

**MEETING OF THE COMMITTEE ON FINANCIAL HARDSHIP
OF THE PHILADELPHIA HISTORICAL COMMISSION**

**FRIDAY, 19 DECEMBER 2014
ROOM 18-029, 1515 ARCH STREET, ONE PARKWAY BUILDING
SAM SHERMAN JR., CHAIR**

PRESENT

Sam Sherman Jr., chair
Dominique Hawkins, AIA, NCARB, LEED AP
Robert Thomas, AIA

Jonathan Farnham, Executive Director

ALSO PRESENT

Jonathan Weiss, Equinox
Peter Staz, Equinox
Matt McClure, Esq., Ballard Spahr
Paul Sehnert, University of Pennsylvania
Paul Boni, Esq., Boni Law
Jared Brey, PlanPhilly
Michael Bixler, Hidden City
Jeffrey Cohen, Bryn Mawr College
Aaron Wunsch, University of Pennsylvania
Ben Leech, Preservation Alliance
Mathew Grubel

CALL TO ORDER

Mr. Sherman called the meeting to order at 1:25 p.m. Ms. Hawkins and Mr. Thomas joined him.

ADDRESS: 400 S 40TH ST

Project: Amend Historical Commission hardship decision of May 2012

Review Requested: Amend earlier decision

Owner: OAP, Inc.

Requestor: Matthew McClure, Esq., Ballard Spahr

History: 1853; John P. Levy House; Colonial Revival alterations and additions for David P. Leas, 1902; additions for convalescent home, 1964, 1975

Individual Designation: 11/1/1973

District Designation: None

Staff Contact: Jon Farnham, jon.farnham@phila.gov, 215-686-7660

OVERVIEW: The University of Pennsylvania and its development partner, Azalea Garden Partners, LP, have requested that the Historical Commission amend its May 2012 hardship decision for the property at 400 S. 40th Street. The request will be considered by the Committee on Financial Hardship and the Commission.

The property consists of a large lot at the southwest corner of 40th and Pine Streets, on which stands a large house with several additions. The house was constructed about 1853 and substantially altered and expanded about 1902; the lot was enlarged in 1907, when the house to the south was demolished. The house was converted into a convalescent home in 1942. In 1964 and 1975, the building was significantly altered and almost entirely encased in a series of concrete block additions. The Historical Commission individually designated the property in 1973, but may have been unaware of the 1964 additions and inexplicably did not review the 1975 additions and alterations. The house is vacant and in poor condition.

Over the last seven years, the Historical Commission has reviewed several proposals for the property. In 2007, the Commission denied a request to rescind the designation. In 2008, the Commission approved a proposal to build a 10-story hotel building with a connector to the restored house. In 2011, the Commission approved a proposal to restore the house and construct a 7-story, L-shaped apartment building in the yard. Neither approved project was undertaken, owing to community opposition.

In early 2012, the University and its development partner submitted a financial hardship application, claiming that the property at 400 S. 40th Street could not be reasonably adapted for a new use and proposing to demolish the building and construct a five-story residential building in its place. In May 2012, by a vote of 7 to 2, with one abstention, the Historical Commission:

1. found that the applicant has demonstrated that the sale of the property is impracticable, that commercial rental cannot provide a reasonable rate of return, and that other potential uses of the property are foreclosed;
2. found the building's required retention would result in a financial hardship for the property owner; and,
3. approved the demolition, pursuant to Section 14-2007(7)(j) of the historic preservation ordinance, provided no demolition is undertaken until all prerequisite approvals for the building permit are obtained and the building permit has been issued for the new construction.

At that same meeting in May 2012, the Commission voted unanimously, with one abstention, to approve in concept the construction of the five-story residential building on the site.

Subsequently, in October 2014, the Historical Commission granted final approval to the construction of the five-story residential building approved in concept in 2012.

The current request proposes that the Commission remove the condition in the third section of the financial hardship decision of May 2012. In that section, the Commission approved the demolition, but conditioned the approval with the restriction that “no demolition is [to be] undertaken until all prerequisite approvals for the building permit are obtained and the building permit has been issued for the new construction.” The reasons for the request are presented in a letter from the attorney for the property owner and development partner.

Section 14-1005(6)(c) of the preservation ordinance, Conditions on Approval, clearly authorizes the Commission to condition building permits.

The Historical Commission may require that a building permit for the alteration or demolition of any building, structure, site, or object subject to its review be issued subject to such conditions as may reasonably advance the purposes of this Chapter 14-1000. L&I shall incorporate all such requirements of the Historical Commission into the building permit at the time of issuance. In cases where the Historical Commission, pursuant to § 14-1005(6)(a), agrees to the demolition of a historic building, structure, site, or object, or of a building, structure, site, or object located within a historic district that contributes, in the Historical Commission’s opinion, to the character of the district, the Historical Commission may require that the historic building, structure, site, or object be recorded, at the owner’s expense, according to the documentation standards of the Historic American Buildings Survey and the Historic American Engineering Record (HABS/HAER) for deposit with the Historical Commission.

