

A New Castle City Board of Adjustment Hearing took place on July 23, 2009 at 7:30 p.m. in the City of New Castle's Town Hall.

Present: Mayor John F. Klingmeyer
Roger A. Akin, City Solicitor
David Athey, City Engineer

Mayor Klingmeyer called the meeting to order at 7:35 p.m.

The Mayor read the Notice of Public Hearing that states, "An application has been filed by John Wheeler and Katherine Klyce, 108 West 3rd Street, New Castle, Delaware, appealing the decision of the Historic Area Commission to approve the issuance of a Historic Review Certificate to allow construction of a 2.5 story single family residence on property located at 101 West 3rd Street, New Castle, Delaware, parcel number 21-018.00-009.

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Thursday, July 23, 2009, at 7:30 p.m. in Old Town Hall, 2nd Floor, located at 2nd and Delaware Street, New Castle, Delaware.+

An affidavit of publication in the News Journal was published on 7/8/09.
Mr. Jeff Bergstrom confirmed that the property has been properly posted.

Mr. Akin announced that at the request of one of the parties this evening the Board has granted permission for a registered court reporter to be present during the proceedings to record what is done and said. Even though these proceedings are recorded, this is perhaps a more efficient way to create an official record of tonight's proceedings.

Mr. Bayard Marin is representing the applicants. He stated that a letter was sent requesting the recusal of the Mayor and City Solicitor. The basis of the recusal of the Mayor was as follows: at a previous Board of Adjustment hearing the Mayor said on record that the standard applicable is the Colonial standard. Mr. Marin offered a two-page excerpt of the Board of Adjustment (10/08) opinion he is referencing and requested it be entered as Wheeler Exhibit 1. A two-page excerpt of a document titled "Additions and New Construction" was entered as Wheeler Exhibit 2. (Portions of the summary were read aloud.) He continued by adding that new construction in a historic district is governed by the Department of Interior Standards that address mass, bulk and height. These are also the standards for the city. Section 230-52 speaks to the function of the Historic Area Commission (HAC). HAC has published guidelines on the historic area that show what they are to decide. There are a variety of styles of homes in the historic district; it is not just the Colonial period that is historically significant. Mr. Marin believes that the Mayor has pre-judged the case that, unless it is Colonial, residents can do as they wish.

Mr. John Tracey, counsel for property owner Regina Marini, does not feel the Mayor needs to recuse himself from this matter. The standard that will be applied in reviewing HAC is that as an appellate body, the Board should look at

what the body below did and determine if it was arbitrary and capricious. HAC spent seven (7) hearings reviewing guidelines with the applicant. They made a decision that is now before this Board's review. He objects that the Mayor recuse himself based on the argument raised by the objectors.

Mayor Klingmeyer addressed Mr. Marin's request for recusal. He was a councilman when the current law was adopted. The law's purpose is to preserve Colonial period homes and those built shortly thereafter. When New Castle adopted the historic area code it was unique. We (government) were telling residents they had to build a safe home as well as using certain standards. This passed with no objections because the residents were assured that residents living in a non-Colonial home would have to meet building codes only. Those living in Colonial homes would be preserved. The original HAC members were aware of this, but the guidelines don't determine the law. Rather, the law determines the guidelines. Over time HAC assumed roles beyond themselves. Their primary goal is the Colonial period. They made an effort to have the word "Colonial" replaced with the word "historical". This meant that HAC could tell all residents living in the historic area what they could and could not do in their homes. It was voted down at a City Council meeting because the public didn't want it. It allows people a variety of styles of homes. He knows what the original intent was and will not recuse himself.

Mr. Marin asked that the multi-page document "City of New Castle Historic Area: Guidelines and Standards Handbook" be admitted as Wheeler Exhibit 3. An excerpt from the Federal Code of Regulations dealing with the Interior Department was submitted as Wheeler Exhibit 4. Mr. Marin offered that these are the appropriate standards that are to be applied by historic area commissions and are specific to New Castle. Department of Interior standards are used throughout the country.

Mr. Athey asked if the National Park Service document is referenced in the guidelines for the HAC. If not, is a federal document applicable? Mr. Marin commented that New Castle is a federal historic district. The Department of Interior standards apply to a federal historic district. Mr. Akin will research the point further if needed. As clarification, Mr. Marin's position is not being accepted, rather his evidence is being accepted.

