

**City of Cape May Zoning Board of Adjustment Meeting Minutes
July 22, 2010**

Opening: In compliance with the Open Public Meetings Act, adequate notice of the meeting was provided. Chairperson Pitman called the meeting to order at 6:30 P.M.

Roll Call:	Mr. Pitman, Chairperson	Present
	Mr. Williams, Vice Chairperson	Present
	Mrs. Hutchinson	Present
	Mr. Iurato	Present
	Mr. White	Present
	Mr. Schmidtchen	Present
	Mr. Todd	Present
	Mr. Meier, Alt 1	Present
	Mrs. Inderwies, Alt 2	Present

Also Present: Mary L. Rothwell, Zoning Officer
Edie Kopsitz, Recording Secretary
George Neidig, Board Solicitor
Craig Hurless, P.E., P.P., Board Engineer

Reorganization:

Chairperson:

Mr. White nominated Mr. Pitman for Chairperson. Seconded by Mr. Schmidtchen and **carried 8-0.** Those in favor: Mr. Iurato, Mr. White, Mrs. Hutchinson, Mr. Schmidtchen, Mr. Todd, Mr. Meier, Mrs. Inderwies and Mr. Williams. Those Opposed: None. Those Abstaining: Mr. Pitman.

Vice Chairperson:

Mr. White nominated Mr. Williams for Vice Chairperson. Seconded by Mrs. Hutchinson and **carried 6-0.** Those in favor: Mr. Iurato, Mr. White, Mrs. Hutchinson, Mr. Schmidtchen, Mr. Todd, and Mr. Pitman. Those Opposed: None. Those Abstaining: Mr. Williams.

Board Attorney:

Mr. Williams moved to appoint George B. Neidig, Esquire as Board Attorney. Seconded by Mr. White **carried 7-0.** Those in favor: Mr. Iurato, Mr. White, Mrs. Hutchinson, Mr. Schmidtchen, Mr. Todd, Mr. Williams and Mr. Pitman. Those Opposed: None. Those Abstaining: None.

Board Engineer:

Mr. Schmidtchen moved to appoint Craig Hurless, PE of Polistina & Associates as Board Engineer. Seconded by Mr. White **carried 7-0**. Those in favor: Mr. Iurato, Mr. White, Mrs. Hutchinson, Mr. Schmidtchen, Mr. Todd, Mr. Williams and Mr. Pitman. Those Opposed: None. Those Abstaining: None.

2010/2011 Meeting Dates: Mary Rothwell, Zoning Officer/Board Assistant read the dates for the record.

Mr. White moved to appoint the 2010/2011 Meeting dates as presented. Seconded by Mr. Todd **carried 7-0**. Those in favor: Mr. Iurato, Mr. White, Mrs. Hutchinson, Mr. Schmidtchen, Mr. Todd, Mr. Williams and Mr. Pitman. Those Opposed: None. Those Abstaining: None.

Official Newspaper:

Mr. Williams moved to recognize the Star & Wave as the Zoning Board's official newspaper, and the Press of Atlantic City as an alternative. Seconded by Mr. Todd and **carried 7-0**. Those in favor: Mr. Iurato, Mr. White, Mrs. Hutchinson, Mr. Schmidtchen, Mr. Todd, Mr. Williams and Mr. Pitman. Those Opposed: None. Those Abstaining: None.

Minutes: June 24, 2010

Motion made by Mr. Iurato to approve the minutes dated June 24, 2010. Seconded by Mr. Williams and **carried 5-0**. Those in favor: Mr. Iurato, Mr. Williams, Mr. Schmidtchen, Mr. Todd and Mr. Pitman. Those Opposed: None. Those Abstaining: Mr. White and Mrs. Hutchinson.

Applications:

**Celio, 120 Decatur Street, Block 1041 Lot 7
Appeal from Decision of Administrative Officer
Historic Preservation Commission (HPC)**

George Neidig announced that the Celio application has been postponed to August 26, 2010 at 6:30pm without further notice. The applicant waived the time constraints.

**Franks Investments Inc., 711 Beach Avenue, Block 1062 Lots 6 & 7
Appeal form Decision of Administrative Officer
Historic Preservation Commission**

Craig Hurless, Board Engineer was sworn in and clarified his credentials for the record.