The staff has reviewed the case and suggests that, although it has the authority to do so, the Commission should not place such conditions on complete demolitions approved under the financial hardship provision in the historic preservation ordinance. The ordinance authorizes the Commission to approve demolitions in two instances, when the issuance of the building permit is necessary in the public interest, and when the Commission finds that the building cannot be used for any purpose for which it is or may be reasonably adapted. In the public interest case, the Commission may appropriately condition a demolition because the Commission is essentially relinquishing its protection of the public benefit provided by the historic resource to allow for a construction project that will presumably provide a greater public benefit. In such a case, the Commission may appropriately condition the demolition to protect the public benefit associated with the historic resource until the greater benefit is guaranteed.

In the hardship case, the Commission has determined that the historic building cannot be reasonably adapted for a new use, i.e. that its retention removes most or all value from the property, and a demolition must be allowed to restore some value to the property and avoid a regulatory taking. In some instances, a partial demolition may be sufficient to permit a reasonable reuse of the property; in others, only a complete demolition allows for reasonable reuse. In cases in which the Commission finds that a partial demolition will alleviate the financial hardship, the Commission may reasonably condition the demolition to ensure that the remaining portion of the historic resource is protected during the demolition and subsequent construction. However, in cases in which the Commission finds that only a complete demolition will alleviate the financial hardship, the Commission should not condition the demolition on the completion of an unrelated task, such as the acquisition of a permit for a new building, because such a condition delays the restoration of some value to the property and thereby potentially violates

the property owner's constitutionally protected rights. The Commission may have an interest in reviewing the new construction that may follow a complete demolition approved under the hardship provision, but that interest is entirely separate and distinct from alleviating the hardship. Once the Commission has determined that only a complete demolition of a historic building will provide a potential for reasonable reuse of a property, the Commission should allow for the complete demolition unconditionally.

A review of the Commission's practice since 2000 is informative. Since 2000, the Commission has approved five public interest demolition applications: Pennsylvania School for the Deaf's Early Learning Center, Race Street firehouse-Convention Center, Sansom Street Parking Authority garage, Curtis Institute dormitory and performance hall, and Episcopal Cathedral. In four of the five cases, the Commission conditioned the demolition approval with mechanisms that ensured that demolition would not occur until the subsequent project, and hence the greater benefit, was guaranteed. The fifth case, the Sansom Street Parking Authority project approval, was not conditioned, but the approval was overturned on appeal.

Since 2000, the Commission has approved seven financial hardship applications: Temple University-Park Mall, 10 Rittenhouse, Episcopal Hospital, Hillman Medical Center, Church of the Assumption, 400 S. 40th Street, and Boyd Theater. In four of the seven cases, the demolition approval was not conditioned. In the 10 Rittenhouse case, the demolition approval was conditioned, but the demolition was partial, not complete; the front section of the Rittenhouse Club was retained. Only two of the seven complete demolitions approved under the financial hardship provision since 2000 included conditions on the demolition, Hillman Medical Center and 400 S. 40th Street, the case in question. The staff contends that, in light of the financial hardship findings, an argument can be made that those demolitions should not have been conditioned. Once the Commission has determined that nothing short of a complete demolition of a historic building will allow for the reasonable reuse of a property, the Commission should permit the complete demolition unconditionally. The hardship provision is a safety valve of sorts that allows the Commission to release its jurisdiction when confronted with a regulatory taking and thereby act constitutionally. If a complete demolition is the only means to avoid a regulatory taking, then the Commission should not condition the demolition approval on guarantees of a subsequent construction project; the demolition, which permits the reasonable reuse, should be allowed unconditionally. In the public interest case, the Commission enjoys some discretion; it may approve a demolition, with or without conditions, when it determines that the issuance of a demolition permit is necessary in the public interest. In the financial hardship case, the Commission has no discretion; it must approve a demolition without condition when it determines a complete demolition is the only means to avert a regulatory taking.

STAFF RECOMMENDATION: The staff recommends that the Historical Commission grant the request and remove the condition in question from its action on the 400 S. 40th Street financial hardship application of 11 May 2012. The third section of the decision should read: "to approve the demolition, pursuant to Section 14-2007(7)(j) of the historic preservation ordinance," without the condition. The condition reading "no demolition is [to be] undertaken until all prerequisite approvals for the building permit are obtained and the building permit has been issued for the new construction" should be deleted from the 11 May 2012 action.