Mr. Akin asked Mr. Marin if he believes that the City guidelines are inconsistent with what the Department of Interior standards are with regard to New Castle. Mr. Marin replied "no, that construction of a new building in a historic area must be sympathetic to the historic area." That is the issue before the Board.

Mr. Marin confirmed that he wrote a letter dated 7/22/09 to Mr. Akin asking for his and the Mayor's recusal from this hearing. (*The letter was read aloud.*) With regard to Mr. Akin, the basis for his request surrounds Mr. Akin's ruling on HAC's tie-breaking vote which he contends was erroneous and lends to prejudging his

vote. Regarding the Mayor, at a previous BOA hearing he is on record stating that HAC was designed to control Colonial land use issues. This is not the correct standard to be used. He cited the New Castle Historic Area Guidelines handbook that provides that new construction in the historic area should be compatible with neighboring properties and the New Castle historic area in general. The Mayor's preconceived standard on this matter disqualifies him from serving. *(The letter was admitted into evidence as Wheeler Exhibit 5.)* Mr. Marin continued by citing the *Warrington v. State Personnel Commission (Chancery Court 1994)* case as support of his position. *(This case was entered into the record as Wheeler Exhibit 6.)*

Mr. Tracey submitted a letter and attachment dated 7/23/09 to the Board in support of their past actions concerning this subject. *(He summarized in more detail the letter's contents.) (The letter and attachment were entered as Marini Exhibit 1.)*

Mr. Akin then addressed Mr. Marin's request for his recusal. He has read the Warrington case as well as other cases noted within that case. When HAC met in December 2008 and January 2009 of this year it was determined that not all notice requirements under City law were satisfied so HAC reconvened in April 2009, at our advice, and heard the case again. Ms. Monigle had a personal matter arise and was unable to attend the April meeting. The vote was 2 in favor and 2 opposed to the Marini application. He was asked by HAC to determine whether the matter had to be heard over again, was their vote a denial of the application, or was there a way that Ms. Monigle could cast her vote. He advised that based on his review of case law Ms. Monigle could review the record of the case as well as listening to a multi-hour tape of all the April discussion and review exhibits offered in the April meeting and then come to the May HAC meeting and registered her vote. I did not advise which way she should cast her decision. I did offer that she could cast the deciding vote at the May HAC meeting. Based on my advice to Ms. Monigle the appealing parties are asking him to recuse himself stating that he has prejudiced himself in some way of hearing evidence and arguments on whether the HAC decision should be affirmed or overturned. Mr. Akin does not feel this is a fair statement.

Mr. Akin continued that Mr. Marin noted in his argument that some evidence was excluded at the May HAC meeting. HAC did preclude certain evidence at their May meeting and that is because the April hearing was the time for people to bring petitions before HAC and for people to speak for or against the Marini plans as they existed in April and it was the time for the record to be made. The only reason it appeared on the HAC agenda in May was for Ms. Monigle to cast her vote. The sole reason for excluding evidence at the May hearing was not to rehear the entire case again and have more concerned members of the public come forward to state their reasons for/against the application but simply to allow Ms. Monigle to provide her vote.

He also noted that if the Mayor and he recused themselves this evening a quorum requiring two members would be destroyed and this body could not hear this case. He does not believe it has been proven that he has committed himself one way or another on this case and refused to step down and will continue to sit on the Board.

Mr. Marin continued with how the procedure that did take place was applied. He offered a petition opposed to the project containing approximately 82 signatures. At the May 2009 HAC hearing Ms. Monigle indicated that she could hear the recording without issue and Mr. Eldon du P. Homsey, architect, brought a drawing or board with a minor change (in scale). Ms. Monigle declined to look at the board or hear Mr. Homsey's testimony. At the beginning of the hearing she made the statement that she would not hear from the public. This was procedurally wrong, arbitrary and capricious. Mr. Marin had a court reporter make a recording of all the hearings involved since September 2007. Copies of those transcripts were offered to the Board. Mr. Akin clarified that the December 2008 and January 2009 meetings were declared void by HAC and not important in deciding this case. Mr. Marin agreed that HAC should not have considered or referred to those meetings, but there are references in the April 2009 hearing to the December 2008 and January 2009 hearings. *(Mr. Marin cited page numbers of references to December 2008 and January 2009 made in the April hearing.)* Mr. Akin disputed Mr. Marin's assertion that HAC members should have dismissed what they heard in December and January. The Marini plan has evolved over many years through a series of hearings and changed/amended/revised plans. They re-decided the case but Mr. Akin questioned whether Mr. Marin felt HAC members should have erased from their minds any information they may have received at the December 2008 and January 2009 hearings. Mr. Marin said that is not what he speaks to. He is not referring to actual submissions and does not see any harm in those being reconsidered at the April HAC meeting. He is concerned with references made to what was discussed at the December 2008 and January 2009 HAC meetings. *(The page numbers in the April 2009 HAC meeting transcript were noted for the record.)*

