

December 9, 2020

Rehoboth Beach Planning Commission
229 Rehoboth Avenue
Rehoboth Beach, DE 19971
Attn: Chair Trunzo, Vice-Chair Patterson and All Members

Re: Site Plan Review Application 0620-03
Clear Space Theatre, Inc. & Rehoboth Spotlight, Inc.

Dear Planning Commission Members:

Please consider this letter at your December 11, 2020 Planning Commission (“PC”) meeting in regard to future proceedings in the above matter involving Appellants and Clear Space Theatre (“CST”). We are very concerned that a rush to judgment – which does not correct prior errors, which is based on short-circuited procedures, and which relies upon an incomplete record that does not provide a legitimate basis for a decision – does no good for anyone in the long term. To minimize the need for any further appeals in the above matter, we urge you to adopt the suggested procedures and timetables below in Part I. In addition, in Part II we explain the rationale for our suggestions in Part I. Finally, in Part III we provide the PC with an update of post-November 12, 2020 developments, which is essential to fully understand our rationale and the why our concerns are real and not theoretical.

Part I – Procedures and Timetables

1. December 11, 2020: PC Meeting to consider the items below.¹
2. December 21, 2020: Deadline for PC to receive suggestions from Appellants, CST and others regarding:
 - (a) further information required prior to public hearing; and
 - (b) subsequent PC processes to be used prior to and at public hearing.
3. December 30, 2020: Deadline for PC to receive responsive comments on items submitted in 2 above.
4. January 8, 2021: PC meeting to determine:
 - (a) date for site visit by full PC membership (CST site, traffic circle, Sussex Street, etc.) to occur in January 2021 with parties and public present (consistent with COVID-19 restrictions) and video recording of site visit available to persons not permitted or able to attend.
 - (b) whether all necessary information required by law has been submitted by CST and made available/posted for the public by January 8, 2021; and
 - (c) (i) if PC determines all necessary information has been submitted by CST and made available/posted for the public by January 8, 2021, PC to set pre-hearing date for full PC site visit and to set public hearing date; **OR**

¹ In our letter of November 12, 2020 to the PC, discussed in more detail in Part III below, we urged the PC to “solicit suggestions from involved stakeholders on how to proceed. The appellants, applicant and others may have useful ideas for what would be done, and when it would be done.... [B]etween now and the Planning Commission’s December 2020 meeting, your receipt of suggestions from stakeholders could be very useful in terms of future scheduling.” To our knowledge, the PC has not reached out for suggestions, so instead we are sending this unsolicited letter.

(ii) if PC determines if all necessary information has **not** been submitted by CST or **not** yet been made available to the public by January 8, 2021, PC to identify what necessary additional information must still be submitted by CST and made available/posted for the public, and PC may select public hearing date **contingent** upon receipt of all such necessary additional information and availability/posting for the public at least 21 days prior to selected public hearing date (*for example*, if PC determines on January 8, 2021 that all necessary information has been submitted by CST and made available/posted for the public, then selected public hearing could be held as early as January 29/February 1; if PC determines on January 8, 2021 that all necessary information has **not** been submitted by CST or has **not** yet been made available/posted, PC could select February 5, 2021 as public hearing date **contingent** upon such submittal and availability/posting **no later than** January 15, 2021 – but if PC determines on or before February 5, 2021 that the January 15, 2021 deadline was missed, then public hearing must be rescheduled by PC to a date that is at least 21 days after such submittal and availability/posting. It is important that the PC adhere strictly to rescheduling the public hearing if any necessary information has not been submitted by CST or made available/posted as required).

5. Public Hearing Date (selected per 4 above, January 31/February 1 or later): Public Hearing as required by Site Plan Review Ordinance, with PC decision to be made on same day as public hearing unless PC decides to take case under advisement or otherwise postpone decision to a later date.

Part II – Rationale for Procedures and Timetables

The above procedures and timetables do not unreasonably or unnecessarily delay any public hearing or resolution of the CST matter, nor do they allow for an unsupportable acceleration of such public hearing or resolution. If the PC moves ahead on December 11, 2020 to set a public hearing date in January 2021, without determining that the requirements for a public hearing have been fully met – and without allowing the parties to weigh in on whether such requirements have been met – then the PC would be committing the same error that created the current problem, as we now explain.