DISCUSSION: Mr. Farnham presented the request to the Committee on Financial Hardship. Attorney Matt McClure, developers Jonathan Weiss and Peter Staz, and Paul Sehnert of the University of Pennsylvania represented the request.

Mr. McClure stated that he had no witnesses to present to the Committee, but would make the case in support of the request himself. He explained that his clients are seeking to amend the Historical Commission's May 2012 hardship decision for 400 S. 40th Street. He stated that they are requesting that the Commission remove the condition requiring that they obtain a building permit for the new construction before beginning demolition. He noted that the Committee on Financial Hardship had not recommended that the Commission impose the condition, but instead had added the condition during its review. Mr. McClure reminded the Commission that Section 14-1005(6)(c) of the preservation ordinance authorizes the Commission to impose conditions on its decisions, provided those conditions "reasonably advance the purposes of the ordinance." For demolitions, the ordinance notes that the Commission may require recordation of the building to be demolished. The ordinance also notes that the Department of Licenses & Inspections is obligated to include such conditions on the building permit itself. Mr. McClure observed that the condition placed on the hardship approval in question is a condition that precedes the issuance of the permit, not a condition placed on the permit itself. He acknowledged that the ordinance authorizes the Commission to condition permits, but contended that, if the Commission has the discretion to impose conditions, then it also has the discretion to modify and remove conditions. He informed the Committee that he is requesting on behalf of his clients that the Commission remove the condition requiring the issuance of the building permit for the new construction before any demolition may commence. Mr. McClure stated that he agreed with the Commission's staff that there are instances when conditioning demolitions would be appropriate. He offered the conditioned approval of the demolition of the Race Street fire station for the convention center as an example of appropriate conditioning. The Commission's public interest approval of the demolition of the fire station prohibited any demolition until assurances that the convention center would be built were provided. Mr. McClure also argued that the Commission can and should condition approvals in cases of partial demolition in which the work is approved under the alteration provisions of the ordinance. He offered the recent Warner Brothers Film Distribution Center conversion to a hotel as an example. He noted that partial demolition approvals under the demolition provisions of the ordinance, such as the 10 Rittenhouse case, can be appropriately conditioned. He concluded that the Commission may appropriately condition demolition approvals, but such conditions must conditions "reasonably advance the purposes of the ordinance." The Commission's authority to condition is not unfettered. Mr. McClure considered the purposes of the ordinance as defined in Section 14-1001 of the ordinance and concluded that, in light of the hardship review, only the purpose delineated in Section 14-1001(5) was applicable in the current instance: the purposes of the ordinance are to "strengthen the economy of the City by enhancing the City's attractiveness to tourists and by stabilizing and improving property values." Mr. McClure contended that, despite the University's considerable efforts to maintain the property at 400 S. 40th Street, the property is a blight on the neighborhood. He asserted that nothing in the ordinance supports the continuation of the terms of the condition in question. He also asserted that removing the condition would be consistent with the Commission's precedent. He asserted that the Commission has not typically conditioned hardship-complete demolition approvals. He pointed to the Commission's relatively recent approval of the demolitions of the Harrison and Aspinwall Buildings at Episcopal Hospital. The Commission approved the complete demolitions under the hardship provisions without conditions and without requiring any plans for new construction at the site.

Mr. McClure informed the Committee that he did not represent the University and its development partner when it obtained the hardship approval to demolish 400 S. 40th Street. The parties proceeded without counsel. He acknowledged that the parties did not object to the

imposition of the condition when they received the approval in 2012. He noted, however, that whatever value the condition might have had, if any, in 2012, it no longer has. He stated that it is clear that the University is committed to undertaking the project at the site. The University has expended considerable resources over the last two years in pursuit of the project, which has been slowed by litigation. Mr. McClure recounted that the Historical Commission approved the demolition owing to financial hardship in May 2012; that decision was appealed to the Board of License & Inspection Review, which held a hearing stretching across 10 sessions before affirming the Commission; that decision was appealed to the Commission of Common Pleas, where Judge Ceisler upheld the Board and Commission; that decision has now been appealed to Commonwealth Court. Mr. McClure stated that, assuming they are successful in Commonwealth Court, his clients would like to proceed with the demolition. He stated that his clients are not “doing an end run” and will not demolish the building “in the middle of the night,” but would like to demolish the building when the Historical Commission appeals have run their course and the preservation litigation is complete. He stated that other litigation with the two investment property owners and nearby homeowners’ association may take another year or two to complete, but is unrelated to the Historical Commission matter. He stated that his clients would like to demolish the building when the hardship litigation is complete. He stated that other unrelated zoning litigation may take two more years to resolve and his clients would like to demolish the building before it is resolved. He stated that maintaining the building in the interim will result in wasting the funds of the non-profit. He acknowledged that the University has significant funds, but contended that it must spend them wisely. Spending \$30,000 per year on a building that has been approved for demolition is not a prudent use of the school money. It is a waste of assets. Mr. McClure noted that the three appellants have described the building as “somewhat mutilated” and “awful” and “not very good.” Mr. McClure contended that the building in question would not be nominated for designation or designated today, owing to its alterations and lack of integrity. He noted that no one has been able to explain why this building was designated or how the subsequent alterations were permitted without the Commission’s approval. Mr. McClure claimed that the building is a blight on the neighborhood. He stated that neighbors routinely ask the University to abate the blight, but the “yoke of appeals” prevents the University from acting.