Mr. Akin informed that this Board has been provided with transcripts of the April 2009 and May 2009 HAC hearings by Mr. Tracey's firm. He asked whether Mr. Marin's intention of submitting transcripts of those hearings again are meant to be compared to those submitted by Mr. Tracey's firm. Mr. Marin confirmed that that is his reason and that there is always the possibility of an error. *(December 2008 HAC hearing transcript admitted as Wheeler Exhibit 7; January 2009 HAC hearing transcript admitted as Wheeler Exhibit 8; April 2009 HAC hearing transcript admitted as Wheeler Exhibit 9; May 2009 HAC hearing transcript admitted as Wheeler Exhibit 10.)*

Mr. Marin submitted a log of differences in the transcripts and a memorandum indicating differences in the text of the transcripts prepared by different court reporters. *(Admitted as Wheeler Exhibit 11 and 12 respectively.)*

Another procedural issue raised by Mr. Marin involved a previous Board of Adjustment meeting that was heard at the same time a petition was pending in Superior Court to determine if another hearing was wrong. For the record there should be an exhaustion of administrative remedies before any further hearing was considered or permitted.

Mr. Marin argued that substantive issues still remain. The same problem of the building being too large for the area, incompatible with the historic district, and the changes that have been made are de minimus. He asked for permission to call on Mr. Homsey to offer testimony on his drawing. Mr. Akin informed that when HAC reconvened in May 2009 to allow Ms. Monigle to register her vote, Mr. Heckrotte was unable to be at that meeting. If HAC had heard more evidence and testimony, including Mr. Homsey, that is evidence that Mr. Heckrotte would not have had the benefit of hearing. This would be another reason why the factual presentation was finished with HAC at the April 2009 hearing.

With regard to allowing testimony this evening from Mr. Homsey, Mr. Akin offered that the purpose of tonight's hearing is not to re-hear the case with new testimony from experts, residents or others. This Board's charge sitting as an appellate body over the HAC is to look at the record that was made before the HAC to determine whether they acted arbitrarily, capriciously, or whether there was substantial evidence to support the decision that they made. For this Board to hear new evidence on the case tonight we are being asked to substitute our judgment for that of the HAC. He recommended that new testimony not be heard by this Board this evening. (*He cited Delaware land use cases to support his recommendation.*) Finally, the ordinance provides that HAC make decisions because of their expertise and not this body. Mr. Marin requested that Mr. Homsey's board with changes be admitted as an exhibit. Mr. Akin recommended that it not be permitted for the same reasons as new testimony is not being accepted. The Mayor and Mr. Athey agreed with Mr. Akin's position on testimony and not admitting the changed board as an exhibit.

Mr. Tracey added that it was clear that there was an opportunity for witnesses to participate at the April 2009 HAC hearing. Mr. Homsey testified on behalf of the objectors; Mr. Breck testified on behalf of the applicant. The hearing was closed and a vote taken which resulted in a 2-2 vote. It was specifically decided at that hearing that the purpose of the May 2009 HAC hearing would be solely for Ms. Monigle to cast her vote. Mr. Tracey presented copies of letters authored by Mr. Akin to Mr. Marin asking that Mr. Marin provide the board that Mr. Homsey used when presenting his testimony at the April 2009 hearing so Ms. Monigle could review it before casting her vote. He did not provide the board to Mr. Akin to present to Ms. Monigle. In the transcript of the April HAC hearing provided by Mr. Marin, Mr. Homsey's testimony before HAC was very clear and accurately transcribed with few gaps in what was prepared by Mr. Marin's office as well as

Mr. Tracey's office. As for the board, the opportunity to present for Ms. Monigle's review was made and not taken until the day of the May 2009 hearing and it was a revised board at that time and Ms. Monigle applied her discretion to exclude it.