As you know, on November 12, 2020, as explained in the November 19, 2020 letter from their counsel Max Walton, Esq., the Mayor & Commissioners (“M&C”) voted to grant Appellants’ motion to remand the Planning Commission Decision (“PC Decision”) in the above matter “due to the premature placement of the public hearing on the August 14, 2020 agenda” and to require “a new public hearing on the application.” (“Walton Letter”). The PC must take all reasonable steps to assure that, once again, it does not vote on December 11, 2020 for a “premature placement” of the public hearing in January 2021. The PC must assure that this time, when it sets a public hearing date, CST has actually submitted in a timely fashion (so as to allow reasonable public review) **all** necessary information required by law, and that **all** such information has been timely made available/posted for the public. It simply is not feasible to make that determination on December 11, 2020, and any vote to do so risks yet another appeal.

Appellants are almost done with a thorough evaluation of the information previously submitted by CST and/or made available/posted for the public, and already we have discovered that not all necessary information has been thus provided to the PC (for example, adequate information relating to noise, landscaping, and lighting; a *bona fide* parking plan; a *bona fide* parking study; and much more). This has been an arduous task of going through over 1,000 pages of documents, but it must be done if the proper legal process is to be followed. We expect to complete our evaluation by the end of next week and will thereafter provide our list to the PC for its review at its January 11, 2021 PC meeting. But as our timetable suggests, Appellants and CST and the public should also submit comments and responsive comments by December 21 and 30 on suggested procedures.

The procedures suggested above by Appellants, and the timelines for those procedures, will move this matter ahead at a reasonable pace and with minimal risk of error and appeal – if such procedures are properly implemented.

In addition, another important reason for the above timetable would allow Appellants and CST a reasonable amount of time to work out a settlement of their differences which might remove significant opposition to a revised CST proposal. In Part III below, we explain how Appellants – on the same day as the M&C remand – immediately and publicly expressed their interest in trying to reach mutual agreement with CST. Unfortunately, CST did not contact any Appellants until three weeks later, but there has been an initial exchange of correspondence and we hope that it will be followed by discussions. In Appellants’ view, it is impractical – given the amount of information to be exchanged and reviewed and discussed, and given the upcoming Christmas holidays – for any meaningful discussions to be successfully completed in the next 30 days. Rather, adopting the above procedures and timetables suggested in Part I will allow for the possibility of success without either foot-dragging or an unreasonable rush to judgment.

Finally, the above timetable will allow for a legitimate visit by the full PC to the CST site and surrounding areas that are critical to resolving this matter – e.g., the traffic circle on Rehoboth Avenue, Sussex Street, etc. Although the PC’s counsel has expressed the opinion that the individual site visits done by individual PC members on an *ad hoc* basis were legal, the case law he has cited is based on very different facts and certainly does not permit what happened in this case where actual fact-finding missions were undertaken by several PC members on their own. The only remedy for this conduct is a “curative” visit by the full PC, as has been done in other cases over the years, with the presence of the parties and the public, see Committee for Washington’s Riverfront Parks v. Thompson, 451 A.2d 1177, 1182 (1982). Absent such a “curative” visit, the prior individual visits will continue to provide a valid basis for reversal by the M&C or by a court. Of course, the proposed “curative” site visit should be consistent with COVID-19 limitations as to social distancing, masks, limited attendance, etc.

The above rationale fully supports the procedures and timetables that we’ve suggested in Part I. But to get a better understanding of the risks of foregoing such procedures and timetables, we urge the PC to read Part III below.

Part III – Post-November 12, 2020 Developments

Appellants are concerned – and the below facts demonstrate – that many of the same efforts that led to a “premature placement of the public hearing” in summer 2020 are again presenting themselves right now. We urge the PC not to allow those efforts to succeed.

