

**CITY OF NEWARK
DELAWARE
BOARD OF ADJUSTMENT
MINUTES
OCTOBER 21, 2021**

Those present at 7:00 p.m.:

Members:	Jeff Bergstrom, Chair Kevin Hudson Bill Moore Mark Morehead Chris Rogers
Staff:	Paul Bilodeau, City Solicitor (arrived at 7:07 pm) Mike Fortner, Planner II Tom Fruehstorfer, Planner II Nichol Scheld, Administrative Professional I

Mr. Bergstrom called the meeting to order at 7:00 p.m. and asked Ms. Scheld to call out the roll.

1. APPROVAL OF MINUTES FROM MEETING HELD MARCH 18, 2021:

Mr. Morehead requested to make a clarification to the minutes at the bottom of the first page; he wanted to amend the minutes to “discussion of the case with either party to the case” because the problem was ultimately that the City Solicitor arranged for a Planning Department employee to contact Mr. Morehead with an explanation which in turn led to Mr. Morehead’s recusal. Mr. Bergstrom thought the request was reasonable.

MOTION BY MR. ROGERS, SECONDED BY MR. MOORE: TO APPROVE THE MINUTES WITH THE CHANGE PROPOSED BY MR. MOREHEAD.

MOTION PASSED. VOTE: 5 to 0.

Aye: Bergstrom, Hudson, Moore, Rogers, Morehead.

Nay: 0.

Mr. Rogers asked if he could read a statement. Mr. Bergstrom confirmed and appreciated his candor.

Mr. Rogers explained that his statement had nothing to do with the application before the Board that evening. He read:

I work for a company called AECOM. AECOM is an international engineering firm with an office in Newark. Among other services, the Newark office provides planning and engineering services to municipalities in Delaware, Maryland and Pennsylvania. I was originally appointed to the Board of Adjustment in 2018 and reappointed in 2019. On my 2019 Board of Adjustment application under the question: *Do you have a personal or business relationship with any member of City Council, members of any City board or commission, or employee of the City of Newark?* I

stated: *My company, AECOM, currently has an On-Call Engineering Services Contract with the City. As a company, we may pursue other opportunities with the City.*

That was the case at the time. AECOM no longer has an On-Call Engineering Services Contract with the City. In February 2020 the City issued Request for Proposals 20-01 Municipal Planning Services for the City of Newark seeking proposals from planning firms to assist the Planning Department with the various services provided by the Department on an as-needed basis. The Request for Proposal required *A statement to the effect that the selection of the proposer shall not result in a conflict of interest with any other party which may be affected by the work to be undertaken. Should any potential or existing conflict be known by a proposer, said proposer must specify the party with which the conflict exists or might arise, the nature of the conflict, and whether or not the proposer would step aside or resign from the engagement or representation creating the conflict. (The City reserves the right to select more than one firm to perform the required services to avoid conflict of interest and other similar occurrences.)*

AECOM submitted a proposal on March 17, 2020 which included a statement: *Chris Rogers also serves on the City Board of Adjustment. There may be situations in the future where Mr. Rogers would need to recuse himself as a Board of Adjustment member on applications involving variances or appeals. If shortlisted, we would like to discuss this matter in more detail with the City Staff and City Attorney.*

AECOM was one of 3 firms selected by the City to provide the planning services described in RFP 20-01. Currently AECOM is providing services on 2 projects under this contract, the Newark TID and a Greenhouse Emissions Assessment. I have not personally been involved on either of these projects nor have they involved issues or projects that have been before this Board.

In August 2021 the City issued Request for Proposal No. 21-05, Strategic Planning and Implementation Services for Charrette, Associated Review, and Recommended Revisions to the BB and RA Districts of the City Zoning Code. RFP 21-05 included the same conflict statement requirement as RFP 20-01.

AECOM submitted a proposal on September 14, 2021 which included the following statement: *It should be noted that Chris Rogers serves on the City Board of Adjustment. There may be situations in the future where Chris would need to recuse himself as a Board of Adjustment member on applications involving variances or appeals as they may relate to the BB or RA Zoning Districts. If selected, we would like to discuss this matter in more detail with the City Staff and City Attorney.*

On Monday, October 18, 2021, AECOM was awarded the contract. As of today, a contract has not been officially executed and services on the project have not begun. In the future, in the event AECOM is involved in a project that comes before this Board, I will consult with Counsel on the need to recuse myself. It is my intent to err on the side of caution regarding recusals to avoid even the appearance of a conflict of interest or ex-parte communications. Thank you.

Mr. Bergstrom thanked Mr. Rogers and reminded that conflicts that were acknowledged ahead of time were often not conflicts of interest.

2. The appeal of OMG STAR, LLC t/a The Grain Exchange, property address 591 Collaboration Way, Fintech Building, STAR Campus:

Ms. Scheld read the facts of the case into the record and noted that the address submitted on the application was 560 Collaboration Way and should be corrected to 590 Collaboration Way. (*Secretary's note: the correct address is 591 Collaboration Way.*)

- **Sec. 32-56.4(d)(3) – Facilities selling alcoholic beverages for consumption on premises and restaurant patios** – No bar or similar structure used for sale of dispensing of liquor shall be permitted on a patio. The plan shows a bar at the structure wall opening; a variance to allow a bar to be located on a patio is requested.
- **Sec. 32-56.4(d)(4) - Facilities selling alcoholic beverages for consumption on premises and restaurant patios** - No electronically amplified sound shall be permitted on a patio; a variance is requested to allow electronically amplified sound on the patio.

Mr. Bergstrom asked if anyone was present to speak for the applicants. John Tracey, Young Conaway Stargatt & Taylor, would speak on behalf of the applicant. He informed that the proprietors Jim O'Donoghue and Lee Mikles were present, as was Tracy Shickle of the University of Delaware. Mr. Bergstrom swore in all witnesses.

Mr. Tracey explained the applicants were seeking two variances for a new restaurant concept that would be the latest entry into Grain family. He informed that Grain was begun by two entrepreneurs with UD roots and their first facility was on Main Street. Since then, the pair opened three additional restaurants in Kennett Square, Summit Marina, and Lewes. He noted that as the family of restaurants expanded, the owners invested significant time and efforts in the advance of community efforts, environmental advocacy, and supporting local arts, among others. At the same time, UD, in partnership with other entities, had been developing the STAR Campus at the site of the former Chrysler Plant along Route 896 apart from the sports complex. The project brought research, medical, and educational services to the campus, along with technology and with other businesses, both for the benefit of consumers, engineering services, and research purposes. He informed that as the site continued to expand, UD tried to anticipate and meet the needs of the tenants, teachers, students, and visitors that visited the site, and a glaring deficiency was that the facility lacked any significant food services on the campus itself so if a person did not bring a meal, they had to head off campus for options other than vending machines. He pointed that there were no places within walking distance of the facility which meant that driving was required.