Mr. McClure asked the Committee to consider a provision of the ordinance that is often overlooked. Section 14-1005(6)(e)(.2) directs the Commission to consider the historical, architectural, and aesthetic significance of the building when making decisions. He asked the Committee to take the building’s limited significance into account as well as the University’s track record when making its decision. He asked the Committee to recommend that the Commission exercise its discretion and modify the decision, removing the condition. He added that his clients are not seeking to “do an end run around the courts,” but will respect the preservation litigation and the court’s decision in the matter. Mr. Sherman asked Mr. McClure about his clients’ timetable. Mr. McClure responded that the zoning litigation last for another year or two. Mr. Sherman replied that, under the current conditional approval, the unrelated zoning litigation will prevent the property owner from demolishing the building. During that time, the building will be a blight on the neighborhood. Mr. Sherman asked Mr. McClure if his clients would have their new project under construction if not for the litigation. Mr. McClure replied that they would be underway if not for the litigation.

Mr. Thomas asked if the condition was placed on the approval to prevent demolition before the subsequent project was assured. Ms. Hawkins responded in the negative, stating that the condition was placed on the demolition because the subsequent project had not received final

approval at the time of the demolition approval. She stated that, since that time, the Commission has granted final approval to the subsequent project. Mr. McClure disagreed, stating that they could have submitted the hardship and complete demolition application without any subsequent construction proposal. He asserted that the hardship decision was independent of any new construction proposal. He noted again the Episcopal Hospital hardship complete demolition application, which the Commission approved without any subsequent construction proposal. He asserted that the financial hardship decision is a decision about the feasibility of reuse of the existing building, not about the subsequent use of the property.

Mr. Sherman asked Mr. Farnham to recount the many reviews that the Historical Commission had conducted for this property. Mr. Farnham recounted that, over the last seven years, the Historical Commission has reviewed several proposals for the property. In 2008, the Commission approved a proposal to build a 10-story hotel building with a connector to the restored house. In 2011, the Commission approved a proposal to restore the house and construct a 7-story, L-shaped apartment building in the yard. In March 2012, the Commission found that the property at 400 S. 40th Street could not be reasonably adapted for a new use and approved the demolition of the building and approved in concept the construction of a five-story residential building in its place. Subsequently, in October 2014, the Historical Commission granted final approval to the construction of the five-story residential building approved in concept in 2012. During those years, the Commission also considered various in-concept versions of the projects. Also, in 2007, the Commission denied a request to rescind the designation.

Mr. McClure stated that, although he generally agrees with the staff recommendation, he contends that the Commission does not need to adopt it outright to grant this request. He asserted that there may be some circumstances in which the Commission may find it necessary to condition the approval of an application proposing complete demolition owing to financial hardship. An approval of an application for a building of great significance might warrant such conditioning.

Mr. Farnham offered to comment on the staff recommendation, which, he explained, advises that the Commission should not condition approvals of applications for complete demolitions that are predicated on claims of financial hardship and intended to alleviate potential regulatory takings. He stated that he agrees with Mr. McClure that the ordinance authorizes the Commission to condition building permits including demolition permits. He clarified that the staff is not contending that the Commission does not have the authority under the ordinance to condition demolition approvals, but instead is suggesting that, generally, the Commission should not condition approvals of applications for complete demolitions that are predicated on claims of financial hardship and intended to alleviate potential regulatory takings. Mr. Farnham stated that the Commission can and generally should condition demolitions approved under the necessity in the public interest provision because there is no constitutional issue in such cases and because the Commission has an interest in preserving the historic resource until the project with greater public benefit is assured. Mr. Farnham also stated that the Commission likely should condition partial demolition approvals based on financial hardship to guarantee that remaining resources survive the partial demolitions and new construction. He concluded that the staff is not arguing that the Commission cannot condition demolition approvals, but only that it should condition prudently, based on the regulatory conditions.

Mr. Sherman asked Mr. Farnham to confirm for the audience that the Commission will retain jurisdiction over the property even if it removes the condition from the approval as proposed by

the property owner. Mr. Farnham responded that the Commission will retain full jurisdiction over this property, even if the building is demolished, unless and until it rescinds the designation.