Chairman Pitman announced the forum that will be followed. He stated the Zoning Board of Adjustments is an arm of the Court System and request accolades or outspoken comments of any form be refrained. He also gave instructions to the public and professional that will be testifying with regards to the application. Mr. Pitman informed the audience that a vote will not be carry out this evening so that a field inspection be conducted by the Board Members

of the Beach Theater (interior/exterior) that will take place in September. He indicated the Fire Department would accompany for safety reasons. He stated the ordinance that will be adhered to as §525-40 Demolitions & Relocation Criteria (addressing the 9 points) and Craig Hurless recited section. Mr. Pitman announced no new testimony will be taken after 9:30pm, the meeting will end at 10:00pm and there will be a 5 (five) minute break at 8:30pm.

Mr. Neidig informed and clarified the appeal process that will be followed this evening. He stated this hearing would be de nova (elaborating on the method) hearing and not whether the HPC was arbitrary, capricious or unreasonable and will be handled under the current law of the State of New Jersey. All conduct will be in compliance with the Municipal Land Use Law and the open public meetings act. He then asked for all objecting professionals to announce themselves for the record; Stephen Nehmad, Attorney for the Applicant, Robert Fineberg, Attorney for the Historic Preservation Commission (HPC) and Michele DiNato, Attorney for the Beach Theater Foundation. All other witnesses will have opportunity for his or her testimony and cross-examination.

Stephen Nehmad, Attorney for Nehmad, Perillo and Davis representing Franks Investments Incorporated gave an opening statement that reviewed the lengthy procedural history of the application, which he stated, is an appeal. He indicated there have been two (2) reversals of opinion in the processing of his clients efforts to redevelop the Beach Theater site. The appeal is filed pursuant to NJSA 40:55D-70A & 40:55D-70.2, appeals from a Construction Official when a decision was rendered by the Historic Preservation Commission and stated his reasons. He elaborated on the differences of a weak and strong forms of a Historic Preservation Commission (HPC) and clarified that the City of Cape May Historic Preservation Commission (HPC) is a strong Commission by Ordinance. The Historic Preservation Commission granted the partial demolition June of 2007 by Resolution #2007-29 and Planning Board Approval for preliminary site plan in December 23, 2008 by Resolution#1-27-2009:1. He then explained the permit extension act that was in place in September 6, 2008 due to the dire economic conditions that extended certain land use and approvals. He clarified in depth the correspondence (dated September 26, 2008 and October 1 & 8, 2008) between the applicants Counsel, the Historic Preservation Commission counsel Robert Fineberg and the City of Cape May Solicitor Anthony P. Monzo all concurred that any permits that were issued on or after January 1, 2007 will not expire until the end of the extension period December 31, 2012. Mr. Nehmad distributed to the members packets containing these approvals and correspondence and were marked A1-A9. He explained how his client then proceeded with the partial demolition, stated the receipt of a brief e-mail received from the City of Cape May Solicitor indicating the permit extension act no longer applied to the City of Cape May and he responded to the e-mail strenuously expressing his objection in electronic and written correspondence. Mr. Nehmad continued to the present year to which his client wanted to move forward and agreed to a new hearing with the Historic Preservation Commission (January 20, 2010), as long as it was done without prejudice and not waiving of their rights. At the meeting they addressed the 9 points criteria as contained in Cape May City Code §525-40, presented the same plans & exhibits, seeking the same relief and introduced the same professionals as in 2007, referred to Ordinance #127-2007 survey of Historic Properties with the outcome of a denial by the Commission (HPC). Mr. Nehmad informed the members he still disagrees with the (2) instrumentalities of the

City of Cape May (Mr. Fineberg and Mr. Monzo) and filed this application to the Zoning Board of Adjustment. He clarified the reasons for delaying the renovations due to the City Counsel's request to adjourn the application on four occasions to allow a private organization run the section of the structure as a theater and his client complied. Mr. Nehmad wanted noted for the record he believes the Historic Preservation Commission (HPC) should not act in a judicial quayside capacity regarding this application and should not be able to take standing as a vigorous adversary role.

Michele DiNato, Attorney for the Beach Theater Foundation gave her opening statement disagreeing with Mr. Nehmad's interpretation of any Municipality wrongdoing/irregularities of the decision making process. She clarified by itemizing – 1. Permit Extension Act by stating Mr. Monzo first opinion, he did not include the excerpt regarding an environmentally sensitive area that is dictated by the State Planning Act and it does pertain to Cape May City and why the City is exempt from the Permit Extension Act. 2. The Historic Preservation Commission (HPC) after the decision in 2007 was presented with substantial information making the Beach Theater significant, she also elaborated on the 50 year mark guided by the National Register Criteria and stated at the time of original presentation the structure was not 50 years old. 3. Standing of the Historic Preservation Commission and feels the decision of Judge Armstrong should not be referred too and clarified the participation and adversarial context of bringing fact should be permissible to this Board. Mr. Nehmad responded stating her opening statement was like a rebuttal. Mr. Neidig again clarified what the Zoning Board would be voting on.