Mr. Tracey began a slide show and continued that the idea was for Grain to introduce a new restaurant, the Grain Exchange at STAR Campus, to the site of the new Fintech Building. He explained that the Fintech building in the render was the in the forefront and faced a green with an additional building across the way. To the right of the slide, was the Chemours portion of the campus. The next slide displayed the opposite perspective looking towards the Fintech Building where the proposed location of the restaurant was highlighted in a red rectangle. The restaurant would be designed to cater to the workers, visitors, and students within the campus, and would also serve breakfast, lunch, and dinner. Additionally, the bar portion of the restaurant served extended high-top and, in 2019, Grain did \$400,000 in meal service from the bar in 2019. He noted that the restaurant had to comply with the requirements of the ABCC with regard to balancing food and beverage services so that the majority of the revenues was generated by the food services as opposed to the alcohol.

Mr. Tracey then displayed the floor plan and explained that the restaurant proposed a patio for dining extended from the bar on the right-hand side of the depiction. The patio extended into the green area from the original photograph and would create an outdoor atmosphere for visitors to gather, relax, and enjoy one another's company, dine, and listen to music. He explained the applicants proposed to utilize an

indoor/outdoor concept for the bar, which was similar to Grain in Lewes, and had grown in popularity with the advent of the situation over the last 18 months with people seeking the opportunity to have outdoor dining or in areas with good airflow versus indoor. He noted the facility on the slide, similar to the restaurant in Lewes, was really an indoor/outdoor facility in the sense that when inclement weather occurred, the area could be enclosed to create an indoor area. He then presented an aerial perspective of the patio location and pointed that the buildings surrounded the patio on both side. He showed pictures of two existing Grain restaurants utilizing similar patios.

Mr. Hudson interjected and asked if the proposed location was along Discovery Boulevard. Mr. Tracey replied the location was between Discovery Boulevard and Research Boulevard and noted the Fintech Building would be located on Collaboration Way; the restaurant would be facing into the plaza, towards the AP Bio building. Mr. Tracey returned to the slides of Grain in Lewes with the example of the indoor/outdoor setup where the doors could be lowered. He explained the next round of slides showed Grain H2O in Bear where there was a separate outdoor bar that was back to back with the indoor bar. The H2O bar was not fully connected as the applicants proposed for the new location and was instead similar to the Lewes location.

Mr. Tracey explained that the in order to employ the concept, the applicants were seeking two variances from Section 32-56.4 related to the service of alcohol at restaurants. He noted that the majority of the ordinance was focused on the central business district or on facilities that were approximate to residential uses, neither of which was the case with the proposal. He pointed that bulk of 56.4 seemed to be focused on the Main Street area where there were specifications for clearance of sidewalks and patio cafes, where it was necessary to maintain the flow of traffic. He surmised the ordinance was relevant from the 1980's when there were bars that were very close to Main Street which could have been the source of some problems.

Mr. Tracey reiterated that the applicants sought two variances: an outdoor bar and the ability to have amplified music on a patio. He argued that the requests fit within the narrative that UD was seeking to create at the location and on the plaza and was also something for which the Grain brand was noted as all of its venues featured local, live music. He shared that the music entertainment typically consisted of one or two people with guitars and was intended to provide a background for patrons. He noted the music only occurred a few days a week so as not to bother the landlords or tenants. He then introduced Tracy Shickle to describe how the restaurant fit in to UD's vision at STAR Campus.

Ms. Shickle read a prepared statement from the University:

The University of Delaware STAR Campus is home to several thousand University and tenant company employees that are discovering, producing, and making possible the next generation of innovations that will solves some of the world's most complex challenges. Since 2009, STAR Campus Development has facilitated over half a billion dollars of investment in the City of Newark. STAR Campus is less than 50% developed. The University's current and future tenant companies expect to be part of a contemporary innovation community that offers amenities that serve to attract and retain diverse employees, clients, community members, and collaborators. The University has been working with Grain for the past three years to collaboratively develop a service model that meets these expectations and enables Grain ownership to operate a full-service restaurant. As we seek to innovate to address the challenges presented by a global pandemic, the opportunity to offer novel placemaking that enables people to meet and socialize in a safe and engaging setting, is a welcome addition to STAR Campus and to south campus. The University supports Grain's application for area variances to operate a new restaurant at STAR Campus. On behalf of the University, we thank the City of Newark Board of Adjustments for their time and expertise and we hope for a favorable outcome resulting in Grain's application for variances as successful.

Ms. Shickle added that letters of support were submitted the University of Delaware's Executive Vice President and Chief Operating Officer John Long as well as by site leaders from Bloom Energy and Chemours.

Mr. Tracey asked Ms. Shickle to address the idea of utilizing the patio area for amplified music as well as an outside bar and educate the Board in terms of the what the University was trying to create for the Research Plaza. Ms. Shickle reiterated that the Campus was home to several thousand employees that had been very vocal regarding the need for places to convene with customers and employees to enjoy business entertainment and host internal meetings. She reminded that the option was not currently a possibility on STAR Campus. She emphasized the importance of for tenant organizations to be able to relax and socialize in a COVID-friendly environment in a place that offered creative placemaking and was imperative for UD's ability to attract future tenants to Newark and STAR Campus. She informed that the model existed all over the Country in university-anchored innovation districts and research parks so what UD did on STAR Campus could be benchmarked over the entire Country. She pointed that the restaurant would be a desirable and attractive amenity at STAR Campus as evidenced by the support letters that were submitted.

Mr. Tracey asked Ms. Shickle to amplify the role or need that such a facility had in conversations with existing and prospective tenants. Ms. Shickle stated that the current tenants had been very vocal about the desire and the need. She revealed that STAR Campus had hit critical mass off density at STAR Campus where such facility made sense and it would be an expectation for future tenants. She reminded that many employees had 30 to 45 minutes for lunch so the ability to leave the Campus to drive and return during the lunch break was nearly impossible. She claimed that Grain was the ideal collaborator given their historic support of the community of UD faculty research and students. She could not compliment Grain enough and shared that collaboration had been a pleasure. She stated that the model was something that UD was very much looking forward to and it was important to UD as well as the tenant companies on STAR Campus.

Mr. Hudson asked if all of the surrounding properties in the area were UD properties. Ms. Shickle confirmed.