Mr. Akin stated that the record should be clear as to why HAC did not accept the board and that is because between the April and May hearings some changes were made to the board and it was not in the same condition in May as in April and if it were submitted in May, then Mr. Heckrotte (who was absent in May) would not have had the benefit of seeing Mr. Homsey's changes. Mr. Akin did request on several occasions to have the board as presented in April so that he could hand deliver it to Ms. Monigle so her review of the April proceedings would be exactly the same as what HAC was exposed to in April. The exhibit changed for the May hearing and that is the reason why it was excluded, in order to keep the record correct. Mr. Marin argued that the change was small and he was not aware of the change until shortly before the hearing.

Mr. Marin said that an inappropriate standard was applied by HAC and reconstruction of the old building should have been considered. They should have considered reconstruction of the existing building on the property. This is because the footprint of the building that existed on the property should have been one of the criteria before HAC and never was before them. The Mayor asked if there was evidence or something in the Code that the applicants are required to reconstruct. Mr. Marin explained that there are standards in the Department of Interior for reconstruction of historic buildings. The Mayor asked if the building was a historic building. Mr. Marin confirmed it was a historic building. A Board of Adjustment opinion dating to 1998 states that because the property was historic residential in 1991 it will remain historic residential even though the underlying zoning was OS&R. *(For the record, Mr. Marin disagrees with the property being referred to as historic residential.)*

(Kathy Klyce was sworn in by the Mayor.)

Ms. Klyce offered that the building was listed as a historic building on the national register. It is within the historic district of the City of New Castle.

Concerning the petition referenced earlier in the hearing, Mr. Marin asked that it be admitted tonight. Mr. Tracey objected saying that the petition was not introduced at the April 2009 meeting and was not brought up at the May 2009 meeting and was not something that HAC considered. To be consistent and fair and protect the record of HAC in the Spring, Mr. Akin recommended that the petition should not be part of evidence for reasons stated earlier. The Mayor and Mr. Athey agreed.

Mr. Marin then attempted to enter into evidence a note from a resident concerning what Ms. Monigle told him about her vote. Mr. Tracey objected on the basis that the evidence would be hearsay. Ms. Monigle cast her vote and it is

on record. If there was a reason why she felt she did or did not vote properly she could present that to this Board herself. She is not present to verify the accuracy of the statement and it should not be admitted. Mr. Akin agreed with the hearsay argument since the party in the conversation is not here to verify or refute. Mr. Marin feels the testimony should be heard then make a decision. Mr. Tracey objected to getting the statement before the Board without the Board ruling whether it is admissible. It is hearsay, therefore it should not be admitted. Mr. Akin stated that this Board can admit hearsay evidence but in this instance bringing in one side of a conversation in order to attack the credibility of Ms. Monigle does a disservice to her. He is satisfied with her going on record with her decision and how that decision was made. His advice was that this witness not be heard at this hearing. Mayor Klingmeyer concurred based on his concern with listening to conversations without evidence of their accuracy. Mr. Athey agreed based on the hearsay argument.

Mr. Marin's next argument concerned the destruction of trees on the property. A petition has been sent to the Tree Commission and he does not feel that a building permit should be issued until this matter is heard before then. He continued that if this Board approves HAC's decision, no building permit should be issued until the appeal period to the Superior Court has run so this property can be protected until final determination of all the issues has been ruled upon.