Robert Fineberg, Solicitor for Historic Preservation Commission (HPC) for purposes of the hearing he is not disagreeing but clarified he will present the record and reasons for HPC decision supplementing in accordance of the Solicitor ruling that additional material be presented. Mr. Nehmad strenuously objects stating the Members should be determining this appeal anew de nova not Mr. Fineberg advocacy of the Historic Preservation Commission position once again clarifying no standing. He does not object to individuals of the Historic Preservation Commission testimony as citizens of the City and not through their Counsel. Mr. Neidig reaffirmed this de nova appeal should be judged anew based upon the testimony in front of the members and stated Mr. Fineberg could asked questions and cross examine. Mr. Fineberg understood and stepped down.

Mr. Nehmad called Deborah Frank, Vice President of Frank Investment, Inc. and film buyer for Franks Theaters who was sworn in. She clarified her family owns and operates theaters in six (6) states with 23 locations and over 200 screens. She briefly gave history of her family business, which was started in the early 1900's in New Jersey and clarified her status as film buyer describing in detail the operations of that position. She indicated the Cape May City Theater was purchased in 1986. Ms. Frank commented on the decline of smaller theaters stating the majority of mover goes (ages 14 through 25) attend the larger movie complexes with 12 to 14 screens, stadium seating, large food concessions, digital sound and 3-D. She stated the majority of the smaller theaters are functionally obsolete diminished with no audience. She elaborated on the Theater in Cape May as declining since 1998 even though 1st run films were highlighted and stated the theater is functionally obsolete and operating at a loss. She stated the financial officer could not obtain a substantial loan (\$800,000 to a

million dollars) to upgrade due to bring the theater to current expectations due to the current economy and operating at a loss. Mr. Nehmad asked Ms. Frank to elaborate on the alternative concession they made of having the local Theater Foundation operate and save the theater section of the structure. She stated this delayed the HPC original application approval but they allowed this because they agreed to this negotiation (Lease with option of purchase for 1 ½ years).

Mr. Fineberg cross-examined Ms. Frank (with Mr. Nehmad objecting as previously stated) and questioned whether Ms. Frank was related to the previous owner the Hunt Family. Ms. Frank responded “No”. He asked several questions of Ms. Frank regarding the 1986 purchase from the Hunt Family, which included a whether it was viable theater, personal setting (ambiance of a small theater), beach attraction, if when the decline of the theater business was evident did they consider other options, did they consider other cultural activities for the use to which Ms. Frank responded, stating that a theater was not an option and that is why they were here to move forward with the application previously approved.

Ms. DiNato cross-examined Ms. Frank with questions regarding 1st run and sub-run films in New Jersey. They debated on demographics of Northern Jersey versus Seasonal area run theaters. She questioned sections of the lease between Frank Investments and the Beach Theater Foundation (2007-2009) that encompassed where/who the films obtained (leased), whether the other shore locations Theaters (Ocean City & Stone Harbor) buildings were going to be demolished, inquired on what Capital improvements were conducted from 1986, expand on conditions Hoyt Company Lease (1998-2002), inquired about the profit loss statements. Ms. Frank responded stating the seashore theaters are seasonal, elaborated on the cost factor for capital improvements on these structures and clarified the profit loss statements could be explained by her financial management officer.

Chairman Pitman called for a five (5) minute break at 8:25pm. Meeting resumed at 8:33pm.

Member Schmidtchen directed a question to the Chairman that all professionals testimony relate only to the nine (9) points criteria that they have to determine facts, draw an opinion from and make a ruling on. Mr. Nehmad acknowledged this request but stated the testimony this evening is of significant importance to his client.

Mr. Neidig announced that on break a question regarding the public being permitted to cross-examine the applicant and their professionals and clarified that this was permitted as long as it was not redundant.