Mr. Rogers asked Mr. Tracey to revisit the plan slide and asked if the area in question was the hatched rectangle to the right and Mr. Tracey confirmed the area was where the patio would be installed. Mr. Tracey explained that the applicants did not need a variance for the purposes of having a patio that served alcohol, the two variances were specific to the bar seats along the wall, which would technically be considered an outdoor bar, and the second variance was for live music. Mr. Rogers asked if the patio seating would include high-tops where patrons could order alcohol directly from the bar. Mr. Tracey confirmed there would be tables on the patio but noted they were not shown on the slide. Mr. Rogers asked if there could be a situation where patrons were standing around drinking and watching TV or if it was overly prevented by the ABC rule of alcohol to food ratios. Mr. Tracey reiterated that the applicants were not requesting any relief from the City rules that required patrons to be seated and eating while drinking on a patio and were not seeking relief for people to be congregating. Mr. Rogers was unaware such a rule existed, and Mr. Tracey believed that patrons were required to be seated and eating while drinking on a patio. Mr. Fortner nodded in confirmation of Mr. Tracey's statement. Mr. Hudson was also unaware of the rule.

Mr. Morehead asked how the applicants would enforce the rule where patrons would have to be seated. Mr. Tracey replied that Grain would enforce the rule just as any other bar in the City and added the restaurant could be in violation of its Special Use Permit if there was a citation issued. He reminded that restaurants, for better or for worse, learned how to start enforcing measures once COVID hit because certain rules were relaxed. He reminded that there were also capacity limitations and requirements that patrons needed to be seated at their tables in limited groups. He revealed that his son had been a waiter at Grain prior to starting his career and he had to go to more than one table to break tables up or make sure patrons

were seated. He continued that restaurant staff were primarily responsible for enforcement but reminded that the City also had its right to enter a facility to ensure compliance.

Mr. Morehead referred to Mr. Tracey's comments where he interpreted the law as intended for downtown Main Street and the proposed site was not a residential area. Mr. Tracey confirmed that the area was not residential. Mr. Morehead argued that the area could absolutely be a residential area as it was part of the STC zoning, and all residential types were allowable. Mr. Tracey confirmed but pointed that any residential uses would be coming in after the facility was established instead of the facility entering an established residential area, which was what the protections were designed to be against. He argued that the restaurant would be in the location first which meant that the residences coming after would be aware of the facility. He emphasized that the property was very large, and he would address the undeveloped areas later in his presentation. He admitted he was unaware where UD was contemplating to include residences, but the area of the proposed facility was surrounded by a minimum of three tall office buildings, two of which existed, and one was being constructed. Mr. Morehead said that he fully understood the discussion but wanted the record to show that the area could be residential and likely would be in the future. Ms. Shickle interjected that the current master plan for STAR Campus indicated residents proximate to the Newark Regional Transportation Center, which would be a significant distance from the property. She continued that to Mr. Tracey's point, anyone moving into the residences would likely be attracted to the community and be aware of the existing amenities in the community. She pointed that most of the residents would be by the train station and there could be residences on other parts of the property proximate to South College Avenue. She shared that at the present time, there were no plans to construct residential units proximate to the location. She reminded that STAR Campus was 272 acres so there was quite a bit of land.

Mr. Rogers asked Mr. Tracey to explain his remarks regarding the Special Use Permit. Mr. Tracey explained that the restaurant serving alcohol were permitted use within the STC zoning district, as well as BB and the like. Before approval was granted to open, Council had the chance to review the proposal to ensure there would be no adverse impacts on surrounding residents. Mr. Rogers asked if the permit was for outdoor seating or to serve alcohol in general. Mr. Tracey replied the permit was to serve alcohol regardless of outside seating. Mr. Bilodeau confirmed Mr. Tracey's statement that Council would consider whether to issue a Special Use Permit or not and could also impose certain conditions such as hours of operations, et cetera.

Mr. Morehead asked if Council had reviewed the proposal. Mr. Tracey confirmed. Mr. Morehead asked if Council could also make the adjustments that were requested of the Board on their behalf. Mr. Tracey assumed if that was the case than the applicants would have gone to Council but it had been explained to him that the requests were zoning variances and, as Mr. Morehead knew from his time on Council, the applicants could pursue the relief through the Site Plan Approval Process but the Site Plan process was not applicable to the use.

Mr. Moore understood that applicants could pursue the request under Section 32-78 per the Special Use Permit Provision. He was confused on the process because the applicants had not yet gone before Council. He asked why the applicants could not include their variance requests during the Special Use Permit process with Council and why it was not incorporated as one request. Mr. Tracey revealed that there was no clear mechanism to give the applicants the ability to obtain the relief from City Council. He reminded that certain development projects were able to seek relief via the Site Plan Approval process to get variances from zoning restrictions attached to an application as part of the plan approval. He explained that similar language did not exist for the ability to do what the applicants were seeking with alcohol service. He continued that the applicants were present that evening because they had to go to the Board first to obtain any relief from the design so that when they went before Council, the applicants would be able to present the complete picture of the plan.

Mr. Hudson was concerned about the amplified music because he knew of one restaurant on Main Street that had amplified music playing at 5 am when he ran. Mr. Tracey was unsure if the restaurant had a legacy ruling. Mr. Hudson assumed the request would cover speaker music. Mr. Tracey deferred to Mr. Bilodeau but said that the rule clearly covered the applicants' intent to have a musician with a guitar; he did not have the definition of amplified music immediately available to determine if it was radio or actual performers. Mr. Fortner informed that the definition was for electronically amplified music, so an acoustic guitar was not a concern. He informed that the City Manager could grant permission for special outdoor events in the noise ordinance code, but it required an application and were temporary. He emphasized that the request that evening was different. Mr. Morehead referred Mr. Hudson to 32-56(4)(d) which specified patios which served alcoholic beverages could have no electronically amplified sound. He pointed that if Mr. Hudson was running past a restaurant that did not serve alcohol or have an outside patio would not be under the ruling. Mr. Hudson confirmed that the restaurant in question had an outside patio and also served alcohol. Mr. Fortner asked Mr. Hudson to report the restaurant for violation of the noise ordinance and for causing a disturbance. Mr. Hudson assumed the rule would cover regular pre-recorded music and Mr. Fortner confirmed.

Mr. Tracey then presented the legal standards for the variances. He reminded the application was for an area variance under Code and, as the Board was aware, there was a clear distinction between use and area variances that dated back to the *KWIK Check* decision. He explained that a use variance changed the character of a zone district by permitting an otherwise prescribed use while an area variance concerned only the practical difficulty of using property for a permitted use, such as introducing a commercial use into a residential district. He continued that at the property, the service of alcohol was a permitted use and the service of alcohol on a patio was a permitted use which was why the applicants were arguing that the request was for an area variance. He agreed that the variance was unique but the requests in the application were flowing from ancillary zoning restrictions placed upon a permitted use. He emphasized that because it was a special use did not change the calculus. He continued that *Dempsey v. New Castle County Board of Adjustment* noted that the fact that a project was a limited use and was subject to different requirements other than the regular use did not make it a prohibited use and explained that the case was interpreting the New Castle County ordinance and whether a limited use changed something from an area variance to a use variance. He indicated that the critical distinction between "area" and "use" was the fact that the underlying use (a restaurant with liquor service including a patio) was a permitted use and the courts noted that an area variance bore no relationship to the nature of the use, that category of use was permitted in the zoning and the area where the property was located, it was the manner of the use that was prohibited (*Council of Civic Organizations of Brandywine Hundred v. the New Castle County Board Of Adjustment*). He pointed that area variances had been utilized for a variety of reasons including lot size, setback, parking requirements, placement of buildings, type, density, landscaping, et cetera.

