22:22, 90:2, 106:18, 127:8, 127:9, 133:4, 133:11, 133:12, 133:24 <b>wholeness</b> [1] - 128:7 <b>width</b> [1] - 89:13 <b>wild</b> [1] - 25:10 <b>WILLIAM</b> [1] - 1:14 <b>window</b> [13] - 37:1, 37:8, 38:4, 38:17, 39:2, 39:4, 43:12,	43:14, 44:2, 44:24, 62:6, 92:16, 134:20 <b>windows</b> [7] - 35:5, 38:18, 38:20, 38:25, 39:7, 43:18, 128:8 <b>wishes</b> [1] - 10:4 <b>withdrawn</b> [2] - 5:8, 99:4 <b>witness</b> [4] - 35:24, 50:16, 83:1, 90:22 <b>WITNESS</b> [1] - 3:2 <b>witnesses</b> [1] - 107:8 <b>Wonder</b> [1] - 129:22 <b>wondering</b> [1] - 135:24 <b>word</b> [12] - 27:11, 28:4, 29:3, 34:6, 49:18, 58:13, 63:1, 65:21, 80:4, 87:3, 90:14 <b>word-for-word</b> [1] - 58:13 <b>worded</b> [2] - 24:1, 69:24 <b>wording</b> [1] - 61:5 <b>words</b> [11] - 8:11, 13:19, 18:11, 18:12, 18:17, 28:12, 28:20, 40:12, 87:14, 91:22, 132:4 <b>works</b> [7] - 39:12, 94:15, 105:5, 111:18, 111:21, 119:2, 120:21 <b>world</b> [3] - 9:18, 85:20, 122:10 <b>worried</b> [1] - 48:23 <b>worship</b> [1] - 8:2 <b>Wostbrock</b> [1] - 52:11 <b>WOSTBROCK</b> [3] - 2:14, 127:22, 128:1 <b>writ</b> [2] - 26:18, 64:10 <b>write</b> [3] - 21:17, 54:23, 63:24 <b>writers</b> [1] - 63:12 <b>written</b> [4] - 4:6, 11:18, 29:17, 46:2 <b>wrote</b> [1] - 108:19	120:20, 123:15, 124:6, 126:21, 130:2 <b>yesterday</b> [1] - 118:20 <b>yew</b> [1] - 90:9 <b>yourself</b> [2] - 104:6, 115:3 <b>youthfulness</b> [1] - 109:21
<b>Z</b>		
<b>ZBA</b> [1] - 34:1 <b>Zone</b> [3] - 62:23, 62:24, 89:9 <b>zone</b> [9] - 7:24, 10:25, 14:9, 21:24, 36:16, 36:21, 55:17, 89:11, 91:9 <b>Zones</b> [1] - 96:24 <b>zones</b> [2] - 22:2, 109:10 <b>Zoning</b> [6] - 2:2, 4:3, 22:22, 50:5, 107:12, 119:18 <b>ZONING</b> [1] - 1:1 <b>zoning</b> [38] - 7:6, 9:8, 9:16, 9:18, 9:20, 10:16, 10:18, 10:19, 11:1, 12:16, 12:21, 14:3, 14:19, 14:24, 15:7, 21:19, 22:20, 29:2, 29:5, 29:12, 34:1, 44:6, 47:12, 47:18, 49:6, 49:10, 51:7, 51:10, 79:4, 96:10, 108:14, 118:1, 119:25, 120:1, 132:8, 132:14, 132:16, 132:17 <b>Zuidema</b> [4] - 4:16, 68:13, 69:9, 136:22 <b>ZUIDEMA</b> [15] - 1:17, 4:17, 68:14, 69:10, 123:3, 123:11, 123:20, 124:16, 126:4, 126:10, 127:5, 127:12, 130:13, 131:14, 136:23		
<b>Y</b>		
<b>yard</b> [3] - 23:2, 23:6, 112:15 <b>year</b> [2] - 64:6, 72:16 <b>years</b> [18] - 52:13, 83:3, 83:8, 83:10, 83:15, 88:5, 93:1, 95:16, 107:21, 109:1, 109:24, 117:23, 117:24,		