Mr. Sherman asked Mr. Farnham to confirm for the audience that the Committee's recommendation, whatever it is, is non-binding and the Commission will make the final decision. Mr. Farnham confirmed that Mr. Sherman's summary was correct and noted that the Commission would take up the matter at its 9 January 2015 meeting.

Mr. McClure distributed photographs of the property, which were taken in 2012.

Mr. Sherman asked if the building is currently occupied. Mr. McClure replied that the building is not habitable; it is moth-balled and secured.

Mr. McClure stated that his clients "will honor the decisions of the courts," but would like to disconnect the Historical Commission's process from the unrelated zoning process. Mr. Sherman asked Mr. McClure if his clients obtained the zoning relief they sought from the Zoning Board of Adjustment. Mr. McClure responded that the zoning relief was granted, but that zoning approval has been appealed. Mr. Sherman asked him how long it would take for the zoning litigation to be completed. Mr. McClure replied that the litigation will not be resolved for one to two years.

Mr. Thomas asked Mr. McClure to explain what actions his clients would take if the condition is removed. Mr. McClure explained that the building would be removed and the site would be landscaped. The University would maintain the property while awaiting the conclusion of the zoning litigation. Mr. Thomas stated that, in the past, sites awaiting construction would not be tended, but today sites should be and often are well-tended while they await reuse. He stated that he would like some assurances that the University would maintain the site appropriately in the interim. Mr. McClure replied that his clients would happily present an interim landscape plan to the Commission for review. Mr. Sherman stated that Mr. McClure's argument for removing the condition is based in part on the claim that the vacant building is a blight on the neighborhood; if the Commission removes the condition, it should have a guarantee that the site will not continue to be a blight. Mr. Sehnert stated that it is currently very difficult to secure the vacant building; it is routinely broken into, creating a hazard. He stated that the University would gladly maintain the site when cleared. Messrs. Sherman and Thomas agreed that the vacant building poses a fire hazard as well as other hazards. They noted that it is very difficult to secure vacant buildings. Mr. Thomas stated that the vacant building poses more than an aesthetic hazard to the community. Mr. Sherman asked how an interim landscape plan would be reviewed by the Commission. Mr. Farnham suggested that such a plan could be included with the demolition plan and initially reviewed by the staff. If the landscape proposal exceeded the staff's authority to review, it would refer the plan to the Architectural Committee and Commission for review, as it does in the normal course.

Paul Boni, an attorney who represents Constellar Corporation and Maryann Kurmlavage, the owners of two nearby rental properties, and the Woodland Terrace Homeowners' Association in the preservation and zoning litigation, introduced himself. Mr. Boni advised the Committee that it might not be authorized or required to issue a recommendation on the request. He asserted that the Committee on Financial Hardship is a technical advisory committee and no technical advice is being requested. He stated that this is "a purely legal argument" about a condition that was not imposed by this Committee. Mr. Boni concluded that the Committee may have the ability not

to issue a formal recommendation. He stated that he and his clients “have no problem that the issues are being aired and discussed today.” He suggested that the Committee “simply pass it up the line with no recommendation.”

Mr. Boni observed that Mr. McClure has stated today on the record that his clients will not demolish the building until the historic preservation appeal has run its course. Mr. Boni stated that he did not want the Commission to grant the request, but suggested that, if it did, it should replace the current condition with a new condition prohibiting demolition until the historic preservation appeal is exhausted. Mr. Thomas asked Mr. Boni to summarize the appeal process. Mr. Boni responded that he appealed the Historical Commission’s approval to the Board of License & Inspection Review. He stated that he was not successful in overturning the Commission’s decision at the Board. He therefore appealed the Board’s decision to the Court of Common Pleas, where Judge Ceisler affirmed the Board and the Commission. He reported that he has appealed that ruling to the Commonwealth Court, which has tentatively scheduled oral arguments for 9 February 2015. Mr. Boni stated that he was fearful that the condition would be removed and the building demolished before the Commonwealth Court hearing. He stated that he is happy to hear that Mr. McClure is reporting that his clients will not demolish the building until the preservation litigation is complete. Mr. Boni asked Mr. McClure to repeat his request to the Committee. Mr. McClure stated that he is requesting that the Commission remove the condition requiring the prerequisite approvals and building permit before demolition. He stated that he would also accept a condition that his clients obtain the Commission’s approval for the interim landscaping of the site. He further stated that he would stipulate that his clients would not demolish the building during the pendency of the Commonwealth Court appeal, but he contended that that should not be a condition of the Commission’s approval. Mr. Boni questioned whether Mr. McClure’s pledge to wait on any demolition could be enforced. Mr. Sherman asked whether a condition stipulating the requirement for the Commission’s review of the landscaping was necessary. Mr. Farnham replied that the Commission has jurisdiction over any visible changes to the site including landscaping regardless of the imposition of such a condition. Mr. Boni contended that the landscaping question is not significant; he asserted that the question of a stay of the demolition is significant and claimed that Mr. McClure has stated that his clients are willing to wait on any demolition, but are not willing to put it in writing. Mr. McClure stated that his pledge to wait on demolition would be recorded in the minutes. Mr. Boni contended that it should be memorialized by the Commission in its decision in this matter. He claimed that Mr. McClure’s clients could simply change their minds and demolish the building. He concluded that the commitment is only good if enforceable. Mr. McClure responded that his request to modify the decision is unrelated to the pending Commonwealth Court case. He assured the Commission that “he is not seeking to do an end run around the courts.”