Mr. Tracey continued that while the application was not a typical request, clearly borrowing from the Superior Court and the Council of Civic Organizations Case, the proposed usage was permitted but the manner of usage was not (the limitation on the outside bar and live music). He argued that the avenue of relief should be an area variance and added that as noted recently by the Superior Court, an area variance relaxed zoning or building limitations on a property but did not alter how the property was used (*Wagner v. J & B Contractors and New Castle County Board of Adjustment*). He reminded that the limitation on outside music and bar was clearly a zoning limitation as in Article 32-56.4 as opposed to a stand-alone regulation. He reiterated the argument that the request was for an area variance which he would plead under the area variance standard.

Mr. Tracey stated that the area variance standard had four parts. The first, the nature of the zone where the property was located, was STC zoning district which permitted restaurants serving alcohol. The second was the character of the immediate vicinity. Mr. Tracey explained that the STAR Campus was bordered by the railroad tracks at the top of the property, Route 4 at the bottom, and Route 896, with the project in the middle. He informed that the residents on the other side of the railroad tracks were roughly 2,000 feet away from where the patio would be located. He added that there was one apartment community located directly off of Route 896 and was roughly 900 feet away but was located on the opposite side of the U-shaped Chemours Building and was insulated from the proposed use. Regarding the third part, he referred to Ms. Shickle's declaration that the restaurant use was a desired use, endorsed by tenants and landlords, which would clearly not upset the character of the immediate vicinity or neighboring property. The final part of the analysis, the balancing of the harms, and, as noted in *Conway & Conway v. Zoning Board of Adjustment in the City of Wilmington*, the balancing of the harm to the applicant if the variance is denied against the harm to the community if the variance is granted, is the essence of the *KWIK Check* analysis. He argued that in the applicants' instance, there was no demonstrable harm to the community and repeated that the restaurant and patio were not located in proximity to residential housing. The restaurant would be surrounded on three sides by large buildings and on a fourth side a parking lot and would not sit adjacent or approximate to any roadways of merit that carried traffic through from one destination to another. He noted the restaurant would be blocks away from Route 896 but would not be visible from 896 because it would be blocked by the AP Bio Building.

Mr. Tracey reiterated that the landlord and tenants indicated the request was a desirable use and no harm to the community was anticipated. He argued that if the variance was denied, there would be harm suffered by the applicant, and noted that the request was unique and recalled his argument that the restrictions were largely created in response to activities in bars and restaurants on the Main Street corridor. He maintained that the restrictions served limited, if any, import an office campus such as the STAR Campus and, with the number of employees, students, teachers, researchers and visitors, there was a high demand for the services. He added that outdoor services had become more particular and more prevalent in reaction to COVID. He noted that when 32-56.4 was examined, much of the discussion was about maintaining separation between the businesses and the sidewalks where, on Main and South Main Street, many pedestrians tried to avoid conflicts with the ability to walk up and down street and interference from any of the uses. He pointed that the proposed area was in the middle of a park which provided the benefit of having a captive audience during the workdays but no captive audience when the workday was over which, in turn, why the applicants wanted to create a place where patrons could enjoy themselves and spend time within the professional community being created.

Mr. Bergstrom opened the table to questions from the Board.

Mr. Moore was unable to determine the unnecessary hardship or exceptional practical difficulty to the applicants if the outside bar was denied. He understood that the applicants could still serve alcohol inside and asked for more definitive instances of hardship or difficulty. Mr. Tracey said that he had addressed the concern during his four-part analysis and reiterated that in the Conway case, the balancing of the competing interests formed the essence of exceptional practical difficulty. He repeated that the request was unique and emphasized that there was no harm to the community; the only community in the area had endorsed the request and the residential communities were either separated by rail lines or by the Chemours Building. He argued that the harm to the applicant was trying to create a business model that fit in with what UD was looking to achieve in the area by having an outdoor place where patrons could enjoy outdoor dining. He maintained that the bar would not be open 24 hours a day for the entire year because it would be enclosed during cold and inclement weather but was a concept UD wanted to incorporate based on requests from existing and future tenants. He drew the comparison to Main Street because Main Street was one type of

environment with a vibrant outdoor scene of which the City wanted to control certain scenarios based on historical practices and the proposed facility, which would be located in the center of a research, corporate, and business complex, did not have the same concerns.

Mr. Rogers asked if Mr. Tracey was insinuating that the University would be harmed in its ability to attract future tenants or its ability to keep existing tenants if the variances were not granted and Mr. Tracey replied that Ms. Shickle's comments indicated as much. He argued that when tenants compared options, they would include amenities that a complex park/campus offered and could potentially choose another location if all other categories were equal. Ms. Shickle confirmed and reiterated that amenities for corporate, university-anchored innovation districts were prevalent across the Country so when comparing sites to locate and universities with which to collaborate, there was an expectation of amenities. She referred to the letters from Becker Morgan, Chemours, and Bloom, which articulated support for the project and an expectation that the companies would entertain customers and employees with catered events at a walkable location proximate to their facilities. She reminded that the vision for STAR when it was established was of a live/work/play community and, over the past 10 years, the University reached the density on south campus where the proposal made sense. She confirmed that a denial would impact the University's ability to continue to attract top-tier companies without amenities that served the business community.

Mr. Rogers asked if UD owned the buildings and would be the landlord to the applicants. Ms. Shickle replied that UD operated off of a ground-lease model and the Fintech Building was owned by a public/private partnership non-profit called Delaware Technology Park (DTP): DTP ground leased from UD; UD maintained approval of all tenants and tenant improvements to the building, and DTP owned and operated the building. She reiterated that DTP owned the building and UD owned the Ammon Pinizzotto Biopharmaceutical Innovation Center, and Chemours owned its building; the model on STAR Campus was ground lease where buildings were owned by different parties, but UD maintained approval of tenants and tenant improvements.

