

1 and their appropriate integration into the district.
2 This use at this location is not appropriate and
3 certainly doesn't integrate into the lives of these
4 people, their homes, their children and the way that
5 they are entitled to live their lives. This is a
6 neighborhood. It's not out in no man's land. It's
7 a residential neighborhood where people come home to
8 enjoy their property. They want to take that away
9 from them. Don't you let them do that. Don't you
10 let them make fools out of all of us.

11 Now, the second part of this case is
12 the proof addressing the negative criteria is
13 similar to the proof that you would use for a D-1
14 variance. In respect of the first part of the
15 negative criteria that the variance can be granted
16 without substantial detriment to the public good.
17 We know that it cannot be granted without
18 significant detriment to the lives of these people.
19 We know that by the very testimony and impact.
20 These people came out of their homes, they came here
21 tonight, they've been here for three nights to tell
22 you about the problems that they are -- they have
23 been caused as a result of the wedding venue and the
24 use that they put at this property essentially in
25 their backyards. That's the first prong of the

1 test.

2 The second prong of the test is that
3 the variance will not substantially impair the
4 intent and purpose of the zone plan and the zoning
5 ordinance. The zoning ordinance says that this is a
6 rural residential area where you have farms but you
7 have residents, residents that back right up to this
8 property. There's no way that this use that allows
9 these people to get this use at this point will not
10 have a detrimental effect on the zoning and the
11 zoning area. They present virtually no proof. They
12 never even contacted these people. I recall reading
13 the testimony that their planner testified that the
14 use will not have any substantial impact. They
15 didn't talk to any of these people. Not one of
16 these people were interviewed by their planner and
17 said well, what's going on here? Does this use have
18 any impact upon your neighborhood, upon you? Didn't
19 even talk to him. He made a blatant statement
20 without any proof and that's what this whole
21 application lacks, any substantial proof to address
22 the real issues in this application, and that is the
23 parking and that is the impact on the neighborhood.
24 It is substantial. It is detrimental, and it is
25 something that this board should not permit now or

1 in the future or ever.

2 With that, I'd like to thank the
3 members of this board for their patience and
4 courtesy throughout this. I know that you will give
5 it due consideration and do the right things under
6 the law. Fulfill your responsibilities and protect
7 these people. Thank you.

8 MR. FULPER: Thank you. Mr. Morgan.

9 MR. MORGAN: Thank you for your time
10 and consideration, folks. Just a slight bit of a
11 background before I make my statement. I served on
12 the West Windsor Township counsel for 13 years.
13 Before that, I was on the West Windsor planning
14 board for many years as a council representative on
15 the planning board. I was counsel liaison to the
16 zoning board of adjustment in West Windsor. I know
17 something about what you've heard tonight.

18 I will observe that you heard my
19 questioning of the two planners disagreeing with me
20 on some of what I think your zoning ordinance means.
21 They are not attorneys. It is your attorney who
22 must advise you on the meaning of your law. The
23 zoning ordinance is law. It's a legal
24 interpretation as to its meaning.

25 Frankly, I'm very troubled by the

1 suggestion that there is no integral component of
2 this use that doesn't include performing arts. Your
3 ordinance says in entertainment and recreation it's
4 a use for a public or private presentation of or
5 participation in performing arts. A use for the
6 public or private presentation of or participation
7 in performing arts. They are integrated. You can't
8 disconnect the two. Now these are my views. You
9 need to listen to your attorney in advising you that
10 this is a legal interpretation of what that means.

11 Permanent structures are features of
12 both the assembly use and the entertainment and
13 recreation use. You have the power to grant a
14 variance under assembly. You have no power to grant
15 a variance under entertainment and recreation. Your
16 ordinance says participation in performing arts.
17 How much participation? One iota? The majority of
18 time spent in the facility? If you agree with me
19 that the two are integral to each other, that the
20 activity incident to the permanent structure, if it
21 is a permanent structure, and I'm not suggesting it
22 is, I'm not even implying it is, I don't agree it
23 is, but if it is, you must decide which of these
24 definitions this thing falls into.

25 You know, I've attended many

1 weddings, as you've had, and receptions. Your
2 assembly use clearly allows for religion, structures
3 for religion. A reception is not religious. It's
4 entertainment. It is dancing.

5 Is it a banquet facility? You heard
6 my interrogation of the first planner, banquet
7 facility, you need to decide what you think a
8 banquet facility is for purposes of interpreting
9 your ordinance, and that, again, is subject to the
10 advice and counsel of your attorney.

11 But facts inform the legal
12 conclusions. Lawyers are fond of saying the facts
13 drive all legal analytics. They just do. So what
14 are the facts here? The facts are you have people
15 showing up around what, four or five because the
16 bride and the groom are off getting photographs
17 taken, and they are having hor d'oeuvres, music
18 might be starting. They sit down for dinner.
19 Dinner might be an hour and a half, and then the
20 music might, the music might of well started during
21 dinner, at least during the dinners of the
22 receptions I've attended it does. And that's
23 clearly a performing art, whether recorded or live,
24 so if you look at your ordinance and the failure to
25 define how much participation in performing arts is

1 necessary, and you think, as I do, that one iota is
2 enough, even if not, then maybe the majority of the
3 time spent is enjoying music, and it appears that
4 the vast majority of the time expended during these
5 receptions involves performers singing and
6 presenting music, whether live or recorded, I think
7 you have no power. It's a prohibited use.

8 I want to thank you for your
9 patience. This has been many sessions. I came all
10 the way up from Florida to be here. I'm not being
11 paid. I'm doing this because one, I think I got a
12 little bit of experience with some of this stuff,
13 and a planner's view of a definition is not what a
14 lawyer's view might be. I'm doing it here and I'm
15 here on my own time, on my own bill, because these
16 people need to be treated appropriately, and looking
17 at you and having sat in your seats, I know you
18 will, and I thank you.

19 MR. FULPER: Thank you.

20 MR. SINGER: Jonas Singer, appearing
21 on behalf of the applicant. Just as a few
22 preliminary remarks, we started this hearing in
23 September when Zach Lubchansky testified that the
24 first thing he did when he found Brookmill Farm was
25 speak to your zoning official. He spoke to the

1 zoning official to confirm that the use of this
2 property as a wedding venue for banquets was a
3 permitted use. He was advised that it was. The
4 fact, and his correspondence that's part of B-3,
5 Exhibit 3 and 4, that specifically a letter to Mr.
6 Rose outlining what Mr. Lubchansky intended to do at
7 the site, and then a response from Mr. Rose
8 indicating what additional information he was
9 requesting, but the conversation, the notice to him
10 was clear. There was no hiding as to what Mr.
11 Lubchansky was going to do, because he knew that
12 there's nothing to hide. He had to make a
13 substantial investment, which he has, in this
14 property in reliance upon your zoning official.
15 Your zoning official indicated that it was
16 permitted, that it has been done in the past, and it
17 can continue and gave him certain people to contact
18 in order to confirm that other agencies within the
19 township were satisfied.

20 So, you know, Mr. Lubchansky is not
21 the bad guy here, okay? I know the neighbors have
22 had an impact, and I hear it, and it's substantial,
23 but the bottom line is that, you know, Mr.
24 Lubchansky did what he was supposed to do when he
25 got into this business, okay? But having said that,

1 I still think that the application that we've
2 presented to you is a D-3 variance, and I'd like to
3 read to you my closing.