Mr. Boni stated that he does not understand the motivation behind this request. He observed that the in-concept approval of the new construction was granted in 2012, but the final approval was not granted until 2014. He noted that his appeals do not act as stays. Mr. Boni claimed that the University and its partner could have obtained a building permit years ago and satisfied the condition. He asked why they had not obtained the permit. He wondered if they have not obtained the permit because of a business decision. He also suggested that this request is based on the looming Commonwealth Court case, not the reasons provided. Mr. Sherman asked Mr. McClure to explain why his clients had not obtained the permit. Mr. McClure stated that the plans for the permit would cost \$100,000, too much money to spend when the outcome is uncertain. Mr. Sherman asked what would happen if the University constructed the new building before the appeals were settled and then lost in court. Mr. Thomas responded that the

University might be compelled to demolish the new building if it lost on appeal. Mr. McClure stated that he is confident that he will be successful with the appeals, but noted that no reasonable person would take the risk and begin construction until the appeals are settled. Mr. Thomas concurred; he stated that his architectural firm never proceeds with construction documents until all of the prerequisite approvals are obtained. Mr. Thomas stated that he understands why the University would want to proceed with demolition now. It does not make sense to spend funds to maintain the building and carry the liability for two years before the new construction begins. He noted that it would not make sense to prepare construction documents for the building now because the design may change over the intervening two years. Mr. McClure agreed and observed that the hardship decision stands on its own; it is unrelated to the subsequent construction. The hardship finding is not tied to a particular construction project; he again pointed to the Episcopal Hospital case, in which no new construction was proposed. Mr. McClure again stated that his clients agree to undertake no demolition until the Commonwealth Court has reached its decision. Mr. Sherman stated that he does not want to unnecessarily shackle the project, but also does not want to put the Commission in an awkward situation in which the building is demolished before the appeals have run their course. Mr. McClure stated that he could accept the replacement of the current condition on demolition with a condition that the building is not demolished until the Commonwealth Court's historic preservation appeal is exhausted.

Ms. Hawkins stated that the building is in an extremely compromised condition and that she would be "stunned" if anyone suggested today that it should be listed on the Philadelphia Register. She stated that the building has been significantly altered and would have to be rebuilt to return it to its historic condition. She stated that it would be "inappropriate" to list it on the Register today. She stated that it was appropriate for the Commission to impose the condition in question in 2012 because the Commission had not yet approved a final design; however, a final design for the new construction has been approved and the condition should be removed. Mr. Sherman agreed.

Mr. Boni submitted a set of photographs of the property for the record. Mr. Boni contended that the Commission had asserted at the hardship meeting in 2012 that the standards for demolition are the same regardless of the significance of the building; from Independence Hall to a common rowhouse, the standards for demolition are the same. He noted that the Commission had projected a Powerpoint slide making that claim. Distinctions regarding historic value are not relevant, he claimed. He asserted that the house at 400 S. 40th Street is designated as historic and worthy of the protections that would be provided to any historic building. He contended that the Commission's decision will have significant precedential effect. Mr. Farnham stated that he created the Powerpoint slides and delivered the Powerpoint presentation at the Commission meeting in question in 2012 and asserted that he differed with Mr. Boni's interpretation of the Powerpoint slide regarding the role of historic value in demolition determinations. Mr. Farnham recounted that he had stated at that review that the Commission was obligated to apply the same financial hardship standard to all buildings when determining whether a building could be reasonably reused. He stated that the Powerpoint slide was intended to advise the Commission that it should apply the same financial standard to all buildings when determining hardship; for example, the same rate of return on investment should be used to decide the hardship question regardless of the historical or architectural importance of the building. He asserted that the Commission had done just that during its review; it had applied a universal hardship standard to the building, regardless of significance, and determined that there was no feasible reuse for the building. Mr. Farnham reiterated the assertion he made at the start of the review; he contended