Mr. Athey raised the question of whether Mr. Marin is suggesting to have conditions applied if this Board finds against his client. This Board has in the past approved things attaching certain conditions, but asked Mr. Akin how this body can make a ruling in the negative with conditions. Mr. Akin responded that if an appeal is filed from a Board decision allowing construction to go forward, the filing of that appeal stops the construction as a matter of law (*Stay as a Matter of Law*). If this Board was to affirm the HAC approval tonight or a future date, all prerequisites would be available to Mr. Bergstrom to go forward and issue a building permit on construction. However, with the contentious nature of this matter and the fact that an appeal of whatever our decision might be is possible if not likely, the Board is within its prerogative to state that no building permit be issued until at least the appeal period runs out (30 days). This Board could attach such a condition. If someone doesn't like what a Board of Adjustment does they have the additional right to go to Superior Court and file for a restraining order while appeals are pending. We are not required to incorporate such a stipulation in our decision since it is not known what the parties' intentions are after our decision. Given the history of this matter, if the Board feels that an appeal can be reasonably anticipated then the Board may wish to instruct Mr. Bergstrom to withhold the issuance of a building permit until the appeal process has been exhausted. Our Board's decision does not become final until the City Solicitor has drafted an opinion letter that is approved by all Board members. It is then filed in the City offices. That is the date when the appeal period starts running. (*Lengthy discussion about the procedure going forward followed.*)

For the record, Mr. Akin informed the Board that this case is in the Court of Chancery because Mr. Marin's clients filed an appeal several months ago regarding notice and that is why HAC reconvened. As a result of that filing and other negotiations in that Court of Chancery case there is currently in place a judicial stay against further construction, except for limited utility work that has occurred on the site. The judicial stay expires at the time the Board decides the case.

Mr. Tracey approached the Board and addressed statements made by Mr. Marin. He provided a brief overview of the timeline and history of this case. He followed with various points that Mr. Marin raised. With regards to whether there should be a stay in place, he objects to this. As noted by Mr. Akin, there is a stay in place from Chancery Court that will not expire until a written decision from this Board is in place. That should take place within a couple of weeks and allows ample time to have papers ready to be filed if he loses and plans on an appeal. Concerning the demolition of the structure, there is nothing in the City Code that prohibits the demolition of a structure in the historic district nor is there anything in the City Code requiring that the house be reconstructed exactly as it existed previously. If that were the case here then the house would be constructed over the right-of-way line on Third Street, over the right-of-way line on South Street, a garage over the right-of-way line behind and a shed that was over the property line on the park side. This is documented in the Shaw survey that is in every submission Mr. Tracey made to HAC. Simply because a house is on the National Register does not mean it cannot be demolished. Regarding the actions in May 2009 concerning the HAC hearing and how it was conducted, the Warrington case was cited by Mr. Marin. There were four (4) hearings Ms. Monigle participated in before the vote in April 2009. Most of the citations referenced in the April 2009 HAC hearing were made by Mr. Tracey. We were re-presenting what we presented previously in the December 2008 and January 2009 hearings. Some of the changes made between those two hearings were a direct result of suggestions made by HAC at that meeting. Ms. Monigle was not at a disadvantage because the vast material that was covered in April 2009 was the same information and books she had reviewed previously. The only changes made in the book submitted in the April HAC hearing was that the building that she approved was lowered more than when we were before HAC in December 2008 and January 2009. Concerning the quality of the transcripts, there will be differences at times. Sometimes you can't understand a name or can't hear what was said. Ms. Monigle acknowledged on record that she was able to hear the tapes, had the books and given the opportunity to review the board that was requested, but it was not produced for her in the same fashion. She has a long history with this case and followed this building each step along the way. At the May 2009 hearing, which was specifically for Ms. Monigle to cast her vote, a petition was not submitted. Neither of these documents was submitted for the record. Mr. Tracey offered a summary he prepared of the changes to the plans

that were made. He further tracked changes at later meetings. Certain significant changes were made and those changes were cited in detail. His clients were given a list of 16 requested changes that HAC made to the drawings that led to the vote that was voided. When they returned in April 2009 they represented the changes that had been made but also further reduced the size of the building. They were reduced further during the course of the hearing.

Mr. Tracey offered to be entered into evidence the 10/21/08 Board of Adjustment decision (Marini Exhibit #4) and a memo submitted by Mr. Marin regarding the scope and standard of review (Marini Exhibit #5). (*Mayor Klingmeyer and Mr. Athey had no objections to entering Marini Exhibits #4 and #5.*) Mr. Marin objected to the request to enter Mr. Tracey's summary document into evidence. His position is based on the refusal of this Board to hear the testimony of Mr. Homsey, an expert in the field of architecture and the preservation community. To consider a summary prepared by Mr. Tracey that he claims supports the argument as to what all the reductions were, Mr. Marin was prepared to do this through the testimony of Mr. Homsey but was not permitted to do so. Mr. Tracey addressed Mr. Marin's position.