4 The hearing before a zoning board of
5 adjustment is called quasi judicial. It is some of
6 the attributes of a formal judicial hearing but not
7 all. One great benefit of a hearing of this nature
8 is that the public and each applicant has the right
9 to speak and the board has the right to hear their
10 testimony. However, like any public official,
11 including the president, the governor or the judges,
12 this board is duty bound by the law and the oath you
13 take at the beginning of each year to exercise its
14 decision-making within the constraints of the law.

15 Every citizen who appears before this
16 board as an applicant or an objector has the
17 absolute right to have their case decided based upon
18 legal principles, even if the board would prefer to
19 reach a different conclusion.

20 The law recognizes three general
21 categories of uses. One is permitted. Unless there
22 is a bulk variance or site plan, there's no need to
23 come before this board in order to use your property
24 if it's a permitted use.

25 The second are prohibited uses.

1 Those uses that are not specifically delineated in
2 your ordinance as a permitted use, and you would
3 then need a D-1 variance, what's been referred to as
4 a D-1 variance under 40:55D-70(d)(1) which gives
5 this board jurisdiction to allow use or a principal
6 structure in a zoning district which is restricted
7 against such uses or structures by giving special
8 reasons. Those reasons being that the site is
9 uniquely suitable to fulfill the purposes of the
10 MLUL, the use is inherently beneficial, or that the
11 property zoned into any utility the applicant must
12 offer enhanced quality of proof on the negative
13 criteria.

14 But the third type of use,
15 conditional uses, uses which are permitted upon
16 satisfaction of conditions set forth in the
17 ordinance. Under D-3, it gives us more jurisdiction
18 to allow a deviation from a specification or
19 standard set forth in the conditional use ordinance.
20 The case law specifies the type of analysis that a
21 board must undertake when evaluating a request for a
22 deviation from a specification associated with the
23 conditional use.

24 This process entails four steps. The
25 first step is to assess which uses included in the

1 rural residential zone are permitted, precluded and
2 are conditional. Assembly uses are conditional
3 uses. The second step is a determination as to
4 whether the use proposed falls into the category of
5 a conditional use. Section 109-4(22) defines
6 assembly use as follows a use which is a permanent
7 facility, building, structure or installation which
8 is providing for civic, educational, political,
9 religious or social assemblage purposes. This term
10 shall include non-profit or for profit facilities
11 and shall include, but may not be limited to, houses
12 of worship, banquet facilities, lodges, fraternal
13 organizations, civic organizations and funeral
14 homes.

15 Permanent facility, building,
16 structure or installation, it's extremely broad.
17 However, structure as defined in Section 109-4 is
18 anything constructed or erected which requires
19 permanent or temporary attachment to something which
20 is erected on the ground and designed, intended or
21 arranged for the housing, shelter, enclosure and/or
22 structural support of persons, animals or property
23 of any kind, excluding unroofed patios at ground
24 level, parking lots or driveways, fences, and fences
25 in compliance with this chapter.

1 We have buildings that are permanent
2 structures. The structure on which the tent is
3 constructed is a permanent structure, as testified
4 to by the townships planner. There is extensive
5 gardens, pathways, bridges, landscaping, stone
6 structures, buildings, houses, all of which are
7 utilized in the banquet facility. There's just not
8 one part of the property that is utilized for the
9 facility. It's the entire property. It includes
10 profit or non-profit entities. The use for social
11 assemblage purposes shall include but not be limited
12 to banquet facilities. Banquet facilities,
13 according to the dictionary, is a ceremonial dinner
14 to honor a person, including weddings. Therefore,
15 banquet facility is a conditional use.

16 The third step is to determine
17 whether the conditions of the ordinance are
18 satisfied. Section 109-104 of the ordinance
19 contains the conditions. There are three. One,
20 minimum lot size shall be 5 acres, at least four of
21 which shall be buildable. Principal or accessory
22 building shall be located no less than 75 feet from
23 any front side or rear property line or within the
24 building setbacks for the zoning district, whichever
25 is greater. C, maximum lot coverage shall be 35

1 percent. We meet the maximum lot coverage.

2 The final step is for the board to
3 determine whether to allow a variation from the
4 conditions. It requires consideration of the
5 positive and negative criteria under the municipal
6 land use law. In making this inquiry the board is
7 to keep in mind that the use is not a prohibited
8 use, but it's a permitted use subject to conditions.
9 The positive criteria under Coventry Square which is
10 cited at 158 NJ-298 states that the proposed site
11 continues to be appropriate for the conditional use,
12 notwithstanding the deviation from the conditions.

13 There are two considerations you must
14 focus on, the specific deviation and you must assess
15 the impact of that deviation on the suitability of
16 the site. Here there is no impact on the
17 suitability of the site for the proposed use,
18 because the buildings that do deviate are not part
19 of the use. Even though there is an impact caused
20 by two of the buildings which are virtually
21 irrelevant to the banquet use, the impact, the
22 deviation does not impact the continued
23 appropriateness for the banquet use. Also not
24 having four buildable acres that are contiguous does
25 not impact the suitability of the site, because the

1 bridges and the preexisting buildings do allow the
2 property to be contiguous, and no new construction
3 is proposed. Further, the site is 13.8 acres which
4 almost eliminates the impact of the deviation.

5 The property has a unique character,
6 ideally suited for the use as a wedding venue and
7 similar activities. The requested relief will
8 advance the purposes of the MLUL. Overall
9 conditions specific to the site work to offset any
10 deviations from the conditional use standards and
11 allows the site to remain appropriate for an
12 assembly use. The conditional use standards seek to
13 control the impact of the assembly use on adjoining
14 properties by ensuring the site is large enough to
15 absorb the impacts of the use and by creating
16 adequate separation between the structures that
17 house the use and neighboring uses through minimum
18 lot building area and setback standards.

19 Here the lot contains over 13 acres,
20 nine acres over the standard and three times greater
21 than the minimum. It's also in a valley and
22 surrounded by heavy woods. The side slopes place
23 the valley 30 feet to 40 feet below the grade of the
24 surrounding lots.

25 The building used for weddings meet

1 all of the setback requirements. The property is
2 oversized and the coverage is small. The barn,
3 gazebo, storage building are preexisting
4 nonconforming structures. As preexisting
5 nonconforming structures, they can be maintained
6 under the provisions of NSA40:55D-68 and the case
7 law that applies to preexisting structures. The
8 barn and storage building have no role in the
9 assembly use. The gazebo is a small structure which
10 has a limited use and a limited impact.

11 Second, we must prove the negative
12 criteria. Can the variance be granted without
13 substantial detriment to the public good, which has
14 been defined as impact on surrounding properties,
15 and can the variance be granted without
16 substantially impairing the zone plan? First,
17 conditional use is not a prohibited use. It is
18 permitted subject to conditions under Coventry. The
19 impact of surrounding properties was also described
20 in TSI East Brunswick versus ZBA the Township of
21 East Brunswick, 215 NJ-26.

22 The question to be answered by the
23 board is the effect on the surrounding properties of
24 the grant of the variance for the specific
25 deviation? You look to what can we not comply with

1 and does that have the impact on surrounding
2 properties. In the words, the Supreme Court TSI
3 versus Zoning Board of Adjustment, the focus of the
4 analysis is on the effect of noncompliance with one
5 of the conditions, as it relates to the overall zone
6 plan. Because the structures that triggered the
7 deviation are not part of the banquet use, the grant
8 of the variance can have no impact on the
9 surrounding properties and no impact on the zone
10 plan. Also not having four contiguous acres also
11 has no impact on the surrounding properties and no
12 impact on the zone plan, because no new construction
13 is proposed and the preexisting structures do allow
14 for four contiguous acres. Therefore, no impact on
15 surrounding properties and no impact on the zoning
16 plan in accordance with the conditional use
17 standards. Even were there an impact under the case
18 law the impact would have to be substantial.