that complete demolition approvals predicated on findings of financial hardship should not be conditioned on subsequent construction because the decisions are designed to alleviate the hardships, not to preserve historic resources. He stated that once the Commission has found that a building has no feasible reuse, it must allow for the demolition without strings, even though that demolition does not satisfy historic preservation standards. Mr. Farnham added that, in his opinion, the Commission should not stay the demolition pending the outcome of the Commonwealth Court appeal; he asserted that the appellants should seek a stay in the courts, not at the Commission level, and claimed that the courts routinely issue such stays. He concluded that the Commission is not the appropriate venue for the appellants to seek a stay. Mr. Boni interjected that the Commission should issue the stay because the property owner's attorney asked it to do so. Mr. Boni claimed that "you have the opportunity to avoid a major crisis and it's at the applicant's own request." Mr. McClure responded that it was not at his request. Mr. Sherman stated that he is frustrated by this matter. He noted that the Commission has reviewed and approved numerous projects, some of which would have preserved the house, but Mr. Boni and his clients have thwarted every attempt to redevelop this property, with and without the house.

Aaron Wunsch introduced himself as an architectural historian and Spruce Hill resident. He reported that he published a "fairly rigorously researched article" on the house. He asserted that any speculation about whether this building qualifies for the Philadelphia Register is nothing but speculation. He contended that it is not within the purview of this Committee to determine whether or not this property merits historic designation. He stated that he wanted to address the staff recommendation. He stated that the recent news about the Boyd Theater "really speaks to the inadvisability of fast-tracking demolition for hardship cases." He stated that such actions "encourage fly-by-night business schemes that just get the hardship rulings so that they can proceed to clear the site. That would be the signal sent by this move." Mr. Wunsch then stated that he wanted "to speak to the relatively recent tendency of using hardship decisions and those stemming from them like this as opportunities to weaken enforcement of the ordinance or diminish the Commission's regulatory powers. This is a chance to support those powers and those are your powers, so I hope that..." Mr. Wunsch did not complete his sentence.

Ben Leech of the Preservation Alliance stated that his organization has not been a party to any of the appeals stemming from regulatory decisions about this property. Mr. Leech stated that he is concerned about the precedent that a decision might set in this case. He stated that he is concerned by the potential for drawing hard lines between partial and full demolition cases as well as public interest and hardship cases. He stated that all such cases are complicated and there may be an unforeseen, good reason to condition a demolition approval in the future. He cautioned against establishing a blanket policy with today's decision. Mr. McClure responded that he believes that the Commission has the discretion to make this change without making a policy decision.

Mr. Farnham disputed the claims made by Mr. Wunsch and asserted that the staff's recommendation is in no way intended to weaken the power or authority of the Commission. Disagreeing with Mr. Wunsch, he stated that the Commission has approved many fewer demolitions in recent years than it did in the past. Any impression that the Commission is approving increasing numbers of demolitions is simply incorrect. Mr. Sherman agreed and noted that it is a narrative that has been created in the press. Mr. Farnham stated that the staff recommendation is predicated on the belief that the hardship provision is in the ordinance solely to allow the Commission to elude the regulatory taking problem, but he acknowledged that it is

not explicitly defined as such in the ordinance and other interpretations are possible. He pointed out that he is concerned that some in the audience are arguing in this case that the Commission has broader discretion in hardship-demolition matters, including the discretion to impose the condition in question, without really understanding the full implications of their arguments. The staff's contention that the hardship provision exists solely to avoid the regulatory takings condition, the unconstitutional condition, aligns with a very narrow reading of the limits of the Commission's authority to approve demolition. Those who are arguing that the Commission should use its discretion and impose this condition within the hardship structure are inherently arguing that the Commission has very broad, discretionary powers to approve demolition. In fact, those who claim that the Commission should impose such conditions are contending that the Commission can approve demolitions above and beyond the regulatory taking instances and therefore are, essentially, setting a lower standard for demolition approvals and are unknowingly undermining the Commission's capacity to prevent demolitions. Mr. Farnham again stated that the preservation ordinance does not explicitly define the circumstances in which the Commission can approve demolitions under the hardship provision; it is open to interpretation. The regulatory takings interpretation proffered by the staff is the narrow interpretation; it will lead to fewer complete demolition approvals, but approvals that should be unconditional. The discretionary interpretation, in which a finding of hardship is nothing more than a finding that regulation is onerous but not necessarily a taking, is the broad interpretation; it could lead to many more demolition approvals, but approvals that can legitimately be conditioned. Part and parcel with any claim that the Commission should condition hardship complete demolition approvals is a claim that the Commission can approve demolitions at its discretion, without reaching the regulatory taking threshold. Mr. Farnham concluded that the staff recommendation strengthens the authority of the Commission to prevent demolitions; it does not undermine that authority as some incorrectly claim.