Mr. Rogers understood that the facility would be policed by the University's Police Department. Ms. Shickle confirmed that UD Police had primary jurisdiction for STAR Campus. Mr. Tracey interjected that the UD Police force had no objection to the request and were confident they could handle the additional duties. Mr. Rogers asked Mr. Tracey if the applicants had received the Special Use Permit and Mr. Tracey reiterated that the Special Use Permit was the next step. Mr. Rogers stated that the applicants expected to present to Council with variances in-hand and Mr. Tracey confirmed that the applicants wanted to appear before Council with a complete plan. Mr. Rogers found the process to be backwards because Council granted the ability serve alcohol outside which was the larger picture. Mr. Hudson interjected that the confusion was that Council could not sua sponte do a variance of the zoning except through the Site Plan process. Mr. Rogers understood, and Mr. Hudson explained it did not apply for the proposal. Mr. Rogers said he was not suggesting that Council had the ability to vary but thought the primacy of the appropriateness of serving alcohol outside should be established before the Board explored the details of how it was done. Mr. Tracey said the argument could be made either way and the applicants could go to Council to request a Special Use Permit and return to the Board but he did not see the harm in the current practice because the Board was not authorizing the service of alcohol; it was approving a zoning variance. He maintained that the applicants were permitted to have a bar, but they wanted to have chairs on the outside of the wall as opposed to the inside of the wall, which was within the Board's jurisdiction to review and approve. He continued that the Board was determining the physical parameters, but it was ultimately Council's choice for alcohol service. Mr. Bilodeau interjected and confirmed that Council would want whatever variances were at issue to be decided prior to the hearing. He recommended for the application to proceed. Mr. Fortner added that last year, there was a daycare and when a project was brought before Council, it had to be code compliant. He continued that there was a daycare that did not have enough area and sought a variance from the Board which was denied so the daycare did not go before Council. He gave another example of the Mediterranean Grille which

received a variance in the number of seats from the Board and then went to Council for the alcohol permit. Once the applicants received the variance, the plan was compliant with the zoning code because they received relief on the number of seats.

Mr. Bergstrom thanked Mr. Fortner.

Mr. Morehead maintained that the Board was responsible for the public situation throughout the entire City and he could not imagine that if the first variance request was granted, then the Board would not have every restaurant that served alcohol in the City to request the same with the same claim of financial hardship. He claimed that he had been a business traveler for decades and appreciated ordering drinks with meals, but he preferred it not to be at a bar. He could not imagine that with a patio full of high-tops, the problem was serious. He thought it could be agreed that there were a number of restaurants on Main Street and throughout the City that served alcohol and there were a number of restaurants that served alcohol on patios; the question was what was so serious about the 12 or 13 seats at a bar. He believed the only response was that the concern was standing room.

Mr. Tracey appreciated Mr. Morehead's comments but reminded that the primary function of the Board was to weigh requests that were seeking relief from Code which were viewed on a case-by-case basis. While he could appreciate Mr. Morehead's comments on Main Street facilities, there was a vast difference between what was on Main Street versus what would be on STAR Campus. He would not debate the merits of whether there needed to be relief from preventing outside bars everywhere in the City and pointed that most jurisdictions in the State allowed outside bars as evidenced by the provided examples. He argued the bars were in demand, especially in the post-COVID world, but the point he was making that he could structure an argument but there would be a negative reaction to bars outside on Main Street simply due to proximity of the patios themselves to Main Street and was the history of why the ordinance was originally generated. He argued that the situation was completely different when the facility was located in an office campus and there would not be visitors strolling the area to determine where to eat; the location would be isolated, would not draw from competing facilities, and would only be visible to those in the office park. He anticipated the questioning and referred to *Marriott Corporation v. Concord Hotel Management*, the hotels that were in the area of the former Toys "R" Us location. He continued that they received variances from the Board that were related to parking based in part on a restaurant in one of the hotels as well the number of rooms. The Superior Court overturned the decision, but the Supreme Court reinstated because the Supreme Court found it compelling that the parking rationales in the Code were outdated for the location or how the business would function and for hotels with restaurants that primarily served hotel patrons. He felt that in some respects, the argument was the same because all of the restaurants and bars were situated next to each other on Main Street with patios versus an isolated facility that was not near and would not interfere with anything else. The applicants were attempting to meet the needs of professionals that were coming to the facility. He continued that the Board was faced with a situation considering a statute that applied across the entire City, but may find instances where the statute did not need to be applied down to the letter of the law and an variance could be granted in the instance because the location was different.

Mr. Morehead understood Mr. Tracey's argument but claimed that he profoundly did not understand the significance of the bar versus high-tops because the service and post-COVID situation were the same. Mr. O'Donoghue thanked the Board for the hearing and explained that Grain always tried to build the restaurant experience by bringing the outside in, particularly in the post-COVID world where it was necessary that patrons have access to fresh air. He pointed that the Lewes location had a two-sided bar, the same was what the applicants were proposing for STAR, and the outside portion was used far more than the inside. He continued that the bar helped to create an environment where patrons could enjoy the full Grain experience and the layout provided the opportunity for a complete social experience where indoor and outdoor patrons

were sharing the same space. He explained that the space was amenity driven given the needs of the campus. He continued that the facility was not just a bar; they were adding a coffee shop and had a much larger kitchen to provide to-go and catering to fulfill the needs of the people in the surrounding community. He described the indoor/outdoor bar as one more amenity to help serve the multiple demands of what was becoming a very large community at the STAR Campus and part of UD. He reiterated that the bars were successful at their other locations and the applicants had dealt with some of the zoning requirements in Lewes; they wanted to do the same in Newark. He claimed that the set up provided an overall environment change when the windows could be opened to all for everyone to share the same space. Mr. Tracey referred to Mr. Morehead's estimation of 12 or 13 seats and explained the bar also provided the opportunity to reclaim space because the applicants were creating the space to serve restaurant patrons as well as take-out and coffee.

Mr. Morehead understood Mr. Tracey's point but disagreed that people could talk over two bars and be together with the bartender in between, even with the windows open. He noted that the applicants were going before Council anyway and argued that it was Council's law that specifically prescribed the request. He continued that the applicants were asking the Board to act as judges and admitted that Grain was the first restaurant/bar in the area but doubted the situation would remain in 20 years. He asked if the future locations would be allowed to have the same prescribed situation because they were at the same location. Mr. Tracey denied that the Board members were not being enacted as judges, rather they were serving the role of a Board of Adjustment; every law that the Board of Adjustment was asked to provide relief from was a law that had been passed by Council so, whether it was a parking, landscaping, setback or an outside bar seating requirement, all were laws that had been adopted by Council. He maintained that the applicants had a right to a Board hearing under the Code to request relief from the provisions. Mr. Morehead agreed and continued that the Board was supposed to grant minor changes and the discussion was 12 seats at one location versus 12 high-tops at another. He felt the applicants were awfully interested in something that did not seem to matter.