19 A last feature, the buildings are
20 preexisting nonconforming structures, and the owner
21 has the constitutional right to leave them in place.

22 I would submit that the use is
23 consistent with the ordinance in every other respect
24 and that it's an appropriate use as was testified to
25 by our planner and our applicant.

1 We understand there are strong
2 feelings on both sides. Those feelings cannot drive
3 the decision of this board. Mr. Lubchansky believes
4 the project is a positive for the township.
5 Objectors believe otherwise; however, the decision
6 that you must make must be in accordance with
7 principles of law and not personal desires. To do
8 otherwise would deprive Mr. Lubchansky of the
9 protection afforded to him by the law.

10 Thank you.

11 MR. FULPER: It's time for the board
12 to deliberate, but I think we are going to be out of
13 time here.

14 (Discussion off the record.)

15 MR. FULPER: So they have a
16 bifurcated application before us. They are right
17 now only looking at the uses, and by definition,
18 assembly use -- the board has to think about this.
19 If it's not an assembly use, they can still apply
20 for a prohibited use through a D-1.

21 MR. PALILONIS: But they haven't,
22 so -- not to say they couldn't. You know, they made
23 that very clear.

24 MR. KYLE: They also conceded that
25 they didn't think they could make the proofs for a

1 D-1.

2 MR. FULPER: Okay.

3 MR. KYLE: Mr. Lakind said that.

4 MR. PALILONIS: They said that, but,
5 you know.

6 MR. KYLE: I'm not saying he can't
7 apply for it. He conceded that point. So --

8 MR. PALILONIS: I don't think you
9 should take that into account. I do have a question
10 for you along the lines of this performing arts
11 issue. Is there anything else in the ordinance
12 other than becoming completely familiar with the
13 whole ordinance, which would be kind of silly,
14 because that's really what the planning board should
15 understand, but is there anything specific that
16 would give the board any comfort on that issue?

17 MR. KYLE: There's this, I think what
18 Mr. Morgan, the attorney Mr. Morgan, was getting at
19 was there is an entertainment and recreation use
20 defined in the ordinance that's permitted, but it's
21 not permitted in this zoning district. So I think
22 it's kind of -- I understand the point he was trying
23 to make. In terms of what we are considering here
24 in this zoning district, that use is not even
25 permitted, but I think the aspects that we talked

1 about, yes, there's music, but those are all things
2 that happen with social assemblage uses as well.
3 They are not selling tickets for performances. It's
4 all part of kind of assembly, what they are calling
5 an assembly use.

6 MR. PALILONIS: It's up to each
7 member of the board to determine to what extent that
8 goes to the issue of whether or not the proposed or
9 existing use is permitted.

10 MR. FULPER: What I wanted to say
11 too, so this discussion we need to have about the
12 assembly use, the board can make that decision, but
13 obviously make it very clear they'd have to come
14 before us with a site plan. At that point in time,
15 they have to deal with the noise issue. They do
16 have the parking issues and all the other site plan
17 issues, the restrictions of the properties, all the
18 things we've testified to, so just so everybody
19 understands while we are talking about this.

20 I don't know if I'm looking at this
21 wrong, can we take all those issues that we have
22 heard about, the noise, the parking, restrictions on
23 the property and say that that's going to be a site
24 plan issue today, and tonight we've heard testimony
25 only on the use side, and this board needs to decide

1 whether we can define this as an assembly use or
2 not?

3 MR. PALILONIS: Well, the assembly
4 use is the first issue that has to be resolved by
5 the board, but don't lose sight of the, you know,
6 D-3 variance part of it as well. I would request
7 that the board, you know, it's up to you, to reach a
8 decisions on both aspects, both whether it's an
9 assembly use, and if it's not, I mean that's fatal,
10 but also in any case, on the D-3, because we could
11 be wrong on the assembly use, you know? But the
12 negative criteria apply in any case, you know, and
13 yet, as Rob said, you are going to have to deal with
14 those if it and at such time as you get to the site
15 plan implications, which may never happen obviously,
16 but you know, but the negative criteria are very
17 important here.

18 The positive criteria under Coventry
19 are not as powerful as they would be for a D-1, as
20 has been said, and everybody, I think, understands
21 that. You've had to deal with both kinds of D
22 variances over the years, so as far as going back to
23 the beginning, as far as the assembly use is
24 concerned, you have to determine, I mean, I think
25 it's a reasonable interpretation to say that

1 permanent applies to all those different types of
2 buildings or structures or facilities or whatever
3 you want, but you may not agree.

4 And I also think that the, you should
5 look at the list of permitted assembly uses to get
6 some guidance from that, and I think it's also
7 important, it's been pointed out what a permanent
8 structure is. I mean, it's a generic term for all
9 those things, and I think that, you know, you can
10 reach your own conclusion on that interpretation,
11 but I mean I think the language is pretty clear.

12 Having said all that -- oh, and I
13 wanted to cover the issue of the letters from the
14 zoning officer. The bottom line to me is show me a
15 zoning permit, so whatever communications happened
16 there, and it's unfortunate that Mr. Lubchansky
17 didn't ask the right question, but, you know, that's
18 what has to happen sometimes. I mean, everybody's
19 fallen into that trap. I'm not saying he was
20 trapped, but I'm just saying, you know, when you are
21 in a legal situation, if you don't ask the right
22 question, there's no reason you should believe that
23 you are going to get the proper answer, and
24 particularly when we have this kind of money
25 involved here, so, you know, I just don't think that

1 the communication -- and, by the way, you saw the
2 second letter saying oh, wait a minute here. You
3 are trying to do a little bit more than I initially
4 understood or something different, so I don't think
5 that has any relevance.

6 MR. FULPER: I don't see any
7 documentation as to where the zoning officer ever
8 verified the fact that the use was usable. It was
9 more of, it's more of a discussion going on, and
10 then the zoning officer is referring to some of the
11 outstanding permits from that original application
12 with DEP, but then the letter of Chris Rose here in
13 April 12, 2016, this is his letter here, April 26th,
14 he does make a clear statement here saying, "After
15 further research into the current use of the
16 development of this property, it has been discovered
17 the conditional use approval for a bed and breakfast
18 or an assembly use was never granted by the zoning
19 board." So it is clear on the record, just so the
20 board understands that, not that that makes any
21 difference, because they are before us. I mean, we
22 are here. They are where they need to be.

23 The thing I struggle with in the
24 assembly use is the word, I don't get hung up as
25 much on the structures as I do the terminology of

1 permanent facility, and that's where, I was trying
2 to listen to the arguments tonight to get somebody
3 to help me get one way or the other on that one. I
4 feel like this is a facility and it is a permanent
5 facility and then, how do you weigh out a tent goes
6 up and that's not permanent obviously in my mind
7 either, but the facility is permanent. That's where
8 I struggle.

9 I had Jim look at through the
10 ordinances to see is there any other place in our
11 township ordinance that allows for this kind of a
12 use that maybe there's something out there that was
13 more descriptive, so I was trying to get to the
14 point where I was saying that when that was written,
15 that use was written, what was the intent. And so
16 there's no other place anywhere that he could find
17 that has this kind of a use, so I thought well,
18 maybe there was a way I could figure it out in my
19 mind that there was an intent to have that use
20 somewhere else and this didn't really fit. That's
21 what I'm struggling with.