Mr. Thomas noted that much of the building is non-historic. He suggested that it might reduce the University's maintenance costs and liability if it demolished the non-historic sections now and left the historic sections standing during the preservation litigation. Ms. Hawkins responded that it would cost more to partially demolish and stabilize than to retain the entirety of the building. Mr. Thomas agreed but noted that he was brainstorming, trying to find a solution that was acceptable to all parties. Mr. Farnham noted that the Commission explicitly found that the additions had no historic value during its 2007 rescission request review and, therefore, the demolition of the additions could be readily approved, even at the staff level. Mr. Thomas noted that such partial demolitions have been undertaken at the McIlhenney Mansion and the Curtis Center.

Jeff Cohen introduced himself as an architectural historian, member of the Historical Commission's Committee on Historic Designation, and a member of the University's Cultural Resources Committee. Mr. Cohen stated that it is unfortunate that this building is approaching demolition because the University has proposed and the Historical Commission has approved some viable projects that would have preserved and restored this building. He implored the appellants to allow the University to move ahead with one of those projects that would save the building. He rejected Ms. Hawkins' and Mr. McClure's assertions that this building has lost all historic value. Mr. Cohen stated that the University is responsible for the condition of the building. Mr. Cohen stated that he is concerned about other villas in the surrounding area. The decision to allow the demolition of this building may set a precedent paving the way to the demolitions of others. He stated that similar hardship applications could be used to demolish any of the similar buildings in West Philadelphia. He stated that this area has a character that is

worth preserving. A decision to allow the demolition in this case will put all such buildings in West Philadelphia in danger. He again asked those who opposed the earlier projects that would have saved the building to abandon their opposition and allow this building and the neighborhood to be saved. Mr. McClure responded that Mr. Cohen's remarks relate to the hardship decision, which was made more than two years ago. They are not relevant to the request before this Committee today. Mr. McClure added that hardship decisions do not set precedent, owing to the complexity of the cases and the costs associated with pursuing such applications. Ms. Hawkins disagreed with Mr. Cohen's assessment of this building's historic value and observed that the Historical Commission is directed at preserving historic resources for the public or, in other words, resources that are visible from the public right-of-way. She asserted that the public facades of this building are extremely compromised. She noted that the views seen in Mr. Boni's aerial photographs are not the public views. She acknowledged that the building could be restored at enormous cost, but the Commission should not require a property owner to bear that cost. She noted that plans that would have saved the historic building were thwarted by the opposition. She concluded that the hardship decision made more than two years ago is not open to discussion.

Mr. Boni interjected, asking why the Historical Commission has known for nearly 10 years that the additions to this building are illegal and, yet, has not taken any enforcement action against the property owner. Mr. Farnham corrected Mr. Boni, explaining that the additions are legal; building permits were issued for them and there is no enforcement action to be taken. One of the permits was issued in 1975, after the designation as historic and without the Commission's review, but is nonetheless a legal permit. Mr. Thomas dismissed Mr. Boni's assertion, explaining that the Historical Commission could not unilaterally compel a property owner to undo alterations, some of which were made before designation and others which were made with a permit nearly 30 years ago.

Ms. Hawkins moved to recommend that the Historical Commission grant the request and remove the condition reading "provided no demolition is undertaken until all prerequisite approvals for the building permit are obtained and the building permit has been issued for the new construction" from its action on the 400 S. 40th Street financial hardship application of 11 May 2012, leaving the third section of the decision to read: "to approve the demolition, pursuant to Section 14-2007(7)(j) of the historic preservation ordinance." Mr. Thomas seconded the motion and suggested amending the motion to replace the deleted condition with the following conditions: "provided the Historical Commission approves and the property owner implements an interim landscape plan; and provided that no demolition is undertaken until the Commonwealth Court has issued a decision in the appeal of the Historical Commission's decision for 400 S. 40th Street of 11 May 2012." Ms. Hawkins accepted the landscape plan amendment, but not the Commonwealth Court amendment.

COMMITTEE ON FINANCIAL HARDSHIP RECOMMENDATION: By a vote of 2 to 1, the Committee on Financial Hardship voted to recommend that the Historical Commission replace the condition reading "provided no demolition is undertaken until all prerequisite approvals for the building permit are obtained and the building permit has been issued for the new construction" with a condition reading "provided the Historical Commission approves and the property owner implements an interim landscape plan" from its action on the 400 S. 40th Street financial hardship application of 11 May 2012, leaving the third section of the decision to read: "to approve the demolition, pursuant to Section 14-2007(7)(j) of the historic preservation ordinance,

provided the Historical Commission approves and the property owner implements an interim landscape plan.” Mr. Thomas dissented.

ADJOURNMENT

ACTION: Ms. Hawkins moved to adjourn at 2:30 p.m. Mr. Thomas seconded the motion, which passed unanimously.