Immediately after the M&C vote, on November 12, 2020 Appellants wrote to the PC (“Appellants’ 11/12/20 Letter”) stating the following, in relevant part:

In light of the vote by the Mayor and Commissioners to require that the Planning Commission must conduct a *de novo* review and public hearing –and re-vote – on the application(s) of Clear Space Theatre, we would like to propose that the Planning Commission solicit suggestions from involved stakeholders on how to proceed. The appellants, applicant and others may have useful ideas for what would be done, and when it would be done.

[B]etween now and the Planning Commission’s December 2020 meeting, your receipt of suggestions from stakeholders could be very useful in terms of future scheduling.

Finally, we note again that appellants are ***not*** opposed to Clear Space Theatre remaining in the City of Rehoboth Beach. If they are willing to be more flexible in their concept and specific plans, we welcome the opportunity to discuss with them whether there is a solution that solves all reasonable concerns.

After Appellants sent the above letter expressing our willingness to discuss with CST “a solution that solves all reasonable concerns”, three weeks later we received an email from Wesley Paulson on the afternoon of December 2, 2020, asking Appellants to contact him. Prior to his contact with Appellants, apparently Mr. Paulson had been speaking with one resident on Sussex Street who is ***not*** an Appellant and who advised Mr. Paulson that he could ***not*** speak for any of the Appellants. As we understand it, shortly before December 2, 2020, Mr. Paulson and/or others involved with CST arranged a call between that resident and several representatives of CST and others who are assisting CST in its efforts to get its site plan application approved (particularly, former City Commissioner Lisa Schlosser and former Planning Commission Chair Richard Perry). We are advised that phone call involved, on CST’s side, Mr. Paulson, Ms. Susan Haines (CST architect), Mr. Carl Schloegel (CST Board President), Ms. Laura Mason (CST Board Member), Mr. John Pinchord (CST Board Member), Ms. Schlosser and Mr. Perry. That phone call apparently led CST to consider modifications to certain parts of its site plan, which is what led Mr. Paulson to contact Appellants on December 2, 2020 as a follow-up to Appellants’ November 12, 2020 letter to the PC.

On Saturday morning, December 5, 2020, Appellants responded to Mr. Paulson’s December 2, 2020 email. Although intended by Appellants as the basis for private discussions with CST, apparently CST has publicly released Appellants’ email and even posted it on social media. Our December 5, 2020 email is attached to this letter. Appellants’ email response is attached to this letter, and basically we made 3 points:

- We expressed concern that a group calling itself “Save Clear Space” was misleading the public and engaging in counter-productive conduct by stating that Appellants want to “kill Clear Space”, and we affirmed that Appellants’ “preference is to see if all parties can come up with a plan that works for all stakeholders. “
- We stated that “we oppose both unreasonable acceleration and unreasonable delays in decisions about this project.” Noting that “this project would be the largest non-government, non-hotel structure within the City”, we stated “Putting artificial deadlines on our mutual discussions or Planning Commission action is in no one’s best interest if the goal is a consensus plan that eliminates the need for any appeals, including judicial proceedings”
- We explained that “we intend to share your communication with all Appellants immediately, and then engage in internal discussions among Appellants this coming week, after which we’ll get back to you with a proposed format and time frame for working together towards a mutually agreeable solution.”

As it turns out, at almost exactly the same time on December 5, 2020 that Appellants sent the above email to Mr. Paulson, Mr. Paulson had sent an email to Appellants’ Executive Assistant / Coordinator Jennifer Duncan. It is worth quoting Mr. Paulson’s December 5, 2020 email at length because it deals with some issues that CST had discussed with the one resident of Sussex Street, but not with any of the Appellants in the past several weeks, and because it requests Appellants to resolve their disagreements with CST ***by December 31, 2020*** and sign a Stipulation with CST by ***December 31, 2020*** in which Appellants agree to ***no further challenges:***

“I hope we can talk before your meeting on Monday.

In the meantime here are a few updates.