22 I'm just open to discussion of that's
23 where I'm trying to, you know, as a jury I'm trying
24 to look at the facts, not get emotional about it,
25 realizing that all the concerns we heard from the

1 neighbors, all the concerns that we are definitely
2 aware of for noise and parking and stuff are really
3 all site plan issues that are going to be a burden
4 at a later point in time.

5 MR. KYLE: When they come back for
6 site plan, they have to prove the negative criteria
7 on the site plan aspects, so that's something that,
8 you know, comes up again, and that's really when you
9 bifurcate. It's tough with an issue like this.
10 Sometimes the site plan issues are so intertwined
11 with the use. You know, take the parking issue for
12 example. We still don't know if or where that
13 parking is going to be. I tend to agree with the
14 planner that was hired by the township that, Mr.
15 Lydon, that if that parking is somewhere in this
16 township where it's not permitted, if they are going
17 to propose off-site parking in a location of the
18 township where it's not permitted, that drags use
19 issues in on other properties, so, you know, I don't
20 know if that's a site plan issue. I don't know if
21 it's an issue that we deal with now, but the point
22 being either way, if you kind of separate things
23 out, when this comes back for site plan, those
24 issues that we've talked about tonight, the noise,
25 the traffic, all those things, are going to have to

1 be dealt with then.

2 And I think the distinction whether
3 this is an assembly use or not is important. The
4 nature of the relief that's necessary, one versus
5 the other, is there's a significant difference in
6 those two. I'm not saying that should influence
7 your decision. I think you've got to look at it
8 black and white and decide is it an assembly use or
9 not, and if it is, then you are going to look at
10 those variance criteria and, you know, the buildable
11 acreage distinction here, the way this property is
12 divided by the Alexauken Creek, if you had a site
13 that had four buildable, contiguous acres, you might
14 be able to put a permanent parking facility in for
15 those.

16 If that's where we end up talking
17 about okay, yes, it is an assembly use and we are
18 looking at those criteria, I think that criteria
19 alone is important, because it's the ability to
20 provide what you need on the site to make it work
21 that really drives it, and that's where the parking
22 I think becomes important. So --

23 MR. MARTUCCI: I want to add too for
24 ADA accessibility and fire access for emergency
25 vehicles which they propose under this application

1 no new building, you know, the impervious areas
2 percentage is going to stay the same, if you do
3 approve the variance to go through, a site plan may
4 say something different or there may be a different,
5 something different before you to look at.

6 So a part of the exhibits I see that,
7 you know, we have a variance plan, which I believe
8 the applicant has submitted to the township, the
9 flood hazard and wetlands permit application just
10 recently now. I had an email from Laura that those
11 information were received from the variance approval
12 from 2014. Our concerns are raised in our letter of
13 August, you know. We stand on those concerns. So
14 just to add to Jim's comment there.

15 MR. PALILONIS: I would ask the board
16 to contemplate what the significance is for an
17 assembly use when the items listed are houses of
18 worship, banquet facility, lodge, fraternal
19 organization, civic organization, funeral home. Can
20 you envision any of those things or anything of the
21 like without a permanent facility? If you can, then
22 fine. Maybe it's an assembly use.

23 MR. FITTING: Can I read what I
24 wrote?

25 MR. PALILONIS: You can do whatever

1 you want.

2 MR. FITTING: So there's been
3 testimony on all the buildings on the property, all
4 except the tent or where the tent is, I think is in
5 agreement that they are permanent structures. I
6 think -- but there was also testimony that none of
7 those structures were good uses for assembly or
8 there could be an assembly in those buildings. The
9 only one was we are talking about is the tent.

10 Ultimately, I don't believe the tent
11 is a permanent structure. The reason, I believe a
12 permanent structure, and when I say structure, we
13 talked about the whole property, so is the whole
14 installation of the property, all the buildings, can
15 they support an assembly? So I believe a permanent
16 structure beyond, you know, the general definition
17 has the core elements permanently incorporated in
18 the structure to support the use. So is it a
19 self-sufficient building for its use? That's to me
20 what the intent is. So if the use is a home, it has
21 bathrooms, bedrooms, kitchens, heat. If it's a
22 restaurant, it's got different requirements, the
23 dining room for patrons, bathrooms, kitchen, yada,
24 yada, so beyond just different building requirements
25 for different buildings, there are different

1 requirements for different assembly uses.

2 These different uses have very
3 different and specific life and safety requirements,
4 as the engineer pointed out. So it's not just can
5 you put a hundred people in there. It's, you know,
6 is it safe to put them in there, you know. So, I
7 mean, in theory, if you didn't agree with that, you
8 could just have a hundred people in a 10 by 10
9 building, barn, shed, whatever, which is considered
10 a permanent structure, but so ultimately, I don't
11 believe the property lack -- I believe the property
12 lacks a safe, permanent structure. What I mean by
13 that, I mean not just the tent. I mean the whole
14 property. So all the buildings together as a
15 collective to me don't support any assembly, any
16 assembly use, you know, the ones that you listed, so
17 I mean, ultimately, I don't think the site is
18 appropriate for an assembly use.

19 MR. ASHTON: Maybe to follow along
20 sort of that same vein of what is a permanent
21 facility and nature of, you know, without the tent,
22 which is not a permanent thing, it wouldn't be
23 suitable for assembly. Is that really any different
24 than a place that had a really fancy mailbox post
25 bricked up on a footing that okay, there's a

1 permanent structure? Maybe I'm exaggerating too
2 much. Maybe it's a storage shed. It's a permanent
3 structure. It's built on foundations, and it's a
4 whole community of tents. Well, yeah, there's a
5 permanent structure there. Is that really the
6 intent of the words "permanent facility" for
7 assembly? And, you know, when you look at the site
8 plan things to the extent, you know, we looked at
9 them separate, but are you ever going to get there
10 when you are using a tent, you know, or is that
11 really why in the ordinance we have, you know,
12 assembly is a permanent facility. It just doesn't
13 work if you don't have a permanent facility. I'm
14 trying to reason through.

15 MR. FITTING: That's why I say the
16 core elements of that structure need to support the
17 use. And that's -- so whether it's in one building
18 or multiple buildings on the property, can you
19 support the use.

20 MR. ASHTON: If you take away the
21 temporary stuff, does it still work for assembly?

22 MR. FITTING: The other buildings
23 have already been stated do not.

24 MR. FULPER: That question would come
25 to my mind would be if you say that doesn't work

1 without the tent for a large gathering, so let's say
2 they decide that what they are going to do is have
3 these little small events where 20 people come to
4 the facility, and they can put them all in the house
5 and have, you know, a banquet or whatever there and
6 provide for them and not utilize a tent, then does
7 that place fall under an assembly use?

8 MR. FITTING: Well, assembly is
9 defined by the number of people also. It depends.

10 MR. FULPER: My question really is
11 what's the number. At what point is it called an
12 assembly use?

13 MR. FITTING: 50.

14 MR. FULPER: Is that -- that's
15 defined.

16 MR. FITTING: In building code. It's
17 not in zoning. It's defined in building. But also
18 in zoning you don't get into safety issues.
19 Obviously that's building as well.

20 MR. ASHTON: I think the principle of
21 is it a permanent facility, well, if it was, if you
22 were able to assemble and whatever meaning, whatever
23 the application is for, to do that for social,
24 civic, whatever, you know, there is list of possible
25 things, worship, if you are able to do that in that

1 permanent facility without the addition of a tent or
2 whatever else, then I think you'd have a much
3 stronger argument that it's a conditional use,
4 because it's, the actual conditional use occurs
5 within the constraints of the permanent facility,
6 not the permanent facility plus the tent.