Mr. Rogers asked what limitations were on the amplified sound and if there were limitations embedded in the regulations such as time limits or decibel regulations. Mr. O'Donoghue informed that no amplified sound was allowed on a patio, so the request was to allow host performances of a single guitar or duo on the patio during happy hours or similar times. Mr. Tracey confirmed the music would be after working hours and UD made it clear that music would be unwelcome while business was in operation. Mr. Hudson argued that UD did not have a say and Mr. Tracey corrected that as the landlord, UD did have a say and referred to Ms. Shickle's earlier comments. Mr. Hudson thought DTP was in charge and Ms. Shickle replied that DTP owned the building, but UD owned the land on STAR Campus. UD would not want anything on STAR Campus that aggravated the tenant organizations during the working day and, since the buildings were proximate to the patio, UD would not expect amplified sound during the working day. She reiterated that the music would be minimal with one or two guitars after working hours. Mr. Hudson asked if UD had authority to stop permitted uses. Ms. Shickle could not speak to the specific regulations but pointed that UD worked in collaboration with all of the building owners and tenant companies; they were a community. UD wanted the efforts to succeed and to continue the economic development and impact of STAR Campus. Ms. Shickle claimed that when there was an issue on the Campus, conversations were held as a group and as responsible business owners, Mr. O'Donoghue and Mr. Mikles would work with UD and the tenant companies to do things that were desirable and interesting for the community. She maintained it was a community resource and community asset, as evidenced by the letters of support from companies who employed thousands of people on STAR Campus. UD did not anticipate any issues in the future and, if there were issues, the group would work through them as they had with everything else.

Mr. Bilodeau interjected and reminded that the Board of Adjustment could also impose conditions on any variance it granted. He suggested that the Board could grant the variance for amplified sound during

certain hours. Mr. Hudson believed enforcement of the special condition was difficult. Mr. Tracey reminded that the applicants were still subject to all of the rules in the City with regard to the level of sound, decibels generated, and the noise ordinance; they were not seeking relief from any of the provisions. Mr. O'Donoghue added that the Lewes location had provisions regarding outdoor amplified music and shared that everything had to be finished by sunset. He admitted the timing was variable but maintained that the location had complied multiple times and participated in an outdoor concert series in Lewes which had been very successful for the last two years; the applicants would follow any rules imposed for the Newark location.

Mr. Rogers asked Mr. Bilodeau if there were conditions of renewal to ensure applicants had been in compliance with sound. He pointed that the applicants were good residents, citizens, and business owners in the City, but nothing could be guaranteed for the future. He understood that variances ran with the land and the use and it was not assured that the applicants would always be the business owners. He asked if there was a way to require that in three years, the applicants must return to renew the variance for sound to ensure the practical application of any conditions had been complied with. Mr. Bilodeau noted that the Special Use Permit for serving alcohol was that if, for whatever reason, the establishment was not in compliance, the Special Use Permit could be suspended, as had been done with a restaurant in town a few years prior. He reiterated that if the applicants did not abide by the sound regulations, their ability to serve alcohol could be suspended which provided an impetus to behave.

Mr. Morehead believed the variances went with the land and asked Mr. Bilodeau if the Board could set that any approval was based on the Special Use Permit Approval and staying in good force. Mr. Bilodeau confirmed and pointed that variance could be conditioned upon the lessee; he agreed the variance went with the land but there was law that indicated if a lessee or tenant applied for special exceptions, the special exceptions would end with the lease ended. Mr. Rogers did not understand and thought the variances ran with the land and although there was a parade of applicants with the best interests in mind, the Board had to consider future consequences. He asked if the variances could be granted specific to the applicant. Mr. Bilodeau confirmed he reviewed the application earlier and found one case that a tenant applied for a special exception in 1998 and the Court ruled that the standing for the special exception ended the lease was declared null and void, but he would investigate further.

Ms. Scheld read the letters of support into the record.

John Long, Executive Vice President and Chief Operating Officer of the University of Delaware, wrote:

Members of the Board: On behalf of the University of Delaware, I write to express the University's support for the above-referenced application. Shortly after the University purchased the former Chrysler Assembly Plant, we set about to work with the Department of Planning and Development to fashion a flexible set of zoning provisions for what would become the STAR Campus. A decade or so later, the STAR Campus is on its way to becoming precisely what the City's comprehensive plan had called for – a research community designed to attract leading research-based employers to the City and State. While the STAR Campus will continue to grow, it has already become a major job creator and engine of economic development for Delaware.

In speaking with occupants of the STAR Campus, we have learned a great deal about what features make a research campus attractive to our potential partners. Every current and potential partner has told us of their desire to see amenities located within the STAR Campus so that those working within it do not have to leave the Campus in order to seek food and entertainment. To that end, we have worked closely with this Applicant in the planning of a restaurant in the new FinTech building, being developed by the Delaware Technology Park – a non-profit entity. Mr. Mikles and Mr. O'Donoghue have planned a facility that will add

to the sense of community at the STAR Campus, providing much needed food and beverage services in an entertaining environment. One of the facility's more innovative features is its ability to open up a wall when weather permits, offering outdoor dining. In this age of caution about patrons seated closely together in indoor spaces, the convertibility into outdoor space makes the facility more attractive. Even beyond its obvious health advantages, this type of indoor-outdoor convertibility is growing in popularity in areas where weather permits, and the University would like to join this trend. Given that STAR Campus is, for the most part, occupied by adults and is not proximate to areas of heavy undergraduate population, the University supports the relaxation of Code provisions designed primarily to resolve problems not likely to occur at this location. Moreover, one suspects that the provisions for which a waiver is being sought were adopted by City Council before this sort of convertible facility was becoming popular. For those reasons, the University joins with the Applicant in asking for the referenced waivers. We would be happy to provide further information upon request. Thank you for your attention to this matter.

Ms. Scheld then read a letter from Brian Coll, Site Manager, Chemours Discovery Hub:

Members of the Board, When Chemours signed on to build our Research & Development center at the STAR campus, it was with the goal of being part of a larger science community at the forefront of innovation, notably here in Delaware. The Chemours Discovery Hub now stands as a state-of-the-art facility, combining cutting edge laboratory capacity with customer engagement spaces. Relationships and projects with University of Delaware are growing across our businesses, emboldened by our proximity. To that end we have had the honor to host both of Delaware's United State Senators in recent weeks, who left with an inspiring vision of our ~275 employees and the capability here at STAR campus. Continuing the journey towards a world-class, science based, live-work-play community requires the inclusion of amenities which both augment the employee experience and foster business growth. Be it for an informal collaboration after a technical session with researchers from Chemours and UD, hosting a prospective employment candidate for lunch, or entertaining executives from Fortune 500 companies, the need for options within walking distance is clear. While Newark's downtown sector offers excellent experiences both lively and intimate, Chemours believes the plan The Grain Exchange brings forth matches our needs. On behalf of the employees at the Chemours Discovery Hub, I ask the members of the Board of Adjustment to strongly consider the variances submitted by The Grain Exchange.