Mr. Nehmad called Charles Naselsky, Esquire (NJ/PA) General Counsel and Member of the Board of Directors of Franks Investment Inc. & Franks Theater Inc. to give testimony who was sworn in. Mr. Naselsky testimony indicated he has been at the capacity stated for ten (10) years and is chief legal officer and is familiar with every aspect of both companies assets portfolio (financial and operational). He confirmed the purchase of the Franks Theater as single screen theater in 1986 (will provide a copy of the deed of conveyance by the next meeting), elucidated on the capital improvements - renovated to a twin theater increasing the

screens (2) but reduced the seating (740 to 591), 1996 increase to 4 screens decreased amount of seating to 497 added digital equipment for sound, carpeting, concession area, screen adjustment for better visual experience and clarified the historical revenue trends from 2003 (when the Frank Theater rescinded the Lease from Hoyt) – 2009 (Frank Theater last operation), explained the Admits & Concession aspect gross ticket sales \$162,000, cost of rental \$92,000 was 55% of gross revenue leaving the remainder for cost associated for maintaining including operating expenses, labor, utility, concession purchase and property taxes. Mr. Naselsky detailed the Debt and Equity equation with operating at a loss (2006, 2007 & 2009 the Theater operated at a loss @\$57,000 a year), detailed the profit and loss margins, financial statements, net loss trouble (Bank concern) and detailed the capital expense FFE (furniture, fixture and equipment) not feasible for the structure to restore to a modern day operating facility, current physical conditions will not allow stadium seating (below flood regulations) and Banks (examining all aspects) do not lend to businesses operating a loss with a seasonal audience. He explained the reason for opening the Rio Grande Theater modern eight (8) screen experience with on site parking and convenient location for access Countywide (year round). Mr. Naselsky elaborated on other modern theaters the Franks own/operate with success.

Mr. Fineberg cross examination of Mr. Naselsky encompassing the Franks Investments ownership of the entire parcel including the retail store rentals, division of property tax (between all lessees) and rental income deferment of operating expenses to theater. Mr. Fineberg stated that one of the Criteria for demolition is whether the building in its entirety generates income or operates at a loss. Mr. Naselsky responded that the Franks Theater (operating at a loss) and Frank Investments Incorporated are separate entities and not on combined balance sheets with different financial statements. Mr. Nehmad responded by stating it is the position that there is hardship that is present by not allowing demolishing of the Theater portion of the property (a partial demolition) due to it not being feasible to run the building as a Theater. Mr. Fineberg takes exception denoting a hardship variance was not noticed and not part of the forum. Mr. Nehmad responded it addresses #7 of the 9 points of Criteria §525-40 and read it into the record.

Ms. DiNato cross-examined asking Mr. Naselsky if the sub run films were considered for continuing operating the theater. He responded that they considered every viable alternative that included showing non-theater product (live feeds) capital expense required would have the theater still operating at a loss. Ms. DiNato questioned the sales price; applicant's constant referral to hardship issues and stated should the demolition be denied the building would have to be placed in a fair market value.

Public Cross Examination at 9: 45pm.

George Costish, Victorian Towers 640 Washington Street a retired Industrial Engineer attempted to cross-examine Mr. Naselsky. He was instructed several times to cross-examine with questions that were relevant but to no avail he was asked to take his seat.

Barbara Skinner, 30 Congress Street, crossed examined Mr. Naselsky questioned whether the applicants professionals investigated other historical theaters in operations (Millville, NJ,

Brynmawr, PA and Key West) for an alternative use due to the demographics of the mature population. She also requested they investigate partnering with a non-profit organization that can obtain funds through the State of New Jersey Department of Consumer Affairs of up to \$600,000. Mr. Naselsky responded stating they were open all offers and clarified no such offer of government money has been received.

Mark Sucher, 124 Decatur Street, questioned if an explanation can be made from the profit loss statements regarding the marketing plan for the Beach Theater. He also asked if the Franks theater group considered when opening the Rio Theater that it would affect attendance and if they have the specific demographics to which zip codes they draw their audience from. Mr. Naselsky responded stating it has the same marketing plan for all seasonal beach related theaters; examples include Stone Harbor and the Mooreland & Strand in Ocean City and also indicated that the Marketing Department has all the data regarding the demographics.

Mr. Pitman announced the meeting would be continued on **September 23, 2010 at 6:30pm** and at the August 26, 2010 meeting a date for a walk through of the Franks Theater will be discussed and scheduled for mid September. Mr. Nehmad acknowledging the request and stated his client will allow, 1. Permitting the walkthrough with the qualifications that the Fire Department will bring appropriate lighting, 2.) Their insurance agent would request a waiver form be signed for all who enter that they be released from any and all liability. 3.) Only Zoning Board Members be admitted.

Adjournment was made by Mr. White, Seconded by Mr. Schmidtchen at 10:05 PM, with all in favor.

Respectfully submitted: Edie Kopsitz, Recording Secretary.