7 I mean, I don't know how many people
8 would sign up for a wedding if, you know, a rainout
9 meant you all stand under umbrellas. It just, I
10 don't know whether that's a realistic thing.

11 MR. FITTING: I mean, if the tent fit
12 50 people and the structures that are there, the
13 permanent structures that are there, could, you
14 know, could provide bathrooms for 50 people, maybe
15 that's a different argument, but, you know, but
16 it's, you know.

17 MR. ASHTON: If you can't do the --
18 if you can't assemble within the constraints or
19 within just the permanent structures, is it a
20 permanent facility for assembly? That's kind of,
21 you know, and sort of looking at the counter of it
22 is well, then, if it doesn't have to be that, what
23 does it require? Does it require fancy lamp posts
24 and now you have a permanent structure and you can
25 do whatever you want? You know, there's got to be

1 some meaning to the permanent facility concept
2 beyond just that we have a shed somewhere on the
3 property that's built on foundation.

4 MR. FULPER: Yeah. That's a good
5 point. Anybody else have any thoughts?

6 MR. PALILONIS: Anybody have any
7 thoughts on the D-3 implications?

8 MR. FITTING: That's whether or not
9 the property is appropriate?

10 MR. PALILONIS: They are applying for
11 a D-3, so, I mean, you don't have to get to that by
12 saying it's not an assembly use, but I think it
13 would be appropriate to --

14 MR. ASHTON: Question for you.

15 MR. PALILONIS: -- respond.

16 MR. ASHTON: For your direction,
17 counsel, for, the applicant was talking about how we
18 have to, when considering it, consider specifically
19 the failings that the property has in terms of
20 setback and in terms of buildable lot, the acreage.
21 That to me kind of gets intertwined pretty closely
22 with the site plan issues, you know? If you are
23 already saying hey, we are not going to do anything
24 different with this, we are not going to do any
25 building, what's the point of the whole three

1 point -- or the whole four-acre requirement? It's
2 that you could have room for that assembly use,
3 right? I mean --

4 MR. FITTING: If you agree it's
5 assembly use, then they would need relief from that.

6 MR. ASHTON: I guess what I'm saying
7 is but what do we consider specifically being
8 related to that four-acre requirement? Is it all
9 the issues of parking and all those things?

10 MR. PALILONIS: You would have to get
11 relief from the four-acre requirement. That's what
12 they are asking for, contiguous buildable area, you
13 know, nonconforming structures in terms of setback,
14 you know, I mean, they are allowed to continue, no
15 question, but, you know, maybe they have some
16 implications for granting relief from the
17 conditions. Maybe they don't, but, I mean, they are
18 not -- you don't just say not an issue. Maybe you'd
19 say they are not an issue.

20 MR. ASHTON: You'd have a reason to
21 say it.

22 MR. PALILONIS: Right. And what's
23 the other one? Well, the big deal was the negative
24 criteria again, you know. I mean, can you reach a
25 conclusion on those two-prong test, you know, even

1 without a site plan in front of you?

2 MR. ASHTON: I guess that's kind of
3 my question for dealing with this issue separately
4 is on the negative criteria, well, if all you are
5 having is, you know, string quartets playing and,
6 you know, elderly groups, maybe it's not going to be
7 too -- maybe it's not going too loud, is that a site
8 plan issue or --

9 MR. PALILONIS: You can't limit it to
10 that. Even if they said it, there's nothing --
11 there's no way you could enforce that.

12 MR. ASHTON: So we have to take that
13 into account to some degree. We can't just say
14 that's all site plan.

15 MR. PALILONIS: To some degree,
16 right. If you are going to contemplate a variance,
17 you've got to -- it's a big deal.

18 MR. ASHTON: It's reasonable.

19 MR. PALILONIS: There's this negative
20 criteria, big deal. Again, under Coventry, when you
21 are talking about a use that is otherwise permitted,
22 you know, are you going to say no, based on the
23 negative criteria? I mean, that's a bigger deal
24 than the positive criteria at that level.

25 MR. FULPER: Negative criteria says

1 that on a D-3 that the effect of the surrounding
2 properties the conditions you put on have to be kept
3 from being substantial. In other words, the effect
4 isn't substantial to the properties, and obviously
5 we've heard testimony that there is substantial,
6 substantial, you know, effect on the neighboring
7 properties. Again, I'm struggling because you know
8 if I put the horse before the cart sometimes, we
9 need to decide on its own merit is it a use or isn't
10 it on its own merit.

11 Then you have to look at D-3. You
12 make a great point. You can't assemble without the
13 tent. Then I'm saying, I guess, in all the
14 testimony they never once told us well, we don't
15 need that tent. We could -- we are going to provide
16 a facility without the tent, because we can do --
17 shrink it down. We can use the permanent
18 facilities. We didn't hear that, and so the point
19 you make is really good. You are -- you convinced
20 me.

21 MR. KYLE: You only have the
22 testimony that was provided. It said up to 250
23 people and it's going to happen in a tent. That's
24 the application that's before it. I like Stu's idea
25 of dealing with the definitional issue, but then,

1 you know, saying how you feel about the variance if,
2 even if you decide it's not an assembly use, it's a
3 good idea because if it goes on appeal and the first
4 thing the judge is going to look at he says you got
5 the definition wrong, it is an assembly use, at
6 least we have a record on the variance and then he
7 can maybe also opine about whether that was proper
8 or not.

9 MR. PALILONIS: We don't want to get
10 it back.

11 MR. KYLE: No, I think it's a great
12 idea to deal with both issues separately.

13 MR. PALILONIS: At least not on that
14 one.

15 MR. KYLE: Not on that issue, right.

16 MR. FITTING: But deal with it in
17 decision or deal with it in a discussion?

18 MR. PALILONIS: No, with a decision,
19 with a vote, two separate votes. You could make one
20 motion, but it would be cleaner.

21 MR. FULPER: Depends how the first
22 vote goes.

23 MR. PALILONIS: No, no, that's what I
24 said.

25 MR. ASHTON: He's saying

1 hypothetical.

2 MR. PALILONIS: In any case, you
3 know, I don't make motions, so the motions will be
4 what they are. But I'm asking you and requesting
5 that you have two motions, separate motions.

6 MR. FULPER: One separate motion for
7 the use definition and interpretation and also
8 for --

9 MR. PALILONIS: And D-3, which is the
10 harder of the application really.

11 MR. KYLE: Let's talk about that for
12 one second. Really in my mind the four buildable
13 acres is probably the most significant issue with
14 respect to D-3 criteria. In the first prong of the
15 negative, does that deviation have a substantial
16 impact on the surrounding properties, and you can
17 relate it to the second prong when you talk about
18 what was the legislative intent of putting that
19 condition in in the first place, and the proof has
20 to reconcile the fact that the governing body put
21 that condition in there. And I think that's where
22 the issue of, you know, was the intent behind four
23 buildable acres, like you said, to have room for
24 parking, for permanent facilities, for, you know,
25 for all those things you would have with an assembly

1 type use. That's how you can tie that all together,
2 and I think that's probably the focus really on.