1. We have engaged the project acoustician evaluate the noise level concerns raised by Ron, Jon, Chad, Bo and others. I am waiting on a report.
2. Copies of the tree site plans are attached. The plans have been approved by the City Arborist based on the formula for mitigating the loss of the two pine trees.
3. One of our board member[s] is actively consulting with adjacent parking lot owners. I can report that M&T will quietly allow our patrons to use their lot after hours but they will not grant an exclusive use. Debbie Reed has refused. We are waiting to hear from Verizon, Tunnell & Raysor, and a few other smaller lot owners.
4. I apologize I have been delayed in drafting an updated "Plan Your Visit" web page for the new location to include a plea to avoid parking on Sussex Street while also encouraging use of DART and parking in metered and municipal lots, including Grove Park (on evenings and weekends).

Gene Lawson has drafted the attached Stipulation document. I am hopeful you and I can work together to update this document if needed in order to **obtain the signatures of all 21 appellants after your meeting on Monday.** I can explain further when I have the opportunity to talk with you by phone.

Please call me at 240-593-4090. I am available all weekend. I look forward to hearing from you."

To his email, Mr. Paulson attached the "Stipulation" drafted by Mr. Lawson, which said in relevant part:

...." As a result of discussions with community leaders and others involved in the proceedings, Clear Space has determined that it will undertake the following actions in order to entice support of the theatre project and to permit the Planning Commission to approve the project prior to the end of the year.... [6 items discussed]

Affirmation and Certification: Due to the time critical nature of the Planning Commission action in this matter (before December 31, 2020), the persons filing the current appeal do hereby agree that they will not file another appeal of a Planning Commission decision in these cases and so signify with their signatures below."

After the emails from Appellants and from Mr. Paulson had "crossed" each other about the same time, soon thereafter on December 5, 2020, Mr. Paulson followed up with another email to Appellants' Executive Assistant / Coordinator thanking her for her "thoughtful detailed reply", saying "I look forward to working with you", and ending by stating "I want to talk by phone before your meeting on Monday to explain further the path the stipulation would take in bringing this matter to a close."

Needless to say, having only transmitted CST's emails to Appellants that same day, Ms. Duncan was in no position to address anything further with CST until after Appellants' planned conference call earlier this week. To repeat what Appellants, through Ms. Duncan, said in their earlier December 5, 2020 email to Mr. Paulson, "we intend to share your communication with all Appellants immediately, and then engage in internal discussions among Appellants this coming week, **after which** we'll get back to you" (emphasis added).

Appellants had expected to get back to Mr. Paulson directly by Wednesday morning, December 10, 2020 – yet we have now discovered new public efforts to undermine the orderly process that we've proposed and also continuing attacks on Appellants by the group "Save Clear Space", apparently with the assent or even encouragement of CST representatives. For example, on December 8, 2020, Ms. Schlosser, posted this message on the "Save Clear Space" Facebook page: "I suggest sharing your concerns with the Planning Commission as well, the Chair is: Jeffrey Trunzo <trunzo.jeffrey@gmail.com>. They are meeting on December 11 to vote on a date for a public hearing - ask them to support Clear Space - and to uphold the current vote

of the Planning Commissioner. If they insist on yet another public hearing, ask them to hold it as early as January 11." As we've explained above, to have a public hearing as early as January 11 (actually, January 8 is the next PC meeting) is only to invite another reversal of any approval that might occur. Further, continuing *ad hominem* attacks on Appellants, which CST has the ability to discourage, do not serve the cause of resolving this dispute amicably.

Despite the above recent developments, Appellants intend to pursue discussions in good faith with CST. If the PC adopts the procedures and timetables suggested above by Appellants, it will allow for an orderly process that minimizes the risk of later appeals and reversals, and also facilitates serious discussions between Appellants and CST to resolve the dispute.