The next letter was from Barry Sharpe, Bloom Energy Vice President of Manufacturing:

Over the past 10 years, Bloom Energy has made a concerted effort to establish our business infrastructure and workforce at the Bloom Manufacturing Center on the Science, Technology and Advanced Research ("STAR") Campus of the University of Delaware in Newark. Our operations in Delaware are an indispensable element of a worldwide effort. The facility utilizes advanced manufacturing applications to efficiently deliver our Energy Servers that provide clean, reliable, and affordable electric power for our customers. Currently we have more than 450 employees working at Bloom and many customers who desire access to food and entertainment that is conveniently located in walking distance to our site. As one the first occupants on the STAR Campus, we have been seeking a food and entertainment destination to support our ability to attract and retain diverse, top talent, engage and host prospective and current customers and have offsite business outings that are safe and engaging. Therefore, we urge the Newark City Council to support the proposed plan to locate a well-established restaurant, The Grain Exchange, in the new FinTech building on the STAR Campus.

The final letter was from J. Michael Riemann, Vice President of Becker Morgan:

To Whom It May Concern: The following is a letter of support for the new Grain Restaurant to be located at the Star Campus in the new Fintech Building. We currently operate an office located in the Star Tower. There is a lack of restaurant options in our vicinity including these types of uses below. We welcome this type of restaurant in close proximity to offices, which will allow our staff and other tenants to walk or ride their bike as opposed to driving their vehicles long distances. In addition, the COVID pandemic has stressed the need for more outdoor dining and entertainment options. Further, the location of this facility will be shielded from the nearest apartment residences by the Chemours and Pinizzotto buildings. We support the request for the following variances outlined below.

- Variance to Section 32-56.4(d)(3) to allow a bar to be located on the patio.
- Variance to Section 32-56.4(d)(4) to allow electronically amplified sound on the patio.

Please approve.

There was no further public comment and the Chair returned the discussion to the table.

Mr. Bergstrom asked if all members were all convinced that the request was for an area variance. Mr. Hudson, Mr. Bergstrom, and Mr. Moore agreed. Mr. Morehead was not convinced and was stuck on the reading of law where “if the bar is used to serve alcohol”. Mr. Rogers deferred to Counsel and argued that the Board should have stopped the applicants an hour prior if the request was not for an area variance; he agreed the request was an area variance. Mr. Bergstrom asked for a member to begin summarizing the evening.

Mr. Hudson presented the *KWIK Check Factors*.

1. *The nature of the zone in which the property is located* – Mr. Hudson pointed that the STAR Campus included various facilities and described the area as an incubator.
2. *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – The immediate vicinity included multiple companies located on University property with one apartment building around 900 feet away that was blocked by some of the buildings.
3. *Whether, if the restriction upon the applicant’s property were removed, such removal would seriously affect the neighboring properties and uses* – The property included technology-based companies with large buildings separated from any other uses in the vicinity; it was isolated from any sort of commercial or residential area.
4. *Whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to efforts to make normal improvements in the character of that use of the property* - Mr. Hudson reviewed the KWIK-Checks case and reiterated that such practical difficulty was present where the requested dimensional change was minimal and the harm to the applicant if the variance was denied would be greater than the probable effect on neighboring properties if the variance was granted. Mr. Hudson wavered but pointed that a statement by Mr. Morehead that the same thing could be accomplished without the bar and Mr. Hudson agreed. He argued that patrons could order drinks without the bar, so he felt that it was minimal. He added that the sound variance played into how isolated the area was and enclosed by the technical buildings; he did not believe the sound would cause issues with the neighboring properties and uses. He

noted that the applicants were attempting to create the atmosphere for an incubator. Another deciding factor was that City Council maintained control over the Special Use Permit and Mr. Hudson thought the location created an extremely unique situation and asked that his motion make the variance conditional on the lessee.

Mr. Moore understood the first three KWIK Checks but was puzzled by the fourth. He understood the situation might be unique but still was of the opinion, based on what the Board had done in the past and what he heard from Counsel, that area variances should not be liberally granted. He believed there had to be a strong reason and it could not be done to substitute or amend the current code. He reminded the applicants would be seeking a Special Use Permit before Council and he felt there was a conflict, regardless of the explanation provided earlier by the Planning Department and City Solicitor. He understood that City Council preferred to have all variances resolved prior to hearing a Special Use Permit but he thought the question of an outside bar was part of the Special Use Permit. He believed if the Board made variance changes then it changed the Code and he was unsure if the Board should be changing the Code. He understood the unique standpoint and that adding the special resources would help attract businesses to the STAR Campus, which appealed to him. He admitted he was still undecided and wanted to hear from other Board members.

Mr. Rogers agreed with the first three KWIK Check Factors as stated by Mr. Hudson and, regarding the fourth, he would add that he was in favor of the applicant based on the reasons stated by Ms. Shickle that the practical difficulty would be to remain competitive in attracting other tenants as compared to other competitive sites. He believed the applicants' exceptional difficulty outweighed the impact to the community in that he denied there was any impact and argued that if the property was anywhere near a residential community, had the ability to impact one, or the surrounding area was not favorable, he would feel differently. He felt there was so little impact that the difficulty of remaining competitive outweighed the impact. He wanted to ensure that the variance, as far as the service to the outside customers was limited to the area as shown on the plan submitted and that the variances be limited to the applicant or lessee. He admitted he was initially concerned regarding patrons watching TV and drinking but once he understood that the outside area was limited to only being served while seated, his concern was satisfied.

Mr. Morehead agreed with Mr. Hudson on the first three factors with the exception of allowing alcohol based on a Special Use Permit; he pointed that Council would be making that decision. He doubted that the abundance of high-top tables outweighed the request to change the law as it was stated for 12 bar seats. Regarding the variance for music, he stated it would be hard in the short term to declare that the immediate area was anything but office buildings and research facilities so, during a time when the area was not a residential community, there was no reason not to allow music at the site. He expressed concern that once the area changed, there was a possibility that the music would not be welcome. He planned to support the music variance with the provision that the lessee remained the lessee; he would not support the request for the bar.

Mr. Bergstrom agreed with Mr. Hudson and Mr. Rogers that the scales were in favor of the applicant and, considering a requirement the Board could make to remit the variance for the current lease holder, he would have no problem voting in favor of the application.

MOTION BY MR. HUDSON, SECONDED BY MR. ROGERS: TO APPROVE THE VARIANCE FOR 32-56.4(D)(3) CONDITIONAL ON THE CURRENT LESSEE AND LIMITED TO THE AREA SHOWN FOR THE EXTERIOR BAR.