3 MR. FITTING: What's really weird
4 here, four contiguous acres that houses no
5 structures.

6 MR. KYLE: That might be important.

7 MR. FITTING: So 99 percent of the
8 structures that are there are in unbuildable areas.

9 MR. FULPER: No, they are in
10 buildable areas but smaller areas, not the four.

11 MR. FITTING: A lot of them aren't
12 even in the --

13 MR. ASHTON: No, just the macadam
14 surface is within the four.

15 MR. KYLE: Let's just look at this
16 for a second. You have --

17 MR. FULPER: They are in buildable
18 area.

19 MR. KYLE: All of the dwelling and
20 the garage area, that's within buildable area. The
21 majority of the tennis court, you know, probably 90
22 percent of it, is within the buildable area. So you
23 have the pool, the pump house --

24 MR. ASHTON: Separate buildable
25 areas. You are speaking of the four contiguous.

1 MR. FULPER: Brian, my point is the
2 buildings are in buildable area. They are not part
3 of the larger bigger piece.

4 MR. KYLE: Not together in one
5 buildable area.

6 MR. FULPER: Were you saying
7 something else, Jim?

8 MR. KYLE: No, I'm trying to bring
9 some focus to the issue.

10 MR. PALILONIS: You have to take it
11 serious in my mind, because this applicant, some
12 future applicant, may want to actually build a
13 permanent facility and, you know, and you are going
14 to, so don't laugh it off, because it may come into
15 play in the future. So, you know, the question is
16 whether you want to give him relief from that.

17 MR. KYLE: Just so we are clear also.

18 MR. PALILONIS: That's in the
19 positives so to speak, whereas the negatives still
20 come into play.

21 MR. KYLE: While I think the setback
22 of the buildings is kind of a secondary issue,
23 because I think it was pretty clear they could
24 remove the gazebo, probably relocate the barn, while
25 it's a secondary issue, the board should still

1 deliberate that fact, but I mean, one or the other,
2 but they both have to be considered.

3 MR. FULPER: Any other comments from
4 any of the board members, any more thoughts?

5 MR. FITTING: This doesn't even have
6 the setbacks on it, even though it's buildable area.

7 MR. KYLE: We have that on the site
8 plan that was submitted, so, I mean, I think it's --
9 so you have the gazebo that's -- that doesn't have
10 the setbacks on it.

11 MR. MARTUCCI: Right here.

12 MR. KYLE: The gazebo's -- the barn's
13 at 36.1, where 75 is required, and I think they, you
14 know, told us during testimony that the barn isn't
15 used for any of the facility functions. Maybe some
16 people go and congregate there after hours, after
17 most people have left, people that are staying on
18 the property. And the gazebo, I guess the pool deck
19 I guess we heard some testimony that that might be
20 within 75 feet.

21 MR. FULPER: Just the deck or
22 something was --

23 MR. KYLE: The gazebo is within a few
24 feet. So, you know, those are really the setback
25 issues. The ordinance requires 75.

1 MR. ASHTON: Are those things when we
2 look at those, they could come up with site plans to
3 not have anything within 75 feet.

4 MR. KYLE: They could.

5 MR. ASHTON: When we think about
6 separating site plan and D-3, you know, the use, I'm
7 looking at like are there things that we say hey,
8 look, it's not reasonable to get this site to work
9 that way, so we shouldn't, you know, maybe on the
10 buildable area, maybe that's one, but on the
11 setbacks, if they could reasonably come up with site
12 plan that would work that we really couldn't say the
13 setbacks were an issue, that might be the better way
14 to dispose of that issue. Say hey, that's not an
15 issue. That would be grantable. Let's focus on the
16 other one that's a bigger challenge, and that's not
17 to say it would be granted, but at least it's
18 potentially feasible a site plan.

19 MR. FITTING: The thing I'm
20 struggling with is because we are sort of making a
21 decision on the future of the potential. Like we
22 already have the zoning already is established for
23 the future, and it's 4 acres, so if they want to
24 propose something in this area in the three acres,
25 then we could make a decision on whether or not we

1 think being under four is appropriate, but we don't
2 have a proposal for any new things in that 4 acres
3 or in that three acres.

4 MR. PALILONIS: You have to decide
5 how you want to take that into account.

6 MR. FITTING: I don't want to take it
7 into account at all.

8 MR. PALILONIS: Right. That's your
9 opinion. That's your decision.

10 MR. FITTING: You know what I mean?
11 To me it's.

12 MR. KOVELOSKI: I agree with you.

13 MR. PALILONIS: If that's the way you
14 feel, then you shouldn't vote for a D-3 variance.

15 MR. FITTING: Like if they came back
16 later and said we want to put these certain
17 buildings in this area and we need the variance for
18 the 4 acres, then we'd make a decision.

19 MR. PALILONIS: You've already taken
20 it away.

21 MR. FITTING: I don't want to give it
22 away now. I don't want to prohibit them from doing
23 that later.

24 MR. KYLE: You want to know
25 something, though, you can weigh in on this too.

1 You are not putting another structure on this
2 property. There's no way.

3 MR. FISHER: It's in a C-1 category.

4 MR. KYLE: There's no fit at this
5 time. That's why I don't want to make that seem
6 significant. I don't know that I would worry about
7 what they could come in with site plan, because they
8 are basically, I think, limited to what's here on
9 the property today.

10 MR. MARTUCCI: My opinion would be
11 you are allowing the assembly use on like the gazebo
12 that is real close to the property line, so you are
13 allowing that by allowing the variance to go
14 through, you are saying that it's okay to assemble
15 at the gazebo that's right on the property line or
16 they may not assemble in the barn, but testimony
17 said that they were, you know, congregating there or
18 somebody was.

19 MR. FULPER: Kevin, you were saying
20 something.

21 MR. KOVELOSKI: To me assembly is
22 supposed to be under the tent of the people coming
23 in. The assembly that we are deciding on the use,
24 is it use as assembly. Mainly it's going to be
25 underneath that tent on the tennis court or

1 wherever.

2 MR. FULPER: From the testimony
3 you've heard.

4 MR. KOVELOSKI: What I heard. That's
5 where I'm struggling. To me that needs a permanent
6 structure to house the assembly. That's where most
7 of the assembly is. That's where the mass majority
8 is. To me it doesn't meet it either way.

9 MR. FULPER: Okay.

10 MR. KOVELOSKI: You could put a tent
11 up in a field and bring a dance floor and a floor
12 and set everything up, and it's the same thing as
13 putting it on a tennis court.

14 MR. FULPER: I know people that do
15 that.

16 MR. KOVELOSKI: So do I, same exact
17 thing. To me the assembly use is, you it needs a
18 permanent structure. That's where most of the
19 people were assembling. That's what's been
20 testified to underneath the tent on the tennis
21 court, and to me, either way. It's like it doesn't
22 fit.

23 MR. FULPER: That's the important
24 thing is that, you know, the facts that you heard,
25 it's got to be what you decide on.

1 MR. KOVELOSKI: They testified it's
2 underneath that tent is the main assembly, and
3 that's where it is. You know, it needs a permanent
4 structure, and to me that tent on the tennis court
5 is not a permanent structure.

6 MR. ROMANO: The only testimony that
7 I saw regarding the use of the word structure, the
8 applicant's professionals were, I guess their
9 attorneys were the only ones that made the same
10 assertion that this was a structure. Our planner,
11 I'm not sure if he has an engineering degree, he was
12 sort of up in the air on it. Our professional, our
13 engineer indicated in the last meeting that this was
14 not a structure, this tent, so in my estimation,
15 that's the way I see it as well. From what I've
16 reviewed and, you know, from the advice that we got
17 from our engineer, this is not a structure. So it's
18 pretty simple to me.

19 MR. FULPER: Yeah. I think the
20 simple thing is that, I think we all agree the tent
21 is not permanent. It's not a structure. Then
22 you've got to get past, well, me speaking for myself
23 have to get past the facility idea of it. But
24 listening to the conversation, I think I've got my
25 ideas. So, I mean, if we want a motion, and the

1 attorney's suggesting that we make a motion for the
2 use definition of assembly use first. Right, Stu?