Respectfully submitted,

Jennifer Duncan

Executive Assistant, Coordinator for Appellants:

Wyn Achenbaum, 62 Columbia Avenue, Rehoboth Beach, DE
Joe Achenbaum, 62 Columbia Avenue, Rehoboth Beach, DE
Mark Betchkal, 38640 Cottage Lane, Unit 5, Rehoboth Beach, DE
Jennifer Duncan, 68 Kent Street, Rehoboth Beach, DE
Suzanne Goode, 1 Grove Street, Rehoboth Beach, DE
Marie Hatkevich, 221 Munson Street, Rehoboth Beach, DE
December Hughes, 74 Columbia Avenue, Rehoboth Beach, DE
John Hughes, 74 Columbia Avenue, Rehoboth Beach, DE
Jan Konesey, 42 Oak Avenue, Rehoboth Beach, DE
Kenneth Konesey, 42 Oak Avenue, Rehoboth Beach, DE
Steve Latsios, 72 Kent Street, Rehoboth Beach, DE
Robert Lauder, 96 Sussex Street, Rehoboth Beach, DE
David Mellen, 105 Rodney Street, Rehoboth Beach, DE
Judy Mellen, 105 Rodney Street, Rehoboth Beach, DE
Janice Miller, The Ark, 409 Rehoboth Avenue, Unit 30, Rehoboth Beach, DE
Michael Nolan, 221 Munson Street, Rehoboth Beach, DE
Amy Sensenig, 98 Sussex Street, Rehoboth Beach, DE
Chad Sensenig, 98 Sussex Street, Rehoboth Beach, DE
Harvey Shulman, 149-B Henlopen Avenue, Rehoboth Beach, DE
John Swift, 100 Sussex Street, Rehoboth Beach, DE

Attachment: Appellants' December 5, 2020 email to CST

Attachment: Appellant's December 5, 2020 email to CST

From: Jennifer Duncan <chaseaman44@gmail.com>
Date: Sat, Dec 5, 2020 at 9:55 AM
Subject: Re: Clear Space
To: Wesley Paulson <wpaulson@clearspacetheatre.org>

Wesley,

Thank you for reaching out to me on December 2 in my role as the Executive Assistant, Coordinator, for the Appellants in the CST matter.

Three weeks ago, on November 12, the day that the Mayor & Commissioners remanded the Planning Commission approval of the CST project back to the Planning Commission for a new public hearing, the Appellants wrote a public letter to the Planning Commission saying we are “are ***not*** opposed to Clear Space Theatre remaining in the City of Rehoboth Beach. If they are willing to be more flexible in their concept and specific plans, we welcome the opportunity to discuss with them whether there is a solution that solves all reasonable concerns.” Based on your December 2 email, we are pleased that CST appears to be interested in discussing a solution with us.

First, following up on our above public letter, let me assure you, that to my knowledge, there is no Appellant who is opposed to CST as a good neighbor. The messaging by a group named “Save Clear Space,” is incorrect in stating that the Appellants want to “kill Clear Space.” There are certainly enough legal and factual infirmities in the CST application that would require the project to be rejected by the Mayor and Commissioners or by a court, but our preference is to see if all parties can come up with a plan that works for all stakeholders.

Such incorrect messaging that we want to “kill Clear Space” serves no useful purpose for CST or the City and is, unfortunately, not only counterproductive, but also unfairly misleads many of CST's supporters. As we have indicated, we can support CST if there is mutual agreement on how to avoid the negative impacts facing the immediate neighborhood as well as other City residents and property owners affected by the project.

Second, we oppose both unreasonable acceleration and unreasonable delays in decisions about this project. While we appreciate that you may disagree, many of the prior mistakes resulted from efforts to rush to judgment. A more deliberate process, even if it led to changes in the submitted site plans, might well have resulted in Planning Commission approval that would not have been appealed – and that would be final by now.

Everyone must keep in mind that this project would be the largest non-government, non-hotel structure within the City of Rehoboth Beach, and it requires more careful discussions and review. Putting artificial deadlines on our mutual discussions or Planning Commission action is in no one's

best interest if the goal is a consensus plan that eliminates the need for any appeals, including judicial proceedings that could take years to resolve. In this regard, we're happy to learn that CST has signed a multi-year lease at its current location, which allows sufficient time to work out differences and allow construction to occur and be completed.

Finally, we intend to share your communication with all Appellants immediately, and then engage in internal discussions among Appellants this coming week, after which we'll get back to you with a proposed format and time frame for working together towards a mutually agreeable solution.

Sincerely,

Jennifer Duncan