Mr. Akin noted that Mr. Marin submitted into evidence this evening summaries of issues that Mr. Marin has prepared. He also noted that Mr. Marin also argued that changes made by Ms. Marin's planner over time were de minimus. If Mr. Marin's clients are arguing that changes made to the plan over time were insignificant or de minimus, it is up to the Board to have a summary of how things have changed over time. The Board has accepted the good-faith accuracy of summaries that Mr. Marin prepared and there is no reason to believe the Mr. Tracey has included inaccurate information in his summary and believes the summary should be part of the record as Marini Exhibit 3.

Mr. Marin then asked to be permitted to enter into the record a summary prepared by him showing the lack of significant change, in lieu of not permitting testimony this evening. (*Mr. Marin was given a copy of Mr. Tracey's summary document, Marini Exhibit #3.*)

Mr. Tracey then addressed the assertion that HAC acted arbitrary and capricious. The objectors are noted as having lauded HAC for their carefully considering the matter during all the hearings. Mr. Tracey touched on the advice given by this Board at a previous hearing and how the applicants followed that advice. He noted Mr. Athey's comment that while this Board may overrule HAC on procedural issues, they steer away from doing so on discretionary decisions. This is a discretionary decision. Mr. Akin noted the Board was acting in an appellate capacity and should not substitute its judgment for that of HAC. The appeal is on the record and the Board should not consider further evidence. There is more than sufficient evidence to support the decision of HAC. From the time they denied his client in 2007 until they approved it in 2009, the majority of the HAC

felt that we made enough changes during that time period to merit approval of the design. At the April 2009 HAC hearing there was very little new evidence presented by the objectors. One person in the audience asked a question. Mr. Homsey provided testimony that was very clear on the tape. He offered an opinion that HAC was free to accept or not accept. He acknowledged the building was similar in height to the buildings across the street and suggested there wasn't significant change to the building despite the fact the building was comparable in size to those across the street. There is no requirement in the proceedings that requires the change from step to step to be significant and meaningful. Ms. Marini went to HAC a total of seven (7) times.

Lastly, Mr. Tracey's position is that there is substantial evidence in the record to support HAC's decision to approve the design and that decision should be affirmed. (*Mr. Tracey detailed his rationale.*) His client's position is the testimony on record at the April 2009 HAC meeting and the three (3) books that were submitted is more than sufficient evidence to support their decision.

Mr. Marin reiterated his feeling that there was a procedural error made in allowing Ms. Monigle to vote in this matter that violated due process. He maintains that the building is the same, there was no substantial change, it is not compatible with the historic district, and the vote of the HAC was arbitrary and capricious. This case should be referred back for a complete hearing rather than a hearing just on the record.

Mayor Klingmeyer then closed the open portion of the meeting.

Mr. Akin placed three (3) binders containing the various Marini plans into evidence. All Board members had received the three (3) binders). The attorneys had been so informed. There was no objection to placing the binders into the record as evidence.

Mr. Athey made a motion that the Board uphold the HAC ruling. Mr. Akin seconded the motion.

Mr. Athey stated the reason he made his motion is that he feels that the purpose of this Board is to determine if any procedural issues were present and rule on same but that overruling the wisdom of HAC would not be appropriate. HAC has their own rules and criteria to follow in evaluating projects. He believes HAC had ample evidence presented to them and they followed all procedures adequately. He said the only procedure he considered subjective was Ms. Monigle's tie-breaking vote but deferred to the City Solicitor's ruling on the matter and, therefore, does not see any procedural issues and he sees no reason to override their ruling.

Mayor Klingmeyer addressed the Board's power to overrule stating that as far as HAC's judgment is concerned he tends to follow it unless there is some

egregious or capricious example of abuse. The case has been before HAC a number of times and they have studied it for a long time. He feels their decision was well thought out. He relies upon the City Solicitor's ruling allowing Ms. Monigle to vote on the matter and agrees with the HAC decision.