3 MR. PALILONIS: That's right.

4 MR. FULPER: Then you want us to
5 handle D-3 after that?

6 MR. PALILONIS: That's right.

7 MR. FULPER: Right now we would be
8 looking for a motion on our interpretation of the
9 assembly use for the property.

10 MR. FITTING: Basically whether or
11 not it meets or does not meet?

12 MR. ASHTON: Whether their
13 application meets an assembly use.

14 MR. FULPER: Make a motion?

15 MR. FITTING: I'll make a motion that
16 this property does not meet the assembly use
17 definition. I mean, I guess that's a motion.

18 MR. FULPER: Should there be --

19 MR. ASHTON: Should we have
20 discussion on the motion?

21 MR. FULPER: So there's more
22 description or anything else that's important.

23 MR. ASHTON: It's not just the
24 property. It's this applied use, right?

25 MR. PALILONIS: Yes.

1 MR. ASHTON: That's what I was going
2 to suggest. Can we incorporate into that motion
3 something to say that the applied-for use on this
4 property does not meet the definition of assembly
5 use?

6 MR. FULPER: Is that what you are
7 trying to say, Brian?

8 MR. FITTING: Ultimately, but, I
9 mean, as you pointed out all the different
10 assemblies, I -- those aren't before us, but I don't
11 think any of these fit, so but said more succinctly,
12 yes. I have no problem with that revision.

13 MR. FULPER: Do you have that motion?

14 MS. HALL: Well, I've got applied-for
15 use does not meet the definition of assembly use.

16 MR. FITTING: But the use is just
17 assembly, just generically. He's not saying a
18 banquet assembly use or a nightclub assembly use.
19 It's just assembly use.

20 MR. ASHTON: Should we be very clear
21 and not assembly, therefore not a permitted?

22 MR. FULPER: So we have a motion.

23 MS. HALL: Motion made by Fitting
24 does not meet -- the applied-for use of assembly
25 use, correct, it's on the recording, so I've got it.

1 Does not meet definition of assembly use, got it.

2 MR. FULPER: So we have a motion. We
3 have a second?

4 MR. KOVELOSKI: I'll second.

5 MR. FULPER: Any discussion about the
6 motion? Hearing no discussion, I'll have a roll
7 call.

8 MR. ASHTON: Just on a technical
9 point. Stu, I didn't get to listen to the testimony
10 from last time, so I'm assuming I should be
11 abstained?

12 MR. PALILONIS: I meant to ask that.
13 Thank you for bringing that up. You should abstain
14 if you haven't heard all the testimony, either
15 personal by being present or reading or --

16 MR. FULPER: There were seven of us.

17 MS. HALL: Last time we had Cronic,
18 Fitting, Romano, myself, Sabatino, Fisher and
19 Fulper. So Ashton and Koveloski are not going to be
20 voting.

21 MR. FULPER: Can he still second it?

22 MR. PALILONIS: Wait a minute, no.
23 As we learned early in the evening, Mr. Fisher is --
24 you are an Alternate 2?

25 MR. FISHER: That's correct.

1 MR. PALILONIS: So Alternate 1 --

2 MS. HALL: He was here last month,
3 and so was Sabatino. Koveloski and Ashton were not.

4 MR. PALILONIS: That's right.

5 MS. HALL: They did not listen to the
6 tapes.

7 MR. PALILONIS: Koveloski was an
8 alternate?

9 MS. HALL: No, he's a regular.

10 MR. PALILONIS: No. Only the people
11 that were here for all the hearings.

12 MR. FULPER: Can Kevin second the
13 motion or not?

14 MR. PALILONIS: No.

15 MS. HALL: So we need another second.

16 MR. FULPER: You want to rescind that
17 second?

18 MR. KOVELOSKI: I rescind that
19 second.

20 MR. FULPER: We need a second on the
21 motion.

22 MR. FISHER: Second.

23 MR. FULPER: We have a second from
24 Fisher. John? Are you okay, John? Any more
25 discussion?

1 MR. CRONCE: I wanted to make sure
2 the way this is worded and the way I vote.

3 MR. FULPER: So we have a second from
4 Fisher. Call the roll call on the motion.

5 MS. HALL: Okay. Cronce?

6 MR. CRONCE: I vote yes, that does
7 not meet the criteria. That's the way it's supposed
8 to --

9 MS. HALL: Yes, it does not meet the
10 criteria. Thank you. Fitting?

11 MR. PALILONIS: That was the motion,
12 just so everybody understands.

13 MR. FITTING: Aye.

14 MS. HALL: Romano?

15 MR. ROMANO: Aye.

16 MS. HALL: Hall? Aye. Sabatino?

17 MR. SABATINO: Aye.

18 MS. HALL: Fisher?

19 MR. FISHER: Aye.

20 MS. HALL: Fulper?

21 MR. FULPER: Aye.

22 MS. HALL: Thank you. Motion passed.

23 MR. FULPER: This is where I'm a
24 little confused here. The motion doesn't pass, why
25 are we going to deal with D-3?

1 MR. PALILONIS: Because that's what
2 they applied for.

3 MR. CRONCE: I don't understand it
4 either.

5 MR. PALILONIS: You want to hear it
6 again?

7 MR. CRONCE: Could you do the short
8 version?

9 MR. PALILONIS: They applied for it.
10 That's all you need to know.

11 MR. CRONCE: Okay.

12 MR. FULPER: So they applied for a
13 D-3. What they are asking for is relief from the
14 setbacks, relief from the non-buildable area of a
15 minimum 4 acres. They meet the 35 percent coverage
16 minimum.

17 MR. KYLE: Yes.

18 MR. FULPER: So there's only two
19 items they had to apply for for a D-3. Those are
20 the two items we have to deal with. Again, so are
21 we looking at a motion to not grant a variance or
22 grant a variance?

23 MR. PALILONIS: However you want to
24 word it.

25 MR. ASHTON: What's the relief? They

1 are seeking specific relief.

2 MR. FITTING: Can they withdraw that?

3 MR. PALILONIS: Why would you ask?

4 MR. FITTING: I mean, as the
5 applicant, would they want us to make a decision
6 potentially?

7 MR. PALILONIS: Please make the
8 motion. I don't know how strongly I can say it.

9 MR. FULPER: So we have a D-3
10 variance application before us for the two
11 deficiencies. Do we have some discussion on that?
12 Again, we have to look at the positive and negative
13 criteria. Positive criteria says that the site -- I
14 should be letting the planner tell us this, I guess.
15 Tell us what we should be weighing.

16 MR. KYLE: So you are focusing on the
17 positive, does the site remain suitable for the
18 proposed use despite the fact you don't have four
19 buildable acres and despite the fact that you have
20 structures within 75 feet of the property lines.

21 On the negative, how does the four
22 buildable acres not being there, contiguous
23 buildable acres, affect the surrounding properties?
24 Likewise with the setbacks.

25 The second prong you are focusing on

1 buildable area and the setbacks and really you are
2 trying to look at what legislative intent behind
3 putting those conditions in place was in the first
4 place, and can you reconcile the fact that this use
5 is appropriate, given the fact that it doesn't
6 meet -- you almost have to kind of look into what
7 the governing body was thinking, and can you
8 reconcile that in your mind, you know, what was the
9 intent behind it. That's why I was saying if there
10 is concern over the parking and the other things,
11 that's kind of the area where you are going to
12 relate those items.