MOTION PASSED. VOTE: 3 to 2.

Aye: Bergstrom, Hudson, Rogers.
Nay: Morehead, Moore.

MOTION BY MR. HUDSON, SECONDED BY MR. MOORE: TO APPROVE THE VARIANCE FOR 32-56.4(D)(4) CONDITIONAL ON THE CURRENT LESSEE AND SUBJECT TO THE LOCATION OF THE BAR.

MOTION PASSED. VOTE: 5 to 0.

Aye: Bergstrom, Hudson, Rogers, Morehead, Moore.
Nay: 0.

3. Discussion on applicants withdrawing an application during a hearing and requesting how many Board members would be present.

Mr. Hudson felt the discussion should be addressed under agenda item 4.

4. Discussion on updating Rules and Procedures

Mr. Morehead explained the document presented was an undated document and had no revision control. The Board needed to make corrections at some point, and he wanted to determine the process. He noted the document was incorrect in several places and Article VII, Section 4, identified filing fees that were grossly out of date because the current filing fees were \$275 and \$1,100. He wanted to determine an assessment approach and revision stage. He noted that rules and procedures were online for City Council and the Planning Commission and when the Boards and Commissions Committee performed a review, they were unaware that the Board of Adjustment had rules and procedures.

Mr. Rogers asked how much weight the document had, if it was a handout at City Hall, or if it was codified. Mr. Morehead said that it was required in State Code. Mr. Moore asked for the source of the document and Mr. Bilodeau replied that he received it from Mr. Hudson four years earlier. Mr. Morehead argued that there should be one document and it should be online. Mr. Moore believed that the process should begin with the City Solicitor to review the details and provide updates when the Board could then comment. Mr. Hudson could not recall who sent him the document but confirmed it came from the City.

Mr. Bilodeau offered to review the document with staff and update. He suggested that Article V, Section 10 discussed that an application could be withdrawn anytime prior to a decision being made. He thought the language could be clarified and noted the fees would be easy to update but he needed Board input for substantive changes. Mr. Morehead referred to the sentence regarding fees and suggested that it end after reference to the Code to remain current. Mr. Morehead admitted that he had not investigated all of the errors with the document but thought each member could review and send corrections to Mr. Bilodeau. Mr. Bilodeau confirmed and suggested that if an applicant asked what members would be present at the meeting, the response would be to confirm there was a quorum without listing the roll. Mr. Hudson agreed and reminded that years ago, he proposed to adopt Rehoboth's rule that a permit could not be removed within fourteen days unless the Board approved because there were instances during a hearing where the project was clearly not going to pass and applicants pulled it to salvage the plans. Mr. Rogers asked if the project was pulled because of the perceived way that a member may vote or because the applicant needed to provide more information. Mr. Hudson replied the projects were pulled because the denial votes were clear but admitted it had not happened in while. Mr. Rogers asked for clarification on why the practice was wrong. Mr. Hudson explained that if the Board just had quorum and the hearing was not going well for

the applicant, the applicants could pull the project and return later with the hope for a different Board make up.

Mr. Bilodeau asked Mr. Hudson to repeat his suggestion. Mr. Hudson clarified that within 14 days of the hearing, an application could only be removed by a vote of the Board. Mr. Morehead asked if a failed application stayed turned down. Mr. Hudson said that there was a refiling fee. Mr. Fortner asked Mr. Bilodeau if there was a required wait time to return to the Board when someone was denied a variance request. Mr. Bilodeau was unaware of any time limitations for variances and thought applicants could return provided they were willing to pay for another hearing, but he would investigate. Mr. Fortner confirmed that developers could pull a project during a Council meeting to retool and focus on concerns and return to Council. He asked if applicants coming before the Board should have the same right. Mr. Hudson confirmed that applicants had the right, but it was dependent upon a Board vote. Mr. Fortner summarized that the Board would have to vote to allow an application to return and Mr. Hudson confirmed that the application could be tabled.

Mr. Rogers favored allowing an applicant to withdraw an application and return with more information to assist in the Board's vote. He had faith in the Board to act appropriately and thought the situation would become too complicated in trying to regulate the way in which applicants submitted or withdrew applications. He witnessed the act in other situations and never had a negative reaction to an application with drawing an application regardless of why it was pulled. Mr. Bilodeau pointed that if there was no limitation on refiling after a denial, the current language indicated an applicant could withdraw at any time before the decision but would have to pay another fee for resubmission. Mr. Hudson asked the fee amount and Mr. Morehead replied \$1,100 for commercial and \$275 for residential. Mr. Hudson pointed that the fees were not a deterrent for a large project and Mr. Bilodeau agreed. Mr. Fortner pointed that there was no limitation on reapplication.

Mr. Rogers agreed that the Board should definitely distinguish what was required by Code and what was desired business conduct, which was not codified. He asked Mr. Morehead if the document was required by State law and Mr. Morehead confirmed both State and City law. Mr. Morehead informed that the State law reference was Title 22, Subchapter 323 and City law listed in Section 32-68. Mr. Rogers suggested that each member make corrections and send them to Mr. Bilodeau. He asked if the document was where the Board would indicate that motions had to be made in the positive. Mr. Hudson pointed that the Board was supposed to follow Robert's Rules which specified there be no negative motions and was the format for any meeting, not just legislative.

Mr. Bergstrom asked if the intent was to correct the document and forward it to Mr. Bilodeau. Mr. Moore asked if all members should be copied and Mr. Bilodeau instructed the Board to send them to him individually; he would collate them into a new document for approval. Mr. Fortner added that the Planning Commission had their own procedures and suggested that the Board use their example. Mr. Moore confirmed the document would be helpful.

Ms. Scheld asked if Council would have to approve any changes since it was in Code. Mr. Hudson said no and explained that the general outline of the Board was in Code but called that the Board of Adjustment shall make and adopt rules in accordance with the provisions of the chapter.

Mr. Moore revealed that he had served on the Board since 2015 and his term had expired. He would not renew his term, so Council was searching for his replacement. He was asked to continue to serve until a replacement had been named and approved by Council. He said, with all due respect, that he enjoyed his time with all of his fellow members, City staff members, administrators, Mr. Bilodeau, and Ms. Scheld. He was stepping down but would continue his service until a replacement was found. Mr. Hudson was sorry to see

Mr. Moore step down. Mr. Bergstrom agreed and said it did not seem like it had been that long. Mr. Moore looked forward to spending time with his grandchildren but had told the Mayor that he would continue to serve if no replacement could be found.

MOTION BY MR. MOORE, SECONDED BY MR. HUDSON: TO ADJOURN.

The meeting adjourned at 9:12 pm.

Nichol Scheld
Administrative Professional I

/ns