Mr. Akin supported the motion. The people with the primary land use decisions in the historical residential district are the members of HAC. He agrees that unless this Board can see a clear procedural error made by HAC, this Board's charge is to review the record that was made before HAC to determine if substantial evidence supported the decision they made. This Board is well aware of the history of this case. HAC made the decision in Spring 2009 that change had been significant enough that they should change its disapproval to approval by a vote of 3-2. He has read Mr. Tracey's transcripts and will read Mr. Marin's professional transcripts. HAC does discuss changes that have been made over time and the Board acknowledges that the Marinis have made all the changes that HAC had requested they make using the litany and under regulations they follow. Those changes haven't been sufficient in the eyes of the objectors but this land use decision in New Castle is committed to HAC. He believes that the Mayor and he made the correct decision not to recuse themselves from this hearing as requested which are stated on the record. He doesn't believe under Delaware case law that it was incorrect to allow Ms. Monigle to review exactly the record made in April and then vote in May, albeit she was the tie-breaking vote. She stated that when she listened to the tape of the April hearing the tape was clear to hear with little or no inaudible comments. He doesn't feel there was a violation of due process to exclude new evidence at the May 2009 HAC hearing because a new member was absent from HAC (Mr. Heckrotte) and had HAC been presented with new evidence at the May 2009 hearing that is evidence that Mr. Heckrotte would not have had when he voted for this application in April 2009. Mr. Marin argued that HAC should have followed criteria having Ms. Marini follow exactly the structure that was on the lot before it was demolished. Mr. Marin could not provide any city ordinance or other authority that required the reproduction of a historic house or a house in an historic area. Therefore, Mr. Akin does not accept this argument unless he is provided with authority that says otherwise. In closing, under the substantial evidence test the HAC has made an admittedly somewhat subjective judgment that change has been significant enough as of this Spring to be rewarded with their approval. HAC is the group within City government committed to making those judgments. Mr. Akin has read all the transcripts in this case and plans and in his opinion there has been change over time and enough change to satisfy HAC that this building should now be approved.

The motion to uphold the HAC ruling was approved by a unanimous vote.

The hearing was adjourned at 10:15 p.m.

Respectfully submitted,

Debbie Turner
Stenographer

Applicant Exhibits

Wheeler Exhibit #1 . Two-page excerpt from Board of Adjustment opinion (10/2008)

Wheeler Exhibit #2 . Two-page excerpt from HAC guidelines (Additions and New Construction)

Wheeler Exhibit #3 . New Castle Historic Area: Guidelines and Standards Handbook (May 1990)

Wheeler Exhibit #4 . Three-page excerpt from Code of Federal Regulations (dealing with Interior Department)

Wheeler Exhibit #5 . Letter from Mr. Marin to Mr. Akin requesting recusal

Wheeler Exhibit #6 . Warrington v. State Personnel Commission (Chancery Court 1994)

Wheeler Exhibit #7 . Mr. Marin's transcript of HAC hearing for December 2008

Wheeler Exhibit #8 . Mr. Marin's transcript of HAC hearing for January 2009

Wheeler Exhibit #9 . Mr. Marin's transcript of HAC hearing for April 2009

Wheeler Exhibit #10 . Mr. Marin's transcript of HAC hearing for May 2009

Wheeler Exhibit #11 . Listing of ~~und~~describable testimony noted by court reporter (retained by Mr. Marin) in HAC hearing of May 2009

Wheeler Exhibit #12 . Listing of ~~und~~describable testimony noted by court report (retained by Mr. Marin) in HAC hearing of April 2009

Marini Exhibit #1 . Letter of support from Mr. Tracey to the Board of Adjustment (7/23/09)

Marini Exhibit #2 -- Letters (5/6/09, 5/7/09, 5/18/09) sent by Mr. Akin regarding completing the record in the HAC case

Marini Exhibit #3 -- Summary of changes by Mr. Tracey

Marini Exhibit #4 . Legal memo (September 2008) submitted by Mr. Marin regarding Scope and Standard of Review

Marini Exhibit #5 -- 10/21/08 Board of Adjustment decision (HAC appeal)

Board Exhibit #1 . Binder containing Marini submissions 1 through 5 to HAC

Board Exhibit #2 . Binder containing Marini submissions 6 through 7 to HAC

Board Exhibit #3 . Binder containing all of HAC's minutes and agendas relating to this matter dating when it was first presented to HAC in 1999 to date, transcripts prepared by Mr. Tracey's office, limited building permit and historic review certificate in this case