13 MR. FULPER: Obviously with the
14 setbacks, I'm sure the intent was the fact was if
15 you are going to have assembly uses, we are going to
16 make the buffer wider and raise it to 75 feet. In
17 this zone the existing setbacks were 50, but the --
18 this use would require 75-foot setback, and the
19 reason I'm sure the intent there was, again, there's
20 going to be more people, more activity, more noise,
21 let's get a bigger buffer for the property line.

22 So using that as your guide to make a
23 decision or make a motion, you need to be talking
24 about what that impact is and those setbacks that
25 are inadequate and the impacts that the planner just

1 discussed about not having the buildable acres,
2 whether you can provide parking and provide all the
3 things that the intent was.

4 MR. PALILONIS: Can you operate this
5 facility or whatever it is as they have been and
6 they are proposing to do without having substantial
7 detrimental impact on the neighbors.

8 MR. FULPER: You can listen to the
9 testimony. You can refer -- you've heard about the
10 noise. You've heard about the parking issues.
11 You've heard about the road that the property is on
12 and what it's capable of handling in traffic. You
13 need to use those things and make a motion whichever
14 way you feel.

15 MR. CRONCE: Either I do it short the
16 way I want to get it done, does it meet --

17 MR. FULPER: George is writing one
18 down.

19 MR. PALILONIS: Should you grant the
20 relief from the four-acre requirement. Should you
21 find in their favor on the negative criteria.

22 MR. KYLE: I think the focus is we
23 want to have a clear determination, put all your
24 thoughts on the record. Let's get everything in
25 there so that it's clear why.

1 MS. HALL: You are voting the way you
2 are voting.

3 MR. KYLE: The more informative the
4 record is, the better off we will be here.

5 MR. ROMANO: What kind of discussion
6 are we looking for? I'm having a tough time
7 drafting.

8 MR. CRONCE: We need to draft up the
9 motion.

10 MR. ROMANO: I understand, so --

11 MR. KYLE: Discussion in terms of --

12 MR. PALILONIS: Most of the testimony
13 you heard was on D-3 variance.

14 MR. ROMANO: Got it. The notes that
15 I have from the applicant in terms of the possible
16 criteria, they indicated that the train helps
17 minimize impacts. You know, indicating that the
18 woods help screen the visual impacts. You know, in
19 follow-up, their professional indicated that hey,
20 they have no experience or they have no
21 qualifications in discussing noise, which is another
22 potential impact, and so it left me with gray, you
23 know, in terms of -- maybe even black in terms of
24 they are talking about certain angles and they are
25 showing you something from a certain perspective,

1 and I didn't get, once we followed up after one of
2 the people in the audience questioned them and we
3 followed up and saying hey, this guy doesn't have
4 all of the qualifications to determine whether it is
5 a positive, if all the positive criteria are
6 satisfied, so I walked away from that thinking no,
7 not all the positive criteria were satisfied.

8 And, you know, can it be granted
9 without substantial detriment to the public good or
10 public welfare? I'm not sure because of that too.
11 So that's where I am right now. It's based upon
12 their testimony.

13 MR. FISHER: I just was going to make
14 a motion to deny D-3 due to the physical constraints
15 of the property. The property won't support the
16 parking. It won't support banquet facilities. It
17 doesn't support -- it presently doesn't sport
18 sanitation requirements, nor is there any
19 possibility that they can be built on the three
20 acres they have. It's all in C-1 category stream
21 corridor. They can't build anything. What they
22 have is what they got, and from what I see, it's not
23 a banquet facility. You know. I don't even think
24 it has the last -- I'm a very simple man.

25 MR. PALILONIS: Just focus on the --

1 MR. FISHER: I just said enough.

2 MR. CRONCE: Put that for a motion.

3 He did say deny.

4 MR. PALILONIS: He stated his piece.

5 Does anybody else want to weigh in?

6 MR. CRONCE: Is that a motion?

7 MR. FULPER: If that's a motion, we
8 can second it and have the discussion if we want to
9 modify.

10 MR. CRONCE: I'll second that motion.

11 MR. FULPER: Anymore discussion on
12 that motion? Do you want to -- could you formulate
13 that motion?

14 MS. HALL: You need it --

15 MR. FULPER: The board needs to hear
16 it.

17 MR. ASHTON: Did he speak about
18 negative side at all? Is that something you want to
19 make sure you've addressed?

20 MR. PALILONIS: Yes.

21 MR. ASHTON: The positive and
22 negative and was that in that as it reads now? Just
23 throwing that out.

24 MR. PALILONIS: Well, the motion is
25 to deny. The point is to state your reasons.

1 MR. KYLE: You can articulate the
2 negative aspects in your own vote. Not that
3 everybody has to do it. As long as we get some
4 sense of why, relating it specifically to the
5 positive and continued suitability and then the
6 negative, you know, the legislative intent and all
7 that.

8 MR. ASHTON: Got it.

9 MR. PALILONIS: You guys have done it
10 many times. Nothing different.

11 MR. FULPER: In that motion, George,
12 kind of get something down.

13 MS. HALL: What I have George was
14 started out as to deny D-3 variance due to the
15 physical characteristics, was it?

16 MR. FISHER: Yes, physical
17 constraints of the property. The property will not
18 support parking, sanitary facility, nor banquet
19 facilities. The buildable area and stream corridor
20 prohibited further building.

21 MR. FULPER: So what he's saying is
22 the positive criteria says is the site suitable
23 despite the deviations, and in your motion you are
24 addressing that. I'm not putting words in your
25 mouth. Is that what you are saying, George?

1 MR. FISHER: Just let me --

2 MR. PALILONIS: His testimony is in
3 the record. The motion is to deny, and he gave his
4 reasons for denying.

5 MR. CRONCE: So you have a motion.
6 You have a second. Is there any more discussion?

7 MR. FULPER: Just as long as the
8 motion is clear enough for members to vote on.
9 That's what I want. I want members clear on what
10 they are voting on. That's important.

11 MR. CRONCE: Can't be any clearer.

12 MR. FISHER: I'd like to make a
13 motion to deny D-3 due to the physical constraints
14 of the property. The property will not support
15 parking, sanitary facilities, nor banquet
16 facilities. Both buildable area and the stream
17 corridor, the C-1 stream corridor, prohibit
18 additional building.

19 MR. CRONCE: We already have a second
20 on that. It's already been done.

21 MR. FULPER: Any more discussion?
22 Let's roll call a motion.

23 MS. HALL: Cronce?

24 MR. CRONCE: I vote yes for the
25 motion that was given.

1 MR. PALILONIS: To deny?
2 MR. CRONCE: To deny.
3 MS. HALL: Yes to deny. Fitting?
4 MR. FITTING: Aye.
5 MS. HALL: Romano?
6 MR. ROMANO: Aye.
7 MS. HALL: Hall? Aye. Sabatino?
8 MR. SABATINO: Aye.
9 MS. HALL: Fisher?
10 MR. FISHER: Aye.
11 MS. HALL: Fulper?
12 MR. FULPER: Aye.
13 MR. SINGER: Thank you for your time
14 and consideration. I appreciate it.
15 (Whereupon the proceedings were
16 concluded at 11:38 p.m.)
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C E R T I F I C A T E

I, DONNA BRUNCK, a Certified Court Reporter of the State of New Jersey, authorized to administer oaths pursuant to R.S.41:2-2, do hereby certify that the foregoing is a true and accurate transcript of the meeting that was taken stenographically by and before me at the time, place and on the date herein before set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any of the parties or attorneys to this action, and that I am not financially interested in the action.

I DO FURTHER CERTIFY that the within transcript format complies with Rule NJ ADC 13:43-5.9.



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Dated: February 3, 2017